No. 16-1436
Title: Donald J. Trump, President of the United States, et al., Petitioners
v.
International Refugee Assistance Project, et al.
Docketed: June 2, 2017
Linked with 16A1190, 17A132
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Numbers: (17-1351)
Decision Date: May 31, 2017
Questions Presented

DATE	PROCEEDINGS AND ORDERS
Jun 01 2017	Petition for a writ of certiorari filed.
Jun 01 2017	Application (16A1190) for a stay pending the disposition of the petition for a writ of certiorari, submitted to The Chief Justice.
Jun 02 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Petitioner.
Jun 02 2017	The respondents are directed to file a response to the petition for a writ of certiorari on or before 3 p.m., Monday, June 12, 2017.
Jun 02 2017	Response to application due on or before 3 p.m., Monday, June 12, 2017.
Jun 02 2017	Application (16A1190) referred to the Court.
Jun 05 2017	Brief amici curiae of The States of Texas, et al. filed.
Jun 09 2017	Brief amici curiae of Public Policy Legal Institute, et al. filed.
Jun 09 2017	Brief amicus curiae of T.A. in support of respondent filed.
Jun 09 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Association of American Medical Colleges and Others in support of respondents.
Jun 09 2017	Motion (16A1191) for leave to file amici brief filed by American Center for Law and Justice in support of petitioners.
Jun 09 2017	Brief amici curiae of Association of American Medical Colleges and Others in support of respondents filed.
Jun 09 2017	Brief amicus curiae of Susan Abeles in support of neither party filed.
Jun 09 2017	Brief amicus curiae of American Center for Law and Justice in support of petitioners filed.
Jun 09 2017	Motion (16A1190) for leave to file amicus brief filed by American Center for Law and Justice in support of petitioners.
Jun 10 2017	Brief amicus curiae of David Boyle in support neither party filed.
Jun 12 2017	Brief of respondents International Refugee Assistance Project, et al. in opposition filed.
Jun 12 2017	Response to application from respondents International Refugee Assistance Project, et al. filed.
Jun 12 2017	Motion for leave to file amici brief filed by Citizens United, et al. in support of petitioners.

Jun 12 2017	Motion for leave to file amicus brief filed by The Becket Fund for Religious Liberty in support of neither party.
Jun 12 2017	Brief amicus curiae of Southeastern Legal Foundation filed.
Jun 12 2017	Motion for leave to file amici brief filed by Constitutional Law Scholars in support of respondents.
Jun 12 2017	Motion for leave to file amici brief filed by The States of New York, et al. in support of respondents.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amicus brief filed by Eagle Forum Education & Legal Defense Fund, Inc. in support of petitioners.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amicus brief filed by The Becket Fund for Religious Liberty in support of neither party.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by The States of Virginia, et al.in opposition to the stay applications.
Jun 12 2017	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed in support of petitioners.
Jun 12 2017	Motion (16A1190) for leave to file amici brief filed by Citizens United, et al.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Interfaith Group of Religious and Interreligious Organizations.
Jun 12 2017	Motion (16A1191) for leave to file amicus brief filed by American Professional Society on the Abuse of Children in support of respondents.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief by Former National Security Officials in support of respondents.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Constitutional law scholars in support respondents.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed Former National Security Officials in support respondents.
Jun 12 2017	Motion for leave to file amicus brief filed by Immigration Reform Law Institute.
Jun 14 2017	Reply of petitioners Donald J. Trump, President of the United States, et al. filed.
Jun 14 2017	Reply of applicants Donald J. Trump, President of the United States, et al. filed.
Jun 20 2017	Supplemental brief of respondents International Refugee Assistance Project, et al. filed.
Jun 24 2017	Letter of respondents International Refugee Assistance Project, et al. received. (Distributed)
Jun 25 2017	Letter of petitioners Donald J. Trump, President of the United States, et al. received. (Distributed)
Jun 26 2017	Application (16A1190) and application (16A1191) are GRANTED IN PART. In addition, application (16A1191) is treated as a petition for a writ of certiorari. The petitions for writs of certiorari in 16-1436 and 16-1540 are GRANTED and the cases are consolidated for argument. In addition to the issues identified in the petitions, the parties are directed to address the following question: "Whether the challenges to Sec. 2(c) became moot on June 14, 2017." Justice Thomas, with whom Justice Alito and Justice Gorsuch join, concurring in part and dissenting in part. Opinion per curiam. (Detached Opinion). VIDED.
Jun 26 2017	The due dates for the briefs on the merits in 16-1436 and 16-1540 are as provided for by Rule 25 of the Rules of this Court. VIDED.
Jun 27 2017	Motion for leave to file amicus brief filed by Immigration Reform Law Institute GRANTED.
Jun 27 2017	Motion for leave to file amicus brief filed by Citizens United, et al. GRANTED.
Jun 27 2017	Motion for leave to file amicus brief filed by The States of New York, et al. GRANTED.

Jun 27 2017	Motion for leave to file amicus brief filed by Constitutional Law Scholars GRANTED.
Jun 27 2017	Motion for leave to file amicus brief filed by The Becket Fund for Religious Liberty GRANTED.
Jul 17 2017	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the petitioners. VIDED
Jul 19 2017	SET FOR ARGUMENT on Tuesday, October 10, 2017. VIDED.
Jul 26 2017	Application (17A132) of Donald J. Trump, President of the United States, et al. to file a consolidated petitioners' brief on the merits and a consolidated reply brief on the merits in excess of the word limits, submitted to The Chief Justice. VIDED.
Jul 31 2017	Application (17A132) granted by The Chief Justice to file a consolidated petitioners' brief on the merits and a consolidated reply brief on the merits in excess of the word limits. VIDED.
Aug 01 2017	Record requested from the U.S.C.A. 4th Circuit.
Aug 03 2017	Brief amici curiae of Public Policy Legal Institute and Center for Competitive Politics in support of neither party filed. VIDED.
Aug 07 2017	Brief amicus curiae of The Criminal Justice Legal Foundation in support of neither party filed. VIDED.
Aug 10 2017	Joint appendix filed (3 volumes). VIDED.
Aug 10 2017	Brief of petitioners Trump, President of U.S., et al. filed. VIDED.
Aug 14 2017	CIRCULATED.
Aug 15 2017	Brief amicus curiae of Professor Victor Williams filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of American Center for Law and Justice filed. VIDED. (Distributed)
Aug 16 2017	Motion for enlargement of time for oral argument and for divided argument filed by respondents. VIDED.
Aug 17 2017	Brief amici curiae of Texas, et al. filed. VIDED. (Distributed)
Aug 17 2017	Motion for leave to file amicus brief filed by Foundation for Moral Law. VIDED.
Aug 17 2017	Brief amici curiae of Hardwired Global, et al. in support of neither party filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Becket Fund for Religious Liberty in support of neither party filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of American Civil Rights Union filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Zionist Organization of America filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of National Security Experts Andrew C. McCarthy, et al. filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of Scholars of Mormon History & Law in support of neither party filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of Citizens United, et al. filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Immigration Reform Law Institute filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Southeastern Legal Foundation filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of American Legislators in Support of Judicial Restraint filed. VIDED. (Distributed)
Aug 22 2017	Brief amicus curiae of Roderick and Solange MacArthur Justice Center filed. VIDED. (Distributed)
Aug 24 2017	Further consideration of the motion of respondents Hawaii, et al. to add John Doe as a party to 16-1540 is deferred to the hearing of the case on the merits. VIDED.

Sep 05 2017	Brief amici curiae of Interfaith Coalition filed. VIDED. (Distributed)
Sep 06 2017	Brief amicus curiae of T.A., a United States Citizen of Yemeni Descent filed. VIDED. (Distributed)
Sep 07 2017	Brief amicus curiae of National CIS Council 119 filed. VIDED. (Distributed)
Sep 08 2017	Brief amici curiae of Chicago, Los Angeles, et al. filed. VIDED. (Distributed)
Sep 08 2017	Motion to add Mohamad Mashta and Grannaz Amirjamshidi as parties filed by respondents Int'l Refugee Assistance, et al.
Sep 09 2017	Brief amicus curiae of Cato Institute filed. VIDED. (Distributed)
Sep 11 2017	Brief of respondents Int'l Refugee Assistance, et al. filed. (Distributed)
Sep 12 2017	Brief amici curiae of International Law Scholars and Nongovernmental Organizations filed. VIDED. (Distributed)
Sep 13 2017	Brief amicus curiae of Freedom from Religion Foundation filed. VIDED. (Distributed)
Sep 13 2017	Brief amici curiae of Civil Rights Organizations filed. VIDED. (Distributed)
Sep 13 2017	Brief amicus curiae of David Boyle filed. VIDED. (Distributed)
Sep 13 2017	Brief amicus curiae of Decalogue Society of Lawyers filed. (Distributed)
Sep 14 2017	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED. (Distributed)
Sep 14 2017	Brief amicus curiae of Japanese American Citizens League filed. VIDED. (Distributed)
Sep 14 2017	Brief amicus curiae of Khizr Khan filed. VIDED. (Distributed)
Sep 14 2017	Brief amici curiae of 37 Appellate Lawyers filed. VIDED. (Distributed)
Sep 15 2017	Brief amicus curiae of American Jewish Committee filed. VIDED. (Distributed)
Sep 15 2017	Brief amicus curiae of KARAMAH filed. VIDED. (Distributed)
Sep 15 2017	Brief amici curiae of Episcopal Bishops filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of International Labor Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Constitutional Law Scholars Gabriel "Jack" Chin, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Scholars of Federal Jurisdiction filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of States of New York, et al., filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Professors of Federal Courts Jurisprudence, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of The Foundation for the Children of Iran, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Constitutional Law Scholars Corey Brettschneider, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Pars Equality Center, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Tahirih Justice Center, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of United States Conference of Catholic Bishops, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of Port of Seattle filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Members of Congress filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Colleges and Universities filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Members of the Clergy, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of American-Arab Anti-Discrimination Committee filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Immigration, Family, and Constitutional Law Professors filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of American Professional Society on the Abuse of Children filed. VIDED. (Distributed)

Sep 18 2017	Brief amici curiae of 161 Technology Companies filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Karen Korematsu, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of International Lawyers for International Law filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Association of Art Museum Directors, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of PEN American Center, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Social Science Scholars filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of American Council on Education, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Muslim Justice League, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Human Rights First, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Immigration Equality, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Former National Security Officials filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of Massachusetts Technology Leadership Council, Inc. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of The Association of American Medical Colleges, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Certain Immigrant Rights Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Executive Branch Officials filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Refugee Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Interfaith Group of Religious and Interreligious Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of Syrian Asylee Ahmad M. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of National Education Association filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Immigration Law Scholars filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of The National Asian Pacific American Bar Association, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of New York University filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Advocates for Human Rights, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Hussam Ayloush, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Howard University School of Law Civil Rights Clinic, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Janet A. Napolitano and other Former Federal Immigration Officials filed. VIDED. (Distributed)
Sep 19 2017	Response to motion of respondents to add Mohamad Mashta and Grannaz Amirjamshidi as parties filed from petitioners Trump, President of U.S., et al. filed.
Sep 24 2017	Letter of petitioners Donald J. Trump, President of the United States, et al. received. (Distributed). VIDED
Sep 25 2017	The parties are directed to file letter briefs addressing whether, or to what extent, the Proclamation issued on September 24, 2017, may render cases No. 16-1436 and 16-1540 moot. The parties should also address whether, or to what extent, the scheduled expiration of Sections 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16-1540 moot. The briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before noon,

	Thursday, October 5, 2017. The cases are removed from the oral argument calendar, pending further order of the Court. VIDED
Oct 04 2017	Reply of petitioners Donald J. Trump, President of United States, et al. filed. VIDED. (Distributed)
Oct 05 2017	Supplemental brief of petitioners Trump, President of U.S., et al. filed. VIDED. (Distributed)
Oct 05 2017	Supplemental brief of respondents Int'l Refugee Assistance, et al. filed. (Distributed)
Oct 10 2017	We granted certiorari in this case to resolve a challenge to "the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780." Because that provision of the Order "expired by its own terms" on September 24, 2017, the appeal no longer presents a "live case or controversy." Burke v. Barnes, 479 U. S. 361, 363 (1987). Following our established practice in such cases, the judgment is therefore vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss as moot the challenge to Executive Order No. 13,780. United States v. Munsingwear, Inc., 340 U. S. 36, 39 (1950). We express no view on the merits. Justice Sotomayor dissents from the order vacating the judgment below and would dismiss the writ of certiorari as improvidently granted.
Oct 24 2017	Letter of petitioners filed. VIDED. (Distributed)

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of foreign nationals from six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, subject to case-by-case waivers. The district court issued, and the court of appeals upheld, a preliminary injunction barring enforcement of Section 2(c) against any person worldwide, because both courts concluded that the suspension violates the Establishment Clause.

The questions presented are:

1. Whether respondents' challenge to the temporary suspension of entry of aliens abroad is justiciable.

2. Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.

3. Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; the United States Department of Homeland Security; the Department of State; the Office of the Director of National Intelligence; John F. Kelly, in his official capacity as Secretary of Homeland Security; Rex W. Tillerson, in his official capacity as Secretary of State; and Daniel R. Coats, in his official capacity as Director of National Intelligence.

Respondents (plaintiffs-appellees below) are the International Refugee Assistance Project, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, Inc., on behalf of itself and its clients; the Middle East Studies Association of North America, Inc., on behalf of itself and its members; Muhammed Meteab; Paul Harrison; Ibrahim Ahmed Mohomed; John Doe #1; John Doe #3; and Jane Doe #2.

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In the Supreme Court of the United States

No.

DONALD J. TRUMP, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of petitioners President Donald J. Trump, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra* (App.), 1a-207a) is not yet reported in the *Federal Reporter*, but a prior version of the opinion is available at 2017 WL 2273306. The opinion of the district court (App. 208a-261a) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1018235. The order of the district court entering a preliminary injunction (App. 262a-264a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this petition. App. 265a-312a.

STATEMENT

The Constitution and Acts of Congress confer on the President broad authority to suspend or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); 8 U.S.C. 1182(f), 1185(a)(1). Exercising that authority, and after consulting with the Secretaries of State and Homeland Security and the Attorney General, the President placed a temporary 90-day pause (subject to individualized waivers) on the entry of certain foreign nationals from six countries that are sponsors or shelters of terrorism, and that Congress or the Executive previously had designated as presenting heightened terrorism-related risks. The district court entered a global injunction barring enforcement of the President's action. App. 262a-264a. The court of appeals affirmed on the basis that the President's "stated national security interest" "was provided in bad faith, as a pretext for its religious purpose." App. 45a; see App. 38a-65a.

A. Legal Framework

"The exclusion of aliens is a fundamental act of sovereignty" that lies in the "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation." *Knauff*, 338 U.S. at 542; see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (Control of the Nation's borders is "interwoven" with "the conduct of foreign relations" and "the war power."). Congress has addressed admission into the United States in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which accords the President broad discretion to suspend or restrict the entry of aliens abroad.

1. Under the INA, admission into the United States normally requires a valid visa or other valid travel document. See 8 U.S.C. 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. Applying for a visa typically requires an in-person interview and results in a decision by a State Department consular officer. 8 U.S.C. 1201(a)(1), 1202(h), 1204; 22 C.F.R. 42.62. Although a visa normally is necessary for admission, it does not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. 1201(h), 1225(a).

Congress has enabled nationals of certain countries to seek temporary admission without a visa under the Visa Waiver Program. 8 U.S.C. 1182(a)(7)(B)(iv); 8 U.S.C. 1187 (2012 & Supp. III 2015). In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or recent visitors to Iraq or Syria, where "[t]he Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force"; as well as nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).[1]

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[1] U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), https://goo.gl/40GmOS; see 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. III 2015); App. 7a n.4.

Congress also has authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in the country, and "whether the presence of an alien in the country * * * increases the likelihood that the alien is a credible threat to" U.S. national security. 8 U.S.C. 1187(a)(12)(D)(i) and (ii) (Supp. III 2015). Applying those criteria, in February 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Visa Waiver Program.[2]

2. Beyond the Executive's authority to remove nationals of particular countries from the Visa Waiver Program, Congress has accorded the President broad discretion to suspend or restrict the admission of aliens. Section 1182(f) of Title 8 of the United States Code provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Section 1185(a)(1) of Title 8 further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe."

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[2] DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://goo.gl/OXTqb5; App. 7a n.4.

B. The Executive Orders

1. On January 27, 2017, the President issued Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (January Order) (App. 277a-288a). The January Order directed the Secretaries of Homeland Security and State to assess current screening procedures to determine whether they are sufficient to detect individuals seeking to enter this country to do it harm. App. 279a (§ 3(a) and (b)). While that review was ongoing, the January Order suspended for 90 days entry of foreign nationals of the seven countries already designated as posing heightened terrorism-related concerns in the context of the Visa Waiver Program, subject to case-by-case exceptions. App. 280a-281a (§ 3(c) and (g)). Other provisions addressed the U.S. Refugee Admissions Program (Refugee Program). 8 U.S.C. 1101(a)(42), 1157.

The January Order was challenged in multiple courts. On February 3, 2017, a district court in Washington enjoined enforcement nationwide of the 90-day entry suspension and various refugee-related provisions. *Washington* v. *Trump*, No. 17-141, 2017 WL 462040 (W.D. Wash.). On February 9, 2017, a Ninth Circuit panel declined to stay that injunction pending appeal. *Washington* v. *Trump*, 847 F.3d 1151 (per curiam). While acknowledging that the injunction may have been "overbroad," the Ninth Circuit declined to narrow it, concluding that "[t]he political branches are far better equipped" to do so. *Id.* at 1166, 1167.

2. On March 6, 2017, responding to the Ninth Circuit's decision—and in accordance with a formal recommendation of the Secretary of Homeland Security and the Attorney General—the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), App. 289a-312a, with an effective date of March

16, 2017, App. 311a (§ 14).[3] The Order revoked the January Order, App. 311a (§ 13), replacing it with significantly revised provisions that address the Ninth Circuit's concerns.

At issue here is Section 2(c) of the Order, which temporarily suspends entry of nationals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The suspension's explicit purpose is to enable the President—based on the recommendation of the Secretary of Homeland Security, in consultation with the Secretary of State and Director of National Intelligence—to assess whether those countries (and others) are providing adequate information "to prevent infiltration by foreign terrorists." App. 299a (§ 2(c)); see App. 295a-296a, 298a-299a (§§ 1(f), 2(a)-(c)). The Order explains that each of the six countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," which is why Congress and the Executive previously designated them. App. 292a (§ 1(d)); see App. 289a-290a (§ 1(b)(i)). The Order details the circumstances of each country that both give rise to "heightened risks" of terrorism and diminish their governments' "willingness or ability to share or validate important information about individuals" needed to screen them properly. App. 292a-295a (§ 1(d)-(e)).[4]

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[3] See Letter from Jefferson B. Sessions III, Att'y Gen., & John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump (Mar. 6, 2017), https://goo.gl/H69g8I.

[4] Although the January Order's suspension had included Iraq, the Order omits Iraq from the suspension because of "the close cooperative relationship between" the U.S. and Iraqi governments, and because, since the January Order, "the Iraqi government has expressly undertaken steps" to supply information necessary to help identify possible threats. App. 296a (§ 1(g)); see App. 304a (§ 4).

Based on those risks, and to facilitate the review of existing procedures, the Order "suspend[s] for 90 days" the "entry into the United States of nationals of" those six countries. App. 299a (§ 2(c)). Addressing concerns courts had raised, however, the Order clarifies that the suspension applies only to aliens who (1) are outside the United States on the Order's effective date, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the January Order. App. 300a-301a (§ 3(a)). It also expressly excludes other categories of aliens that had concerned courts, including lawful permanent residents. App. 301a (§ 3(b)).

The Order contains a detailed provision permitting case-by-case waivers where denying entry "would cause undue hardship" and "entry would not pose a threat to national security and would be in the national interest." App. 301a-303a (§ 3(c)). It provides a nonexhaustive list of circumstances in which a waiver could be appropriate, including when the applicant seeks entry "to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa." App. 303a (§ 3(c)(iv)). Waivers can be requested, and will be acted on by a consular officer, "as part of the visa issuance process," or by the Commissioner of U.S. Customs and Border Protection. App. 302 (§ 3(c)).[5] Other provisions of the Order, not at issue here, concern the Refugee Program.

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[5] See Bureau of Consular Affairs, U.S. Dep't of State, *Executive Order on Visas* (Mar. 22, 2017), https://goo.gl/HoNiNz; DHS, *Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States* (Mar. 6, 2017), https://goo.gl/WtVwTu.

C. Procedural History

1. Respondents—six individuals and three organizations—subsequently filed their operative complaint challenging the Order under the INA and the Establishment Clause, and moved to "enjoin[] [the Order] in its entirety." D. Ct. Doc. 95, at 1 (Mar. 11, 2017); see C.A. App. 254-258. The individual respondents are U.S. citizens or lawful permanent residents who claim that the Order will prevent or delay a foreign-national family member from entering the United States. Four individuals—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—allege that Section 2(c) would prevent family members from obtaining visas. C.A. App. 213-214, 245-252. The other two—Muhammed Meteab and Ibrahim Mohomed—allege that family members would be denied or delayed admission under the Refugee Program. C.A. App. 249-250, 252.

One organization, the Middle East Studies Association of North America, Inc. (MESA), alleges that Section 2(c) will prevent its members abroad from traveling to the United States for conferences, deter U.S. members from conducting work abroad, and prevent foreign scholars from attending MESA's annual meeting in the U.S. C.A. App. 213, 243-245. The other two—the International Refugee Assistance Project (IRAP) and HIAS, Inc.—principally provide resettlement services to refugees and assert injury based on the refugee provisions. C.A. App. 210-213, 235-243.

2. After expedited briefing and argument, the district court enjoined Section 2(c), but not other challenged provisions. App. 208a-264a. It held that three individual respondents (Does #1-3) have standing to challenge Section 2(c) on statutory grounds, App. 222a-227a, but are not likely to succeed on their "claim

that [8 U.S.C.] 1152(a) prevents the President from barring entry to the United States pursuant to [8 U.S.C.] 1182(f), or the issuance of non-immigrant visas, on the basis of nationality," App. 238a. The court held, however, that to the extent implementation of the Order would involve denying immigrant visas abroad based on nationality, that would likely violate Section 1152(a)(1)(A). App. 233a-238a. But because that statutory holding could not provide the basis for enjoining Section 2(c)'s entry suspension, the court proceeded to address respondents' constitutional claim.

The district court held that three respondents (Doe #1, Doe #3, and Meteab) have standing to assert an Establishment Clause claim and are likely to succeed on the merits. App. 228a-230a, 239a-256a. It declined to consider whether Section 2(c)'s express national-security basis is a "facially legitimate and bona fide reason" under *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). App. 254a-255a. Instead, it evaluated respondents' claim under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). App. 239a. While acknowledging that the Order "is facially neutral in terms of religion," the court held—based primarily on campaign statements made by then-candidate Donald Trump and subsequent statements by the President's aides—that it was adopted for an improper "religious purpose" of preventing Muslim immigration. App. 247a; see App. 241a-247a. The court entered a preliminary injunction barring any enforcement of Section 2(c) and denied a stay. App. 262a-264a.

3. The government appealed and sought a stay and expedited briefing. The court of appeals *sua sponte* ordered initial hearing en banc and heard argument on May 8, 2017. On May 25, a divided en banc court largely affirmed the injunction and denied a stay. App. 1a-207a.

a. The majority addressed only respondents' Establishment Clause claim, explaining that the district court's "narrow statutory ruling [was] not the basis for [its] broad preliminary injunction." App. 21a. The majority held that one respondent, Doe #1, could raise that constitutional claim. App. 26a. On the merits, the court reasoned that, although the Order's "stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry," App. 43a, *Mandel* provides only "the starting point" for the analysis, App. 38a. Because, in the majority's view, Doe #1 had made "an affirmative showing of bad faith," it "look[ed] behind" the government's "facially legitimate justification." App. 41a-42a (citation and internal quotation marks omitted); see App. 45a-46a. Relying primarily on statements made by then-candidate Trump in 2015 and 2016, the majority concluded that the Order was "motivated" by a "desire to exclude Muslims from the United States." App. 44a, 51a; see App. 48a-52a.

The majority upheld the nationwide injunction except insofar as it enjoined the "President himself." App. 73a; see App. 65a-74a. It held that a violation of respondents' Establishment Clause rights itself "constitutes irreparable injury" and is not outweighed by harm to the government and public interest. App. 66a (citation omitted); see App. 65a-71a. The majority further held that nationwide relief is appropriate because respondents "are dispersed throughout the United States," the immigration laws "should be enforced vigorously and uniformly," and "enjoining [Section 2(c)] only as to [respondents] would not cure the constitutional deficiency." App. 72a, 73a (citation and emphasis omitted).[6]

b. Four judges filed concurring opinions. App. 75a-145a. Judge Traxler concurred in the judgment. App. 75a. Judges Keenan, Thacker, and Wynn, each writing separately, agreed to varying degrees with the majority's Establishment Clause analysis and opined that the Order also likely violated various provisions of the INA. App. 76a-145a.

c. Judges Agee, Niemeyer, and Shedd filed dissents, and each judge joined each dissent. App. 146a-207a. Judge Agee opined that respondents' Establishment Clause claim is not justiciable. App. 191a-207a. "[T]he imagined future denial of a visa to [Doe #1's] wife is simply too vague and speculative" to confer standing, he concluded, and Doe #1's alleged "stigma" from the Order "is not a cognizable injury" but "simply a subjective disagreement with a government action." App. 197a-198a. Judge Niemeyer opined that the majority's Establishment Clause analysis "plainly violates" *Mandel*, and its "extratextual search for evidence suggesting bad faith" both "radically extends" this Court's precedents and "has no rational limit." App. 157a, 165a, 170a. Judge Shedd opined that the district court "totally failed to respect" the deference due to the Executive's national-security judgments, and the "shortcomings" in its "selectively negative interpretation of political campaign statements" are "obvious." App. 182a, 183a.

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[6] Although the court of appeals correctly recognized that no injunction could run against the "President himself," App. 73a, the President remains injured by the injunction because it prevents the Executive Branch from carrying out his Order.

D. Related Litigation

Litigation over both Orders also has continued in other courts. In *Washington*, the Ninth Circuit denied reconsideration en banc of the panel's decision declining to stay an injunction against the January Order, over the dissent of five judges who issued three separate opinions. Amended Order, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017). As relevant here, Judge Bybee explained that *Mandel* provides the governing "test for judging executive and congressional action [for] aliens who are outside our borders and seeking admission." *Id.*, slip op. 11 (Bybee, J., dissenting from denial of reconsideration en banc) (*Washington* Bybee Dissent). Judge Kozinski opined that using campaign and other unofficial statements made outside the process of "crafting an official policy" to establish "unconstitutional motives" is unprecedented, "unworkable," and produces "absurd result[s]." *Id.*, slip op. 5, 6 (Kozinski, J., dissenting from denial of reconsideration en banc) (*Washington* Kozinski Dissent).

On March 15, 2017, a district court in Hawaii entered a temporary restraining order against all of Sections 2 and 6 of the Order—including provisions that concern only internal and diplomatic government activities. *Hawaii* v. *Trump*, No. 17-50, 2017 WL 1011673 (D. Haw.). The court has since converted that order to a preliminary injunction. *Hawaii* v. *Trump*, No. 17-50, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). The government's appeal of that injunction and request for a stay are currently pending before the Ninth Circuit, *Hawaii* v. *Trump*, No. 17-15589, which heard argument on May 15, 2017.

REASONS FOR GRANTING THE PETITION

At the behest of a single individual plaintiff (John Doe #1), the divided en banc court of appeals affirmed a global injunction against a formal national-security determination by the President, made after consultation with the Secretaries of State and Homeland Security and the Attorney General. The court did not dispute that the President acted at the height of his powers in instituting Section 2(c)'s temporary pause on entry by nationals from certain countries that sponsor or shelter terrorism. Nor did it dispute that Section 2(c)'s text and operation are religion-neutral: its temporary pause applies to certain nationals of the designated countries without regard to religion. As respondents conceded below, Section 2(c) could be constitutional if issued by some other President. But it is likely unconstitutional here, the court held, because the President's "stated national security interest" "was provided in *bad faith*, as a *pretext* for its religious purpose." App. 45a (emphases added). That remarkable holding is wrong and in manifest need of this Court's review.

I. THE DECISION BELOW IS WRONG

The court of appeals found that one individual plaintiff, Doe #1, has standing to challenge Section 2(c). But his claim is not justiciable: he does not seek to vindicate his own Establishment Clause rights based on action directed against him, and he lacks any imminent injury. In any event, his claim fails on the merits. This Court has never invalidated religion-neutral government action based on speculation about officials' subjective motivations drawn from campaign-trail statements by a political candidate. And even if Doe #1 could clear that hurdle, he still could obtain only an injunction to redress *his* alleged injury—not a global injunction barring enforcement of Section 2(c) as to thousands of unidentified aliens abroad. The decision below fails to adhere to foundational principles regarding justiciability, constitutional interpretation, and the scope of equitable relief.

A. Doe #1's Challenge To Section 2(c) Is Not Justiciable

1. This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). That principle is manifested in "the doctrine of consular nonreviewability," which provides that the Executive's decision to issue or revoke a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956). Far from saying otherwise, Congress has reaffirmed the doctrine. It has forbidden "judicial review" of visa revocations (subject to a narrow exception). 8 U.S.C. 1201(i). And it has not authorized any judicial review of visa denials by the alien affected, much less by third parties. *E.g.*, 6 U.S.C. 236(b)(1), (c)(1), and (f); 8 U.S.C. 1104(a)(1).

The denial of a visa and the doctrine of consular nonreviewability generally raise no constitutional question because aliens abroad ordinarily lack any constitutional rights regarding entry. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972). This Court has twice permitted limited judicial review, however, when a U.S. citizen plausibly alleged that the refusal of a visa to an alien abroad violated the citizen's *own* constitutional rights. In *Mandel*, the Court reviewed a claim that the exclusion of a Belgian national who wished to speak on communism violated U.S. citizens' First Amendment right to receive information. 408 U.S. at 756-759, 762-770. And in *Kerry* v. *Din*, the Court reviewed a claim by a U.S. citizen that the exclusion of her husband implicated her due-process rights. 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *id.* at 2139 (Kennedy, J., concurring in the judgment) (assuming without deciding that U.S. citizen had protected liberty interest in husband's visa application).

2. That limited exception does not apply here. As the case comes to this Court, the global injunction against Section 2(c) rests on a single individual, Doe #1. The court of appeals concluded that Doe #1 has standing "with respect to [his] Establishment Clause claim," and it did not decide whether any other respondents also have standing on that claim (or whether Doe #1 has standing to raise a statutory claim). App. 34a.[7] Doe #1, the court stated, asserts "two distinct injuries" from Section 2(c): first, that it would delay "his wife's entry into the United States" as an Iranian national and thereby "prolong their separation"; and, second, that it

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[7] The court of appeals correctly did not hold that any other respondent has standing to challenge Section 2(c). Harrison's fiancé and Doe #3's wife were issued visas and so are not affected by the Order. Gov't C.A. Br. 19 n.6; Resps. C.A. Supp. App. 819. Jane Doe #2 is petitioning for her sister, but there is a multi-year backlog for immigrant-visa numbers for U.S. citizens' siblings. Gov't C.A. Br. 19 & n.7. The remaining individual respondents seek admission of relatives as refugees—a process not affected by Section 2(c). App. 15a-16a. IRAP and HIAS likewise assert standing based on the Order's provisions addressing refugees, and MESA asserts standing based on a member's alleged inability to attend a meeting in November 2017, after the 90-day suspension would end. See p. 8, *supra*; Gov't C.A. Br. 25. None of the organizations has identified a member or client whom Section 2(c) would bar from entering.

"sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community." App. 26a; see App. 15a. Neither alleged injury stems from a putative violation of Doe #1's own Establishment Clause rights.

a. Doe #1's allegations that his wife will be delayed in entering do not even satisfy Article III. If she would be scheduled for a visa-application interview during the 90-day suspension and would be found otherwise eligible for a visa (two facts that are themselves speculative on this record, see C.A. App. 305), the Order specifically provides that "[c]ase-by-case waivers could be appropriate" for "close family member[s]" of a "United States citizen" or "lawful permanent resident." App. 302a, 303a (§ 3(c)(iv)). Doe #1's wife is thus a candidate for a waiver. Unless and until she seeks and is denied a waiver, there is no final decision denying her entry, and Doe #1's claim is not ripe because it depends on "contingent future events that may not occur." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation omitted).

Even assuming Doe #1 has a cognizable injury, it results not from any alleged religious discrimination against *him*, but from supposed religious discrimination against *his wife*. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), the Court explained that individuals who are indirectly injured by alleged religious discrimination against others generally may not sue, because they have not suffered violations of their own rights under the Free Exercise Clause *or* the Establishment Clause. *Id.*

at 429-430.[8] And *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1 (2004), held that a non-custodial parent could not challenge recitation of the Pledge of Allegiance at his daughter's school because his "standing derive[d] entirely from his relationship with his daughter." *Id.* at 15-18 & n.8; see *Smith* v. *Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc), cert. denied, 565 U.S. 820 (2011). Doe #1 cannot bring himself within the *Mandel/Din* exception to nonreviewability by labeling Section 2(c)—which operates only against aliens abroad—as a violation of his own Establishment Clause rights.

b. The court of appeals further held that Section 2(c) injures Doe #1 by sending a "message" that condemns Islam. App. 29a, 32a. That reframing fares no better, and it creates a circuit conflict.

i. This Court has "ma[de] clear" that "the stigmatizing injury often caused by racial [or other invidious] discrimination * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (citation omitted). The Court has applied that rule to Establishment Clause claims: regardless of "the intensity" of a plaintiff's feelings of aggrievement, "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that supports standing to sue, "even though the disagreement is phrased in [Establishment Clause] terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

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[8] Although *McGowan* held that an Establishment Clause challenge can be based on economic injuries in certain circumstances, that holding is inapposite because the challengers there were "direct[ly]" subjected to (indeed, prosecuted under) a Sunday-closing law, which regulated their own conduct and infringed their own freedom from religious compulsion. See 366 U.S. at 422, 430-431. Respondents, in contrast, are not directly subject to the Order's suspension, which applies only to certain aliens abroad.

To be sure, a plaintiff may suffer a "spiritual" injury from the violation of his own Establishment Clause rights where he himself has been "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22. But that principle is inapposite here. In the cases the court of appeals cited, App. 29a-31a & n.10, the plaintiffs were personally exposed to (1) an official statement or practice that explicitly addressed religion and (2) that was directed toward them by their own local or state government.[9]

Neither element is present here. Section 2(c) does not expose respondents to a religious message; it says nothing about religion. And Section 2(c) is not directly targeted at respondents; it applies only to aliens abroad. These differences foreclose Doe #1's claim that

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[9] See *Moss* v. *Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir.) (public high-school student and parent had standing to challenge school policy granting course credit for private religious education and was promoted to them in letter from parochial school), cert. denied, 133 S. Ct. 623 (2012); *Suhre* v. *Haywood County*, 131 F.3d 1083, 1084-1085 (4th Cir. 1997) (county resident had standing to challenge Ten Commandments display in courtroom of county courthouse); *Catholic League for Religious & Civil Rights* v. *City & County of San Francisco*, 624 F.3d 1043, 1047, 1052-1053 (9th Cir. 2010) (en banc) (city residents had standing to challenge city resolution condemning certain actions and beliefs of Catholic Church), cert. denied, 563 U.S. 974 (2011); *Awad* v. *Ziriax*, 670 F.3d 1111, 1117-1118, 1122-1123 (10th Cir. 2012) (state resident could challenge state constitutional amendment presented to voters forbidding state courts from considering "Sharia Law").

Section 2(c) violates his own Establishment Clause rights. The court of appeals tried to sidestep this problem by asserting that, in addressing justiciability, it had to "assume the merits" of Doe #1's argument that the Order "sends a sufficiently religious message such that it violates the Establishment Clause." App. 30a n.9. But regardless of whether Section 2(c) sends a message, *Valley Forge*'s rule required the court to determine whether (not merely assume that) the message is directed to Doe #1 in a way that causes him cognizable injury. The lesson of this Court's cases is that, when the message flows from allegedly discriminatory conduct aimed at others, only those targets of the conduct may sue.

ii. The court of appeals' holding that Doe #1 may sue based on an alleged "message of religious condemnation," App. 32a, conflicts with *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009). As the D.C. Circuit explained, it would "eviscerate well-settled standing limitations" to allow a putative Establishment Clause plaintiff to "re-characterize[]" an abstract injury flowing from "government *action*" directed against others as a personal injury from "a governmental *message* [concerning] religion" directed at the plaintiff. *Id.* at 764. If that were permissible, the D.C. Circuit noted, the challengers in *Valley Forge* and other cases "could have obtained standing to sue simply by targeting not the government's action, but rather the government's alleged 'message' of religious preference communicated through that action." *Ibid.* The D.C. Circuit therefore held that the plaintiffs (Protestant chaplains in the Navy) could not challenge alleged discrimination against others (different

Protestant chaplains) by claiming that it conveyed a pro-Catholic message to them. *Id.* at 762-765.

The court of appeals attempted to distinguish *Valley Forge* and *Navy Chaplaincy* on the ground that "Doe #1 *is* directly affected by the government action—both its message and its impact on his family." App. 32a n.11. But the abstract "message" he alleges could be asserted by any Muslim in the country—indeed, perhaps by anyone offended by Section 2(c)'s perceived message. And as explained above, the Order's only effect particular to Doe #1—the speculative delay in the entry of his wife—does not stem from his religion or any violation of his own Establishment Clause rights.

B. Section 2(c) Does Not Violate The Establishment Clause

On the merits, the President's national-security determination provides a "facially legitimate and bona fide reason" for Section 2(c)'s temporary suspension on entry. *Mandel*, 408 U.S. at 770. The court of appeals arrived at a contrary conclusion by disregarding *Mandel*'s deferential standard and looking instead to domestic Establishment Clause decisions. Even under its unprecedented approach, the court should have upheld Section 2(c). This Court's decisions and respect for a coordinate branch forbid invalidating religion-neutral government action not because of what it says or does, but because of what supposedly motivated the President (and his advisors) in issuing it.

1. Section 2(c) is constitutional under Mandel *and* Din

a. The court of appeals acknowledged that Doe #1's Establishment Clause challenge to the exclusion of aliens abroad is governed by *Mandel*, App. 38a, which the court and other circuits have "equated" with "rational basis review," App. 40a n.14 (collecting cases).

There, the Executive denied admission to a Belgian journalist, Ernest Mandel, who wished to speak on communism. 408 U.S. at 756-759. Because the Attorney General gave "a facially legitimate and bona fide reason" for Mandel's exclusion—Mandel had violated the conditions of previous visas—"courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. *Id.* at 770. That deferential standard reflects the Constitution's allocation of power over the admission of aliens, which is "to be exercised exclusively by the political branches." *Id.* at 765 (citation omitted); see *Fiallo*, 430 U.S. at 792-796 (applying *Mandel*'s test to equal-protection challenge to statute governing admission of aliens).

Mandel compels rejecting Doe #1's constitutional challenge. The court of appeals accepted that Section 2(c)'s entry suspension rests on a facially legitimate reason: protecting national security. App. 43a. And the Order supplies a bona fide factual basis for that reason: Section 1(d) explains that Congress or the Executive previously designated the six listed countries as presenting terrorism-related concerns that "diminish[] the foreign government's willingness or ability to share or validate important information about" its nationals. App. 292a-293a. Section 1(e) then details, country by country, why each poses "heightened risks." App. 293a-295a. Neither Doe #1 nor the court of appeals contested these facts. On that factual basis, Sections 1(f) and 2(c) set forth the President's judgment that a temporary pause in entry is needed to "prevent infiltration by foreign terrorists" and "reduce investigative burdens" while a review of the Nation's screening and vetting procedures is ongoing. App. 298a-299a; see App. 295a-296a. The Order readily satisfies *Mandel's* test.

That test has particular force here for two reasons. First, courts are generally "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the Executive's "reasons for deeming nationals of a particular country a special threat." *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999). Second, Congress conferred on the President express authority to suspend the entry of "any class of aliens * * * for such period as he shall deem necessary" "[w]henever [he] finds" that their entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f). Congress's expansive grant of authority means that the President's power "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083-2084 (2015) (citation omitted).

The court of appeals, however, failed to accord the deference to the Executive that *Mandel* requires. It noted that the political branches' decisions in the immigration context are still "subject to important constitutional limitations." App. 40a-41a (citation omitted). But *Mandel* establishes how those limitations apply with respect to the exclusion of aliens abroad.[10] The court then treated *Mandel's* "bona fide" requirement as a license to ensure that the government's stated reason was given "in good faith." App. 42a. Courts indeed can ensure that the stated reason bears a rational relationship to the government's action—*i.e.*, that the reason is facially bona fide as well as legitimate. But *Mandel* explicitly held that the "bona fide" analysis does not permit "look[ing] behind" the government's stated reason. 408 U.S. at 770. And the Court declined Justice Marshall's invitation in dissent to take "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver." *Id.* at 778. The court of appeals' approach cannot be squared with what *Mandel* said or what it did.

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[10] *Mandel's* substantive standard applies to challenges to decisions to deny visas to aliens seeking entry. It does not govern every issue concerning immigration—such as post-removal detention, *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), or the procedure for exercising legislative power over the suspension of deportation of aliens present in the United States, *INS* v. *Chadha*, 462 U.S. 919 (1983).

b. The court of appeals based its approach on a misreading of Justice Kennedy's concurrence in *Din*. App. 42a-45a. There, a U.S. citizen claimed that she had a due-process right to receive a more extensive explanation for a consular officer's denial of a visa to her husband. 135 S. Ct. at 2131 (opinion of Scalia, J.). In rejecting that claim, Justice Kennedy (joined by Justice Alito) observed that the government's citation of a statutory ground of inadmissibility involving terrorism "indicates it relied upon a bona fide *factual basis* for denying [the] visa." *Id.* at 2140 (emphasis added). He noted that the citizen admitted that her husband "worked for the Taliban government," which "provide[d] at least a *facial* connection to terrorist activity." *Id.* at 2141 (emphasis added). Justice Kennedy concluded that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the citizen] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed." *Ibid.*

That statement cannot plausibly be read as approving a wide-ranging search for pretext in reviewing consular officers' decisions, let alone action by the President. Rather, Justice Kennedy posited a far narrower scenario: the statutory ground of inadmissibility in 8 U.S.C. 1182(a)(3)(B) "specifies discrete factual predicates." 135 S. Ct. at 2141. Ordinarily, a citation of the statute alone will suffice to indicate that those predicates have been found; but in an extreme case, where a citizen plausibly alleges with particularity that a consular officer had no "bona fide factual basis" for determining that an applicant has ties to terrorism, due process may entitle the citizen to "additional factual details" about the basis of the consular officer's decision (provided the information is not classified). *Id.* at 2140, 2141.

That type of inquiry is inapposite here for two independent reasons. First, the statute that authorizes the President's suspension does not specify *any* particular factual predicates: the President need only determine that, in his judgment, entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f). Second, the court of appeals did not question that the terrorism-related grounds set forth in the Order provide an adequate factual basis for Section 2(c)'s temporary suspension, even though the court sought to minimize the relative weight of that basis in finding that national security was not the primary purpose. See App. 53a-55a. Nothing in *Mandel* or *Din* permitted looking behind the President's determination, *notwithstanding* its factual basis, in a search for a contrary subjective motivation.

After reading *Din* to authorize an inquiry into the President's motives, the court of appeals then relied on domestic Establishment Clause precedent as further justification for setting aside Section 2(c). App. 45a-46a. That unprecedented approach is deeply flawed. First, it defeats *Mandel*'s central point that the exclusion of aliens abroad, over which the political branches have plenary authority, calls for especially deferential review. 408 U.S. at 770. Second, domestic case law—involving local religious displays, subsidies for religious schools, and the like—has no sensible application to the President's foreign-policy, national-security, and immigration judgments. The "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world." *Washington* Bybee Dissent 8 n.6. This Court should reject such "intrusion of the judicial power into foreign affairs" committed to the political branches. *Washington* Kozinski Dissent 3 n.2.

Moreover, the court of appeals did not need to reach any of this. Even if *Din* could fairly be read to allow a bad-faith inquiry that turns on a consular officer's subjective motive, and even assuming such an inquiry would apply in the same way to a national-security directive of the President, it would at least require the clearest affirmative showing of bad faith by the President and Cabinet officials. Doe #1 has not remotely cleared that high bar. To the contrary, the President's actions in response to concerns raised by courts regarding the January Order demonstrate *good faith*. For instance, as the Order explains, the January Order had two provisions aimed at aiding victims of religious persecution. App. 291a-292a (§ 1(b)(iv)). The President removed them to make clear that national security, not religion, is the Order's focus. That response to courts' concerns is the opposite of bad faith.

2. Section 2(c) is constitutional under domestic Establishment Clause precedent

After rejecting *Mandel*'s deferential standard of review, the court of appeals held the Order likely unconstitutional by reaching back in time to campaign statements long before development of the Order. That was impermissible under any legal standard. Section 2(c) is not a so-called "Muslim ban," and campaign comments cannot change that basic fact.

a. Even in the domestic setting, in deciding whether official action has an improper religious purpose, courts look to "the text, legislative history, and implementation of the statute," and do not engage in "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (emphasis added) (citation omitted). Searching for purpose outside the operative terms of governmental action makes no sense in the Establishment Clause context, because it is only an "official objective" of favoring or disfavoring religion gleaned from "readily discoverable fact" that implicates the Clause. *Ibid.* Here, Section 2(c)'s text does not refer to or draw any distinction based on religion. And the suspension's "operation," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 535 (1993) (*Lukumi*), confirms that it is religion-neutral: it applies to six countries based on national-security risk, and it applies to certain nationals of those countries without regard to their religion.

The court of appeals held, however, that statements by the President—nearly all before assuming office, while still a private citizen and political candidate—and informal remarks of his aides imply that the entry suspension is intended to target Muslims. App. 48a-51a. In the court's view, those statements "are the exact type of 'readily discoverable fact[s]'" courts "use in determining a government action's primary purpose." App. 51a (quoting *McCreary*, 545 U.S. at 862) (brackets in original). Of course it is readily discoverable that the statements occurred, but the questions are what candidate Trump and his aides *meant* by them—and whether that meaning should have any import for the President's later official action. Resolving the former would require precisely the type of "judicial psychoanalysis" that *McCreary* forecloses. 545 U.S. at 862. As for the latter, to the government's knowledge, the decision below is the first to hold that a provision of federal law—neutral on its face and in operation—violates the Establishment Clause based on speculation about its drafters' supposedly illicit purpose.

Certainly this Court has never done so. *McCreary* involved a display of the Ten Commandments, 545 U.S. at 850, which are explicitly religious speech. The Court held that the final display's "purpose * * * need[ed] to be understood in light of context," and the context of the counties' prior official actions made their objective clear. *Id.* at 874. The Court's analysis centered on the text of the county resolutions authorizing the displays, objective features of those displays, and materials that government actors deliberately made part of the official record—such as statements by the county executive's pastor at the display's official unveiling. *Id.* at 868-874. The other cases the court of appeals invoked also did not depend on anything like the campaign statements at issue here.[11]

b. Even if a court may look beyond a law's text and operation, it should not consider campaign-trail comments. Here, virtually all of the President's statements on which the court of appeals relied were made before he assumed office, see App. 10a-13a, 48a-50a—before he took the prescribed oath to "preserve, protect and defend the Constitution," U.S. Const. Art. II, § 1, Cl. 8, and formed a new Administration, including Cabinet-level officials who recommended adopting the Order. Taking that oath marks a profound transition from private life to the Nation's highest public office, and manifests the singular responsibility and independent authority to protect the welfare of the Nation that the Constitution reposes in the President.

Moreover, "[b]ecause of their nature, campaign statements are unbounded resources by which to find intent of various kinds." App. 169a (Niemeyer, J., dissenting). "They are often short-hand for larger ideas" and "are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise." *Ibid.* They often are made without the benefit of advice from an as-yet-unformed Administration. And they cannot bind elected officials who later conclude that a different course is warranted. See *Republican Party*

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[11] In *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), it was "undisputed" that the legislature knew when it created a special school district that its boundaries were drawn specifically to include only members of one religious sect. *Id.* at 699 (opinion of Souter, J.); *id.* at 729 (Kennedy, J., concurring in the judgment) (law constituted "explicit religious gerrymandering"). Likewise, *Lukumi* held that the local ordinances' "text" and "operation" showed that they were a "religious gerrymander." 508 U.S. at 535 (citation omitted).

of Minn. v. *White*, 536 U.S. 765, 780 (2002); *Washington* Kozinski Dissent 4-5.

Here, for example, the court of appeals relied on statements as early as December 2015 (more than 13 months before the inauguration) referring to immigration by "Muslims." App. 49a (citation omitted). But as the court noted, months later, candidate Trump advocated restrictions based on "territory," and specifically "nation[s] that ha[ve] been compromised by terrorism." App. 50a (citation omitted). And after taking the oath of office, forming an Administration, and consulting with Members of his newly formed Cabinet, the President adopted an Order that follows a territory-based approach and limits entry of nationals from six countries that sponsor or shelter terrorism. The debate over the meaning of the President's statements only highlights the dangers in "opening the door" to campaign comments. App. 170a (Niemeyer, J., dissenting). To the extent courts consider such comments at all, the "presumption of regularity" that attaches to all federal officials' actions, *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14 (1926), magnified here by respect for a coordinate branch, counsels resolving uncertainty in favor of, not against, the validity of official Executive action.

Allowing consideration of campaign statements also "has no rational limit," raising questions about whether courts may consider "statements from a previous campaign, or from a previous business conference, or from college." App. 170a (Niemeyer, J., dissenting). The majority did not deny that its approach might permit considering an official's "college essay," asserting only that such far-removed statements would "rarely" be "reveal[ing]." App. 61a. That ad hoc approach promises to "mire [courts] in a swamp of unworkable litigation," with no principled rules governing how to assess particular past statements made before a candidate assumes office. *Washington* Kozinski Dissent 5. And it threatens to "chill campaign speech," to which "our most basic free speech principles have their fullest and most urgent application." *Ibid.* (citation and internal quotation marks omitted).

c. Excluding campaign statements from the analysis confirms that the decision below is incorrect. The few post-inauguration remarks by the President and aides do not demonstrate an impermissible purpose. The court of appeals cited statements by the President and aides made between the January Order and the Order—describing the Order as pursuing "the same basic policy outcome," reflecting the same "principles," or a "watered down version" of the January Order. App. 50a, 51a (citations omitted). But as the Order explains, both Orders aimed at the same national-security objective: facilitating a review of existing screening and vetting procedures. App. 289a-298a (§ 1(b)-(i)). The Order pursues that objective through substantially revised provisions; the differences are clear on the Order's face.

The court of appeals held that a passing remark by the President when signing the January Order signals an improper motive. After reading its title—"Protecting the Nation From Foreign Terrorist Entry Into the United States," App. 277a—he stated, "[w]e all know what that means." App. 50a (citation omitted). Minutes earlier, in the presence of the newly sworn-in Secretary of Defense, the President had said, "I am establishing new vetting measures to keep radical Islamic terrorists out of the United States of America * * * . We want to ensure that we are not admitting into our country the very threats our soldiers are fighting overseas."[12] In context, the President's passing remark is reasonably understood to refer to terrorist groups like ISIL and al Qaeda, not all Muslims. It is at least ambiguous, and the court erred in setting aside an Executive Order based on an offhand, six-word comment.

C. The Global Injunction Against Section 2(c) Is Vastly Overbroad

Constitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries. Under Article III, "[t]he remedy" sought must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). "The actual-injury requirement would hardly serve [its] purpose * * * of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Ibid.*; see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Equitable principles independently require that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

The court of appeals held that one respondent, Doe #1, has standing to challenge Section 2(c). See p. 10, *supra*. Narrowing the injunction to bar application of Section 2(c) to Doe #1's wife would have prevented any delay in her entry. Yet the court upheld a global injunction barring enforcement of Section 2(c) as to *any* national of the six countries. App. 71a-73a. It reasoned that, because Section 2(c) supposedly sends a message of condemnation to Muslims, the provision had to be enjoined worldwide—lest any application communicate that message to Doe #1. App. 29a-31a. That reasoning places in stark relief how respondents' "condemnation" theory (App. 32a) would eviscerate limitations on both standing *and* equitable relief. By recharacterizing Section 2(c) as government speech directed at U.S. citizens, rather than government conduct directed at aliens abroad, any U.S. citizen apparently could obtain a global injunction against Section 2(c)—or any other allegedly discriminatory immigration law—to silence the supposed message. That result plainly warrants review.

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[12] Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists,'* CNN.com (Jan. 30, 2017), https://goo.gl/dMZEvO.

None of the court of appeals' other justifications withstands scrutiny. It stated that respondents "are dispersed throughout the United States," App. 72a, but it did not conclude that any res-pondent besides Doe #1 has standing. The court also noted that "Congress has made clear that the immigration laws of the United States should be enforced vigorously and uniformly." *Ibid.* (citation, emphasis, and internal quotation marks omitted). That is a curious rationale for preventing enforcement of Section 2(c). Proper respect for uniform enforcement and for a coordinate branch require leaving Section 2(c) in place, with an individualized exception, if necessary, for Doe #1 and his wife. The Order's express severability clause compels the same conclusion.[13] Such tailored relief would have posed far less interference with federal policy than enjoining the President's directive wholesale based on alleged injuries to one individual.

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[13] App. 312a (§ 15(a)) (If "the application of any provision [of the Order] to any person or circumstance[] is held to be invalid, * * * the application of [the Order's] other provisions to any other persons or circumstances shall not be affected.").

II. THE DECISION BELOW IS IN NEED OF REVIEW

The court of appeals, convening en banc *sua sponte*, upheld a global injunction against a formal national-security directive of the President, acting at the core of his constitutional and statutory authority. This Court often grants review to address interference with Executive Branch conduct implicating significant "national security concerns," *Department of the Navy* v. *Egan*, 484 U.S. 518, 520 (1988); see *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008), or the scope of "federal power" over "the law of immigration and alien status," *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). This case involves both. In addition, as explained in the government's accompanying stay application (at 20-22), the injunction interferes with the President's "unique responsibility" to conduct the Nation's foreign affairs, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993), and threatens to undermine the Executive in interacting with other nations.

In declaring the Order unconstitutional, the decision below addressed important questions of justiciability, constitutional interpretation, and the scope of injunctive relief. And the stakes are indisputably high: the court of appeals concluded that the President acted in bad faith with religious animus when, after consulting with three Members of his Cabinet, he placed a brief pause on entry from six countries that present heightened risks of terrorism. The court's decision creates uncertainty about the President's authority to meet those threats as the Constitution and Acts of Congress empower and obligate him to do. Given the ruling's lack of any limiting principle, courts, the public, and other governments may view it as casting a shadow over virtually any action the President takes concerning the six countries covered by Section 2(c), and perhaps other nations. The Court should grant review to restore clarity regarding the President's ability to discharge his constitutional duty.

* * * * *

This Order has been the subject of passionate political debate. But whatever one's views, the precedent set by this case for the judiciary's proper role in reviewing the President's national-security and immigration authority will transcend this debate, this Order, and this constitutional moment. Precisely in cases that spark such intense feelings, it is all the more critical to adhere to foundational legal rules. The decision below departs from those rules, and calls into question the Executive and his authority in a way that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1351

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS; HIAS, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS; MIDDLE EAST
STUDIES ASSOCIATION OF NORTH AMERICA, INC.,
ON BEHALF OF ITSELF AND ITS MEMBERS; MUHAMMED
METEAB; PAUL HARRISON; IBRAHIM AHMED
MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,
PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES; DEPARTMENT OF
HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE
OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN
F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
HOMELAND SECURITY; REX W. TILLERSON, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF STATE; DANIEL
R. COATS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF
NATIONAL INTELLIGENCE, DEFENDANTS-APPELLANTS

Argued: May 8, 2017
Decided: May 25, 2017
Amended: May 31, 2017

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:17-cv-00361-TDC)

Affirmed in part, vacated in part by published opinion. Chief Judge Gregory wrote the opinion, in which Judges Motz, King, Wynn, Diaz, Floyd, and Harris joined in full. Judge Traxler wrote an opinion concurring in the judgment. Judge Keenan wrote an opinion concurring in part and concurring in the judgment, in which Judge Thacker joined except as to Part II.A.i. Judge Wynn wrote a concurring opinion. Judge Thacker wrote a concurring opinion. Judge Niemeyer wrote a dissenting opinion, in which Judges Shedd and Agee joined. Judge Shedd wrote a dissenting opinion, in which Judges Niemeyer and Agee joined. Judge Agee wrote a dissenting opinion, in which Judges Niemeyer and Shedd joined.

Before: GREGORY, Chief Judge, and NIEMEYER, MOTZ, TRAXLER, KING, SHEDD, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, and HARRIS, Circuit Judges.

GREGORY, Chief Judge[1]:

The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866), remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation. Therefore, for the reasons that follow, we affirm in substantial part the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order.

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[1] Judges Motz, King, Wynn, Diaz, Floyd, and Harris join this opinion in full, Judge Traxler concurs in the judgment, and Judges Keenan and Thacker concur in substantial part and concur in the judgment.

I.

A.

In the early evening of January 27, 2017—seven days after taking the oath of office—President Donald J. Trump signed Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("EO-1" or "First Executive Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). Referencing the past and present failings of the visa-issuance process, the First Executive Order had the stated purpose of "protect[ing] the American people from terrorist attacks by foreign nationals." EO-1, Preamble. To protect Americans, EO-1 explained, the United States must ensure that it does not admit foreign nationals who "bear hostile attitudes" toward our nation and our Constitution, who would "place violent ideologies over American law," or who "engage in acts of bigotry or hatred" (such as "'honor' killings"). *Id.* § 1.

To that end, the President invoked his authority under 8 U.S.C. § 1182(f) and immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.[2] *See* EO-1, § 3(c). During the ninety-day period, the Secretary of Homeland Security, Secretary of State, and Director of National Intelligence were to "immediately conduct a review to determine the information needed from any country" to assess whether individuals seeking entry from those countries posed a national security threat. Those cabinet officers were to deliver a series of reports updating the President as to that review and the implementation of EO-1. *See id.* § 3(a)-(b), (h).

The First Executive Order also placed several constraints on the admission of refugees into the country. It reduced the number of refugees to be admitted in fiscal year 2017 from 110,000 to 50,000 and barred indefinitely the admission of Syrian refugees. *Id.* § 5(c)-(d). It further ordered the Secretary of State to suspend for 120 days the United States Refugee Admissions Program ("USRAP"). *Id.* § 5(a). Upon resumption of USRAP, EO-1 directed the Secretary of State to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b).

Individuals, organizations, and states across the nation challenged the First Executive Order in federal court. A judge in the Western District of Washington granted a Temporary Restraining Order ("TRO"), enjoining enforcement nationwide of Sections 3(c), 5(a)-(c), and 5(e). *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit subsequently denied the Government's request to stay the TRO pending appeal and declined to "rewrite" EO-1 by narrowing the TRO's scope, noting that the "political branches are far better equipped" for that task. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam). At the Ninth Circuit's invitation, and in an effort to avoid further litigation concerning the First Executive Order, the President enacted a second order ("EO-2" or "Second Executive Order") on March 6, 2017. Exec. Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). The Second Executive Order revoked and replaced the First Executive Order. *Id.* § 1(i).

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[2] According to the Pew Research Center, Iraq's population is 99% Muslim, Iran's is 99.5%, Libya's is 96.6%, Sudan's is 90.7%, Somalia's is 99.8%, Syria's is 92.8%, and Yemen's is 99.1%. *See* Pew Res. Ctr., *The Global Religious Landscape* 45-50 (2012).

Section 2(c) of EO-2—"Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period"—is at the heart of the dispute in this case. This section reinstated the ninety-day suspension of entry for nationals from six countries, eliminating Iraq from the list, but retaining Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "Designated Countries"). EO-2, § 2(c). The President, again invoking 8 U.S.C. § 1182(f) and also citing 8 U.S.C. § 1185(a), declared that the "unrestricted entry" of nationals from these countries "would be detrimental to the interests of the United States." *Id.*[3]

The Second Executive Order, unlike its predecessor, states that nationals from the Designated Countries warrant "additional scrutiny" because "the conditions in these countries present heightened threats." *Id.* § 1(d). In justifying the selection of the Designated Countries, EO-2 explains, "Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones."[4] *Id.* The Second Executive Order states that "until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* § 1(f).

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[3] Section 2(c) reads in full:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

The Second Executive Order also provides brief descriptions of the conditions in each of the Designated Countries. It notes, for instance, that "Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas[, and] . . . elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country." *Id.* § 1(e)(iv).

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[4] As the Government notes, nationals from these six countries are ineligible for the Visa Waiver Program, which currently allows nationals of thirty-eight countries seeking temporary admission to the United States for tourism or certain business purposes to enter without a visa. *See* 8 U.S.C. § 1187(a). The program excludes nationals of or aliens who have recently visited Iraq or Syria and nationals of or recent visitors to countries designated as state sponsors of terror (Iran, Sudan, and Syria). *See* 8 U.S.C. § 1187(a)(12); *see* U.S. Dep't of State, *U.S. Visa Waiver Program* (Apr. 6, 2016), https://www.dhs.gov/visa-waiver-program (saved as ECF opinion attachment). It also excludes recent visitors to Libya, Somalia, and Yemen. U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (saved as ECF opinion attachment). Thus, nationals from the six countries identified in Section 2(c), like nationals from the vast majority of countries, must undergo the individualized vetting of the regular visa process.

The Second Executive Order further states that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States." *Id.* § 1(h). It provides the following examples: two Iraqi refugees who were convicted of terrorism-related offenses in January 2013, and a naturalized citizen who came to this country as a child refugee from Somalia and who was sentenced for terrorism-related offenses in October 2014. *Id.* The Second Executive Order does not include any examples of individuals from Iran, Libya, Sudan, Syria, or Yemen committing terrorism-related offenses in the United States.

The Second Executive Order clarifies that the suspension of entry applies to foreign nationals who (1) are outside the United States on its effective date of March 16, 2017, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of EO-1—January 27, 2017. *Id.* § 3(a). Section 2(c) does not bar entry of lawful permanent residents, dual citizens traveling under a passport issued by a non-banned country, asylees, or refugees already admitted to the United States. *Id.* § 3(b). The Second Executive Order also includes a provision that permits consular officers, in their discretion, to issue waivers on a case-by-case basis to individuals barred from entering the United States. *Id.* § 3(c).

The Second Executive Order retains some—but not all—of the First Executive Order's refugee provisions. It again suspends USRAP for 120 days and decreases the number of refugee admissions for fiscal year 2017 by more than half, *id.* § 6(a), but it does not include the indefinite ban on Syrian refugees. The Second Executive Order also eliminates the provision contained in EO-1 that mandated preferential treatment of religious minorities seeking refugee status. It explains that this provision "applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion." *Id.* § 1(b)(iv). It further explains that EO-1 was "not motivated by animus toward any religion," but rather was designed to protect religious minorities. *Id.*

Shortly before the President signed EO-2, an unclassified, internal report from the Department of Homeland Security ("DHS") Office of Intelligence and Analysis dated March 2017 was released to the public. *See* J.A. 425-31. The report found that most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States, and concluded that increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States. J.A. 426. According to a news article, a separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat. J.A. 424. In a declaration considered by the district court, ten former national security, foreign policy, and intelligence officials who previously served in the White House, State Department, DHS, and Central Intelligence Agency—four of whom were aware of intelligence related to terrorist threats as of January 20, 2017—advised that "[t]here is no national security purpose for a total ban on entry for aliens from the [Designated Countries]." J.A. 91.

B.

The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump's assumption of office. We now recount certain of those statements.

On December 7, 2015, then-candidate Trump published a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." J.A. 346.[5] That same day, he

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[5] Trump's "Statement on Preventing Muslim Immigration" reads in full:

> (New York, NY) December 7th, 2015,—Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe

highlighted the statement on Twitter, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.A. 470. And Trump read from the statement at a campaign rally in Mount Pleasant, South Carolina, that evening, where he remarked, "I have friends that are Muslims. They are great people—but they know we have a problem." J.A. 472.

In an interview with CNN on March 9, 2016, Trump professed, "I think Islam hates us," J.A. 516, and "[W]e can't allow people coming into the country who have this hatred," J.A. 517. Katrina Pierson, a Trump spokeswoman, told CNN that "[w]e've allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.A. 518. In a March 22, 2016 interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration, claiming that this proposed ban had received "tremendous support" and stating, "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. "You need surveillance," Trump explained, and "you have to deal with the mosques whether you like it or not." J.A. 522.

> only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.—*Donald J. Trump*

J.A. 346. The district court noted that, as of February 12, 2017, this statement remained on Trump's campaign website. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *4 (D. Md. Mar. 16, 2017). The statement was subsequently removed from the campaign website shortly before the May 8, 2017 oral argument in this case.

Candidate Trump later recharacterized his call to ban Muslims as a ban on nationals from certain countries or territories. On July 17, 2016, when asked about a tweet that said, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," then-candidate Trump responded, "So you call it territories. OK? We're gonna do territories." J.A. 798. He echoed this statement a week later in an interview with NBC's Meet the Press. When asked whether he had "pulled back" on his "Muslim ban," Trump replied, "We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place." J.A. 480. Trump added, "I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." J.A. 481. Trump continued, "Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently." J.A. 481.

On December 19, 2016, following a terrorist attack in Germany, President-Elect Trump lamented the attack on people who were "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.A. 506. Two days later, when asked whether recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump commented, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful." J.A. 506.

The President gave an interview to the Christian Broadcasting News on January 27, 2017, the same day he issued the First Executive Order. In that interview, the President explained that EO-1 would give preference to Christian refugees: "They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible. . . . " J.A. 461. He found that situation "very, very unfair." J.A. 461. Just before signing EO-1, President Trump stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The following day, former New York City Mayor and presidential advisor Rudolph Giuliani appeared on Fox News and was asked, "How did the President decide the seven countries?" J.A. 508. Giuliani answered, "I'll tell you the whole history of it. So when [the President] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508. Giuliani said he assembled a group of "expert lawyers" that "focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It's based on places where there [is] substantial evidence that people are sending terrorists into our country." J.A. 508-09.

In response to the Ninth Circuit's decision not to stay enforcement of the nationwide injunction, the

President stated at a news conference on February 16, 2017, that he intended to issue a new executive order tailored to that court's decision—despite his belief that the First Executive Order was lawful. *See* J.A. 334. In discussing the Ninth Circuit's decision and his "[e]xtreme vetting" proposal, the President stated, "I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result." J.A. 352. A few days later Stephen Miller, Senior Policy Advisor to the President, explained that the new order would reflect "mostly minor technical differences," emphasizing that it would produce the "same basic policy outcome for the country." J.A. 339. White House Press Secretary Sean Spicer stated, "The principles of the executive order remain the same." J.A. 379. And President Trump, in a speech at a rally in Nashville, Tennessee, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/ (saved as ECF opinion attachment)).

At the March 6, 2017 press conference announcing the Second Executive Order, Secretary of State Rex Tillerson said, "This executive order is a vital measure for strengthening our national security." J.A. 376. That same day, Attorney General Jefferson Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President detailing how weaknesses in our immigration system compromise our nation's security and recommending a temporary pause on entry of nationals from the Designated Countries.

Appellants' Br. 8 n.3 (citing Letter from Jefferson B. Sessions III, Attorney Gen., and John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump (Mar. 6, 2017)). In a CNN interview the next day, Secretary Kelly specified that there are probably "13 or 14 countries" that have "questionable vetting procedures," not all of which are Muslim countries or in the Middle East. J.A. 411. He noted that there are "51 overwhelmingly Muslim countries" and rejected the characterization of EO-2 as a "Muslim ban." J.A. 412.

C.

This action was brought by six individuals, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, and three organizations that serve or represent Muslim clients or members.

Four of the individual Plaintiffs—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—allege that EO-2 would impact their immediate family members' ability to obtain visas. J.A. 213-14, 245-52, 305, 308-09, 318-19. Collectively, they claim that Section 2(c) of EO-2, the provision that suspends entry for certain foreign nationals for ninety days, will prolong their separation from their loved ones. *See, e.g.*, J.A. 306. John Doe #1 has applied for a spousal immigration visa so that his wife, an Iranian national, can join him in the United States; the application was approved, and she is currently awaiting her visa interview. J.A. 305. Jane Doe #2, a college student in the United States, has a pending I-130 visa application on behalf of her sister, a Syrian refugee living in Saudi Arabia. J.A. 316, 318-19. Since the filing of the operative

Complaint on March 10, 2017, two of Plaintiffs' family members have obtained immigrant visas. The Government informed the district court that Paul Harrison's fiancé secured and collected a visa on March 15, 2017, the day before EO-2 was to take effect. Appellants' Br. 19 n.6 (citing J.A. 711-12, 715). Doe #3's wife secured an immigrant visa on May 1, 2017, and Plaintiffs anticipate that she will arrive in the United States within the next eight weeks. J.A. 819. The remaining two individual Plaintiffs—Muhammed Meteab and Ibrahim Ahmed Mohomed—allege that EO-2 would delay or deny the admission of their family members as refugees. J.A. 214, 249-50, 252, 313-14, 321-22.

Beyond claiming injury to their family relationships, several of the individual Plaintiffs allege that the anti-Muslim message animating EO-2 has caused them feelings of disparagement and exclusion. Doe #1, a scientist who obtained permanent resident status through the National Interest Waiver program for people with extraordinary abilities, references these "anti-Muslim views," worries about his safety in this country, and contemplates whether he should return to Iran to be with his wife. J.A. 304, 306. Plaintiff Meteab relays that the "anti-Muslim sentiment" motivating EO-2 had led him to feel "isolated and disparaged in [his] community." J.A. 314. He explains that when he is in public with his wife, who wears a hijab, he "sense[s] a lot of hostility from people" and recounts that his nieces, who both wear a hijab, "say that people make mean comments and stare at them for being Muslim." J.A. 314. A classmate "pulled the hijab off" one of his nieces in class. J.A. 314.

Two of the organizational Plaintiffs, the International Refugee Assistance Project and the Hebrew Immigrant Aid Society, primarily assist refugees with the resettlement process. *See* J.A. 210-13, 235-43. These organizations claim that they have already diverted significant resources to dealing with EO-2's fallout, and that they will suffer direct financial injury from the anticipated reduction in refugee cases. J.A. 238, 243, 276-77. They further claim that their clients, who are located in the United States and the Middle East, will be injured by the delayed reunification with their loved ones. J.A. 268, 282-83. The final Plaintiff, the Middle East Studies Association, an umbrella organization dedicated to fostering awareness of the Middle East, asserts that EO-2 will, among other injuries, reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees. J.A. 243-45, 300-03.

D.

Plaintiffs initiated this suit on February 7, 2017, seeking declaratory and injunctive relief against enforcement of the First Executive Order. Plaintiffs claimed that EO-1 violated the Establishment Clause of the First Amendment; the equal protection component of the Due Process Clause of the Fifth Amendment; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-24 (2012); and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2012). They named as Defendants the President, DHS, the Department of State, the Office of the Director of National Intelligence, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence.

On March 10, 2017, four days after the President issued EO-2, Plaintiffs filed the operative Complaint, along with a motion for a TRO and/or preliminary injunction. Plaintiffs sought to enjoin implementation of EO-2 in its entirety, prior to its effective date. In quick succession, the Government responded to the motion, Plaintiffs filed a reply, and the parties appeared for a hearing.

The district court construed the motion as a request for a preliminary injunction, and on March 16, 2017, it granted in part and denied in part that motion. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *1. In its Memorandum Opinion, the district court first found that three individual Plaintiffs (Doe #1, Doe #2, and Doe #3) had standing to bring the claim that Section 2(c) violates the INA's provision prohibiting discrimination on the basis of nationality in the issuance of immigrant visas, 8 U.S.C. § 1152(a)(1)(A). *Id.* at *6. The court also determined that at least three individual Plaintiffs (Meteab, Doe #1, and Doe #3) had standing to pursue the claim that EO-2 violates the Establishment Clause. *Id.* at *7.

After finding Plaintiffs' claims justiciable, the district court turned to the merits of their claims. The court determined that Plaintiffs are likely to succeed only in part on the merits of their INA claim. *Id.* at *10. It found that Section 2(c) likely violates § 1152(a)(1)(A), but only as to its effective bar on the issuance of *immigrant* visas, because § 1152(a)(1)(A) explicitly applies solely to immigrant visas. To the extent that Section 2(c) prohibits the issuance of nonimmigrant visas and bars entry on the basis of nationality, the court found that it was not likely to violate § 1152(a)(1)(A). *Id.* The court did not discuss this claim in addressing the remaining preliminary injunction factors.

The district court next found that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim. *Id.* at *16. It then considered the remaining preliminary injunction requirements, but only as to the Establishment Clause claim: it found that Plaintiffs would suffer irreparable injury if EO-2 were to take effect, that the balance of the equities weighed in Plaintiffs' favor, and that a preliminary injunction was in the public interest. *Id.* at *17. The district court concluded that a preliminary injunction was therefore proper as to Section 2(c) of EO-2 because Plaintiffs' claims centered primarily on that provision's suspension of entry. The court accordingly issued a nationwide injunction barring enforcement of Section 2(c). *Id.* at *18.

Defendants timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II.

Because the district court enjoined Section 2(c) in its entirety based solely on Plaintiffs' Establishment Clause claim, we need not reach the merits of Plaintiffs' statutory claim under the INA.

In Section 2(c) of EO-2, the President suspended the entry of nationals from the six Designated Countries, pursuant to his power to exclude aliens under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f), and Section 215(a)(1) of the INA, codified at 8 U.S.C.

§ 1185(a)(1). The Government contends that Section 2(c)'s suspension of entry falls squarely within the "expansive authority" granted to the President by § 1182(f)[6] and § 1185(a)(1).[7] Appellants' Br. 28. Plaintiffs, on the other hand, argue that Section 2(c) violates a separate provision of the INA, Section 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), prohibiting discrimination on the basis of nationality "in the issuance of immigrant visas."[8]

The district court determined that Plaintiffs are likely to succeed on their claim under § 1152(a)(1)(A) only in limited part. Because Section 2(c) has the practical effect of halting the issuance of immigrant visas on the basis of nationality, the court reasoned, it is inconsistent with § 1152(a)(1)(A). To that extent—and contrary to the Government's position—the court found that Presidential authority under § 1182(f) and § 1185(a)(1) is cabined by the INA's prohibition on nationality-based discrimination in visa issuance. But the district court's ruling was limited in two important respects. First, because § 1152(a)(1)(A) applies only to the issuance of *immigrant* visas, the district court discerned no conflict between that provision and the application of Section 2(c) to persons seeking *non-immigrant* visas. And second, the district court found that because § 1152(a)(1)(A) governs the issuance of visas rather than actual entry into the United States, it poses no obstacle to enforcement of Section 2(c)'s nationality-based entry bar. The district court summarized as follows:

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[6] Section 1182(f), entitled "Suspension of entry or imposition of restrictions by President," provides in pertinent part that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

[7] Section 1185(a)(1) provides that "[u]nless otherwise ordered by the President, it shall be unlawful[ ] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe. . . . " 8 U.S.C. § 1185(a)(1).

[8] Section 1152(a)(1)(A) provides, with certain exceptions not relevant here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

> Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas. . . . They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Int'l Refugee Assistance Project, 2017 WL 1018235, at *10.

This narrow statutory ruling is not the basis for the district court's broad preliminary injunction enjoining Section 2(c) of EO-2 in all of its applications. Rather, Plaintiffs' constitutional claim, the district court determined, was what justified a nationwide preliminary injunction against any enforcement of Section 2(c). If we were to disagree with the district court that § 1152(a)(1)(A) partially restrains the President's authority under § 1182(f) and § 1185(a)(1), then we would be obliged to consider Plaintiffs' alternative Establishment Clause claim. And, importantly, even if we were to *agree* with the district court's statutory analysis, we still would be faced with the question of whether the scope of the preliminary injunction, which goes beyond the issuance of immigrant visas governed by § 1152(a)(1)(A) to enjoin Section 2(c) in its entirety, can be sustained on the basis of Plaintiffs' Establishment Clause claim.

In light of this posture, we need not address the merits of the district court's statutory ruling. We recognize, of course, the doctrine of constitutional avoidance, which counsels against the issuance of "unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam). But as we have explained, the district court's constitutional ruling was necessary to its decision, and review of that ruling is necessary to ours. Accordingly, we decline to reach the merits of Plaintiffs' claim under § 1152(a)(1)(A). The breadth of the preliminary injunction issued by the district court may be justified if and only if Plaintiffs can satisfy the requirements for a preliminary injunction based on their Establishment Clause claim. We therefore turn to consider that claim.

III.

The Government first asks us to reverse the preliminary injunction on the grounds that Plaintiffs' Establishment Clause claim is non-justiciable. In its view, Plaintiffs have not satisfied the foundational Article III requirements of standing and ripeness, and in any event, the doctrine of consular nonreviewability bars judicial review of their claim. We consider these threshold challenges in turn.

A.

The district court found that at least three individual Plaintiffs—Muhammed Meteab, Doe #1, and Doe #3—have standing to assert the claim that EO-2 violates the Establishment Clause. We review this legal determination de novo. *Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 n.2 (4th Cir. 2007).

The Constitution's gatekeeping requirement that federal courts may only adjudicate "Cases" or "Controversies," U.S. Const. art. III, § 2, obligates courts to determine whether litigants have standing to bring suit, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). To demonstrate standing and thus invoke federal jurisdiction, a party must establish that "(1) it has suffered an injury in fact, (2) the injury is fairly traceable to the defendants' actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The parties' core dispute is whether Plaintiffs have suffered a cognizable injury. To establish a cognizable injury, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560); *see also Beck v. McDonald*, 848 F.3d 262, 270-71 (4th Cir. 2017).

In evaluating standing, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *see also Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd by District of Columbia v. Heller*, 554 U.S. 570 (2008) ("The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."). This means, for purposes of standing, we must assume that Section 2(c) violates the First Amendment's prohibition against governmental "establishment of religion."

"Standing in Establishment Clause cases may be shown in various ways," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011), though as oft-repeated, "the concept of injury for standing purposes is particularly elusive" in this context, *Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). Nevertheless, the Supreme Court and this Circuit have developed a set of rules that guide our review.

To establish standing for an Establishment Clause claim, a plaintiff must have "*personal contact* with the *alleged* establishment of religion." *Id.* at 1086 (emphasis added). A "mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Id.* The Supreme Court has reinforced this principle in recent years: "plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion." *Winn*, 563 U.S. at 129. This "direct harm" can resemble injuries in other contexts. Merchants who suffered economic injury, for instance, had standing to challenge Sunday closing laws as violative of the Establishment Clause. *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (noting that, in *McGowan*, appellants who were "fined $5 plus costs had standing"). But because Establishment Clause violations seldom lead to "physical injury or pecuniary loss," the standing inquiry has been adapted to also include "the kind of injuries Establishment Clause plaintiffs" are more "likely to suffer." *Suhre*, 131 F.3d at 1086. As such, "noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Id.* "Feelings of marginalization and exclusion are cognizable forms of injury," we recently explained, "particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

Doe #1—who is a lawful permanent resident of the United States, Muslim, and originally from Iran—filed a visa application on behalf of his wife, an Iranian national. Her application has been approved, and she is currently awaiting her consular interview. J.A. 305. If it took effect, EO-2 would bar the entry of Doe #1's wife. Doe #1 explains that because EO-2 bars his wife's entry, it "forces [him] to choose between [his] career and being with [his] wife," and he is unsure "whether to keep working here" as a scientist or to return to Iran. J.A. 306. Doe #1 adds that EO-2 has "created significant fear, anxiety, and insecurity" for him and his wife. He highlights the "statements that have been made about banning Muslims from entering, and the broader context," and states, "I worry that I may not be safe in this country." J.A. 306; *see also* J.A. 314 (Plaintiff Meteab describing how the "anti-Muslim sentiment motivating" EO-2 has led him to feel "isolated and disparaged in [his] community").

Doe #1 has therefore asserted two distinct injuries stemming from his "personal contact" with the alleged establishment of religion—EO-2. *Suhre*, 131 F.3d at 1086. First, EO-2 will bar his wife's entry into the United States and prolong their separation. And second, EO-2 sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community.

We begin with Doe #1's allegation that EO-2 will prolong his separation from his wife. This Court has found that standing can be premised on a "threatened rather than actual injury," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc), as long as this "threat of injury [is] both real and immediate," *Beck*, 848 F.3d at 277 (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)). The purpose of the longstanding "imminence" requirement, which is admittedly "a somewhat elastic concept," is "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

The Government does not contest that, in some circumstances, the prolonged separation of family members can constitute an injury-in-fact. The Government instead argues that Doe #1's claimed injury is speculative and non-imminent, Appellants' Br. 19, such that it is not "legally and judicially cognizable." *Id.* at 18 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). According to the Government, Doe #1 has failed to show that his threatened injury—prolonged separation from his wife—is imminent. It asserts that Doe #1 has offered no reason to believe that Section 2(c)'s "short pause" on entry "will delay the issuance of [his wife's] visa." Appellants' Br. 19.

But this ignores that Section 2(c) appears to operate by design to delay the issuance of visas to foreign nationals. Section 2(c)'s "short pause" on entry effectively halts the issuance of visas for ninety days—as the Government acknowledges, it "would be pointless to issue a visa to an alien who the consular officer already knows is barred from entering the country." Appellants' Br. 32; *see also* Brief for Cato Institute as Amicus Curiae Supporting Appellees 25-28, ECF No. 185 (arguing that Section 2(c) operates as a ban on visa issuance). The Government also cites 8 U.S.C. § 1201(g), which provides in relevant part that "[n]o visa or other documentation shall be issued to an alien if [] it appears to the consular officer . . . that such alien is ineligible to receive a visa or other documentation under section 1182 of this title." *See also* U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016). A ninety-day pause on issuing visas would seem to necessarily inject at least some delay into any pending application's timeline. And in fact, the Government suggests that pending visa applications might not be delayed, but *denied*. *See* Appellants' Br. 33 (explaining that "when an alien subject to the Order is denied an immigrant visa, . . . he is being denied a visa because he has been validly barred from entering the country"). A denial on such grounds would mean that once the entry suspension period concludes, an alien would have to restart *from the beginning* the lengthy visa application process. What is more, Section 2(c) is designed to "reduce investigative burdens on relevant agencies" to facilitate *worldwide* review of the current procedures for "screening and vetting of foreign nationals." Logically, dedicating time and resources to a global review process will further slow the adjudication of pending applications.

Here, Doe #1 has a pending visa application on behalf of his wife, seeking her admission to the United States from one of the Designated Countries. Prior to EO-2's issuance, Doe #1 and his wife were nearing the end of the lengthy immigrant visa process, as they were waiting for her consular interview to be scheduled. J.A. 305. They had already submitted a petition, received approval of that petition, begun National Visa Center ("NVC") Processing, submitted the visa application form, collected and submitted the requisite financial and supporting documentation to NVC, and paid the appropriate fees. J.A. 305; *see* U.S. Dep't of State, *The Immigrant Visa Process*, https://travel.state.gov/content/visas/en/immigrate/immigrant-process.html (last visited May 14, 2017) (saved as ECF opinion attachment) (diagramming steps of the immigrant-visa application process). If Section 2(c) were in force—restricting the issuance of visas to nationals in the Designated Countries for ninety days and initiating the worldwide review of existing visa standards—we find a "real and immediate" threat that it would prolong Doe #1's separation from his wife, either by delaying the issuance of her visa or denying her visa and forcing her to restart the application process. *Beck*, 848 F.3d at 277 (quoting *Lebron*, 670 F.3d at 560).

This prolonged family separation is not, as the Government asserts, a remote or speculative possibility. Unlike threatened injuries that rest on hypothetical actions a plaintiff may take "some day," *Lujan*, 504 U.S. at 564, or on a "highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148, the threatened injury here is imminent, sufficiently "real" and concrete, *Spokeo*, 136 S. Ct. at 1549, and would harm Doe #1 in a personal and "particularized" way, *id.* at 1548. The progression of Doe #3's wife's visa application illustrates this. Doe #3's wife received a visa on May 1, 2017, while Section 2(c) was enjoined. If Section 2(c) had been in effect, she would have been ineligible to receive a visa until after the expiration of the ninety-day period. *See* 8 U.S.C. § 1201(g). Put simply, Section 2(c) would have delayed the issuance of Doe #3's wife's visa. This cuts directly against the Government's assertion that it is uncertain whether or how Section 2(c) would affect visa applicants. Clearly Section 2(c) will delay and disrupt pending visa applications.

Even more, flowing from EO-2 is the alleged state-sanctioned message that foreign-born Muslims, a group to which Doe #1 belongs, are "outsiders, not full members of the political community." *Moss*, 683 F.3d at 607 (quoting *McCreary*, 545 U.S. at 860).[9] Doe #1 explains how the Second Executive Order has caused him to fear for his personal safety in this country and wonder whether he should give up his career in the United States and return to Iran to be with his wife. J.A. 306. This harm is consistent with the "[f]eelings of marginalization and exclusion" injury we recognized in *Moss*. 683 F.3d at 607.

In light of these two injuries, we find that Doe #1 has had "personal contact with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086. Regardless of whether EO-2 actually violates the Establishment Clause's command not to disfavor a particular religion, a merits inquiry explored in Section IV.A, his injuries are on par with, if not greater than, injuries we previously deemed sufficient in this context. *See Moss*, 683 F.3d at 607 (finding Jewish daughter and father who received letter describing public school policy of awarding academic credit for private, Christian religious instruction suffered injury in part because they were made to feel like "'outsiders' in their own community").[10]

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[9] The Government would have us, in assessing standing, delve into whether EO-2 sends a sufficiently religious message such that it violates the Establishment Clause. But this "put[s] the merits cart before the standing horse." *Cooksey*, 721 F.3d at 239 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006)). The question of whether EO-2 "conveys a message of endorsement or disapproval [of religion]" is a merits determination. *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985)). And both parties address it as a merits question in their briefs. Appellants' Br. 48 ("The Order, in contrast, conveys no religious message. . . . "); *id.* at 52 ("Here, the Order does not convey a religious message. . . . "); Appellees' Br. 38 ("The Order's purpose to exclude Muslims conveys the exact same message. . . . "). Because we assume the merits of Plaintiffs' claim in assessing standing, we need not reach the Government's argument on this point.

The Government attempts to undercut these injuries in several ways. It first frames Plaintiffs' injuries as "stress." Appellants' Br. 23. That minimizes the psychological harm that flows from confronting official action preferring or disfavoring a particular religion and, in any event, does not account for the impact on families. The Government next argues that because the Second Executive Order "directly applies only to aliens abroad from the specified countries," it is "not directly targeted at plaintiffs," who are based in the United States, "in the way that local-or state-government messages are." Appellants' Reply Br. 3. An executive order is of course different than a local Sunday closing law or a Ten Commandments display in a state courthouse, but that does not mean its impact is any less direct. Indeed, because it emanates from the highest elected office in the nation, its impact is arguably felt even more directly by the individuals it affects. From Doe #1's perspective, the Second Executive

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[10] Plaintiffs' injuries are also consistent with the injuries that other courts have recognized in Establishment Clause cases that do not involve religious displays or prayer. *See Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (recognizing injury stemming from amendment that "condemn[ed] [plaintiff's] religious faith and expose[d] him to disfavored treatment"); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc) (finding "exclusion or denigration on a religious basis within the political community" to be sufficiently concrete injury).

Order does not apply to arbitrary or anonymous "aliens abroad." It applies to his wife.

More than abstractly disagreeing with the wisdom or legality of the President's policy decision, Plaintiffs show how EO-2 impacted (and continues to impact) them *personally*. Doe #1 is not simply "roam[ing] the country in search of governmental wrongdoing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982). Rather, he is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life.[11] This case thus bears little resemblance to *Valley Forge*.

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[11] For similar reasons, this case is not, as the Government claims, comparable to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008). In that case, the court found that non-liturgical Protestant chaplains who were part of the Navy's Chaplain Corps lacked standing to bring a claim that the Navy preferred Catholic chaplains in violation of the Establishment Clause. *Id.* at 765. The court stated its holding as follows: "When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown an injury-in-fact to bring an Establishment Clause claim." *Id.* at 764-65. The court repeatedly emphasized that plaintiffs were not themselves affected by the challenged action. *See id.* at 758 ("[T]he plaintiffs do not claim that the Navy actually discriminated against any of them."); *id.* at 760 ("But plaintiffs have conceded that they themselves did not suffer employment discrimination. . . . Rather, they suggest that *other* chaplains suffered discrimination."). In fact, plaintiffs' theory of standing was so expansive that their counsel conceded at oral argument that even the "judges on th[e] panel" would have standing to challenge the allegedly discriminatory conduct. *Id.* at 764. Here, by contrast, Doe #1 *is* directly affected by the government action—both its

We likewise reject the Government's suggestion that Plaintiffs are seeking to vindicate the legal rights of third parties. The prudential standing doctrine includes a "general prohibition on a litigant's raising another person's legal rights." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This "general prohibition" is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.[12]

For all of these reasons, we find that Doe #1 has met his burden to establish an Article III injury. We further find that Doe #1 has made the requisite showing that his claimed injuries are causally related to the challenged conduct—the Second Executive Order—as

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message and its impact on his family. Thus, contrary to the Government's assertion, Appellants' Br. 24, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it.

[12] The district court here correctly recognized that the Supreme Court has on multiple occasions "reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *5 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (reaching merits where American citizen challenged denial of husband's visa application); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (reaching merits where American scholars challenged denial of temporary nonimmigrant visa to Marxist Belgian journalist)); *see also Mandel*, 408 U.S. at 772 ("Even assuming, arguendo, that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveler's lectures do." (Douglas, J., dissenting)). The Supreme Court's consideration of the merits in these cases suggests, at least at a general level, that Americans have a cognizable interest in the application of immigration laws to their foreign relatives.

opposed to "the independent action of some third party not before the court." *Cooksey*, 721 F.3d at 238 (quoting *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005)). Enjoining enforcement of Section 2(c) therefore will likely redress those injuries. Doe #1 has thus met the constitutional standing requirements with respect to the Establishment Clause claim. And because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

Lastly, the Government asserts that Plaintiffs' Establishment Clause claim is unripe. It argues that under EO-2, Plaintiffs' relatives can apply for a waiver, and unless and until those waiver requests are denied, Plaintiffs' claims are dependent on future uncertainties. When evaluating ripeness, we consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). An action is fit for resolution "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). The "hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 199 (4th Cir. 2013) (quoting *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992)).

Our ripeness doctrine is clearly not implicated here. Plaintiffs have brought a facial challenge, alleging that EO-2 violates the Establishment Clause regardless of whether their relatives secure waivers. This legal question is squarely presented for our review and is not dependent on the factual uncertainties of the waiver process. What is more, Plaintiffs will suffer undue hardship, as explained above, were we to require their family members to attempt to secure a waiver before permitting Plaintiffs to challenge Section 2(c). We accordingly find the claim ripe for judicial decision.

B.

In one final justiciability challenge, the Government asserts that consular nonreviewability bars *any* review of Plaintiffs' claim. This Court has scarcely discussed the doctrine, so the Government turns to the District of Columbia Circuit, which has stated that "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). But in the same opinion, the court explained that judicial review was proper in cases involving "claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." *Id.* at 1163 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986)). This is precisely such a case. More fundamentally, the doctrine of consular nonreviewability does not bar judicial review of constitutional claims. *See, e.g.*, *Din*, 135 S. Ct. at 2132 (reviewing visa denial where plaintiff asserted due process claim). The Government's reliance on the doctrine is therefore misplaced.

Behind the casual assertion of consular nonreviewability lies a dangerous idea—that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, *see infra* Section IV.A, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake. To the contrary, the Supreme Court has affirmed time and again that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This "duty will sometimes involve the 'resolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). In light of this duty, and having determined that the present case is justiciable, we now proceed to consider whether the district court properly enjoined Section 2(c) of the Second Executive Order.

IV.

A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power" and is "to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)). For a district court to grant a preliminary injunction, "a plaintiff 'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). The district court found that Plaintiffs satisfied all four requirements as to their Establishment Clause claim, and it enjoined Section 2(c) of EO-2. We evaluate the court's findings for abuse of discretion, *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012), reviewing its factual findings for clear error and its legal conclusions de novo, *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

A.

The district court determined that Plaintiffs are likely to succeed on the merits of their claim that EO-2 violates the Establishment Clause. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *16. It found that because EO-2 is "facially neutral in terms of religion," *id.* at *13, the test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), governs the constitutional inquiry. And applying the *Lemon* test, the court found that EO-2 likely violates the Establishment Clause. The Government argues that the court erroneously applied the *Lemon* test instead of the more deferential test set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). And under *Mandel*, the Government contends, Plaintiffs' claim fails.

1.

We begin by addressing the Government's argument that the district court applied the wrong test in evaluating Plaintiffs' constitutional claim. The Government contends that *Mandel* sets forth the appropriate test because it recognizes the limited scope of judicial review of executive action in the immigration context. Appellants' Br. 42. We agree that *Mandel* is the starting point for our analysis, but for the reasons that follow, we find that its test contemplates the application of settled Establishment Clause doctrine in this case.

In *Mandel*, American university professors had invited Mandel, a Belgian citizen and revolutionary Marxist and professional journalist, to speak at a number of conferences in the United States. 408 U.S. at 756. But Mandel's application for a nonimmigrant visa was denied under a then-existing INA provision that barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism." 8 U.S.C. § 1182(a)(28)(D) (1964). The Attorney General had discretion to waive § 1182(a)(28)(D)'s bar and grant Mandel an individual exception, but declined to do so on the grounds that Mandel had violated the terms of his visas during prior visits to the United States. 408 U.S. at 759. The American professors sued, alleging, among other things, that the denial of Mandel's visa violated their First Amendment rights to "hear his views and engage him in a free and open academic exchange." *Id.* at 760.

The Supreme Court, citing "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which

Congress has forbidden,'" *id.* at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), found that the longstanding principle of deference to the political branches in the immigration context limited its review of plaintiffs' challenge, *id.* at 767. The Court held that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." *Id.* at 770. The Court concluded that the Attorney General's stated reason for denying Mandel's visa—that he had violated the terms of prior visas—satisfied this test.[13] It therefore did not review plaintiffs' First Amendment claim.

Courts have continuously applied *Mandel*'s "facially legitimate and bona fide" test to challenges to individual visa denials. *See Din*, 135 S. Ct. at 2139-40 (Kennedy, J., concurring in the judgment) (applying *Mandel*'s test to challenge to visa denial); *Cardenas v. United States*, 826 F.3d 1164, 1172-73 (9th Cir. 2016) (same); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) (same). Subsequently, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Supreme Court applied *Mandel*'s test to a facial challenge to an immigration law, finding "no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. And in a case where plaintiffs brought a constitutional challenge to an immigration law, this Court has found that "we must apply the same standard as the *Fiallo* court and uphold the statute if a 'facially legitimate and bona fide reason' supports [it]." *Johnson*, 647 F.3d at 127.[14] *Mandel* is therefore the starting point for our review.

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[13] The Court specifically declined to decide "what First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced." *Id.*

But in another more recent line of cases, the Supreme Court has made clear that despite the political branches' plenary power over immigration, that power is still "subject to important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), and that it is the judiciary's responsibility to uphold those limitations. *Chadha*, 462 U.S. at 941 (stating that Congress and the Executive must "cho[ose] a constitutionally permissible means of implementing" their authority over immigration). These cases instruct that the political branches' power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action's constitutionality is in question.

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[14] In *Johnson*, this Court considered an equal protection challenge to an immigration law. *Id.* at 126-27. Relying on several of our sister circuits, we equated *Mandel*'s "facially legitimate and bona fide" test with rational basis review. *Id.* at 127 (citing *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065-66 (9th Cir. 2003), *as amended* (June 9, 2003); *Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000)). But the *Johnson* Court's interpretation is incomplete. Rational basis review does build in deference to the government's reasons for acting, like *Mandel*'s "facially legitimate" requirement, but it does not call for an inquiry into an actor's "bad faith" and therefore does not properly account for *Mandel*'s "bona fide" requirement. Even more, *Johnson* and similar cases applying rational basis review did so in the context of equal protection challenges. *See, e.g.*, *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000). But courts do not apply rational basis review to Establishment Clause challenges, because that would mean dispensing with the purpose inquiry that is so central to Establishment Clause review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *see also Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 n.2 (10th Cir. 2008) (suggesting that rational basis review cannot be used to evaluate an Establishment Clause claim) (citing *Heller*, 554 U.S. 570). We therefore decline to apply *Johnson*'s interpretation of *Mandel*'s "facially legitimate and bona fide" test to this case.

We are bound to give effect to both lines of cases, meaning that we must enforce constitutional limitations on immigration actions while also applying *Mandel*'s deferential test to those actions as the Supreme Court has instructed. For the reasons that follow, however, we find that these tasks are not mutually exclusive, and that *Mandel*'s test still contemplates meaningful judicial review of constitutional challenges in certain, narrow circumstances, as we have here.

To begin, *Mandel*'s test undoubtedly imposes a heavy burden on plaintiffs, consistent with the significant deference we afford the political branches in the immigration context. *See Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (describing the "narrow standard of [judicial] review of decisions made by the Congress or the President in the area of immigration and naturalization"). The government need only show that the challenged action is "facially legitimate and bona fide" to defeat a constitutional challenge. *Mandel*, 408 U.S. at 770. These are separate and quite distinct requirements. To be "facially legitimate," there must be a valid reason for the challenged action stated on the face of the action. *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in the judgment) (finding visa denial "facially legitimate" where government cited a statutory provision in support of the denial).

And as the name suggests, the "bona fide" requirement concerns whether the government issued the challenged action in good faith. In *Kerry v. Din*, Justice Kennedy, joined by Justice Alito, elaborated on this requirement. *Id.* at 2141.[15] Here, the burden is on the plaintiff. Justice Kennedy explained that where a plaintiff makes "an affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity," courts may "look behind" the challenged action to assess its "facially legitimate" justification. *Id.* (suggesting that if plaintiff had sufficiently alleged that government denied visa in bad faith, court should inquire whether the government's stated statutory basis for denying the visa was the actual reason for the denial). In the typical case, it will be difficult for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity. *See, e.g.*, *Cardenas*, 826 F.3d at 1173 (applying *Din* and finding that plaintiff who alleged that consular officer refused to consider relevant evidence and acted based on racial bias had failed to make an affirmative showing of bad faith). And absent this affirmative showing, courts must defer to the government's "facially legitimate" reason for the action.

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[15] The Ninth Circuit has found that Justice Kennedy's concurrence is the controlling opinion in *Din*. It relied on the Supreme Court's holding in *Marks v. United States*, which stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Cardenas*, 826 F.3d at 1171 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). We agree that Justice Kennedy's opinion sets forth the narrowest grounds for the Court's holding in *Din* and likewise recognize it as the controlling opinion.

Mandel therefore clearly sets a high bar for plaintiffs seeking judicial review of a constitutional challenge to an immigration action. But although *Mandel's* "facially legitimate and bona fide" test affords significant deference to the political branches' decisions in this area, it does not completely insulate those decisions from *any* meaningful review. Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action. In other words, *Mandel's* requirement that an immigration action be "bona fide" may in some instances compel more searching judicial review. Plaintiffs ask this Court to engage in such searching review here under the traditional Establishment Clause test, and we therefore turn to consider whether such a test is warranted.

We start with *Mandel's* requirement that the challenged government action be "facially legitimate." EO-2's stated purpose is "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." EO-2, Preamble. We find that this stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry. EO-2 therefore satisfies *Mandel's* first requirement. Absent allegations of bad faith, our analysis would end here in favor of the Government. But in this case, Plaintiffs have alleged that EO-2's stated purpose was given in bad faith. We therefore must consider whether they have made the requisite showing of bad faith.

As noted, Plaintiffs must "plausibly allege[] with sufficient particularity" that the reason for the government action was provided in bad faith. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Plaintiffs here claim that EO-2 invokes national security in bad faith, as a pretext for what really is an anti-Muslim religious purpose. Plaintiffs point to ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and included a preference for religious minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which President Trump and his advisors described as having the same policy goals as EO-1. *See, e.g.*, J.A. 339, 346, 370, 379, 403, 470, 472, 480, 481, 506, 508, 516-18, 522, 798. Plaintiffs also point to the comparably weak evidence that EO-2 is meant to address national security interests, including the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity.

Based on this evidence, we find that Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the "facially legitimate" reason proffered by the government is not "bona fide," we no longer defer to that reason and instead may "look behind" EO-2. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment).

Since Justice Kennedy's concurrence in *Din*, no court has confronted a scenario where, as here, plaintiffs have plausibly alleged with particularity that an immigration action was taken in bad faith. We therefore have minimal guidance on what "look[ing] behind" a challenged immigration action entails. *See id.* In addressing this issue of first impression, the Government does not propose a framework for this inquiry. Rather, the Government summarily asserts that because EO-2 states that it is motivated by national security interests, it therefore satisfies *Mandel*'s test. But this only responds to *Mandel*'s "facially legitimate" requirement—it reads out *Mandel*'s "bona fide" test altogether. Plaintiffs, for their part, suggest that we review their claim using our normal constitutional tools. And in the Establishment Clause context, our normal constitutional tool for reviewing facially neutral government actions is the test in *Lemon v. Kurtzman*.

We find for several reasons that because Plaintiffs have made an affirmative showing of bad faith, applying the *Lemon* test to analyze EO-2's constitutionality is appropriate. First, as detailed above, the Supreme Court has unequivocally stated that the political branches' immigration actions are still "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also Chadha*, 462 U.S. at 941-42. The constitutional limitation in this case is the Establishment Clause, and this Court's duty to uphold the Constitution even in the context of a presidential immigration action counsels in favor of applying our standard constitutional tool. Second, that Plaintiffs have satisfied *Mandel's* heavy burden to plausibly show that the reason for the challenged action was proffered in bad faith further supports the application of our established constitutional doctrine. The deferential framework set forth in *Mandel* is based in part on general respect for the political branches' power in the immigration realm. Once plaintiffs credibly call into question the political branches' motives for exercising that power, our reason for deferring is severely undermined. In the rare case where plaintiffs plausibly allege bad faith with particularity, more meaningful review—in the form of constitutional scrutiny—is proper. And third, in the context of this case, there is an obvious symmetry between *Mandel's* "bona fide" prong and the constitutional inquiry established in *Lemon*. Both tests ask courts to evaluate the government's purpose for acting.

Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine. Applying this doctrine harmonizes our duty to engage in the substantial deference required by *Mandel* and its progeny with our responsibility to ensure that the political branches choose constitutionally permissible means of exercising their immigration power. We therefore proceed to "look behind" EO-2 using the framework developed in *Lemon* to determine if EO-2 was motivated by a primarily religious purpose, rather than its stated reason of promoting national security.

2.

To prevail under the *Lemon* test, the Government must show that the challenged action (1) "ha[s] a secular legislative purpose," (2) that "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) that it does "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674 (1970)) (citation omitted). The Government must satisfy all three prongs of *Lemon* to defeat an Establishment Clause challenge. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The dispute here centers on *Lemon*'s first prong.

In the Establishment Clause context, "purpose matters." *McCreary*, 545 U.S. at 866 n.14. Under the *Lemon* test's first prong, the Government must show that the challenged action "ha[s] a secular legislative purpose." *Lemon*, 403 U.S. at 612. Accordingly, the Government must show that the challenged action has a secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)). The government cannot meet this requirement by identifying *any* secular purpose for the challenged action. *McCreary*, 545 U.S. at 865 n.13 (noting that if any secular purpose sufficed, "it would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action"). Rather, the government must show that the challenged action's *primary* purpose is secular. *Edwards*, 482 U.S. at 594 (finding an Establishment Clause violation where the challenged act's "primary purpose . . . is to endorse a particular religious doctrine," notwithstanding that the act's stated purpose was secular).

When a court considers whether a challenged government action's primary purpose is secular, it attempts to discern the "official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. The court acts as a reasonable, "objective observer," taking into account "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* (quoting *Santa Fe*, 530 U.S. at 308). It also considers the action's "historical context" and "the specific sequence of events leading to [its] passage." *Edwards*, 482 U.S. at 595. And as a reasonable observer, a court has a "reasonable memor[y]," and it cannot "'turn a blind eye to the context in which [the action] arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315).

The evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious. Then-candidate Trump's campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a "Statement on Preventing Muslim Immigration," in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on" and remarked, "[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life." J.A. 346. In a March 9, 2016 interview, Trump stated that "Islam hates us," J.A. 516, and that "[w]e can't allow people coming into this country who have this hatred," J.A. 517. Less than two weeks later, in a March 22 interview, Trump again called for excluding Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. And on December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.A. 506.

As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion. On July 17, 2016, in response to a tweet stating, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," Trump said, "So you call it territories. OK? We're gonna do territories." J.A. 798. One week later, Trump asserted that entry should be "immediately suspended[ed] . . . from any nation that has been compromised by terrorism." J.A. 480. When asked whether this meant he was "roll[ing]back" his call for a Muslim ban, he said his plan was an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.A. 481.

Significantly, the First Executive Order appeared to take this exact form, barring citizens of seven predominantly Muslim countries from entering the United States. And just before President Trump signed EO-1 on January 27, 2017, he stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The next day, presidential advisor and former New York City Mayor Giuliani appeared on Fox News and asserted that "when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508.

Shortly after courts enjoined the First Executive Order, President Trump issued EO-2, which the President and members of his team characterized as being substantially similar to EO-1. EO-2 has the same name and basic structure as EO-1, but it does not include a preference for religious-minority refugees and excludes Iraq from its list of Designated Countries. EO-2, § 1(e). It also exempts certain categories of nationals from the Designated Countries and institutes a waiver process for qualifying individuals. EO-2, § 3(b), (c). Senior Policy Advisor Miller described the changes to EO-2 as "mostly minor technical differences," and said that there would be "the same basic policy outcomes for the country." J.A. 339. White

House Press Secretary Spicer stated that "[t]he principles of the [second] executive order remain the same." J.A. 379. And President Trump, in a speech at a rally, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Reilly, *supra*). These statements suggest that like EO-1, EO-2's purpose is to effectuate the promised Muslim ban, and that its changes from EO-1 reflect an effort to help it survive judicial scrutiny, rather than to avoid targeting Muslims for exclusion from the United States.

These statements, taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States. The statements also reveal President Trump's intended means of effectuating the ban: by targeting majority-Muslim nations instead of Muslims explicitly. And after courts enjoined EO-1, the statements show how President Trump attempted to preserve its core mission: by issuing EO-2—a "watered down" version with "the same basic policy outcomes." J.A. 339. These statements are the exact type of "readily discoverable fact[s]" that we use in determining a government action's primary purpose. *McCreary*, 545 U.S. at 862. They are explicit statements of purpose and are attributable either to President Trump directly or to his advisors. We need not probe anyone's heart of hearts to discover the purpose of EO-2, for President Trump and his aides have explained it on numerous occasions and in no uncertain terms. *See Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003) ("Besides, no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the [government actor's] purpose."). EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Muslim ban and EO-2 itself.[16] *See McCreary*, 545 U.S. at 866 (rejecting notion that court could consider only "the latest news about the last in a series of governmental actions, however close they may all be in time and subject"). The reasonable observer could easily connect these statements to EO-2 and understand that its primary purpose appears to be religious, rather than secular.

The Government argues, without meaningfully addressing Plaintiffs' proffered evidence, that EO-2's primary purpose is in fact secular because it is facially neutral and operates to address the risks of potential terrorism without targeting any particular religious group. Appellants' Br. 42-44. That EO-2's stated objective is religiously neutral is not dispositive; the entire premise of our review under *Lemon* is that even facially neutral government actions can violate the Establishment Clause. *See Lemon*, 403 U.S. at 612 (recognizing that "a law 'respecting' . . . the establishment of religion[] is not always easily identifiable as one," and creating a three-part test for discerning when a facially neutral law violates the Establishment

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[16] We reject the government's contentions that none of these statements "in substance corresponds to [Section 2(c)]," Appellants' Br. 52, and that Section 2(c) "bears no resemblance to a 'Muslim ban,'" *id.* at 53. These statements show that President Trump intended to effectuate his proposed Muslim ban by targeting predominantly Muslim nations, rather than Muslims explicitly. Section 2(c) does precisely that.

Clause); *see also Santa Fe*, 530 U.S. at 315 ("Our examination [under *Lemon*'s purpose prong] . . . need not stop at an analysis of the text of the policy."). We therefore reject the Government's suggestion that EO-2's facial neutrality might somehow fully answer the question of EO-2's primary purpose.[17]

The Government's argument that EO-2's primary purpose is related to national security, Appellants' Br. 43-44, is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, J.A. 397, and that those agencies only offered a national security rationale after EO-1 was enjoined. Furthermore, internal reports from DHS contradict this national security rationale, with one report stating that "most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." J.A. 426. According to former National Security Officials, Section2(c) serves "no legitimate national security purpose," given that "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years" and that there is no evidence of any new security risks emanating from these countries. Corrected Brief for Former National Security Officials as Amici Curiae Supporting Appellees 5-8, ECF No. 126-1.[18] Like the district court, we think this strong evidence that any national security justification for EO-2 was secondary to its primary religious purpose and was offered as more of a "litigating position" than as the actual purpose of EO-2. *See McCreary*, 545 U.S. at 871 (describing the government's "new statements of purpose . . . as a litigating position" where they were offered to explain the third iteration of a previously enjoined religious display). And EO-2's text does little to bolster any national security rationale: the only examples it provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis—Iraq is not a designated country in EO-2—and a Somalian refugee who entered the United States as a child and was radicalized here as an adult. EO-2, § 1(h). The Government's asserted national security purpose is therefore no more convincing as applied to EO-2 than it was to EO-1.

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[17] Plaintiffs suggest that EO-2 is not facially neutral, because by directing the Secretary of Homeland Security to collect data on "honor killings" committed in the United States by foreign nationals, EO-2 incorporates "a stereotype about Muslims that the President had invoked in the months preceding the Order." Appellees' Br. 5, 7; *see* J.A. 598 (reproducing Trump's remarks in a September 2016 speech in Arizona in which he stated that applicants from countries like Iraq and Afghanistan would be "asked their views about honor killings," because "a majority of residents [in those countries] say that the barbaric practice of honor killings against women are often or sometimes justified"). Numerous amici explain that invoking the specter of "honor killings" is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric. *See, e.g.*, Brief for New York University as Amicus Curiae Supporting Appellees 21, ECF No. 82-1; Brief for Muslim Justice League, et al., as Amici Curiae Supporting Appellees 17-18, ECF No. 152-1; Brief for History Professors and Scholars as Amici Curiae Supporting Appellees 2-3, ECF No. 154-1; Brief for Constitutional Law Scholars as Amici Curiae Supporting Appellees 19 n.3, ECF No. 173-1; Brief for Members of the Clergy, et al., as Amici Curiae Supporting Appellees 13, ECF No. 179-1. The Amici Constitutional Law Scholars go so far as to call the reference to honor killings "anti-Islamic dog-whistling." Brief for Constitutional Law Scholars 19 n.3. We find this text in EO-2 to be yet another marker that its national security purpose is secondary to its religious purpose.

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[18] A number of amici were current on the relevant intelligence as of January 20, 2017. *Id.* at 9.

Relatedly, the Government argues that EO-2's operation "confirms its stated purpose." Appellants' Br. 43. "[I]t applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion." *Id.* In support of its argument that EO-2 does not single out Muslims, the Government notes that these six countries are either places where ISIS has a heavy presence (Syria), state sponsors of terrorism (Iran, Sudan, and Syria), or safe havens for terrorists (Libya, Somalia, and Yemen). Appellants' Br. 5-6. The Government also points out that the six Designated Countries represent only a small proportion of the world's majority-Muslim nations, and EO-2 applies to everyone in those countries, even non-Muslims. *Id.* at 44. This shows, the Government argues, that EO-2's primary purpose is secular. The trouble with this argument is that EO-2's practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from the United States. And that EO-2 is underinclusive by targeting only a small percentage of the world's majority-Muslim nations and overinclusive for targeting all citizens, even non-Muslims, in the Designated Countries, is not responsive to the purpose inquiry. This evidence might be relevant to our analysis under *Lemon*'s second prong, which asks whether a government act has the primary *effect* of endorsing or disapproving of religion, *see*

Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), but it does not answer whether the government acted with a primarily religious purpose to begin with. If we limited our purpose inquiry to review of the operation of a facially neutral order, we would be caught in an analytical loop, where the order would always survive scrutiny. It is for this precise reason that when we attempt to discern purpose, we look to more than just the challenged action itself. And here, when we consider the full context of EO-2, it is evident that it is likely motivated primarily by religion. We do not discount that there may be a national security concern motivating EO-2; we merely find it likely that any such purpose is secondary to EO-2's religious purpose.

The Government separately contends that our purpose inquiry should not extend to "extrinsic evidence" that is beyond EO-2's relevant context. Appellants' Br. 45. The Government first argues that we should not look beyond EO-2's "text and operation." *Id.* at 45-46. But this is clearly incorrect, as the Supreme Court has explicitly stated that we review more than just the face of a challenged action. *See, e.g., Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("[O]ur [Establishment Clause] analysis does not end with the text of the statute at issue.")

(citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534).[19]

The Government next argues that even if we do look beyond EO-2 itself, under *McCreary*, we are limited to considering only "the operative terms of governmental action and official pronouncements," Appellants' Br. 46, which we understand to mean only EO-2 itself and a letter signed by the Attorney General and the Secretary of State that largely echoes EO-2's text, *id.* at 8 n.3 (citing Letter, *supra*). We find no support for this view in *McCreary*. The *McCreary* Court considered "the traditional external signs that show up in the 'text, legislative history, and implementation of the [challenged action],'" 545 U.S. at 862 (quoting *Santa Fe*, 530 U.S. at 308), but it did not limit other courts' review to those particular terms. *Id.* Nor did it make such an artificial distinction between "official" and "unofficial" context. Rather, it relied on principles of "common sense" and the "reasonable observer[']s . . . reasonable memor[y]" to cull the relevant context surrounding the challenged action. *Id.* at 866. The Government would have us abandon this approach in favor of an unworkable standard that is contrary to the well-established framework for considering the context of a challenged government action.

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[19] The Government separately suggests that we should limit our review to EO-2's text and operation based on "the Constitution's structure and its separation of powers," and the "'presumption of regularity' that attaches to all federal officials' actions." Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926)). In support of this point, the Government relies on pre-*McCreary* cases discussing, variously, judicial deference to an executive official's decision to deport an alien who had violated the terms of his admission to the United States, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), the President's absolute immunity from damages liability based on his or her official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), and the presumptive privilege we afford a President's conversations and correspondence, *United States v. Nixon*, 418 U.S. 683, 708 (1974). These cases suggest that in certain circumstances, we insulate the President and other executive officials from judicial scrutiny in order to protect and promote the effective functioning of the executive branch. But these cases do not circumscribe our review of Establishment Clause challenges or hold that when a President's official acts violate the Constitution, the acts themselves are immune from judicial review. We find no support in this line of cases for the Government's argument that our review of EO-2's context is so limited. In fact, the Supreme Court has suggested quite the opposite. *See Zadvydas*, 533 U.S. at 695 ("Executive and Legislative Branch decisionmaking . . . power is subject to important constitutional limitations." (citing *Chadha*, 462 U.S. at 941-42)).

And finally, the Government argues that even if we could consider unofficial acts and statements, we should not rely on campaign statements. Appellants' Br. 49. Those statements predate President Trump's constitutionally significant "transition from private life to the Nation's highest public office," and as such, they are less probative than official statements, the Government contends. *Id.* at 51.[20] We recognize that in many cases, campaign statements may not reveal all that much about a government actor's purpose. But we decline to impose a bright-line rule against considering campaign statements, because as with any evidence, we must make an individualized determination as to a statement's relevancy and probative value in light of all the circumstances. The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action. *See Glassroth*, 335 F.3d at 1297 (reviewing an elected judge's campaign materials that proclaimed him the "Ten Commandment's Judge" as part of its inquiry into the constitutionality of a Ten Commandments display he installed); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (considering facially neutral campaign statements related to bussing in an equal protection challenge); *California v. United States*, 438 U.S. 645, 663-64 (1978) (referring to candidates' political platforms when considering the Reclamation Act of 1902); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that in the equal protection context, "[w]hen there is [] proof that a discriminatory purpose has been a motivating factor in the decision," a court may consider "contemporary statements by members of the decisionmaking body").

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[20] The government also suggests that we can never rely on private communications to impute an improper purpose to a government actor. *See, e.g.*, *Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d Cir. 2004) (limiting its review to statements made by the elected officials who oversaw the government action). But this is incorrect. These cases merely establish that the motives of people not involved in the decisionmaking process cannot *alone* evince the government's motive. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not *direct* evidence of discrimination." (emphasis added)). But when those statements reveal something about the government's purpose, they are certainly part of the evidence we review for purpose. In *McCreary*, the Court noted that a pastor had delivered a religious message at the ceremony for the challenged religious display. 545 U.S. at 869. Based on this and other evidence of purpose, the Court concluded that "[t]he reasonable observer could only think that the [government] meant to emphasize and celebrate the [display's] religious message." *Id.* In any event, none of these cases contemplate the situation here, where the private speaker and the government actor are one and the same. We need not impute anyone's purpose to anyone else, for the same person has espoused these intentions all along. The distinction between candidate and elected official is thus an artificial one where the inquiry is only whether the reasonable observer would understand the candidate's statements to explain the purpose of his actions once elected.

Just as the reasonable observer's "world is not made brand new every morning," *McCreary*, 545 U.S. at 866, nor are we able to awake without the vivid memory of these statements. We cannot shut our eyes to such evidence when it stares us in the face, for "there's none so blind as they that won't see." Jonathan Swift, *Polite Conversation* 174 (Chiswick Press ed., 1892). If and when future courts are confronted with campaign or other statements proffered as evidence of governmental purpose, those courts must similarly determine, on a case-by-case basis, whether such statements are probative evidence of governmental purpose. Our holding today neither limits nor expands their review.[21]

The Government argues that reviewing campaign statements here would encourage scrutiny of all religious statements ever made by elected officials, even remarks from before they assumed office. Appellants' Br. 49-50. But our review creates no such sweeping implications, because as the Supreme Court has counseled, our purpose analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266; *see also Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one. . . . "). Just as a reasonable observer would not understand general statements of religious conviction to inform later government action, nor would we look to such statements as evidence of purpose. A person's particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause—rarely, if ever, will such evidence reveal anything about that person's actions once in office. For a past statement to be relevant to the government's purpose, there must be a substantial, specific connection between it and the challenged government action. And here, in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more." J.A. 370.

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[21] This finding comports with the *McCreary* Court's observation that "past actions [do not] forever taint" a government action, 545 U.S. at 873-74. Whether a statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement.

For similar reasons, we reject the Government's argument that our review of these campaign statements will "inevitably 'chill political debate during campaigns.'" Appellants' Br. 50 (quoting *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995)). Not all—not even most—political debate will have any relevance to a challenged government action. Indeed, this case is unique not because we are considering campaign statements, but because we have such directly relevant and probative statements of government purpose at all. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) (observing that government actors "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate"). To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.

Lastly, the Government contends that we are ill-equipped to "attempt[] to assess what campaign statements reveal about the motivation for later action." Appellants' Br. 50. The Government argues that to do so would "mire [us] in a swamp of unworkable litigation," *id.* (quoting Amended Order, *Washington v. Trump*, No. 17-35105, slip op. at 13 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of reconsideration en banc)), and "forc[e us] to wrestle with intractable questions," such as "the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative." *Id.* But discerning the motives behind a challenged government action is a well-established part of our purpose inquiry. *McCreary*, 545 U.S. at 861 ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine." (citations omitted)). As part of this inquiry, courts regularly evaluate decisionmakers' statements that show their purpose for acting. *See, e.g.*, *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801 (10th Cir. 2009) (considering news reports quoting county commissioners who described both their determination to keep challenged religious display at issue and the strength of their religious beliefs); *Glassroth*, 355 F.3d at 1297 (reviewing elected judge's campaign materials for evidence of his purpose in installing religious display); *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001) (reviewing state legislators' statements in discerning purpose of statute challenged under the Establishment Clause); *see also Edwards*, 482 U.S. at 586-87 (looking to statute's text together with its sponsor's public comments to discern its purpose). And the purpose inquiry is not limited to Establishment Clause challenges; we conduct this analysis in a variety of contexts. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down federal statute based in part on "strong evidence" that "the congressional purpose [was] to influence or interfere with state sovereign choices about who may be married"); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-80 (1979) (upholding public hiring preferences based in part on finding that government had not created preferences with purpose of discriminating on the basis of sex); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, No. 16-833, 2017 WL 2039439 (U.S. May 15, 2017) (concluding that challenged voting restrictions were unconstitutional because they were motivated by racially discriminatory intent). We therefore see nothing "intractable" about evaluating a statement's probative value based on the identity of the speaker and how specifically the statement relates to the challenged government action, for this is surely a routine part of constitutional analysis. And this analysis is even more straightforward here, because we are not attempting to discern motive from many legislators' statements, as in *Brown*, but rather are looking primarily to one person's statements to discern that person's motive for taking a particular action once in office.

The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.

EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails *Lemon*'s purpose prong in violation of the Establishment Clause.[22] Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

B.

Because we uphold the district court's conclusion that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim, we next consider whether Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 22; *Musgrave*, 553 F.3d at 298. As we have previously recognized, "in the context of an alleged violation of

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[22] What is more, we think EO-2 would likely fail any purpose test, for whether religious animus motivates a government action is a fundamental part of our Establishment Clause inquiry no matter the degree of scrutiny that applies. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (upholding town's legislative prayer policy in part because "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 696 (1989) (finding that the challenged statute satisfied *Lemon*'s purpose prong in part because "there is no allegation that [it] was born of animus"); *Lynch*, 465 U.S. at 673 (stating that the Establishment Clause "forbids hostility toward any [religion]"); *see also* Brief for Constitutional Law Scholars 6-11. There is simply too much evidence that EO-2 was motivated by religious animus for it to survive any measure of constitutional review.

First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190 (4th Cir. 2013) (en banc) (quoting *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 471 (D. Md. 2011)). Accordingly, our finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the absence of an injunction, they will suffer irreparable harm.

Indeed, the Supreme Court has stated in no uncertain terms that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). Though the *Elrod* Court was addressing freedom of speech and association, our sister circuits have interpreted it to apply equally to Establishment Clause violations. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986). We agree with these courts that because of "the inchoate, one-way nature of Establishment Clause violations," they create the same type of immediate, irreparable injury as do other types of First Amendment violations. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303; *see also id.* ("[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place. . . . ").

We therefore find that Plaintiffs are likely to suffer irreparable harm if Section 2(c) of EO-2 takes effect.

C.

Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This is because "courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937)). As the district court did, we consider the balance of the equities and the public interest factors together.

The Government first contends that "the injunction causes [it] direct, irreparable injury" that outweighs the irreparable harm to Plaintiffs because "'no governmental interest is more compelling than the security of the Nation.'" Appellants' Br. 54 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). When it comes to national security, the Government argues, the judicial branch "should not second-guess" the President's "'[p]redictive judgment[s].'" Appellants' Br. 55 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)). The Government further argues that the injunction causes institutional injury, because according to two single-Justice opinions, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The Government contends that this principle applies here because the President "represents the people of all 50 states." Appellants' Reply Br. 25.

At the outset, we reject the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined. This Court has held that the Government is "in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). "If anything," we said, "the system is improved by such an injunction." *Id.* (quoting *Giovani Carandola*, 303 F.3d at 521). Because Section 2(c) of EO-2 is likely unconstitutional, allowing it to take effect would therefore inflict the greater institutional injury. And we are not persuaded that the general deference we afford the political branches ought to nevertheless tip the equities in the Government's favor, for even the President's actions are not above judicial scrutiny, and especially not where those actions are likely unconstitutional. *See Zadvydas*, 533 U.S. at 695; *Chadha*, 462 U.S. at 941-42.

We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries. *See United States v. Robel*, 389 U.S. 258, 264 (1967) ("*Th[e] concept of 'national defense' cannot be deemed* an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . [O]ur country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). National security may be the most compelling of government interests, but this does not mean it will always tip the balance of the equities in favor of the government. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (agreeing with the dissent that the government's "authority and expertise in [national security and foreign relations] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals" (quoting *id.* at 61 (Breyer, J., dissenting))). A claim of harm to national security must still outweigh the competing claim of injury. Here and elsewhere, the Government would have us end our inquiry without scrutinizing either Section 2(c)'s stated purpose or the Government's asserted interests, but "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history," *Patrolmen's Benevolent Ass'n of New York v. City of New York*, 310 F.3d 43, 53-54 (2d. Cir. 2002) (citing *Korematsu v. United States*, 323 U.S. 214, 223 (1944)), and is incompatible with our duty to evaluate the evidence before us.

As we previously determined, the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country. We remain unconvinced that Section 2(c) has more to do with national security than it does with effectuating the President's promised Muslim ban. We do not discount that EO-2 may have some national security purpose, nor do we disclaim that the injunction may have some impact on the Government. But our inquiry, whether for determining Section 2(c)'s primary purpose or for weighing the harm to the parties, is one of balance, and on balance, we cannot say that the Government's asserted national security interest outweighs the competing harm to Plaintiffs of the likely Establishment Clause violation.

For similar reasons, we find that the public interest counsels in favor of upholding the preliminary injunction. As this and other courts have recognized, upholding the Constitution undeniably promotes the public interest. *Giovani Carandola*, 303 F.3d at 521 ("[U]pholding constitutional rights surely serves the public interest."); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002))); *Dayton Area Visually Impaired Pers., Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties."). These cases recognize that when we protect the constitutional rights of the few, it inures to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large.

When the government chooses sides on religious issues, the "inevitable result" is "hatred, disrespect and even contempt" towards those who fall on the wrong side of the line. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Improper government involvement with religion "tends to destroy government and to degrade religion," *id.*, encourage persecution of religious minorities and nonbelievers, and foster hostility and division in our pluralistic society. The risk of these harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group. "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J. concurring). We therefore conclude that enjoining Section 2(c) promotes the public interest of the highest order. And because Plaintiffs have satisfied all the requirements for securing a preliminary injunction, we find that the district court did not abuse its discretion in enjoining Section 2(c) of EO-2.

V.

Lastly, having concluded that Plaintiffs are entitled to a preliminary injunction, we address the scope of that injunction. The Government first argues that the district court erred by enjoining Section 2(c) nationwide, and that any injunctive relief should be limited solely to Plaintiffs.

It is well-established that "district courts have broad discretion when fashioning injunctive relief." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). Nevertheless, "their powers are not boundless." *Id.* The district court's choice of relief "should be carefully addressed to the circumstances of the case," *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts may issue nationwide injunctions consistent with these principles. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992).

The district court here found that a number of factors weighed in favor of a nationwide injunction, and we see no error. First, Plaintiffs are dispersed throughout the United States. *See* J.A. 263, 273; *see also Richmond Tenants Org.*, 956 F.2d at 1308-09 (upholding nationwide injunction where challenged conduct caused irreparable harm in myriad jurisdictions across the country). Second, nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that "the immigration laws of the United States should be enforced vigorously and *uniformly*." *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (quoting Immigration Reform and Control Act of 1996, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384); *see also Arizona v. United States*, 132 S. Ct. 2492, 2502 (2015) (describing the "comprehensive and unified system" of "track[ing] aliens within the Nation's borders"). And third, because Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications. Its continued enforcement against similarly situated individuals would only serve to reinforce the "message" that Plaintiffs "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). For these reasons, we find that the district court did not abuse its discretion in concluding that a nationwide injunction was "necessary to provide complete relief." *Madsen*, 512 U.S. at 778.

Finally, the Government argues that the district court erred by issuing the injunction against the President himself. Appellants' Br. 55 (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (finding that a court could not enjoin the President from carrying out an act of Congress)). We recognize that "in general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (opinion of O'Connor, J.) (quoting *Johnson*, 71 U.S. at 501), and that a "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows," *id.* at 802. In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself. We therefore lift the injunction as to the President only. The court's preliminary injunction shall otherwise remain fully intact.

To be clear, our conclusion does not "in any way suggest[] that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). Even though the President is not "directly bound" by the injunction, we "assume it is substantially likely that the President . . . would abide by an authoritative interpretation" of Section 2(c) of the Second Executive Order. *Id.* at 803 (opinion of O'Connor, J.).

VI.

For all of these reasons, we affirm in part and vacate in part the preliminary injunction awarded by the district court. We also deny as moot Defendants' motion for a stay pending appeal.

AFFIRMED IN PART, VACATED IN PART

TRAXLER, Circuit Judge, concurring in the judgment:

I concur in the judgment of the majority insofar as it affirms the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the Executive Order against the officers, agents, and employees of the Executive Branch of the United States, and anyone acting under their authorization or direction, who would attempt to enforce it, because it likely violates the Establishment Clause of the United States Constitution. I also concur in the judgment of the majority to lift the injunction as to President Trump himself.

BARBARA MILANO KEENAN, Circuit Judge, with whom JUDGE THACKER joins except as to Part II.A.i., concurring in part and concurring in the judgment:

I concur in the majority opinion's analysis with respect to its conclusions: (1) that the stated "national security purpose" of the Second Executive Order[1] likely fails *Mandel*'s "bona fide" test and violates the Establishment Clause, *see Kleindienst v. Mandel*, 408 U.S. 753 (1972); and (2) that the record before us supports the award of a nationwide injunction.[2] I write separately to express my view that although the plaintiffs are unlikely to succeed on the merits of their claim under Section 1152(a)(1)(A), their request for injunctive relief under the INA nevertheless is supported by the failure of Section 2(c) to satisfy the threshold requirement of Section 1182(f) for the President's lawful exercise of authority.[3]

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[1] Exec. Order No. 13,780, *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[2] Based on my view that the Second Executive Order does not satisfy the threshold requirement of 8 U.S.C. § 1182(f) for exercise of a president's authority under that statute, I would conclude that the Second Executive Order is not "facially legitimate" within the meaning of *Mandel*, 408 U.S. at 770. Nevertheless, I join in the majority opinion's holding that the plaintiffs are likely to succeed on the merits of their Establishment Clause claim, based on my further conclusion that the Second Executive Order likely fails *Mandel*'s "bona fide" test. In reaching this conclusion, I additionally note that I do not read the majority opinion as holding that a plausible allegation of bad faith alone would justify a court's decision to look behind the government's proffered justification for its action. Rather, in accordance with Justice Kennedy's concurrence in *Din*, a plaintiff must make an affirmative showing of bad faith to satisfy the "bona fide" requirement of *Mandel*. *See Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment).

I.

As an initial matter, I conclude that John Doe #1 has standing to raise a claim that the Second Executive Order violates the INA.[4] To establish standing under Article III, a plaintiff must show that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff seeking "to enjoin a future action must demonstrate that he is immediately in danger of sustaining some direct injury as the result" of the challenged conduct, which threat of injury is "both real and immediate." *Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) (internal quotation marks omitted) (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)).

Prolonged separation from one's family members constitutes a cognizable injury-in-fact. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam). As the government concedes, by barring entry of nationals from the six identified countries, Section 2(c) of the Second Executive Order operates to delay, or ultimately to prevent, the issuance of visas to nationals from those countries.

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[3] We may consider this facial deficiency not raised by the plaintiffs because this defect is apparent from the record. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (explaining that the Court may affirm on any grounds apparent from the record).

[4] Because only one plaintiff must have standing for the Court to consider a particular claim, I do not address whether the other plaintiffs also have standing to challenge the Second Executive Order under the INA. *See Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

Before the President issued the Second Executive Order, John Doe #1 filed a visa application on behalf of his Iranian national wife, and took substantial steps toward the completion of the visa issuance process. However, his wife's request for a visa is still pending. It is self-evident from the language and operation of the Order that the 90-day "pause" on entry, which the government may extend, is likely to delay the issuance of a visa to John Doe #1's wife and her entry into the United States, a likelihood that is not remote or speculative.[5] Accordingly, I conclude that John Doe #1 has established the existence of an injury-in-fact that is fairly traceable to the Second Executive Order, and which is likely to be redressed by a favorable decision in this case.

II.

I turn to consider whether the plaintiffs are entitled to a preliminary injunction based on the likelihood that the Second Executive Order violates the INA. This Court evaluates a district court's decision to grant a preliminary injunction based on an abuse-of-discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d

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[5] For the same reasons, I reject the government's contention that the plaintiffs' claims are not ripe for review. The harm to the plaintiffs caused by separation from their family members is imminent and concrete, and is not ameliorated by the hypothetical possibility that the plaintiffs might receive a discretionary waiver under Section 3(c) of the Second Executive Order at some point in the future.

355, 366 (4th Cir. 2012). Under this standard, we review the district court's factual findings for clear error and review its legal conclusions de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

A preliminary injunction is an "extraordinary remedy," which may be awarded only upon a "clear showing" that a plaintiff is entitled to such relief. *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345-46 (4th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)), *vacated on other grounds*, 559 U.S. 1089 (2010). Preliminary relief affords a party before trial the type of relief ordinarily available only after trial. *Id.* at 345. A preliminary injunction must be supported by four elements: (1) a likelihood of success on the merits; (2) that the plaintiff likely will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities weighs in the plaintiff's favor; and (4) that a preliminary injunction is in the public interest. *Id.* at 346.

A.

I begin by considering whether the plaintiffs are likely to succeed on the merits of a claim that the Second Executive Order fails to comply with the requirements of the INA. In interpreting a statute, courts first must consider the plain meaning of the statutory language. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). A statute's plain meaning derives from consideration of all the words employed, rather than from reliance on isolated statutory phrases. *Id.* (citing *United States v. Mitchell*, 518 F.3d 230, 233-34 (4th Cir. 2008)).

i.

Initially, I would reject the plaintiffs' contention that 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas, operates as a limitation on the President's authority under 8 U.S.C. § 1182(f) to "suspend the entry of all aliens or any class of aliens" if he finds that the entry of such aliens "would be detrimental to the interests of the United States." Section 1152(a)(1)(A) provides that:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Thus, the plain language of Section 1152(a)(1)(A) addresses an alien's ability to obtain an immigrant visa. Section 1182(f), on the other hand, explicitly addresses an alien's ability to *enter* the United States, and makes no reference to the issuance of visas. *See* 8 U.S.C. § 1182(f). I am unpersuaded by the plaintiffs' attempt to read into Section 1152(a)(1)(A) terms that do not appear in the statute's plain language.

Sections 1152(a)(1)(A) and 1182(f) address two distinct actions in the context of immigration, namely, the issuance of a visa and the denial of an alien's ability to enter the United States. Indeed, the fact that an alien possesses a visa does not guarantee that person's ability to enter the United States. For example, an alien who possesses a visa may nonetheless be denied admission into the United States for a variety of reasons set forth elsewhere in the INA. *See* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [sic] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."). For these reasons, I would reject the plaintiffs' assertion that Section 1152(a)(1)(A) provides a basis for affirming the preliminary injunction issued by the district court.

ii.

Nevertheless, I would conclude that the plaintiffs' request for injunctive relief is supported by the President's failure to comply with Section 1182(f). In issuing his proclamation under Section 2(c), the President relied exclusively on two provisions of the INA. The President stated in material part:

> I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

82 Fed. Reg. at 13,213.

Section 1185(a), however, does not confer any authority on a president. Instead, that statute imposes certain requirements on persons traveling to and from the United States, and renders unlawful their failure to comply with the requirements of the statute.

In contrast, Section 1182(f) addresses a president's authority to impose restrictions on the entry of aliens into the United States. Section 1182(f) states, in relevant part: "Whenever the [p]resident finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," the president may "suspend the entry [into the United States] of all aliens or any class of aliens." Although this language provides broad discretion to a president to suspend the entry of certain aliens and classes of aliens, that discretion is not unlimited.

The plain language of Section 1182(f) permits a president to act only if he "finds" that entry of the aliens in question "*would be* detrimental to the interests of the United States" (emphasis added). In my view, an unsupported conclusion will not satisfy this "finding" requirement. Otherwise, a president could act in total disregard of other material provisions of the INA, thereby effectively nullifying that complex body of law enacted by Congress.

Here, the President's "finding" in Section 2(c) is, in essence, a non sequitur because the "finding" does not follow from the four corners of the Order's text. In particular, the text fails to articulate a basis for the

President's conclusion that entry by any of the approximately 180 million[6] individuals subject to the ban "would be detrimental to the interests of the United States."

I reach this conclusion by examining the Order's relevant text. In Section 1(a) of the Order, the President declares that the policy of the United States is "to protect its citizens from terrorist attacks, including those committed by foreign nationals," and "to improve the screening and vetting protocols and procedures" involved in issuing visas and in the administration of the United States Refugee Admissions Program. 82 Fed. Reg. at 13,209. The Order explains that such screening and vetting procedures are instrumental "in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." *Id.*

The Order further states that the governments of Iran, Libya, Somalia, Sudan, Syria, and Yemen are unlikely to be willing or able "to share or validate important information about individuals seeking to travel to the United States," because these countries: (1) have porous borders facilitating "the illicit flow of weapons, migrants, and foreign terrorist fighters"; (2) have been compromised by terrorist organizations; (3) contain "active conflict zones"; or (4) are state sponsors of terrorism. *Id.* at 13,210-11. In light of these conditions, the Second Executive Order proclaims that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13,211.

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[6] *See* Cent. Intelligence Agency, *The World Factbook, Country Comparison: Population*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (last visited May 19, 2017) (saved as ECF opinion attachment) (listing populations of the six identified countries, in the total amount of more than 180 million). Notably, the class of banned "nationals" potentially includes citizens of one of the six identified countries whether or not those citizens have ever been physically present in one of these countries. *See* Cent. Intelligence Agency, *The World Factbook, Field Listing: Citizenship*, https://www.cia.gov/library/publications/the-world-factbook/fields/2263.html (last visited May 19, 2017) (saved as ECF opinion attachment).

Significantly, however, the Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States. Nor does the Order articulate a relationship between the unstable conditions in these countries and any supposed propensity of the nationals of those countries to commit terrorist acts or otherwise to endanger the national security of the United States. For example, although the Order states that several of the six countries permit foreigners to establish terrorist safe havens within the countries' borders, the Order does not assert that any *nationals* of the six countries are likely to have joined terrorist organizations operating within those countries, or that members of terrorist organizations are likely to pose as *nationals* of these six countries in order to enter the United States to "commit, aid, or support acts of terrorism." *See id.* at 13,210-12 (noting, among other things, that the Syrian government "has allowed or encouraged extremists to pass through its territory to enter Iraq," and that "ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States").

The text of the Second Executive Order therefore does not identify a basis for concluding that entry of any member of the particular class of aliens, namely, the more than 180 million nationals of the six identified countries, would be detrimental to the interests of the United States. In the absence of any such rationale articulating the risks posed by this class of foreign nationals, the President's proclamation under Section 2(c) does not comply with the "finding" requirement of the very statute he primarily invokes to issue the ban imposed by Section 2(c).

The government asserted at oral argument in this case that the Second Executive Order nevertheless can stand on the rationale that the President is "not sure" whether any of the 180 million nationals from the six identified countries present a risk to the United States. Oral Arg. 38:04-40:11. I disagree that this rationale is sufficient to comply with the specific terms of Section 1182(f). Although this statute does not require the President to find that the entry of any alien or class of aliens would present a danger to the United States, the statutory text plainly requires more than vague uncertainty regarding whether their entry might be detrimental to our nation's interests. Indeed, given the scope of Section 2(c), the President was required under Section 1182(f) to find that entry of any members of the identified class *would be* detrimental to the interests of the United States.

Instead of articulating a basis why entry of these foreign nationals "would be detrimental" to our national interests, the Order merely proposes a process under which the executive branch will study the question. *See* 82 Fed. Reg. at 13,212-13. This "study" proposal is an implicit acknowledgement that, presently, there is no affirmative basis for concluding that entry of nationals from these six countries "*would be* detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added).

The government likewise fails in its attempt to justify the Second Executive Order by relying on the prior exclusion of individuals from the Visa Waiver Program who had certain connections to the six countries identified in the Order. *See* 82 Fed. Reg. at 13,209. Generally, the Visa Waiver Program allows nationals of specific countries to travel to the United States without a visa for purposes of tourism or business for up to 90 days. *See generally* 8 U.S.C. § 1187. Based on modifications to the Program made by Congress in 2015 and by the Secretary of Homeland Security in 2016, people with certain connections to the six named countries no longer were permitted to participate in the Program.[7] As a result, those newly ineligible aliens became subject to the *standard* procedures required for the issuance of visas.[8] Thus, exclusion from the Visa Waiver Program merely reimposed for such aliens the customary requirements for obtaining a visa, and did not impose any additional conditions reflecting a concern that their entry "would be detrimental to the interests of the United States." Further, the above-described limitations of the Visa Waiver Program underscore the fact that, currently, the relevant class of aliens does not enjoy "*unrestricted* entry" into the United States as incorrectly stated in Section 2(c) of the Second Executive Order. *See* 82 Fed. Reg. at 13,213 (emphasis added).

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[7] *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989-91; Department of Homeland Security, U.S. Customs and Border Protection-009 Electronic System for Travel Authorization System of Records, 81 Fed. Reg. 39,680, 39,682 (June 17, 2016).

[8] *See* U.S. Customs & Border Prot., *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions*, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq (last visited May 19, 2017) (saved as ECF opinion attachment).

Accordingly, I would hold that the text of Section 2(c) fails to meet the statutory precondition for the lawful exercise of a president's authority under Section 1182(f). I thus conclude that the plaintiffs likely would succeed on the merits of this particular statutory issue. *See Winter*, 555 U.S. at 20.

B.

I also would conclude with respect to Section 1182(f) that the plaintiffs would satisfy the remaining *Winter* factors, because they are "likely to suffer irreparable harm in the absence of preliminary relief," the balance of the equities would resolve in their favor, and an injunction would be in the public interest. *Id.* First, at a minimum, plaintiff John Doe #1 has shown that absent an injunction, he likely will be subject to imminent and irreparable harm based on the prolonged separation from his wife that will result from enforcement of the Second Executive Order. *See Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). And, based on my conclusion that Section 2(c) is invalid on its face, I would hold that an injunction should be issued on a nationwide basis.

Next, the balance of harms weighs in favor of granting a preliminary injunction. *See Winter*, 555 U.S. at 24. The government's interest in enforcing laws related to national security as a general matter would be a strong factor in its favor. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). However, because the Second Executive Order does not comply with the threshold requirement for a president's lawful exercise of authority under Section 1182(f), the government's interest cannot outweigh the real harms to the affected parties. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (reviewing the First Executive Order, dismissing the government's claim of irreparable injury, and noting that "the Government has done little more than reiterate" its general interest in combating terrorism).

Finally, the public interest also strongly favors a preliminary injunction, because the public has an interest "in free flow of travel" and "in avoiding separation of families." *Id.* at 1169. And, most importantly, the public interest is served by ensuring that any actions taken by the President under Section 1182(f) are lawful and do not violate the only restraint on his authority contained in that statute.

III.

Accordingly, in addition to affirming the district court's judgment with respect to the plaintiffs' Establishment Clause claim and the issuance of a nationwide injunction, I would affirm the court's judgment and award of injunctive relief on the separate basis that the Second Executive Order is invalid on its face because it fails to comply with the "finding" requirement of Section 1182(f).

WYNN, Circuit Judge, concurring:

Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination. We have matured from the lessons learned by past experiences documented, for example, in *Dred Scott* and *Korematsu*. But we again encounter the affront of invidious discrimination—this time layered under the guise of a President's claim of unfettered congressionally delegated authority to control immigration and his proclamation that national security requires his exercise of that authority to deny entry to a class of aliens defined solely by their nation of origin. Laid bare, this Executive Order is no more than what the President promised before and after his election: naked invidious discrimination against Muslims. Such discrimination contravenes the authority Congress delegated to the President in the Immigration and Nationality Act (the "Immigration Act"), 8 U.S.C. § 1101 *et seq.*, and it is unconstitutional under the Establishment Clause.

To that end, I concur fully in the majority opinion, including its analysis and conclusion that Section 2(c) of the Executive Order, which suspends entry of nationals from six predominantly Muslim countries, likely violates the Establishment Clause. In particular, I agree that even when the President invokes national security as a justification for a policy that encroaches on fundamental rights, our courts must not turn a blind eye to statements by the President and his advisors bearing on the policy's purpose and constitutionality. Those statements characterized Section 2(c) as the realization of the President's repeated promise, made before and after he took office, to ban Muslims.[1] And I agree that "the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country."[2] *Ante* at 75.

I write separately because I believe Plaintiffs' claim that Section 2(c) exceeds the President's authority under the Immigration Act also is likely to succeed on the merits. That statute authorizes the President to suspend the "entry of any aliens or of any class of aliens" that he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Because the Executive Order here relies on national origin as a proxy for discrimination based on religious animus, the Government's argument that Section 2(c)'s suspension on entry "falls squarely within the President's broad authority" under Section 1182(f) essentially contends that Congress delegated to the President virtually unfettered discretion to deny entry to any class of aliens, including to deny entry solely on the basis of nationality and religion. Appellants' Br. at 28. Not so.

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[1] The answer to the rhetorical question of whether the President will be able to "free himself from the stigma" of his own self-inflicted statements, *post* at 189, lies in determining whether the Executive Order complies with the rule of law. That requires us to consider, in each instance, how the character, temporality, and nature of the President's repeated, public embrace of an invidiously discriminatory policy offensive to the Constitution bear on a challenged policy.

[2] It strains credulity to state that "the security of our nation is indisputably *lessened* as a result of the injunction." *Post* at 188 (emphasis added). Rather, the district court's order only enjoined implementation of Section 2(c) of the Executive Order—a provision that the President maintained would *increase* national security. Indeed, two reports released by the Department of Homeland Security in February 2017 and March 2017 found that citizenship is an "unlikely indicator" of whether an individual poses a terrorist threat to the United States and that most of the individuals who have become U.S.-based violent extremists have been radicalized after living in the United States for a period of years. J.A. 233. The Government has not provided any information suggesting, much less establishing, that the security risks facing our country are any different today than they were when the President first sought to impose this temporary ban only seven days into his presidency.

To the contrary, the Immigration Act provides no indication that Congress intended the "broad generalized" delegation of authority in Section 1182(f) to allow the President "to trench . . . heavily on [fundametal] rights."[3] And even if the plain language of Section 1182(f) suggested Congress had given the President such unfettered discretion to invidiously discriminate based on nationality and religion—which it does not—a statute delegating to the President the authority to engage in such invidious discrimination would raise grave constitutional concerns. Indeed, imposing burdens on individuals solely on the basis of their race, national origin, or religion—"a classification of persons undertaken for its own sake . . . inexplicable by anything but animus towards the class it affects"[4]—is "odious to a free people whose institutions are founded upon the doctrine of equality."[5] That is why—even when faced with a congressional delegation of seemingly unbridled power to the President or his appointees

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[3] *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

[4] *Romer v. Evans*, 517 U.S. 620, 636, 632 (1996).

[5] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

—the Supreme Court repeatedly "ha[s] read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation" when the delegation provides no explicit statement that Congress intended for the executive to use the delegated authority in a manner in conflict with constitutional protections.[6]

Accordingly, I conclude that Section 2(c)'s suspension on entry likely exceeds the President's authority under the Immigration Act to deny entry to classes of aliens.

I.

The majority opinion does not reach the merits of Plaintiffs' claim that Section 2(c)'s suspension on entry violates the Immigration Act, and Section 1182(f), in particular. *Ante* at 28-31. The district court, however, concluded that the Executive Order likely violates the Immigration Act insofar as Section 2(c) effectively prohibits the issuance of immigrant visas to aliens from the six countries based on their nationalities. *Int'l Refugee Assistance Project v. Trump*, -- F. Supp. 3d --, 2017 WL 1018235, at *10 (D. Md. Mar. 16, 2017). And the Government has argued, both on appeal and before the district court, that the suspension on entry falls within the President's delegated power under Section 1182(f). Appellants' Br. at 28-30. Accordingly, the question of whether Section 2(c) complies with Section 1182(f) is squarely before this Court.[7]

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[6] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Section 1182(f) provides, in relevant part, that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Like the district court, the majority opinion finds, and I agree, that Plaintiffs are likely to establish—based on statements by the President and his advisors—that in promulgating Section 2(c), the President relied on one suspect classification (national origin) as a proxy to purposely discriminate against members of another suspect class (adherents to a particular religion) solely on the basis of their membership in that class. *Ante* at 58. Thus, in considering Plaintiffs' statutory claim, we confront the following question: Did Congress, in enacting Section 1182(f), authorize the President to deny entry to a class of aliens on the basis of invidious discrimination?

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[7] The Government also asserts that Section 2(c)'s suspension on entry is authorized by Section 1185(a) of the Immigration Act, which "authorizes the President to prescribe 'reasonable rules, regulations, and orders,' as well as 'limitations and exceptions,' governing the entry of aliens." Appellants' Brief at 29 (quoting 8 U.S.C. § 1185(a)). The Government does not argue that Sections 1182(f) and 1185(a) confer meaningfully different powers on the President. Because Section 1182(f) is specifically tailored to the suspension on entry, and because there is no reason to believe that the analysis would be different under Section 1185(a), my analysis will proceed under Section 1182(f).

Additionally, because the Executive Order cites the Immigration Act as the sole statutory basis for the President's authority to proclaim Section 2(c)'s suspension on entry, I need not, and thus do not, take any position on the scope of the President's delegated power to deny entry to classes of aliens under other statutes. Likewise, because the claim at issue relates only to Section 2(c)'s compliance with the Immigration Act, I do not address whether, and in what circumstances, the President may deny entry to classes of aliens under his inherent powers as commander-in-chief, even absent express congressional authorization. *See The Prize Cases*, 67 U.S. 635 (1862).

Finally, I agree with Judge Keenan's analysis and conclusion that, at a minimum, John Doe #1 has standing to pursue Plaintiffs' Immigration Act claim. *Ante* at 82-83.

A.

Two related canons of statutory construction bear directly on this question. First, under the "constitutional avoidance canon," "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible' [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted) (quoting *Crowell*, 285 U.S. at 62). This canon "rest[s] on the reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Put differently, "[t]he courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Supreme Court has applied the constitutional avoidance canon on several occasions to narrow facially broad statutes relating to immigration and national security. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court assessed whether Section 1231(a)(6) of the Immigration Act—which provides that certain categories of aliens who have been ordered removed "may be detained beyond the removal period" —authorized the detention of such categories of aliens indefinitely. 533 U.S. at 689. Notwithstanding that Section 1231(a)(6) placed no express limitation on the duration of such detentions, the Supreme Court "read an implicit limitation into the statute . . . limit[ing] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* Explaining that "permitting indefinite detention of an alien would raise a serious constitutional problem" and noting the absence of "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed," the Supreme Court concluded that the constitutional avoidance canon required adoption of the "implicit limitation." *Id.* at 690, 697.

The Supreme Court also relied on the constitutional avoidance canon in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). In that case, the Supreme Court rejected the Government's arguments that two statutes amending the Immigration Act (1) deprived the judiciary of jurisdiction to review habeas petitions filed by certain aliens subject to removal orders and (2) retroactively deprived certain aliens who had pled guilty to criminal offenses —which convictions rendered such aliens removable— the opportunity to pursue a discretionary waiver of removal, notwithstanding that such aliens had been entitled to pursue such a waiver at the time of their plea. *Id.* at 292-93, 297. In reaching these conclusions, the Supreme Court acknowledged that Congress, at least in certain circumstances, has the constitutional authority to repeal habeas jurisdiction and to make legislation retroactive. *Id.* at 298-99, 315-16. Nonetheless, because (1) the Government's proposed constructions would require the Supreme Court to hold that Congress intended to exercise "the outer limits of [its] power" under the Constitution and (2) the legislation included no "clear, unambiguous, and express statement of congressional intent" indicating that Congress intended to exercise the "outer limits" of its power, the Supreme Court rejected the Government's positions. *Id.* at 299, 313-26.

The second applicable canon of construction—which is a corollary to the constitutional avoidance canon—requires an even clearer indication of congressional intent regarding the infringement on constitutional rights due to the absence of direct action by Congress. That canon forbids courts from construing a "broad generalized" delegation of authority by Congress to the executive as allowing the executive to exercise that delegated authority in a matter that "trench[es]" upon fundamental rights, *Kent v. Dulles*, 357 U.S. 116, 129 (1958), absent an "explicit" statutory statement providing the executive with such authority, *Greene v.*

McElroy, 360 U.S. 474, 507 (1959). Under this canon, which I will refer to as the "delegation of authority canon," courts must "construe narrowly all delegated powers that curtail or dilute" fundamental rights. *Kent*, 357 U.S. at 129; *see also United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in a delegation] narrows, however, when the regulation . . . potentially affects fundamental rights. . . . This is because the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake."). The Supreme Court requires that delegations that potentially authorize the executive to encroach on fundamental rights "be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting *and* implementing our laws." *Greene*, 360 U.S. at 507 (emphasis added) (citation omitted).

As with the constitutional avoidance canon, the Supreme Court has applied the delegation of authority canon to statutes involving immigration and national security. For example, in *United States v. Witkovich*, 353 U.S. 194 (1957), the Supreme Court interpreted Section 242(d)(3) of the Immigration and Nationality Act of 1952, which provided that the Attorney General could require any alien subject to a final order of deportation that had been outstanding for more than six months "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." 353 U.S. at 195 (quoting 8 U.S.C. § 1252(d)(3) (1952)). The Government asserted that the plain language of the provision afforded the Attorney General near unfettered discretion to demand information from such aliens. *Id.* at 198. Although the Supreme Court acknowledged that "[t]he language of [Section] 242(d)(3), if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of [such] aliens," the Supreme Court limited the Attorney General's authority under Section 242(d)(3) to "questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue." *Id.* at 199, 202. In rendering this narrowing construction, the Supreme Court emphasized, first, that the broad reading proposed by the Government would call into question the statute's constitutional validity and, second, that the context and legislative history did not provide unambiguous evidence that Congress intended to give the Attorney General the unbridled authority the Government claimed. *Id.* at 199-200.

The Supreme Court also applied the delegation of authority canon in *Kent v. Dulles*, 357 U.S. 116 (1958). There, the Supreme Court was asked to construe a statute providing that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States." 357 U.S. at 123 (internal quotation marks omitted) (quoting 22 U.S.C. § 211a (1952)). Pursuant to that authority, the executive branch promulgated a regulation authorizing the Secretary of State to demand an affidavit from any passport applicant averring whether the applicant had ever been a Communist and barring issuance of passports to Communists. *Id.* at 118 & n.2. Under that regulation, the Department of State denied a passport to an applicant on grounds he refused to submit such an affidavit. *Id.* at 118-19. Thereafter, the applicant sought a declaratory judgment that the regulation was unconstitutional. *Id.* at 119. Despite the breadth of the plain language of the delegating statute, the Supreme Court "hesitate[d] to impute to Congress . . . a purpose to give [the Secretary of State] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Id.* at 128. Emphasizing (1) that the authority to deny a passport necessarily involved the power to infringe on the fundamental right to travel and (2) that the statutory delegation provision's "broad generalized" terms were devoid of any "explicit" indication Congress had intended to "give[] the Secretary authority to withhold passports to citizens because of their beliefs or associations," the Supreme Court refused "to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." *Id.* at 129-30.

Taken together, the two canons reflect the basic principle that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 548 (1950) (Frankfurter, J., dissenting) (explaining that legislation potentially encroaching on fundamental rights "should not be read in such a decimating spirit unless the letter of Congress is inexorable"). Although closely related, the two canons are analytically distinct. In particular, the constitutional avoidance canon involves *direct actions* by Congress that potentially encroach upon fundamental rights. By contrast, the delegation of authority canon governs *delegations* by Congress that potentially allow a delegatee to exercise congressional power to encroach on fundamental rights. Because Congress does not itself decide when or how its delegated authority will be exercised, any encroachment on individual rights by Congress's delegatee must be supported by an "explicit" statement that Congress intended to permit such encroachment, *Greene*, 360 U.S. at 507—a more stringent requirement than the "clear indication" necessary when Congress acts directly, *Zadvydas*, 533 U.S. 696-97.

B.

The constitutional avoidance canon and the delegation of authority canon bear directly on the scope of authority conferred on the President by Congress under Section 1182(f) because, if construed broadly, Section 1182(f) could authorize the President to infringe on fundamental constitutional rights. In particular, the Supreme Court has "consistently repudiated '(d)istinctions between citizens solely because of their ancestry' [or race] as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "[T]he imposition of special disabilities" upon a group of individuals based on "immutable characteristic[s] determined solely by the accident of birth," like race and national origin, runs contrary to fundamental constitutional values enshrined in the Fifth and Fourteenth Amendments because it "violate[s] 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). Accordingly, the Constitution forbids "[p]referring members of any one group for no reason other than race or ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring in judgment). Or, more simply, the Constitution prohibits "discrimination for its own sake." *Id.*

Although religion, unlike race and national origin, is not an immutable characteristic, the Constitution treats classifications drawn on religious grounds as equally offensive. The First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). To that end, the Constitution forbids both discriminating against "those who embrace[] one religious faith rather than another" and "preferring some religions over others—an invidious discrimination that would run afoul of the [Constitution]." *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

If, as the Government's argument implies, Congress delegated to the President the authority to deny entry to an alien or group of aliens based on invidious discrimination against a race, nationality, or religion, then Section 1182(f) would encroach on the core constitutional values set forth in the First, Fifth, and Fourteenth Amendments: The President could deny entry to aliens of a particular race solely based on the color of their skin. The President could deny entry to citizens of a particular nation solely on the basis of their place of birth. The President could deny entry to adherents of a particular religion solely because of their subscription to that faith. Or, as this Court concludes the President likely did here, the President could rely on one form of invidious discrimination—discrimination based on national origin—to serve as pretext for implementing another form of invidious discrimination—discrimination based on religion.

The President justified his use of this layered invidious discrimination on grounds that citizens of the six predominantly Muslim countries subject to the suspension on entry pose a special risk to United States security. Revised Order § 1(e). In particular, the Executive Order generally points to "the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations." *Id.* § 1(d). The order also cites, as the sole example of an act of terrorism by a native of one of the six countries, a native of Somalia who was brought to the United States as a refugee at the age of two and was convicted, as an adult, of "attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." *Id.* § 1(h).

Accordingly, the President relies on the acts of *specific* individuals and groups of individuals (*i.e.*, "terrorist organizations" and "their members") within the six countries to establish that *all* citizens of those countries pose a danger to the United States. Dissenting from the Supreme Court's sanctioning of the forced internment of Japanese Americans during World War II, Justice Murphy explained the danger such rationales pose to the core constitutional value of equality:

> [T]o infer that examples of individual [misconduct] prove group [misconduct] and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference . . . has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

To be sure, the Supreme Court has recognized that, particularly in times of war,[8] Congress has broad authority to control immigration, including the power to authorize the President to establish policies restricting the entry of aliens. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that "the power to admit or exclude aliens is a sovereign prerogative" entrusted almost exclusively to Congress). And "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

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[8] Congress's constitutional power to control immigration—and authority to delegate that control—fundamentally differs in a time of war. *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) ("[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless."). The Supreme Court's broadest statements regarding the scope of the President's delegated powers over immigration—which are relied upon by the Government—are in cases in which Congress expressly declared war and authorized the President to deny entry to aliens as part of his prosecution of the conflict. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 & n.7 (1953) ("Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife [including] *the present emergency* [the Korean War]." (emphasis added)); *Knauff*, 338 U.S. at 543 ("[B]ecause the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country *during a time of national emergency* [World War II]." (emphasis added)).

But the Supreme Court also has long, and repeatedly, held that Congress's power to create immigration laws remains "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (holding that Congress's constitutionally devised powers to control immigration, among other powers, are "restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). That is particularly true when the discriminatory burdens of an immigration policy fall not just on aliens who have no claim to constitutional rights, but also on citizens and other individuals entitled to constitutional protections. *Cf. Zadvydas*, 533 U.S. at 693-94 (surveying the Supreme Court's immigration jurisprudence and finding that whether a plaintiff alien could lay claim to constitutional protections "made all the difference").

Here, aliens who are denied entry by virtue of the President's exercise of his authority under Section 1182(f) can claim few, if any, rights under the Constitution. But when the President exercises that authority based solely on animus against a particular race, nationality, or religion, there is a grave risk—indeed, likelihood—that the constitutional harm will redound to *citizens*. For example, we hold today that the denial of entry to a class of aliens solely based on their adherence to a particular religion likely violates the

Establishment Clause by sending "a state-sanctioned message that foreign-born Muslims . . . are 'outsiders, not full members of the political community.'" *Ante* at 38 (quoting *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012)). Likewise, were the President to deny entry to a class of aliens solely based on their race, *citizens* of that race would be subjected to a constitutionally cognizable "feeling of inferiority as to their status in the community." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954). And denying entry to classes of aliens based on invidious discrimination has the potential to burden the fundamental right of *citizens* to marry the partner of their choice based on nothing more than the partner's race, nationality, or religion.[9] *Loving*, 388 U.S. at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."). Put simply, when the Government engages in invidious discrimination—be it against aliens or citizens—individuals whose rights the Constitution protects face substantial harm.

Because construing Section 1182(f) as authorizing the President to engage in invidious discrimination is plainly inconsistent with basic constitutional values and because the violation of those values implicates the rights of citizens and lawful permanent residents, not just aliens, the Government's proposed construction "raise[s] serious constitutional problems." *St. Cyr*, 533 U.S. at 299-300.

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[9] *See Kerry v. Din*, 135 S. Ct. 2128, 2142 (2015) (Breyer, J., dissenting) (stating that a United States citizen and resident has a procedural due process interest in knowing the Government's grounds for denying a visa application by her husband, an Afghan citizen with no claim to rights under the Constitution); *id.* at 2139 (Kennedy, J., concurring in judgment) (recognizing that a United States citizen may have "a protected liberty interest in the visa application of her alien spouse").

C.

Having concluded that the Government's broad reading of Section 1182(f) raises serious constitutional concerns, we must reject that construction absent a "clear indication of congressional intent" to allow the President to deny the entry of classes of aliens on invidiously discriminatory bases. *Zadvydas*, 533 U.S. at 696-97. And because Section1182(f) involves a delegation of congressional authority, not a direct action by Congress, the indication of congressional intent to authorize the President, as delegatee, to encroach on fundamental rights must be "explicit." *Greene*, 360 U.S. at 507.

To ascertain congressional intent, we look to the "plain meaning" of Section 1182(f). *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt.)*, 706 F.3d 245, 251 (4th Cir. 2013). "To determine a statute's plain meaning, we not only look to the language itself but also the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (internal quotation marks omitted); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (holding that in ascertaining congressional intent, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (internal quotation marks omitted)). Here, neither the language of Section 1182(f), nor the context in which the language is used, nor the "object and policy" underlying the Immigration Act "explicitly" state, much less "clear[ly] indicat[e]," that Congress intended to authorize the President to deny entry to aliens based on invidious discrimination.

1.

Beginning with the plain language, Section 1182(f) permits the President to suspend the entry of "any aliens or of any class of aliens" *only* when he "finds that the entry of [such aliens] would be detrimental to the interests of the United States." Accordingly, the plain language of Section 1182(f) does not explicitly authorize the President to deny entry to a class of aliens solely defined by religion or by race, national origin, or other immutable characteristic.

Nonetheless, in arguing that Section 1182(f) authorizes the Executive Order's suspension on entry, the Government focuses on that statute's use of the (concededly broad) term "any class of aliens." Appellants' Br. at 28-29. But the Government's argument omits the crucial limitation Congress imposed by requiring that the President may bar entry *only* upon a finding that entry of a class of aliens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That restriction requires a substantive connection between an alien's membership in a particular class and the likelihood that her entry would be detrimental to the interests of the United States.

Detrimental is defined as "harmful" or "damaging." Webster's Third New International Dictionary (2002). Accordingly, Section 1182(f) authorizes the President to deny entry to an alien if the President has reason to believe that, by virtue of the alien being a member of a particular class, her entry is more likely to damage or harm the interests of the United States. But the Constitution forbids imposing legal burdens on a class of individuals solely based on race or national origin precisely because those immutable characteristics bear no "relationship to individual responsibility." *Weber*, 406 U.S. at 175. Because an alien's race or national origin bears no "relationship to individual responsibility," those characteristics, by themselves, cannot render it more likely that the alien's entry will damage or harm the interests of the United States. *Cf. Romer*, 517 U.S. at 632, 636 (holding that "a classification of persons undertaken for its own sake" is "inexplicable by anything but animus towards the class it affects[, has no] relationship to legitimate state interests," and therefore violates the Fourteenth Amendment). Likewise, the Constitution's prohibition on discriminating against "those who embrace[] one religious faith rather than another," *Seeger*, 380 U.S. at 188 (Douglas, J., concurring), means that an alien's adherence to a particular religion alone also provides no constitutionally cognizable basis for concluding that her entry is disproportionately likely to harm or damage the interests of the United States.

Because race, national origin, and religion bear no factual or constitutionally cognizable relationship to individual responsibility, courts have long interpreted delegation provisions in the Immigration Act as barring executive officials from engaging in invidious discrimination. For example, in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (Hand, J.), the Second Circuit recognized "implied limitations" on Congress's facially broad delegation of authority to the Attorney General to suspend the deportation of any alien unlawfully present in the country. 180 F.2d at 490. Writing for the court, Judge Hand suggested that denying suspension of deportation based on "irrelevant" reasons having no bearing on whether the "alien's continued residence [was] prejudicial to the public weal"—such as "becom[ing] too addicted to attending baseball games, or ha[ving] bad table manners"—would exceed the Attorney General's congressionally delegated authority. *Id.* Factors like these, Judge Hand explained, are "considerations that Congress *could not have intended to make relevant*" to a determination of whether an alien could permissibly remain in the United States.[10] *Id.* at 491 (emphasis added). Under the dictates of equality established by the Constitution, an alien's race, nationality, or religion is as irrelevant to the potential for his entry to harm the interests of the United States as is the alien's addiction to baseball or his poor table manners.

Judge Friendly made this point clear in *Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2d Cir. 1966) (Friendly, J.). There, the Second Circuit again confronted a question regarding the scope of the Attorney General's authority —delegated by Congress—to suspend an alien's deportation. 360 F.2d at 716-17. Judge Friendly concluded that "the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or *rested on an impermissible basis such as an invidious discrimination against a particular race or group.*" *Id.* at 719 (emphasis added). Like addiction to baseball and poor table manners, invidious discrimination is a "consideration[] that Congress could not have intended to make relevant" to decisions regarding whether to allow an alien residence in the United States, Judge Friendly held. *Id.* (internal quotation marks omitted) (quoting *Kaloudis*, 180 F.2d at 491).

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[10] Notably, *Kaloudis* found a basis for this clear outer limit on congressional delegations of discretionary authority to the executive branch in the Immigration Act well before Congress made explicit, in comprehensively amending the Immigration Act, that discrimination on the basis of race, sex, ethnicity, and nationality has no place in controlling immigration. *See infra* Part I.C.3.

Just as Congress "could not have intended to make" considerations like "invidious discrimination against a particular race or group" relevant to the Attorney General's discretionary decision to suspend an alien's deportation from the United States, *id.*, Congress "could not have intended to make" invidious discrimination relevant to the President's discretionary determination regarding whether the entry of a particular alien or class of aliens is "detrimental to the interests of the United States," 8 U.S.C. § 1182(f). That is because invidious discrimination has no connection to whether an alien's residence in the United States would be harmful or damaging to the nation or its interests. Accordingly, not only does the plain language of Section 1182(f) fail to "explicitly" authorize the President to use invidious discrimination in determining whether to deny entry to a class of aliens, *see Greene*, 360 U.S. at 507, it does not even provide a "clear indication" that Congress intended to delegate to the President the power to invidiously discriminate, *see Zadvydas*, 533 U.S. at 696-97.

2.

Nor does the broader context of the Immigration Act, and Section 1182(f)'s place within it, suggest that Congress intended Section 1182(f) to allow the President to suspend the entry of a class of aliens based on invidious discrimination. In Section 1182(a), Congress enumerates numerous specific classes of aliens who are ineligible for visas or admission. These categories encompass, for example, classes of individuals who pose a variety of health, safety, and security risks, or are likely to become public charges. *See generally* 8 U.S.C. § 1182(a). Many of the categories are quite specific, providing particularized reasons why individual aliens may be deemed inadmissible. For example, aliens who have been convicted of certain crimes, served as foreign government officials and committed "particularly severe violations of religious freedom," or participated in the commission of torture are inadmissible. 8 U.S.C. § 1182(a)(2)(A), (G); *id.* § 1182(a)(3)(E)(iii). Likewise, Section 1182(a) deems inadmissible aliens who have been members of a totalitarian or Communist party, abused their status as student visa holders, or "engaged in the recruitment or use of child soldiers." *Id.* § 1182(a)(3)(D); *id.* § 1182(a)(6)(G); *id.* § 1182(a)(3)(G).

Importantly, most of the categories of inadmissible classes of aliens Congress sets forth in Section 1182(a) relate to past *conduct* by an alien that renders the alien particularly dangerous to the interests of the United States. *E.g.*, § 1182(a)(2); § 1182(a)(3); § 1182(a)(6)(E); § 1182(a)(8)(B); § 1182(a)(9)(A). And, in accordance with Congress's decision to define categories of inadmissible aliens largely based on individual conduct and responsibility rather than considerations over which aliens have no control, none of the Section 1182(a) categories render a class of aliens inadmissible solely on the basis of religion or of race, national origin, or other immutable characteristic.

Notwithstanding Congress's enumeration of the many general and specific categories and classes of aliens that the executive branch may or must deem inadmissible—and its failure to include any category defined by race, national origin, or religion alone—the Government argues that, in enacting Section 1182(f), Congress delegated to the President the authority to deny entry to any class of aliens for any reason whatsoever, necessarily including for invidiously discriminatory reasons. Appellants' Br. at 28-29. But in construing a statutory provision, we must, if at all possible, avoid a construction "that would render another provision [in the same statute] superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010). And reading Section 1182(f) as conferring on the President the unbridled authority to deny entry to any class of aliens would impermissibly render superfluous the numerous specific classes of inadmissible aliens that Congress has enumerated in Section 1182(a).

The District of Columbia Circuit reached an identical conclusion in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ginsburg, J.). There, the court considered 8 U.S.C. § 1182(a)(27) ("Subsection (27)"), which required the Attorney General to exclude an alien if the Attorney General had reason to believe that the alien sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." 785 F.2d at 1047 (internal quotation marks omitted) (quoting 8 U.S.C. § 1182(a)(27) (1982)). The question at issue was whether Subsection (27) allowed the Attorney General to "exclude aliens whose entry might threaten [United States'] foreign policy objectives simply because of their membership in Communist organizations," *id.* at 1057, when an adjacent provision in the statute, 8 U.S.C. § 1182(a)(28) ("Subsection (28)"), specifically dealt with exclusion of aliens who were or previously had been members of any Communist party, *Abourezk*, 785 F.2d at 1048. Then-Judge (now Justice) Ginsburg concluded that reading the Attorney General's vague and generalized delegated authority under Subsection (27) to allow exclusion on such a basis would impermissibly render Subsection (28) "superfluous." *Id.* at 1057.

"To preserve the significance of both sections, and the congressional intent that guided their adoption," the court held that the Attorney General could not rely on Subsection (27) to exclude aliens who were or had been members of a Communist party unless "the reason for the threat to the 'public interest[,] . . . welfare, safety, or security'" that the Attorney General put forward as a basis for barring entry under Subsection (27) was "*independent of* the fact of membership in or affiliation with the proscribed organization." *Id.* at 1058 (alterations in original) (quoting 8 U.S.C. § 1182(a)(27)). Put differently, the court prohibited the executive branch from using the general exclusionary authority conferred by Congress in Subsection (27) to circumvent the more specific provision in Subsection (28) dealing with exclusion of aliens affiliated with the Communist party. *Id.* at 1057-58.

For the same reason, the President's reliance on Section 1182(f) as a basis for Section 2(c)'s suspension on entry also is inconsistent with Section 1182(a)(3)(B), which includes "specific criteria for determining terrorism-related inadmissibility." *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). Recall that the Executive Order justified the President's suspension on entry, in part, on grounds that certain nationals of the six countries were members of terrorist organizations or previously had engaged in acts of terrorism and, therefore, that admitting aliens from those countries would be detrimental to the interests of the United States. *See supra* Part I.B.

Section 1182(a)(3)(B) renders inadmissible aliens who have been, are, or may in the future be connected to or engaged in terrorist activity, including aliens who have "engaged in a terrorist activity"; those whom government officials know or have reasonable cause to believe are "likely to engage after entry in any terrorist activity"; those who have "incited terrorist activity"; and those who "endorse[] or espouse[] terrorist activity or persuade[] others to" do so or who "support a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i). That subsection also provides detailed definitions of "terrorist activity," "terrorist organization," the act of "engag[ing] in terrorist activity," and "representative" of a terrorist organization. *Id.* § 1182(a)(3)(B)(iii)-(vi).

Congress established these "specific criteria for determining terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140, against the backdrop of the executive branch's exclusion of aliens based on "mere membership in an organization, some members of which have engaged in terrorist activity" even when there was no indication that *the alien seeking admission* was himself engaged in such activity. H.R. Rep. No. 100-882, at 19 (1988). By enacting specific provisions regarding the inadmissibility of aliens who are or have been engaged in terrorist activity, Congress sought to make clear that "the definitions of 'terrorist activity' and 'engages in terrorist activity' must be applied on a case by case basis" and that "simple membership in any organization . . . is not *per se* an absolute bar to admission to the United States"—whether under the President's general authority to bar entry or otherwise. *Id.* at 30.

If Congress has deemed it unlawful for the President to absolutely bar the entry of aliens who *are members of an organization* that includes some members who engage in terrorism, it defies logic that Congress delegated to the President in Section 1182(f) the far broader power to absolutely bar the entry of aliens who *happen to have been born in a particular country*, within the borders of which some individuals have engaged in terrorism. Indeed, this is precisely why courts apply the canon of statutory construction "that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal quotation marks omitted). When, as here, a statute includes "a general authorization [Section 1182(f)] and a more limited, specific authorization [Section 1182(a)(3)(B)] . . . side-by-side" that canon requires that "[t]he terms of the specific authorization must be complied with" in order to avoid "the superfluity of a specific provision that is swallowed by the general one." *Id.* Accordingly, Section 1182(a)(3)(B), not Section 1182(f), is the congressionally authorized mechanism for the President to deny entry to aliens whom he concludes are detrimental to the United

States because they pose a threat of engaging in terrorist activities. *See Abourezk*, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under Section 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*." (emphasis added)).

Interpreting Section 1182(f) to allow the President to suspend the entry of aliens based solely on their race, nationality, or other immutable characteristics also would conflict with 8 U.S.C. § 1152(a), which provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Congress passed Section 1152(a) in 1965, more than a decade after it enacted Section 1182(f), as part of a comprehensive revision to the Immigration Act intended to eliminate nationality-based discrimination in the immigration system. *See infra* Part I.C.3.

Section 1152(a) deals with issuance of *immigrant visas*, rather than entry, which is governed by Section 1182. Nonetheless, reading Section 1182(f) as authorizing the President to deny entry based on invidious discrimination would place Section 1182(f) in conflict with Section 1152(a), which prohibits invidious discrimination in the issuance of visas. In particular, the Immigration Act authorizes the executive branch to refuse to issue a visa to any alien who "is ineligible to receive a visa or such other documentation under section 1182." 8 U.S.C. § 1201(g). As the Government concedes, the President's exercise of his authority under Section 1182(f) to deny entry to aliens from the six predominantly Muslim countries, were it lawful, also would bar, by virtue of Section 1201(g), such aliens from obtaining visas, including *immigrant* visas. This would be the very result Congress sought to avoid in ending nationality-based discrimination in the issuance of immigrant visas through its passage of Section 1152(a).

Accordingly, Section 1182(f)'s function within the Immigration Act does not clearly indicate that Congress intended to delegate to the President the authority to suspend the entry of aliens based on invidious discrimination. On the contrary, construing Section 1182(f) as broadly authorizing the President to engage in invidious discrimination in denying entry would render superfluous the numerous categories of inadmissible aliens Congress took pains to identify in Section 1182(a), including the provisions directly addressing aliens who pose a risk of engaging in terrorist activities, and conflict with Section 1152(a)'s prohibition on discrimination based on race, nationality, and other immutable characteristics.

3.

Reading Section 1182(f) as allowing the President to deny entry to classes of aliens based on invidious discrimination also would contradict the "object and policy" underlying the Immigration Act. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455. Although the specific language of Section 1182(f) dates to 1952, Congress "comprehensive[ly] revis[ed]" the Immigration Act in 1965 (the "1965 Revisions"). *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 78 (1964) (statement of Sen. Fong).

Those revisions were drafted concurrently with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and enacted at the height of the civil rights movement with the express purpose of "eliminat[ing] the national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965); *see also S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 3*, 88th Cong. 107 (1964) (statement of Sen. Hart) ("A law that says that one man is somewhat less than another simply because of accident of his place of birth is not tolerable in the year 1964. A formula based on equality and fair play must be enacted. Selection should be based primarily on questions of our own national interest.").

Prior to the 1965 Revisions, the Immigration Act employed nationality-based quotas, limiting the number of immigrants admissible to the nation each year based on nation of birth. President Kennedy called on Congress to repeal the nationality-based quota system, condemning it as a system "without basis in either logic or reason" that "neither satisfie[d] a national need nor accomplishe[d] an international purpose" but instead "discriminate[d] among applicants for admission into the United States on the basis of accident of birth." Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, 1963 PUB. PAPERS 594, 595 (July 23, 1963). After President Kennedy's assassination, President Johnson renewed Kennedy's request for "the elimination of the national origins quota system," which he described as "incompatible with our basic American tradition" and "our fundamental belief that a man is to be judged—and judged exclusively—on his worth as a human being." Special Message to the Congress on Immigration, 1965 PUB. PAPERS 37, 37, 39 (Jan. 13, 1965).

The 1965 Revisions answered President Kennedy's and President Johnson's calls. Congress explained that the 1965 Revisions abolished nationality-based discrimination in the immigration system in order to "firmly express in our immigration policy the dedication which our nation has to the principles of equality, of human dignity, and of the individual worth of each man and woman." *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 1*, 88th Cong. 4 (1964) (statement of Sen. Kennedy). Time and again Congress connected the need to eliminate the nationality-based quota system to American "tenets of equality irrespective of race, creed, or color" and emphasized that abolishing nationality-based quotas "demonstrat[ed] to the whole world that we practice what we preach, and that all men are equal under law." *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 100-01 (1964) (statement of Sen. Fong); *see also id. Vol. 1*, at 9 (statement of Sen. Hart) (explaining that the 1965 Revisions abolished the "irrational . . . national origins concept, which said in clear and echoing words that the people of some nations [we]re more welcome to America than others" based on "[a]rbitrary ethnic and racial barriers").

Upon signing the bill into law at Liberty Island, New York, President Johnson lauded the end of the nationality-based discrimination that previously defined the American system of immigration, describing the 1965 Revisions as abolishing "the harsh injustice of the national origins quota system," which "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." 1965 PUB. PAPERS 1037, 1038-39 (Oct. 3, 1965). As a result of the 1965 Revisions, immigrants would be permitted to come to America "because of what they are, and *not because of the land from which they sprung*." *Id.* at 1039 (emphasis added).

To effect its purpose of eliminating discrimination in the immigration system, Congress stripped the Immigration Act of all provisions expressly authorizing national origin-based invidious discrimination and added Section 1152(a)(1)'s prohibition on discrimination in the issuance of visas based on nationality and other immutable characteristics, such as race. As evidenced by Section 1152(a)(1), disregarding national origin in selecting which immigrants to admit to the United States remains a core principle of United States immigration policy. Far from evidencing "any clear indication" that Congress intended the President to have the authority to exercise his Section 1182(f) powers based on invidious discrimination, the "object and policy" of the Immigration Act suggest that Congress *did not* intend to grant the President unbridled authority to engage in invidious discrimination when deciding whether and to what extent to suspend alien entry.[11]

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[11] The Government points to a number of orders promulgated by Presidents pursuant to their authority under Section 1182(f) as evidence that that statutory provision authorizes the President to engage in national origin-based discrimination. But the previous orders the Government cites materially differ from Section 2(c), in that they did not suspend the entry of classes of aliens based on national origin alone, let alone use national origin as a proxy to suspend the entry of a class of aliens based on another invidiously discriminatory basis, such as religion. *See* Proclamation 8693 (July 24, 2011) (suspending the entry of aliens subject to travel bans issued by the United Nations Security Council's resolution barring member nations from permitting the entry of individuals who threaten peace in various nations); Proclamation 8342 (Jan. 22, 2009) (suspending the entry of senior government officials "who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies, or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons"); Proclamation 6958 (Nov. 22, 1996) (suspending the entry of "members of the Government of Sudan, officials of that Government, and members of the Sudanese armed forces" based on the Sudanese government's harboring of individuals who attempted to assassinate the Egyptian President in Ethiopia, in violation of Ethiopian sovereignty); Executive Order No. 12,807 (May 24, 1992) (suspending the entry of "undocumented aliens [entering the United States] by sea" during the mass exodus of Haitian nationals fleeing a military coup, often in dangerous and overcrowded sea vessels); Proclamation 5887 (Oct. 22, 1988) (suspending the entry of "officers and employees" of the Nicaraguan government as nonimmigrants to the United States based on the Nicaraguan government's "unjustified expulsion" of American diplomats and "long-standing . . . suppression of free expression and press and support of subversive activities throughout Central America"); Proclamation 5829 (June 10, 1988) (suspending the entry of "Panamanian nationals . . . who formulate or implement the policies of Manuel Antonio Noriega and Manuel Solis Palma" due to

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In sum, the language of Section 1182(f), related provisions in the Immigration Act, and the "object and policy" of the statute do not "explicitly" state, much less provide a "clear indication," that Congress intended to delegate to the President wholly unconstrained authority to deny entry to any class of aliens, including based on invidiously discriminatory reasons. *See Zadvydas*, 533 U.S. at 697. Accordingly, Section 2(c)—which this Court finds was likely borne of the President's animus against Muslims and his intent to rely on national origin as a proxy to give effect to that animus—exceeds the authority Congress conferred on the President in Section 1182(f). As Judge Friendly put it, "Congress could not have intended to make relevant" to the President's exercise of his delegated authority to suspend the entry of aliens "invidious discrimination against a particular race or group." *Wong Wing Hang*, 360 F.2d at 719 (internal quotation marks omitted).

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those officials' act of "preventing the legitimate government . . . from restoring order and democracy" to Panama).

Of the executive orders cited by the government, President Reagan's suspension on the entry of Cuban nationals *as immigrants* comes closest to a nationality-based suspension on alien entry. Proclamation 5517 (Aug. 22, 1986). But that executive action was not challenged as a violation of either Section 1182(f) or Section 1152(a)(1), and therefore the judiciary never had the opportunity to address whether the order complied with those provisions or the Constitution. Nor does a single, unchallenged executive action "demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence." *Abourezk*, 785 F.2d at 1056.

II.

Invidious "discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). Yet the Government asks this Court to hold that, in enacting Section 1182(f), Congress intended to delegate to the President the power to deny entry to a class of aliens based on nothing more than such aliens' race, national origin, or religion.

One might argue, as President Trump seemed to suggest during the campaign, *ante* at 18-21, that *as a matter of statistical fact*, Muslims, and therefore nationals of the six predominantly Muslim countries covered by the Executive Order, disproportionately engage in acts of terrorism, giving rise to a *factual* inference that admitting such individuals would be detrimental to the interests of the United States. Indeed, viewing the Executive Order in its most favorable light, that is the precisely the rationale underlying Section 2(c). Setting aside the question of whether that *factual finding* is true, or even reasonable—which is, at best, highly debatable given the 180 million people in the countries subject to the suspension on entry and the 1.6 million Muslims worldwide—that is precisely the inference that the Framers of the Constitution and the Reconstruction Amendments concluded was impermissible as a matter of *constitutional law.*[12] *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting). In particular, classifying individuals based solely on their race, nationality, or religion—and then relying on those classifications to discriminate against certain races, nationalities, or religions—necessarily results in placing special burdens on individuals who lack any moral responsibility, a result the Framers deemed antithetical to core democratic principles and destabilizing to our Republic. *Id.*

Even though the Constitution affords greater latitude to the political branches to draw otherwise impermissible distinctions among classes of aliens, the harm to core constitutional values associated with governmental sanctioning of invidious discrimination—and the harm to citizens stemming from the abridgement of those values—demands evidence of "careful and purposeful consideration by those responsible for *enacting **and** implementing* our laws" before such discrimination should be sanctioned by the judiciary. *Greene*, 360 U.S. at 507 (emphasis added). Because Congress did not provide any indication—let alone the requisite "explicit" statement—that it intended to delegate to the President the authority to violate fundamental constitutional values of equality in exercising his authority to deny entry to classes of aliens, I reject the Government's proposed construction of Section 1182(f).

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[12] Our country adheres to the rule of law in preserving core constitutional protections. Thus, when the President can identify no change in circumstances justifying an invidious encroachment on constitutional rights, a simple claim of potential harm to national security does not provide the President with unfettered authority to override core constitutional protections. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that a claim of potential harm to national security does not provide the executive branch with unconstrained authority to override the freedom of the press). Indeed, even the invocation of Congressional war powers to protect national defense do "not remove constitutional limitations safeguarding essential liberties." *Robel*, 389 U.S. at 264-67 (internal quotation marks omitted).

In emphasizing the larger constitutional problems raised by construing Section 1182(f) as a delegation of authority to engage in invidious discrimination, we must not forget that the Constitution embraces equality in order to forestall highly personal harms. Plaintiff John Doe #1, a lawful permanent resident, seeks to be reunited with his wife, an Iranian national, whom Section 2(c) bars from entering the United States. As Justice Jackson explained when confronted with another broad delegation of congressional authority over immigration, "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized [the President] to break up the family of [a lawful permanent resident] or force him to keep his wife by becoming an exile." *Knauff*, 338 U.S. at 551-52 (Jackson, J., dissenting).

THACKER, Circuit Judge, concurring:

I concur in the majority's opinion but write separately for three reasons: (1) I would not consider remarks made by candidate Trump before he took his presidential oath of office; (2) I would nonetheless find that Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of the Second Executive Order ("EO-2") violates the Establishment Clause, based solely on remarks made or sentiments expressed after January 20, 2017; and (3) I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c), as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the Immigration and Nationality Act ("INA").

I.

I agree with the majority's conclusion that Appellees have standing to challenge the constitutionality of § 2(c) of EO-2 and that EO-2 likely violates the Establishment Clause. However, in my view, we need not—and should not—reach this conclusion by relying on statements made by the President and his associates before inauguration.

While on the campaign trail, a non-incumbent presidential candidate has not yet taken the oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, and may speak to a host of promises merely to curry favor with the electorate. Once a candidate becomes President, however, the Constitution vests that individual with the awesome power of the executive office while simultaneously imposing constraints on that power. Thus, in undertaking the Establishment

Clause analysis, I believe we should focus our attention on conduct occurring on President Trump's inauguration date, January 20, 2017, and thereafter. Indeed, for the reasons below, looking to pre-inauguration conduct is neither advisable nor necessary.

A.

In confining my analysis to post-inauguration statements and actions, I do not draw on a blank slate. To begin, "the Establishment Clause protects religious expression from *governmental interference*." *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2003) (emphasis supplied). To this end, Establishment Clause jurisprudence has focused on government action rather than "a[] judicial psychoanalysis" of individuals. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). We have neither the right nor the ability to peer inside an official's "heart of hearts"; indeed, we will "not look to the veiled psyche of government officers"—much less that of *candidates* for public office—to divine the purpose of a law. *Id.* at 862-63.

The Government relies on the doctrines of executive privilege and presidential immunity to contend that EO-2 is essentially unreviewable, arguing that courts "should not second-guess the President's stated purpose by looking beyond the policy's text and operation," and that we should instead apply a "presumption of regularity" to his actions. Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). While I do not agree with this proposition for the reasons ably set forth by Chief Judge Gregory, I do believe the Supreme Court's decisions in the executive privilege and immunity context support confining our review to statements by the President and his administration made after the inauguration, once the President began operating pursuant to Article II. Those decisions explain that the judiciary's ability to probe official, presidential conduct is related to his discharge of *official* power. *See Clinton v. Jones*, 520 U.S. 681, 703 (1997) ("[W]e have long held that when the President takes *official action*, the Court has the authority to determine whether he has acted within the law." (emphasis supplied)); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) ("It is well established that 'a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any *ordinary individual*.'" (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)) (emphasis supplied)). Indeed, the executive privilege—and, by that token, the separation of powers—applies where the President operates within the executive's core constitutional powers. *See Nixon*, 418 U.S. at 708-09. It follows that a president's conduct after he takes office, but not before, carries the imprimatur of official "government" action, and can only then be considered "government interference" under the Establishment Clause. *Mellen*, 327 F.3d at 376.

B.

For more practical reasons, we should also hesitate to attach constitutional significance to words a candidate utters on the campaign trail. Campaign speeches are inevitably scattered with bold promises, but once the dust settles after an election—when faced with the reality of the office and with benefit of wise counsel—a newly inducted public official may act with a different philosophy. Presidents throughout history have dialed back or even reversed campaign promises.[1] To be sure, the President's statements regarding Islam before assuming office reveal religious animus that is deeply troubling. *See, e.g.*, J.A. 346 ("Donald J. Trump Statement on Preventing Muslim Immigration," dated December 7, 2015).[2] Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so.

II.

Even without focusing on any campaign rhetoric, the record in this case amply demonstrates the primary purpose of EO-2 was to ban Muslims from entering the United States in violation of the Establishment Clause. I would thus base our Establishment Clause analysis on the morphing of the First Executive Order ("EO-1") into EO-2, the statements of presidential representatives and advisors, the lack of evidence supporting a purported national security purpose, and the text of and logical inconsistencies within EO-2.

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[1] Indeed, many might argue that this President has repeatedly and regularly dialed back or reversed course on his campaign promises. *See, e.g.*, Priya Krishnakumar et al., *Tracking President Trump's Campaign Promises*, L.A. Times (Apr. 26, 2017), http://www.latimes.com/projects/la-na-pol-trump-100-days-promises/ (reporting President Trump has "scaled back" or "abandoned" 9 out of 31 campaign promises) (saved as ECF opinion attachment).

[2] Given that they were made on the campaign trail, I do not consider as part of my analysis the President's campaign website's archived statements about the plan to ban all Muslims from entering the United States. However, I must note it is peculiar that those statements were removed shortly before we began hearing arguments in this case. *See* Dan Merica, *Trump campaign removes controversial Muslim ban language from website*, CNN (May 8, 2017, 3:37 PM), http://www.cnn.com/2017/05/08/politics/trump-muslim-ban-campaign-website/ (saved as ECF opinion attachment).

The Government argues that we should simply defer to the executive and presume that the President's actions are lawful so long as he utters the magic words "national security." But our system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate. Although the executive branch may have authority over national security affairs, *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)), it may only exercise that authority within the confines of the law, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46, 654-55 (1952) (Jackson, J., concurring); and, of equal importance, it has always been the duty of the judiciary to declare "what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A.

The President issued EO-1 on January 27, 2017. *See* Exec. Order 13,769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 banned citizens of seven majority Muslim nations—Libya, Iran, Iraq, Somalia, Syria, Sudan, and Yemen—from entering the United States. The ban applied to over 180 million Muslims, or just over 10% of the world Muslim population, and was executed without input from relevant cabinet officials. Indeed, the President actively shielded certain officials from learning the contents of EO-1: per then-acting Attorney General Sally Yates, the administration advised "the Office of Legal Counsel

. . . not to tell the attorney general about [EO-1] until after it was over." *Full Transcript: Sally Yates and James Clapper testify on Russian election interference*, Wash. Post (May 8, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference (saved as ECF opinion attachment).

As Rudy Giuliani, an advisor to the President, explained on January 28, 2017, EO-1 did all this with the *purpose* of discriminating against Muslims. Giuliani was quite clear that the President wanted to enact a "Muslim ban" and had assembled a commission to study how to create a "Muslim ban" legally. J.A. 508. Per Giuliani, EO-1 was the President's attempt at a legal "Muslim ban." *Id.*[3]

To further this goal, EO-1 suspended the entry of refugees for 120 days but directed the Secretary of State "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." EO-1, § 5(b).

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[3] Giuliani is purportedly a member, and claims to be chairman, of an expert legal commission assembled to study how to create a lawful way to ban Muslims from entering the country and an acknowledged advisor to the President. *See* J.A. 508-09. Courts routinely analyze statements and reports from presidential commissions such as the one of which Giuliani is a member. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (citing and quoting President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967) to demonstrate importance of privacy in communications); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing Attorney General's Commission on Pornography to establish state's interest in punishing child pornography possession).

The President explained that this exception was designed to give Christians priority in entering the United States as refugees. He said that in Syria,

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the *Christians*. And I thought it was very, very unfair. So we are going to help *them*.

J.A. 462 (emphases supplied).[4] The statements of the President, his advisor, and the text of EO-1 made crystal clear a primary purpose of disfavoring Islam and promoting Christianity.

After the Ninth Circuit upheld the stay of EO-1, the President set about to issue a new executive order. But significantly, in revising the order, the executive branch did not attempt to walk away from its previous discriminatory order. Instead, it simply attempted to effectuate the same discrimination through a slightly different vehicle—the proverbial wolf in sheep's clothing. Indeed, Press Secretary Sean Spicer confirmed that "[t]he principles of the executive order remain the same," J.A. 379,[5] and the President's Senior Policy Advisor, Stephen Miller, described the changes in the new order as "mostly minor technical differences," *id.* at 339.

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[4] Presidential statements necessarily shed light on executive policy. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015) (using presidential statement to show United States' position on status of Jerusalem); *Clinton v. City of New York*, 524 U.S. 417, 495-96 (1998) (Breyer, J., dissenting) (relying on presidential statements to demonstrate effect of Line Item Veto Act).

B.

The President issued EO-2 on March 6, 2017. *See* Exec. Order 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017). Like its predecessor, EO-2 lacks evidentiary support, is logically inconstant, and evinces an intent to discriminate against Muslims.

1.

First, the Government offers very little evidence in an attempt to support the President's ban of approximately 180 million people. EO-2 claims, "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" but cites only two such examples, each of which is weakly related, if at all, to the purported purpose of EO-2. EO-2, § 1(h). One example is from Iraq, but, as Iraq is not part of EO-2, it does not support *this* ban at all. The other example involves a child brought to the United States as a two-year-old. As this two-year-old was ultimately radicalized in the United States and not abroad, this case is unrelated to better screening and vetting—the purported purpose of EO-2. *See* Br. for Cato Institute as Amicus Curiae Supporting Appellees at 12-13, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 19, 2017), ECF No. 185; EO-2, § 1(a), (h).

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[5] When relevant, the press secretary and other White House Official's statements can represent official government position. *See, e.g.*, *Reynolds v. United States*, 123 S. Ct. 975, 984 (2012) (citing to the Office of the Press Secretary to show President's position on registration of sex offenders who committed offenses before enactment of the Adam Walsh Child Protection and Safety Act of 2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 549 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (relying on Office of the White House Press Secretary's statement to identify official executive policy).

In sharp contrast to the dearth of evidence to support the purported purpose of EO-2, 42 bipartisan former national security officials concluded EO-2 "bear[s] no rational relation to the President's stated aim of protecting the nation from foreign terrorism." Corrected Br. for Former National Security Officials as Amici Curiae Supporting Appellees at 4, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 13, 2017), ECF No. 126. In addition, since the issuance of EO-1, a report by the Department of Homeland Security has found that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," likewise undermining any purported security justification for the Order. J.A. 419.

2.

The Government's untenable position is made even worse by the fact that the Government's purported justification for EO-2 does not logically support the ban it created. EO-2 reasoned that people coming from the six banned countries posed an increased risk of committing terrorist acts because, according to the Department of State's Country Reports on Terrorism 2015 (the "Country Reports"), "each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and were unwilling or unable "to share or validate important information about individuals seeking to travel to the United States." EO-2, § 1(d); *see* § 1(e) (citing Country Reports). However, given these conditions as the reason for the ban, and based on the Country Reports, two other majority Christian countries—Venezuela and the Philippines—should have logically been included. *See* U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2015 78-85, 297-98, 308-09, 314-15, 352, 380 (June 2016), https://www.state.gov/documents/organization/258249.pdf (excerpts saved as ECF opinion attachment). Neither country is willing and able to help the Government verify information about people attempting to travel to the United States, and both countries have terrorist organizations operating within their boundaries. Therefore, applying the Government's logic, the potential of a terrorist act from a national of Venezuela or the Philippines would also justify a blanket ban on all nationals from these countries. Interestingly, however, the CIA World Factbook reports that Venezuelan population is, at most, 2% Muslim, and the Philippine population is 5% Muslim. *See* Cent. Intelligence Agency, ***Field Listings: Religions***, World Factbook, https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html (last visited May 23, 2017) (saved as ECF opinion attachment). Thus, the Government has not consistently applied the criteria it claims it used, and the reason seems obvious—and inappropriate.

Moreover, if the conditions in the six countries subject to EO-2 truly motivated the Government's travel ban, the Government would have based its ban on *contact* with the listed countries, not *nationality*. Under

EO-2, a person who is a citizen of Syria would not be allowed to enter the United States even if they had never set foot in Syria. However, a person who lived his or her whole life in Syria but never obtained Syrian citizenship, and had even recently lived near terrorist-controlled regions of Syria, would be unaffected and freely allowed to enter the United States.[6] As a result, EO-2 is at once both overinclusive and underinclusive and bears no logical relationship to its stated objective.

Last, but by no means least, EO-2 identifies and discriminates against Muslims on its face. It identifies only Muslim majority nations, thus banning approximately 10% of the world's Muslim population from entering the United States. It discusses only Islamic terrorism. And, it seeks information on honor killings —a stereotype affiliated with Muslims[7]—even though honor killings have no connection whatsoever to the stated purpose of the Order.[8]

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[6] Syrian citizenship is not based on country of birth. *See* Legislative Decree 276-Nationality Law [Syrian Arab Republic], Legislative Decree 276, 24 November 1969. Therefore, a person can have Syrian citizenship without ever setting foot in the country and a person who lives in Syria for their entire lifetime may not have Syrian citizenship.

[7] Honor killings, in which family members kill one of their own (usually a woman) under the belief that the murder is necessary to vindicate the family's honor, occur within societies of many faiths and, notably, in countries that were not subject to either Executive Order. *See* Kimberly Winston, *Activists: Trump Call for Honor Killings Report Targets Muslims*, USA Today (March 7, 2017, 3:06 PM), https://www.usatoday.com/story/news/2017/03/07/activists-trump-call-honor-killings-report-targets-muslims/98861230/ (saved as ECF opinion attachment).

C.

All of this evidence—arising after January 20, 2017—leads to only one conclusion: the principal motivation for the travel ban was a desire to keep Muslims from entering this country. EO-2 does not pass constitutional muster. Our constitutional system creates a strong presumption of legitimacy for presidential action; however, this deference does not require us to cover our eyes and ears and stand mute simply because a president incants the words "national security." The Constitution and our system of democracy requires that we ensure that any and every action of the President complies with the protections it enshrines.

III.

Finally, I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of EO-2, as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the INA.[9]

Section 1182(f) of Title 8 states that the President may "suspend the entry of all aliens or any class of aliens" "for such period as he shall deem necessary" when the President finds that such entry "would be detrimental to the interests of the United States." However, § 1152(a)(1)(A), which was promulgated after

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[8] EO-1 also sought information on honor killings. *See* EO-1 § 10(a)(iii).

[9] I join in Part I of Judge Keenan's opinion, concluding that the plaintiffs possess standing to bring a claim under the INA.

§ 1182(f), states that no person seeking an immigrant visa[10] "shall . . . be discriminated against" on the basis of "nationality." To be sure, EO-2 discriminates on the basis of nationality, suspending entry of "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen" (the "Designated Countries"). EO-2, § 2(c). The crux of the Government's argument, however, is that § 1152(a)(1)(A) does not prevent the President, acting pursuant to his § 1182(f) authority, from suspending *entry* based on nationality, even if that suspension necessarily mandates the denial of immigrant visas based on nationality. This is nonsensical. I find this argument to contravene longstanding canons of statutory construction as well as the text and effect of EO-2 itself.

A.

Our jurisprudence gives ample guidance for a situation in which two statutes conflict with one another. But the Government believes § 1182(f) and § 1152(a)(1)(A) do not conflict at all. Instead, the Government posits that the two statutes "address different activities handled by different government officials." Appellants' Br. 31 (internal quotation marks omitted). The Government thus believes the specific visa denial warranted by EO-2 falls squarely within the broad ambit of § 1182(f).

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[10] Immigrant visas are issued to persons seeking admission to the United States with the goal of obtaining lawful permanent residence status. *See* 8 U.S.C. §§ 1101(a)(15), (20), 1201(a)(1)(A). Those seeking admission for other purposes, such as business, study, or tourism, typically receive nonimmigrant visas. *See id.* §§ 1101(a)(15), 1201(a)(1)(B). I would decline Appellees' invitation to extend § 1152(a)(1)(A) to nonimmigrant visas.

I will first address whether we are faced with any real conflict between these provisions. "When two acts touch upon the same subject, both should be given effect if possible." *United States v. Mitchell*, 39 F.3d 465, 472 (4th Cir. 1994) (citation omitted). And "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). We must "fit, if possible, all parts into an harmonious whole." *Id.* (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). In this vein, 8 U.S.C. § 1201(g) provides, "No visa . . . shall be issued to an alien . . . ineligible to receive a visa . . . under section 1182. . . . " Thus, when a President suspends entry to a national from a Designated Country and renders him inadmissible under § 1182(f), there is a strong argument that the alien *must be* denied a visa. *See generally* 8 U.S.C. § 1182 (titled "Inadmissible aliens"). To conclude that the two statutes operate independently and deal with totally separate executive functions would be to ignore this link.

Furthermore, although the Government contends the provisions at issue do not touch upon the same subject—asserting that the visa issuance process is a "different activity" than suspension of entry—its own arguments and the text and operation of EO-2 belie this notion.

EO-2 directs that the entry of nationals of the Designated Countries be suspended, but the Government admits the Department of State will "implement th[e] suspension [of entry] by *declining to issue visas* to aliens who are covered by the Order and who are not found eligible for a waiver." Appellants' Br. 34 n.12 (emphasis supplied); *see also* J.A. 729 (Government counsel admitting immigrant visa applicants "will be denied a visa if they are a national from the listed country"). EO-2 also delineates who is entitled to or restricted from entry *based on* one's visa status. *See* EO-2, § 3(a) (defining the scope of entry suspension to those outside the United States on the effective date of the order who "did not have a valid visa" on the date of the now-revoked first executive order; and "do not have a valid visa" as of the effective date of EO-2). Further, the Government offers the precarious justification that "when an alien subject to [EO-2] is denied an immigrant visa, he is not suffering discrimination on the basis of nationality of the sort prohibited by Section 1152(a)(1)(A); instead, he is being denied a visa because he has been validly barred from entering the country." Appellants' Br. 33. Following this circular logic, an alien is barred from entry because he does not have and cannot attain a visa, but he is denied a visa because he is barred from entry. It is clear that in EO-2, the visa issuance and entry concepts are intertwined to the point of indistinguishability.[11]

The Government also contends it would be a "fruitless exercise" and would "make no sense" to enable issuances of immigrant visas pursuant to § 1152(a)(1)(A), when those aliens receiving the visas would nonetheless be barred from entering the United States once they reach our borders. Appellants' Br. 31, 35. I fail to see how permitting a national of one of the Designated Countries to continue with her immigrant visa process would be fruitless, unless, of course, the Government intends to use the ban as a gateway to a much more permanent ban, ultimately sweeping in those nationals whose processes were halted by the order. *See* Section 1(a) (stating that a "Policy and Purpose" of the EO-2 is to improve the protocols and procedures "associated with the visa-issuance process"). Moreover, being a visa holder, even if one maybe temporarily inadmissible, carries with it a certain status with regard to EO-2. *See, e.g.*, EO-2, § 3(c) (suggesting that one receiving a visa from U.S. Customs and Border Protection during the protocol review period could gain entry to the United States).

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[11] Indeed, Section 3 of EO-1, the predecessor to EO-2's Section 2, was entitled "Suspension of *Issuance of Visas* and Other Immigration Benefits to Nationals of Countries of Particular Concern."

I likewise fail to see how allowing one to continue with her incipient visa process would "make no sense," when that national could be one step closer to ultimately reuniting with her loved ones. For example, in the case of John Doe #1, his wife could conceivably proceed with her visa application interview, obtain her visa, and once the protocol review period has ended, join her husband in the United States as soon as possible thereafter, quickly redressing John Doe #1's constitutionally cognizable injury of being separated from an immediate family member.

For all of these reasons, I would reject the Government's argument that § 1152(a)(1)(A) and § 1182(f) operate in separate statutory spheres. I believe § 1152(a)(1)(A)'s prohibition limits the President's § 1182(f) authority in the issuance of EO-2. As the Government itself mentioned in its opening brief, "courts judge the legitimacy of a law by what it says and does." Appellants' Br. 2. Here, the ultimate effect of what EO-2 actually *does* is require executive agencies to deny visas based on nationality.

Therefore, I next turn to the traditional canons of statutory construction to determine how to resolve this tension between § 1182(f) and § 1152(a)(1)(A). I approach this analysis mindful that the executive branch's authority over immigration affairs is conferred and cabined by Congress. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (The Executive's "broad discretion over the admission and exclusion of aliens . . . extends only as far as the statutory authority conferred by Congress.").

B.

When faced with provisions that apparently conflict, we must give effect to each provision, with a later enacted, more specific statute trumping an earlier, more general one. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").

First, § 1152(a)(1)(A) must be given effect. Reading § 1182(f) as bestowing upon the President blanket authority to carry out a suspension of entry, which involves rejecting a particular country's immigrant visa applications as a matter of course, would effectively nullify the protections in § 1152(a)(1)(A) and create an end-run around its prohibitions against discrimination. It would collapse the statutory distinction between entry and visa issuance, *see* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."), and ultimately allow the chief executive to override any of Congress's carefully crafted visa criterion or grounds for inadmissibility.

Second, § 1182(f) was enacted in 1952, but § 1152(a)(1) was enacted in 1965 as part of a sweeping amendment of the INA. We assume that "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010). Thus, we must accept that Congress knew about the President's broad authority in § 1182(f) when it enacted § 1152(a)(1)(A), and the latter lists several exceptions, none of which include the former. *See* § 1152(a)(1)(A) (exempting §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153). Section 1152(a)(1)(A) is also more specific, applying to demarcated types of discrimination and a certain type of visa. *See Radzanower*, 426 U.S. at 153 (preference should be given to statute involving a "narrow [and] precise . . . subject").

Finally, the Government's suggestions of potential statutory discord are unconvincing. For example, the Government relies on 8 U.S.C. § 1185(a)(1), which makes it unlawful for any alien to enter the United States "except under such reasonable rules, regulations, and orders, and subject to such limitations" prescribed by the President. But this provision merely acts as an implementation provision flowing from § 1182(f), which, as stated above, is limited by § 1152(a)(1)(A). In addition, § 1152(a)(1)(B) is of no concern to this analysis given that it applies to the Secretary of State, and § 2(c) of EO-2 bars visa issuance to nationals of the Designated Countries, rather than regulating visa processing locations.

C.

For these reasons, I find Appellees' statutory argument that EO-2 violates § 1152(a)(1)(A) because it requires the denial of immigrant visas on the basis of nationality the more compelling argument. Therefore, I would conclude that Appellees have shown a likelihood of success on the merits on this point. I otherwise join Judge Keenan's opinion, with the exception of Part II.A.i.

IV.

In conclusion, I believe the district court's injunction should be affirmed based on the majority's Establishment Clause conclusion, although I would do so based only on consideration of post-inauguration conduct. I also believe that the plaintiffs will likely succeed on the merits of their argument that EO-2 violates the INA for the reasons stated by Judge Keenan and set forth in Part III of this opinion.

NIEMEYER, CIRCUIT JUDGE, with whom JUDGE SHEDD and JUDGE AGEE join, dissenting:

The district court issued a nationwide preliminary injunction against Executive Order No. 13,780 issued by President Donald Trump on March 6, 2017, to suspend temporarily, while vetting procedures could be reviewed, the entry of aliens from six countries, reciting terrorism-related concerns. While the court acknowledged the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to enter the Order and also acknowledged that the national security reasons given on the face of the Order were legitimate, the court refused to apply *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which held that courts are precluded from "look[ing] behind" "facially legitimate and bona fide" exercises of executive discretion in the immigration context to discern other possible purposes, *id.* at 770. Relying on statements made by candidate Trump during the presidential campaign, the district court construed the Executive Order to be directed against Muslims because of their religion and held therefore that it likely violated the Establishment Clause of the First Amendment.

I conclude that the district court seriously erred (1) by refusing to apply the Supreme Court's decision in *Mandel*; (2) by fabricating a new proposition of law —indeed, a new rule—that provides for the consideration of campaign statements to recast a later-issued executive order; and (3) by radically extending Supreme Court Establishment Clause precedents. The district court's approach is not only unprecedented, it is totally unworkable and inappropriate under any standard of analysis.

The majority reworks the district court's analysis by applying *Mandel*, albeit contrary to its holding, to defer only to the facial *legitimacy* of the Order but not to its facial *bona fides*, despite the *Mandel* Court's holding that "when the Executive exercises this power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of the plaintiffs. *Mandel*, 408 U.S. at 770 (emphasis added). In addition, the majority, after violating *Mandel*, then adopts the same new rule of law adopted by the district court to consider candidate Trump's campaign statements to find the Executive Order's stated reasons "pretext[ual]," *ante* at 51, and then to rewrite the Order to find it in violation of the Establishment Clause. This too is unprecedented and unworkable.

Accordingly, I respectfully dissent. I would vacate the district court's injunction.

I

A

The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, requires that an alien, to obtain admission into the United States, must normally both possess a visa and be admissible upon his or her arrival at a port of entry, *id.* §§ 1181, 1182(a)(7), 1201(h).

Exceptions exist which allow for entry without a visa. For instance, Congress has established a Visa Waiver Program, which allows nationals of certain countries to seek temporary admission into the United States for 90 days or less. 8 U.S.C. § 1187. In December 2015, however, Congress excluded aliens from admission under this program who are dual nationals of or have recently visited Iraq, Syria, any country designated by the Secretary of State to be a state sponsor of international terrorism, or any country that the Secretary of Homeland Security has deemed to be a country or area of concern. Pub. L. No. 114-113, div. O, tit. II, § 203, 129 Stat. 2988, 2989-91 (2015) (codified at 8 U.S.C. § 1187(a)(12)). At all times relevant to this litigation, the countries designated by the Secretary of State to be state sponsors of international terrorism have been Iran, Sudan, and Syria. U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 4, 299-302 (June 2016), https://perma.cc/KJ4B-E4QZ. Also, in February 2016, the Department of Homeland Security ("DHS") excluded recent visitors to and nationals of Libya, Somalia, and Yemen from the Program. DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://perma.cc/87CZ-L4FU.

Even when an alien possesses a visa, the alien must also be *admissible* to the United States when arriving at a port of entry. Congress has accorded the President broad discretion over the admission of aliens, providing in 8 U.S.C. § 1182(f):

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

In addition, Congress has specified that the entry of aliens is governed by "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

B

On January 27, 2017, the President issued Executive Order 13,769, 89 Fed. Reg. 8977, which was challenged in several courts. A district court in Washington enjoined nationally the enforcement of several provisions of that order, *see Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and the Ninth Circuit declined to stay the district court's injunction pending appeal, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

Rather than challenge that decision further, the President issued a revised order—Executive Order 13,780—on March 6, 2017, entitled, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13,209, which is the Order before us. This Order revoked the earlier order and rendered moot the challenge to the earlier order.

The first Section of the revised Executive Order announces the policy goals of "protect[ing] the Nation from terrorist activities by foreign nationals" by "improv[ing] the screening and vetting protocols and procedures associated with the visa-issuance process and the [United States Refugee Admissions Program]" that "play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." Order Preamble, § 1(a).

The Order then recites the previous Administration's response to terrorist activities in the countries covered by the current Order:

> Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen . . . had [during the prior Administration] already been identified as presenting heightened concerns about terrorism and travel to the United States. . . . [And] [i]n 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of . . . statutory factors related to terrorism and national security. . . . Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

Order § 1(b)(i). Describing further the threats posed generally by these nations, the Order states:

> Nationals from the countries previously identified . . . warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that condi-

> tions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

Order § 1(d). Finally, the Order describes as follows "the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States," relying on the Department of State's *Country Reports of Terrorism 2015*:

> (i) Iran. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and . . . al Qa'ida. . . . Iran does not cooperate with the United States in counterterrorism efforts.
>
> (ii) Libya. Libya is an active combat zone. . . . In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. . . . The United States Embassy in Libya suspended its operations in 2014.
>
> (iii) Somalia. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. . . .
>
> (iv) Sudan. Sudan has been designated as a state sponsor of terrorism since 1993 because of its sup-

> port for international terrorist groups, including Hizballah and Hamas . . . [and it] provided safe havens for al-Qa'ida and other terrorist groups to meet and train. . . . [E]lements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.
>
> (v) Syria. Syria has been designated as a state sponsor of terrorism since 1979. [Although] [t]he Syrian government is engaged in an ongoing military conflict against ISIS[,] . . . ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.
>
> (vi) Yemen. . . . Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited [internal] conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations. . . .

Order § 1(e). Based on this collection of information, the Order concludes that, "[i]n light of the conditions in these six countries, until [an] assessment of current screening and vetting procedures . . . is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Order § 1(f).

The operative provisions, as relevant here, are stated in Section 2 of the Order, which directs the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." Order § 2(a). The Secretary of Homeland Security is then directed to present a report with his findings to the President. Order § 2(b). And finally, pending the review, the Order prohibits the entry of certain nationals from the six countries, as follows:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the

limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

Order § 2(c).

The referenced limitations in Section 3 specify that the suspension does not apply to nationals of the designated countries who are inside the United States on the effective date of the Order (March 16, 2017) or who had a valid visa at 5:00 p.m. on January 27, 2017 or on the effective date of the Order. Order § 3(a). The Section goes on to create exceptions that allow the entry of lawful permanent residents of the United States, foreign nationals with valid travel documents that are not visas, dual nationals traveling on passports issued by a non-designated country, foreign nationals traveling on diplomatic visas, foreign nationals granted asylum, refugees already admitted to the United States, and any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture. Order § 3(b). Finally, Section 3 allows consular officers or the Commissioner of U.S. Customs and Border Protection to "decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest." Order § 3(c).

In sum, nationals of the designated countries who lack visas were, prior to the Order, unable to enter the United States under the Visa Waiver Program, 8 U.S.C. § 1187. Nationals who possess visas are exempted from the Order, as are most other nationals who have the ability to enter the United States through another travel document. *See* Order §§ 2, 3. The Order thus affects nationals of the designated countries who, lacking visas, were already unable to enter the United States but who had hoped to obtain a visa and to enter the United States within the 90 day period of the Order.[1]

C

The plaintiffs are three organizations and six individuals. Two of the organizations, the International Refugee Assistance Project ("IRAP") and HIAS, Inc., provide legal assistance and aid to refugees, while the third organization, the Middle East Studies Association ("MESA"), is an organization of students and scholars of Middle Eastern studies. The six individual plaintiffs are U.S. citizens or lawful permanent residents who alleged that the Order would prevent or delay foreign-national family members from entering the United States.

On March 10, 2017, after Executive Order 13,780 was issued but before it went into effect, the plaintiffs filed their operative complaint, as well as a motion for a preliminary injunction to enjoin enforcement of the Order. They alleged, as relevant here, that the Order violates the Establishment Clause of the First Amendment and 8 U.S.C. § 1152(a), which prohibits discrimination based on nationality in issuing immigrant visas. After expedited briefing and argument, the district court entered a nationwide preliminary injunction that barred enforcement of Section 2(c) of the Order.

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[1] Other portions of the Order, not at issue here, suspend adjudication of applications under the Refugee Program for 120 days, subject to case-by-case waivers, and limit to 50,000 the number of refugees admitted in fiscal year 2017. Order § 6(a)-(c).

The district court began its analysis by concluding that at least three of the individual plaintiffs had standing.

On the merits, the court concluded that the plaintiffs were likely to succeed on their claim that the Order violated the Establishment Clause. Although the court acknowledged that "the Second Executive Order is facially neutral in terms of religion" and that "national security interests would be served by the travel ban," it nonetheless looked behind the Order to statements made during the presidential campaign by candidate Trump and concluded, based on these statements, that the Order was likely motivated by anti-Muslim animus. In looking behind the Order, the court refused to apply *Mandel,* stating as its reason that *Mandel* applied to the review of decisions by immigration officers denying visas and "does not apply to the promulgation of a sweeping immigration policy at the highest levels of the political branches."

The district court also found that the plaintiffs were likely to succeed on a small portion of their statutory claim, concluding that the Order conflicted with federal law insofar as it had "the specific effect of halting the issuance of [immigrant] visas to nationals of the Designated Countries." Otherwise, it found that "an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) [did] not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas." (Internal quotation marks omitted).

From the entry of the preliminary injunction, the government filed this appeal.

II

In affirming the district court's ruling based on the Establishment Clause, the majority looks past the face of the Order's statements on national security and immigration, which it concedes are neutral in terms of religion, and considers campaign statements made by candidate Trump to conclude that the Order denigrates Islam, in violation of the Establishment Clause. This approach (1) plainly violates the Supreme Court's directive in *Mandel*; (2) adopts a *new rule of law* that uses campaign statements to recast the plain, unambiguous, and religiously neutral text of an executive order; and (3) radically extends the Supreme Court's Establishment Clause holdings. I address these legal errors in turn.

A

I begin with the majority's failure faithfully to apply *Mandel*.

In *Mandel*, Ernest Mandel, a Belgian citizen, was denied a nonimmigrant visa to enter the United States to participate in conferences and to give speeches. In denying his admission to the United States, the Attorney General relied on 8 U.S.C. §§ 1182(a)(28)(D), (G)(v) and 1182(d)(3)(A), which provided that aliens who advocate or publish "the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship" shall be excluded from admission to the United States unless granted a waiver by the Attorney General. Mandel admitted that he was a Marxist who advocated the economic, governmental, and international doctrines of world communism, and the Attorney General refused to grant him a waiver. *Mandel*, 408 U.S. at 756, 759. University professors in the United States, who had invited Mandel to the United States to speak, as well as Mandel himself, filed an action challenging the constitutionality of the relevant statutory provisions and the Attorney General's exercise of his authority under those provisions. *Id.* at 759-60. They alleged that the relevant statutory provisions and the Attorney General's denial of a waiver were unconstitutional because they deprived the American plaintiffs of their First Amendment rights to hear and meet with Mandel. *Id.* at 760.

Despite its conclusion that the professors' First Amendment rights were well-established, the Supreme Court held that Mandel's exclusion was lawful. At the outset, the Court explicitly accepted that Mandel's exclusion implicated the First Amendment. It found, however, that its "[r]ecognition that First Amendment rights are implicated . . . [was] not dispositive of [its] inquiry." *Mandel*, 408 U.S. at 765. The Court stated that, based on "ancient principles of the international law of nation-states," Congress could categorically bar those who advocated Communism from entry, explaining that "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Id.* The Court repeated Justice Harlan's holding that the government's power "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." *Id.* at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)).

The Court then rejected the argument that the Attorney General's denial of a waiver violated the First Amendment. The Court forbade judges from interfering with the executive's "facially legitimate and bona fide" exercise of its immigration authority or balancing that exercise against constitutional rights. *Mandel*, 408 U.S. at 770. Specifically, it recognized that "Congress has delegated conditional exercise of this power [of exclusion] to the Executive" and declined to apply more scrutiny to executive exercise of that power than it would to Congress's own actions. *Id.* It concluded:

> We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, *the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests* of those who seek personal communication with the applicant.

Id. (emphasis added).

The holding of *Mandel* ineluctably requires that we vacate the district court's preliminary injunction. The similarities between *Mandel* and this case are numerous and significant. In both cases, Congress delegated power to the executive to prohibit the entry of a certain class of foreign nationals. 8 U.S.C. § 1182(a)(28)(D), (d)(3)(A) (1970); 8 U.S.C. § 1182(f) (2016). The plaintiffs in each case challenged the executive's exercise of that statutory discretion as violative of their individual First Amendment rights. The court in *Mandel* rejected this challenge because, even assuming a constitutional violation lurked beneath the surface of the executive's implementation of his statutory authority, the reasons the executive had provided were "facially legitimate and bona fide." We must thus reject this similar challenge today.

The Court has consistently reaffirmed and applied *Mandel*'s holding. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court declined to scrutinize a statute that gave different immigration status to a child born out of wedlock depending on whether it was the child's mother or father who was a citizen or lawful permanent resident. Although that statute involved two suspect classifications—gender and legitimacy—the Court, citing *Mandel*, nonetheless concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. *Id.* at 799. Accordingly, in response to the plaintiffs' arguments that the distinction was based "on an overbroad and outdated stereotype," the Court indicated that "this argument should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.

And both *Mandel* and *Fiallo* were reaffirmed more recently in Justice Kennedy's opinion in *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment). In *Din*, the Court considered a suit by a United States citizen who alleged that the government deprived her of a liberty interest protected under the Due Process Clause by denying her husband's visa application without adequate explanation, providing only a citation to the provision under which the visa was denied. Justice Kennedy, writing for himself and Justice Alito to provide the fourth and fifth votes in favor of the government, stated that "[t]he reasoning and the holding in *Mandel* control here" and that the reasoning of *Mandel* "has particular force in the area of national security." *Id.* at 2140. He concluded that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that, because the government had provided Din with a facially legitimate and bona fide reason for its action, Din had no viable constitutional claim. *Id.* at 2141.

The plaintiffs can provide no coherent basis for their assertion that this case is not controlled by *Mandel* and its progeny. They do argue that the holding of *Mandel* does not apply to claims under the Establishment Clause, but they are unable to point to any case in which the Supreme Court has ever suggested the existence of such a limitation, or, indeed, any case in which it has suggested that some areas of law are not governed by the rule laid out in *Mandel*. Absent such a case, we are not now at liberty to craft—out of whole cloth—exceptions to controlling Supreme Court precedents.

To reach its conclusion, the majority does not adopt the plaintiffs' broad argument that *Mandel* does not even apply. Instead, in its attempt to escape *Mandel's* clear holding, it asserts that "[w]here plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith," the court may "step away from our deferential posture and look behind the stated reason for the challenged action" to attempt to discern the action's purpose. *Ante* at 50. This approach, which totally undermines *Mandel*, is the foundation of its new rule that campaign statements may be considered to recast an unambiguous, later-adopted executive order on immigration. The majority states that even though the Order is on its face legitimate and provides reasons rooted in national security, because the plaintiffs "have more than plausibly alleged" bad faith, "we no longer defer" to the Order's stated purpose "and instead may 'look behind' [the Order]" in an attempt to discern whether the national security reason was *in fact* provided as a pretext for its religious purpose. *Ante* at 52. This approach casually dismisses *Mandel*, *Fiallo*, and *Din*.

If the majority's understanding had been shared by the Supreme Court, it would have compelled different results in each of *Mandel*, *Fiallo*, and *Din*, as in each of those cases the plaintiffs alleged bad faith with at least as much particularity as do the plaintiffs here. In *Mandel*, the allegations were such that Justice Marshall, writing in dissent, observed that "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham." *Id.* at 778 (Marshall, J., dissenting). In *Fiallo*, Justice Marshall, again writing in dissent, pointed to the fact that the statute in question relied on "invidious classifications." *Fiallo*, 430 U.S. at 810 (Marshall, J., dissenting). And in *Din*, the plaintiffs argued that the consular decision should be reviewed because it fell within the "limited circumstances where the government provides no reason, or where the reason on its face is illegitimate." Brief for Respondent at 31, *Din*, 135 S. Ct. 2128 (No. 13-1402), 2015 WL 179409. But, as those cases hold, a lack of good faith must appear on the face of the government's action, not from looking behind it.

As support for its dramatic departure from Supreme Court precedent, the majority relies on a scattershot string of quotations drawn out of context from one sentence in *Din*. The carelessness of the majority's presentation is demonstrated simply by a comparison of its characterization of *Din* and the actual language of *Din* taken in context. Here is how the majority characterizes *Din*:

> Justice Kennedy explained that where a plaintiff makes **"an affirmative showing of bad faith"** that is **"plausibly alleged with sufficient particularity,"** courts may **"look behind"** the challenged action to assess its "facially legitimate" justification.

Ante at 50. And here is what Justice Kennedy in *Din* actually said, with the language quoted by the majority in bold:

> Absent **an affirmative showing of bad faith** on the part of the consular officer who denied Berashk a visa—which Din has not **plausibly alleged with sufficient particularity**—*Mandel* instructs us not to **"look behind"** the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed.

Din, 135 S. Ct. at 2141 (emphasis added).

More problematic is the majority's misunderstanding of *Din*'s actual holding, which the majority tries to reshape for its own ends. In *Din*, when the plaintiff refused to accept the curt explanation of why her husband was denied a visa, she claimed that due process required that the government disclose the factual basis for its determination. Faced with Din's request for these underlying facts, the Supreme Court declined, instead applying *Mandel*'s requirement that the plaintiff must show that the government's reasons were not *facially* legitimate and not *facially* bona fide. As Justice Kennedy explained:

> Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis.
>
> * * *
>
> Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular office relied.
>
> * * *
>
> [But] the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. [Citing *Fiallo*, 430 U.S. at 795-96]. And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this.
>
> * * *
>
> For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a *facially legitimate and bona fide reason* for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). *By requiring the Government to provide more, the Court of Appeals erred* in adjudicating Din's constitutional claims.

Din, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in judgment) (emphasis added) (citations omitted). Nowhere did the *Din* Court authorize going behind the government's notice for the purpose of showing bad faith. The plaintiff had to show *facially* that the notice was in bad faith, *i.e.*, not bona fide. The majority's selective quotations from *Din*, which conceal *Din*'s faithful application of *Mandel*, are simply misleading. Indeed, the impetus for the majority's approach is revealed when it states, "If we limited our purpose inquiry to review of the operation of a *facially neutral* order, we would be caught in an analytical loop, where the order would always survive scrutiny." *Ante* at 62 (emphasis added). That consequence—that facially neutral executive orders survive review—is precisely what *Mandel* requires.

In looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited. *Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion in search of circumstantial evidence of alleged bad faith. The majority, now for the first time, rejects these holdings in favor of its politically desired outcome.

B

Considering the Order on its face, as we are required to do by *Mandel*, *Fiallo*, and *Din*, it is entirely without constitutional fault. The Order was a valid exercise of the President's authority under 8 U.S.C.

§§ 1182(f) and 1185(a) to suspend the entry of "any aliens" or "any class of aliens" and to prescribe "reasonable rules, regulations, and orders" regarding entry, so long as the President finds that the aliens' admission would be "detrimental to the interests of the United States." And Executive Order No. 13,780 was not the first to be issued under this authority. Such orders were entered by Presidents Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama.[2] Moreover, the particular reasons given for the issuance of the Executive Order respond directly to the described risk of terrorism from six countries, justifying the imposition of a 90-day pause in the admission of nationals from those countries while the Administration determines whether existing screening and vetting procedures are adequate.

The Executive Order begins by noting that the previous Administration, in conjunction with Congress, identified seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—"as presenting heightened concerns about terrorism and travel to the United States," specifically noting that the previous Administration's Secretary of Homeland Security designated Libya, Somalia, and Yemen as countries of concern for travel purposes based on terrorism and national security. Order § 1(b)(i). And finally it notes that Members of Congress had expressed concerns about "screening and vetting procedures" following terrorist attacks in 2016 in Europe, as well as in this country. *Id.*

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[2] *See, e.g.*, Exec. Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981) (Reagan); Proclamation 5,517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Reagan); Exec. Order 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (George H.W. Bush); Proclamation 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996) (Clinton); Proclamation 7,359, 65 Fed. Reg. 60,831 (Oct. 10, 2000) (Clinton); Executive Order 13,276, 67 Fed. Reg. 69,985 (Nov. 15, 2002) (George W. Bush); Exec. Order 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (Obama); Exec. Order 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016) (Obama).

Adding to the historical assessment of those risks, the Executive Order continues with its conclusions, based on additional data, that the conditions in the countries previously identified had worsened, at least with respect to six of the seven countries (excepting Iraq), noting that some of those countries were state sponsors of terrorism or were significantly compromised by terrorist organizations. Several of the countries were unwilling or unable to share or validate information about nationals seeking to travel to the United States, and in some, the conditions increasingly enabled "terrorist operatives or sympathizers to travel to the United States." Order § 1(d).

Finally, the Order addresses the particular circumstances of each of the six countries covered by the Order, noting for example, that Iran, Sudan, and Syria were state sponsors of terrorism; that the governments in Libya, Somalia, and Syria were rendered partially or entirely unable to resist terrorist organizations because of the organizations' activities; and that Iran, Libya, Syria, and Yemen either were not cooperating with the United States in its counterterrorism efforts or were unable to do so.

None of the facts or conditions recited as reasons for the issuance of the Executive Order have been challenged as untrue or illegitimate. Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive

Order, they would have had no problem with the Order. As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional." Similarly, the district court found the face of the Order to be neutral in terms of religion. And the majority too so concludes. *Ante* at 52, 59.

Moreover, these reasons amply support the modest action taken by the Executive Order, which imposes only a temporary pause of 90 days to assess whether the screening and vetting procedures that are applied to nationals from these high-risk countries are adequate to identify and exclude terrorists. Even this pause is accompanied by an authorization to issue waivers designed to limit any harmful impact without compromising national security.

While the legitimate justifications for the Order are thoroughly established, its supposed ills are nowhere present on its face. Far from containing the sort of religious advocacy or disparagement that can violate the Establishment Clause, the Order contains no reference to religion whatsoever. Nor is there any trace of discriminatory animus. In short, under *Mandel* and its progeny, Executive Order 13,780 comfortably survives our review.[3]

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[3] The opinions in support of affirmance betray an object beyond a disciplined analysis. Judge Gregory states, for example, that the Executive Order "drips with religious intolerance, animus, and discrimination," *ante* at 12, and Judge Wynn states similarly, "this Executive Order is no more than . . . naked invidious discrimination against Muslims," *ante* at 94. These statements flatly mischaracterize an order that undisputedly contains no facial reference to religion.

C

The majority's new rule, which considers statements made by candidate Trump during the presidential campaign to conclude that the Executive Order does not mean what it says, is fraught with danger and impracticability. Apart from violating all established rules for construing unambiguous texts—whether statutes, regulations, executive orders, or, indeed, contracts—reliance on campaign statements to impose a new meaning on an unambiguous Executive Order is completely strange to judicial analysis.

The Supreme Court has repeatedly warned against "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). And consistent with that warning, the Court has never, "in evaluating the legality of executive action, deferred to comments made by such officials to the media." *Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24 n.52 (2006). The Court's reluctance to consider statements made in the course of campaigning derives from good sense and a recognition of the pitfalls that would accompany such an inquiry.

Because of their nature, campaign statements are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas; they are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise. And they are often ambiguous. A court applying the majority's new rule could thus have free reign to select whichever expression of a candidate's developing ideas best supports its desired conclusion.

Moreover, opening the door to the use of campaign statements to inform the text of later executive orders has no rational limit. If a court, dredging through the myriad remarks of a campaign, fails to find material to produce the desired outcome, what stops it from probing deeper to find statements from a previous campaign, or from a previous business conference, or from college?

And how would use of such statements take into account intervening acts, events, and influences? When a candidate wins the election to the presidency, he takes an oath of office to abide by the Constitution and the laws of the Nation; he appoints officers of the government and retains advisors, usually specialized in their field. Is there not the possibility that a candidate might have different intentions than a President in office? And after taking office, a President faces new external events that may prompt new approaches altogether. How would a court assess the effect of these intervening events on presidential intent without conducting judicial psychoanalysis?

The foibles of such a rule are unbounded and its adoption would have serious implications for the democratic process. As Judge Kozinski said well when he wrote about the Ninth Circuit's use of the same campaign statements:

> Even if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result —namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate. If a court were to find that campaign skeletons prevented an official from

> pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official's "heart of hearts" to divine whether he really changed his mind, just as the Supreme Court has warned us not to? *See McCreary*, 545 U.S. at 862.

Washington v. Trump, No. 17-35105 (9th Cir. March 17, 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc).

The danger of the majority's new rule is that it will enable any court to justify its decision to strike down any executive action with which it disagrees. It need only find one statement that contradicts the stated reasons for a subsequent executive action and thereby pronounce that reasons for the executive action are a pretext. This, I submit, is precisely what the majority opinion does.

Moreover, the unbounded nature of the majority's new rule will leave the President and his Administration in a clearly untenable position for future action. It is undeniable that President Trump will need to engage in foreign policy regarding majority-Muslim nations, including those designated by the Order. And yet the majority now suggests that at least some of those future actions might also be subject to the same challenges upheld today. Presumably, the majority does not intend entirely to stop the President from creating policies that address these nations, but it gives the President no guidelines for "cleansing" himself of the "taint" they have purportedly identified.

Finally, the new rule would by itself chill political speech directed at voters seeking to make their election decision. It is hard to imagine a greater or more direct chill on campaign speech than the knowledge that any statement made may be used later to support the inference of some nefarious intent when official actions are inevitably subjected to legal challenges. Indeed, the majority does not even deny that it employs an approach that will limit communication to voters. Instead, it simply opines remarkably that such chilling is "a welcome restraint." *Ante* at 68.

The Supreme Court surely will shudder at the majority's adoption of this new rule that has no limits or bounds—one that transforms the majority's criticisms of a candidate's various campaign statements into a constitutional violation.

D

Finally, it is readily apparent that the plaintiffs' attempt to use campaign statements to transform a facially neutral executive action into an Establishment Clause violation would, in any event, be unlikely to succeed on the merits.

The thrust of the plaintiffs' argument, which the majority adopts, is that the Order violates the Establishment Clause's requirement of religious neutrality because it was enacted "primarily for the purpose of targeting Muslims." To be sure, courts must ensure that government action is indeed motivated by a secular, rather than religious, purpose. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). And while the government's "stated reasons" for an action "will generally get deference," it is true that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

But these generic standards are all of the doctrinal support that the plaintiffs and the majority can muster. For one, the Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs. And of the few government actions that the Supreme Court has invalidated based on a religious purpose, *McCreary*, 545 U.S. at 859 (remarking that the Court had "found government action motivated by an illegitimate purpose only four times since *Lemon*"), each is manifestly distinguishable from the Order here.

First, for all of the weight that the majority places on *McCreary*, it ignores that the Court there confronted a *facially religious* government action—the display of the Ten Commandments in two county courthouses. The Court in *McCreary* thus began with a *presumption* that the display was intended to promote religion. *See* 545 U.S. at 867-69. When it examined the legislative history surrounding the displays, it did so only to reject the government's attempt to overcome that presumption with a secular, pedagogical purpose—a purpose that the Court declined to accept because it was adopted "only as a litigating position," *id.* at 871, "without a new resolution or repeal of the old [and expressly religious] one," *id.* at 870; *see also Sch. Dist. of Abing-*

ton Twp. v. Schempp, 374 U.S. 203, 223-24 (1963) (holding that schools' policy of required Bible study and recitation of the Lord's Prayer violated Establishment Clause). In stark contrast, the district court here concluded, and the majority agrees, that nothing on the face of the Executive Order speaks to religion. *Ante* at 59-60. Under *McCreary*, we should therefore begin with the presumption that the Order is neutral toward religion.

To be sure, the Supreme Court in "unusual cases" will find a religious purpose even where the government action contains no facial reference to religion. *McCreary*, 545 U.S. at 865. The majority, quoting selectively from these cases, invokes them to justify its searching inquiry into whether the Order's secular justifications were subordinate to a religious purpose that it has gleaned only from extrinsic statements. The majority's approach, however, in no way accords with what the Court actually *did* in those cases. In each case, the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins. *See Santa Fe*, 530 U.S. at 315-16 (invalidating school policy of allowing student-led "invocation" before football games because the policy's language and context showed that religious prayer was the "preferred message"); *Edwards v. Aguillard*, 482 U.S. 578, 585-86 (1987) (invalidating state law that required creationism to be taught with evolution because the law did nothing to accomplish its stated secular purpose of "protect[ing] academic freedom"); *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (invalidating state law that provided for one minute of "meditation or voluntary prayer" at the start of each school day because bill's sponsor stated that sole purpose was to encourage school prayer and prior statute already provided for student meditation).

The Executive Order in this case fits nowhere within this line. It is framed and enforced without reference to religion, and the government's proffered national security justifications, which are consistent with the stated purposes of the Order, withstand scrutiny. Conflicting extrinsic statements made prior to the Order's enactment surely cannot supplant its facially legitimate national security purpose. *See McCreary*, 545 U.S. at 865 ("[T]he Court often . . . accept[s] governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims"); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (referring to the Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute"). Indeed, to hold otherwise would fly in the face of the Court's decisions upholding government actions with connections to religion far more obvious than those here. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (city's inclusion of crèche in Christmas display justified by "legitimate secular purposes," namely "to celebrate the Holiday and to depict the origins of that Holiday"); *McGowan v. Maryland*, 366 U.S. 420, 444-46 (1961) (upholding state's requirement that businesses be closed on Sundays because, while Sunday laws had obvious religious origins, their religious purpose had dissipated in favor of a secular one).

The decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), on which the majority also relies, is similarly inapposite. The state law at issue in that case "carved out" a new school district that included only "a religious enclave of Satmar Hasidism, practitioners of a strict form of Judaism." *Id.* at 690. In *Kiryas Joel*, however, the government did not dispute that the lines were drawn with religion in mind. *Id.* at 699. Rather than searching for extrinsic statements as evidence of a religious purpose, the Court took the government at its word and treated as corroborative of its religious purpose the fact that "the district's creation ran uniquely counter to state practice." *Id.* at 702; *see also id.* at 729 (Kennedy, J., concurring in the judgment) ("There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This *explicit* religious gerrymandering violates the First Amendment Establishment Clause" (emphasis added)).

The government here, by contrast, provides ample nonreligious justification for the Order and actively contests that it has any religious purpose. Far from running "counter" to typical national security practice, each of the Order's six affected countries was previously designated as "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Order § 1(d). And an Order that affects all nationals of six countries, irrespective of their religion, is not so precisely hewn to religious lines that we can infer, based on its operation alone, a predominantly religious purpose.

Undeterred, the majority, pursuing its objective despite the costs, opens *Lemon*'s already controversial purpose inquiry even wider.[4] It engages in its own review of the national security justifications supporting the Order and concludes that protecting national security could not be the President's "primary purpose." As evidence, the majority points to the President's level of consultation with national security agencies before issuing the Order; the content of internal Department of Homeland Security reports; the comments of former national security officials made in an *amicus* brief; and its own assessment of the national security threats described in the Order. *Ante* at 60-62.

This intense factual scrutiny of a facially legitimate purpose, of course, flies in the face of *Mandel*, *Fiallo*, and *Din*. But even within traditional Establishment Clause doctrine, it is an unprecedented overreach. It goes far beyond the Court's inquiry in *McCreary*, where the government offered a secular "litigating position" for a *facially religious* action, 545 U.S. at 871, or in *Wallace*, where the government's proffered secular purpose for a statute that provided for "meditation or voluntary prayer" was belied by the fact that a previous law already provided for a minute of meditation, 472 U.S. at 59-61 (finding that the bill's "sole purpose" was religious). In those cases, the Court concluded that the government's secular purpose did not hold up even on its own terms—that is, even accepting the *soundness* of the secular purpose, undisputed historical facts made clear that the secular purpose was not primary. The Court emphatically did not, however, question the *factual bases* underlying the government's proffered secular purpose.

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[4] While there is no question that it binds us, *Lemon*'s test, and particularly its inquiry into government purpose, has repeatedly been criticized as open-ended and manipulable. *See McCreary*, 545 U.S. at 902 (Scalia, J., dissenting) ("By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record"); *see also, e.g.*, *Santa Fe*, 530 U.S. at 319-20 (Rehnquist, C.J., dissenting); *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment); *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Should the majority not be wary of jumping when on thin ice?

The majority's intense factual inquiry is particularly inappropriate where the government's secular purpose is related to national security—a subject, as the majority recognizes, on which we owe the executive significant deference. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (explaining that, where the executive had concluded that material support to terrorist organizations "will ultimately inure to the benefit of their criminal, terrorist functions," "[t]hat evaluation of the facts by the Executive . . . is entitled to deference" because it "implicates sensitive and weighty interests of national security and foreign affairs").

Unless corrected by the Supreme Court, the majority's new approach, which is unsupported by any Supreme Court case, will become a sword for plaintiffs to challenge facially neutral government actions, particularly those affecting regions dominated by a single religion. Government officials will avoid speaking about religion, even privately, lest a court discover statements that could be used to ascribe a religious motivation to their future actions. And, in the more immediate future, our courts will be faced with the unworkable task of determining when this President's supposed religious motive has sufficiently dissipated so as to allow executive action toward these or other majority-Muslim countries. The Establishment Clause demands none of these unfortunate and unprecedented results.

* * *

For all of the foregoing reasons, I would reject the plaintiffs' and the district court's Establishment Clause arguments and vacate the district court's injunction.

SHEDD, Circuit Judge, with whom Judge NIEMEYER and Judge AGEE join, dissenting[1]:

National security is a complex business with potentially grave consequences for our country. Recognizing this fact, the Supreme Court has observed that "it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).[2] This observation is especially true in today's world, where we face threats from radical terrorists who seek to cross our borders for the purpose of harming us and destroying our way of life. Although we often are quick to forget the fact, "the real risks, the real threats, of terrorist attacks are constant and not likely soon to abate," *Boumediene v. Bush*, 553 U.S. 723, 793 (2008); therefore, "the Government's interest in combating terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Given the multitude of critical factors involved in protecting national security, including the delicacy of foreign relations and the worldwide intelligence information that is constantly generated, combined with the ever-changing threatening circumstances, "questions of national security . . . do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case," *Lebron v.*

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[1] Though I fully join Judge Niemeyer's and Judge Agee's well-reasoned dissenting opinions, I offer the following additional comments to explain why I believe the district court further abused its discretion in entering the preliminary injunction. Judge Niemeyer and Judge Agee have authorized me to state that they join in this dissenting opinion.

[2] I have omitted internal quotation marks, alterations, and citations here and throughout this opinion, unless otherwise noted.

Rumsfeld, 670 F.3d 540, 549 (4th Cir. 2012), and "they are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil," *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Every President has the "constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces." *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007). In this role, a President and his national security advisors (unlike federal judges at all levels, lawyers, and commentators) have constant access to information "that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797. For these reasons and more, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dept. of Navy v. Egan*, 484 U.S. 518, 530 (1988).

This case involves the President's attempt to impose a *temporary pause* on the entry of nationals from six countries that indisputably present national security concerns. "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). Along this line, the Supreme Court has noted that "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *United States v.*

Flores-Montano, 541 U.S. 149, 152 (2004), and has explained that the President is not obligated to disclose his reasons "for deeming nationals of a particular country a special threat . . . and even if [he] did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

One thing is certain: to whatever extent it is permissible to examine the President's national security decision in this case, where the President has acted "pursuant to an express or implied authorization from Congress," the President's decision is entitled to "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). This is especially true when, as here, plaintiffs seek preliminary injunctive relief to stop the President from executing a national security policy, for in even the most routine cases, which this certainly is not, a preliminary injunction "is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

The obvious rationale underlying these important principles has been discussed many times by the Supreme Court, this Court, and others, but the district court totally failed to respect them. Rather than giving any deference to the President (or his national security advisors) regarding his national security assessment, or imposing a heavy burden on the plaintiffs to overcome the President's decision, or showing any sense of restraint in wielding the extraordinary remedy of injunctive relief, the district court simply cast aside the President's decision as nothing more than a sham based on its own ideas concerning the wisdom of the Executive Order. In doing so, the district court made the extraordinary finding—based on a *preliminary* evidentiary record—that the President exercised his otherwise lawful authority to effect the temporary pause primarily because he bears animus towards Muslims and wants to impose a "Muslim ban." Remarkably, the district court made this finding while also acknowledging that the Executive Order is facially neutral, that there are heightened security risks with the countries listed in the Executive Order, and that national security interests would be served by the travel pause.

The shortcomings inherent in the district court's fact-finding are obvious. It is primarily based on the district court's selectively negative interpretation of political campaign statements made before the President swore his oath of office,[3] its acceptance of the national security assessment of *former* government officials (many of whom openly oppose this President), its failure to account for the national security assessment of the *current* Attorney General and Secretary of Homeland Security, its misplaced conclusion regarding the President's decision not to submit the Executive Order to the Executive bureaucracy for "inter-agency review," and the purported novelty of the temporary travel pause. Moreover, despite its express recognition of the dangers posed by the designated countries and the national security interests served by the temporary travel pause, the district court—with no access to intelligence information[4]—criticized the President for failing to identify any instances of individuals who came from the designated countries having engaged in terrorist activity in the United States, faulted the President for not explaining why the temporary travel pause is the necessary response to the existing risks, and ultimately found that the President failed to prove that national security cannot be maintained without the temporary travel pause. As if all of this is not enough, the President's supposed goal of "banning Muslims" from the United States is not remotely served by the temporary travel pause, a fact that makes the district court's factual finding even more dubious.[5]

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[3] Ironically, courts are sensitive in defending their own integrity and often use the judicial oath of office as a shield against claims of bias. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("There is a presumption of honesty and integrity in those serving as adjudicators. All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."). Certainly, the President, who takes a similar oath of office, should be accorded the same trust. *See, e.g., N.L.R.B. v. Enterprise Leas. Co. SE, LLC*, 722 F.3d 609, 671 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part) ("The majority also gives short shrift to the fact that the President too swears an oath to uphold the Constitution, and that when he acts under its express authority, his actions should be accorded a presumption of constitutionality.").

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[4] In *Waterman S.S. Corp.*, 333 U.S. at 111, the Court made the following apt observation: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

The district court's questionable fact-finding is sufficient (among other reasons) to vacate the injunction, but there is ultimately a more obvious fatal flaw in the injunction order: the court's complete failure to actually account for the public interest. In addition to the general restraint courts must show when considering injunctive relief, courts "should be particularly cautious when contemplating relief that implicates public interests." *Salazar v. Buono*, 559 U.S. 700, 714 (2010).[6] Although the public interest generally favors the protection of constitutional rights, that interest must sometimes yield to the public interest in national security, *see, e.g.*, *Defense Distrib. v. U.S. Dept. of State*, 838 F.3d 451, 458-60 (5th Cir. 2016), because "unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning," *Wayte v. United States*, 470 U.S. 598, 612 (1985). This is such a case.

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[5] The limited temporal and geographical scope of the Executive Order, coupled with the designated categorical exclusions and case-by-case waiver process, strongly supports the President's stated national security rationale rather than the district court's bias finding. Even without those exclusions and waivers, the temporary travel pause would only potentially affect approximately 10% of Muslims worldwide.

[6] To obtain a preliminary injunction, a plaintiff must establish: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Counc., Inc.*, 555 U.S. 7, 20 (2008).

The circumstances of this case are similar in material respects to those presented in *Winter*, and a straightforward application of that case warrants reversal here. The *Winter* plaintiffs complained that the United States Navy's sonar-training program harmed marine mammals and that the Navy should have prepared an environmental impact statement before conducting certain training exercises. The district court agreed and preliminarily enjoined the Navy from using sonar in certain circumstances during training exercises. The Ninth Circuit affirmed the injunction, but the Court reversed. Applying the standard four-part preliminary injunction test, the Court acknowledged the importance of plaintiff's ecological, scientific, and recreational interests in marine mammals and accepted for purposes of discussion that they had shown irreparable injury from the Navy's training exercises. However, the Court concluded that these factors were "outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 23. In the Court's view: "A proper consideration of these factors alone require[d] denial of the requested injunctive relief." *Id.*

The Court explained that the lower courts "significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense." *Id.* at 24. In reaching this conclusion, the Court noted that the case involved complex professional military decisions regarding training and control of a military force, to which "great deference" is ordinarily given, *id.*, and it observed that the record contained declarations from senior Navy officials that underscored the threat posed by enemy submarines and the need for extensive sonar training to counter the threat, as well as a declaration from the President that training with sonar was essential to national security. The Court emphasized that the lower courts "failed properly to defer" to senior Navy officers' judgment about the effect that a preliminary injunction would have on the effectiveness of the training. *Id.* at 27. Additionally, the Court pointed out that "despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion." *Id.* at 26. Ultimately, while acknowledging that "military interests do not always trump other considerations," the Court determined that "the proper determination of where the public interest lies does not strike us as a close question." *Id.*

As in *Winter*, the district court's public interest analysis misses the mark. Here, the facially neutral Executive Order explains in detail the President's underlying reasoning for the temporary travel pause. Additionally, the record contains a joint letter from the Attorney General and Secretary of Homeland Security in which they detail their concerns "about weaknesses in our immigration system that pose a risk to our Nation's security," and in which they assert that "*it is imperative that we have a temporary pause on the entry of nationals from certain countries to allow this review to take place—a temporary pause that will immediately diminish the risk we face from application of our current vetting and screening programs for individuals seeking entry to the United States from these countries.*" To be sure, the district court found that the *President's* alleged bias is the primary reason for the temporary travel pause, but it found no such bias on the part of his Cabinet officials.[7] Moreover, the district court acknowledged that national security is in fact a secondary reason for the temporary travel pause, and it found that the countries designated in the Executive Order present heightened security risks and that national security interests would be served by the temporary travel pause.

Despite this record, the district court—with no meaningful analysis—simply dismissed the public's interest in national security with the specious conclusion that "Defendants . . . have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." *I.R.A.P. v. Trump*, 2017 Westlaw 1018235, *17 (D. Md. 2017). As noted, national security is the most compelling of public interests, and the question of how best to protect public safety in this area does not, as the district court implies, boil down to a least-restrictive means test, *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005) ("We believe that the district court ultimately accorded insufficient deference to that determination, effectively imposing upon the President the equivalent of a least-restrictive-means test. To subject to such exacting scrutiny the President's determination that criminal prosecution would not adequately protect the Nation's security at a very minimum fails to accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress."), or require a danger that satisfies the court's "independent foreign policy analysis," *Regan v. Wald*, 468 U.S. 222, 242 (1984). Therefore, the relevant point is not whether the temporary travel pause is the *only* way, or even the best way, to protect national security. The simple fact of the matter is that regardless of any ulterior motive one might ascribe to the President, the record still conclusively establishes that the temporary travel pause will in fact promote an important national security objective.

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[7] Similarly, plaintiffs' counsel admitted during oral argument that he has no basis to challenge the integrity of the Attorney General and Secretary of Homeland Security. The apparent good-faith of these officials, which is an inconvenient fact for the plaintiffs, leads inexorably to the unanswered question of why the district court essentially ignored or rejected their detailed national security advice to the President.

Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest. As we have explained, for example, in applying the state secrets doctrine, a plaintiff with a plausibly viable constitutional claim can be barred from pursuing it "not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security." *El-Masri*, 479 F.3d at 313. In my view, the very serious national security interest served by the temporary travel pause (as determined by those who are duly empowered to make the decision and who have access to current intelligence information) greatly outweighs the alleged temporary and relatively minor harm that will befall these few plaintiffs. The district court abused its discretion by failing to strike this balance. *See, e.g.*, *Sarsour v. Trump*, 2017 Westlaw 1113305, *15 (E.D.Va. 2017) ("Based on the record now before the Court, the parties' respective interests described above, the subject matter of EO-2, and the protections to the public that EO-2 is intended to provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.").

Today's decision may be celebrated by some as a victory for individual civil rights and justice, and by others as a political defeat for this President. Yet, it is shortsighted to ignore the larger ramifications of this decision. Regrettably, at the end of the day, the real losers in this case are the millions of individual Americans whose security is threatened on a daily basis by those who seek to do us harm. Even if the district court's instinct is correct and no tangible harm directly results from its order enjoining the President from attempting to protect American citizens, the injunction prohibits the government from addressing a serious risk identified by the Attorney General and Homeland Security Secretary; therefore, the security of our nation is indisputably lessened as a result of the injunction. Moreover, the President and his national security advisors (and perhaps future Presidents) will be seriously hampered in their ability to exercise their constitutional duty to protect this country.[8]

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[8] At oral argument, several judges (including myself) questioned when, if ever, the President could free himself from the stigma of bias that the district court has enshrined by its *preliminary* "fact-finding." Notably, no one has provided a satisfactory response.

AGEE, Circuit Judge, with whom Judge NIEMEYER and Judge SHEDD join, dissenting:

In their haste to reach the merits of the plaintiffs' Establishment Clause claim, my colleagues in the majority neglect to follow the longstanding and well-defined requirements of Article III of the United States Constitution. They err, as did the district court, in holding that the plaintiffs had standing to bring an Establishment Clause claim. For that reason, I respectfully dissent from the majority's decision to uphold the district court's preliminary injunction. The plaintiffs do not have standing to bring the current action.[1]

I.

A.

Article III limits the federal judiciary's authority to adjudicate only "cases" and "controversies." U.S. Const. art. III, § 2. "[S]tanding is an integral component of the case or controversy requirement." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").[2] A plaintiff must satisfy three elements to establish standing: (1) "the plaintiff must have suffered an injury in fact —an invasion of a legally protected interest which is

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[1] I join the well-written dissents of Judge Niemeyer and Judge Shedd in full. But, for the reasons stated herein, I would find it unnecessary to reach the merits of the plaintiffs' Establishment Clause claim.

[2] I have omitted internal alterations, citations, and quotation marks here and throughout this dissent, unless otherwise noted.

(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

Due to the difficulty of determining injury in Establishment Clause cases, "rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see also Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) ("Many of the harms that Establishment Clause plaintiffs suffer are spiritual and value-laden, rather than tangible and economic."). However, "a mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Suhre*, 131 F.3d at 1086; *see also Moss*, 683 F.3d at 605 ("Nonetheless, we must guard against efforts to use this principle to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury."). For example, "a citizen of Omaha, Nebraska who finds a religious symbol in the Haywood County Courthouse [in North Carolina] to be offensive in the abstract would not have standing to challenge it. The injury to our hypothetical Omaha plaintiff partakes of a generalized grievance, based on nothing more than each citizen's shared individuated right to a government that shall make no law respecting the establishment of religion." *Suhre*, 131 F.3d at 1086; *accord Defenders of Wildlife*, 504 U.S. at 575 ("[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."). Conversely, "direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086.

B.

The district court determined that three of the individual plaintiffs (Meteab, John Doe #1, and John Doe #3) had sufficiently pleaded that they had suffered stigmatization due to the Executive Order. *See* J.A. 780 (finding that the plaintiffs claimed "the anti-Muslim animus underlying the Second Executive Order inflicts *stigmatizing injuries* on them all" (emphasis added)). Because Section 2(c) also allegedly prevents the family members of these plaintiffs from entering the country, the district court held that they had asserted injuries sufficient to confer standing to pursue their Establishment Clause claim.

Doe #1 is a lawful permanent resident and "non-practicing Muslim[]." J.A. 213, 305. His wife, also a non-practicing Muslim and Iranian national, has applied for an immigrant visa. She is currently awaiting an embassy interview, a condition precedent to the determination of whether to grant a visa. *See* 22 C.F.R. § 42.62(b) ("Every alien executing an immigrant visa application must be interviewed by a consular officer who shall determine on the basis of the applicant's representations and the visa application and other relevant documentation—(1) The proper immigrant classification, if any, of the visa applicant, and (2) The applicant's eligibility to receive a visa."). Doe #1 alleges that the Executive Order has caused him and his wife to experience "significant fear, anxiety and insecurity . . . regarding their future." J.A. 246. He argues that because he is afraid that he will not be allowed to reenter the United States if he travels to Iran, Section 2(c) "forces [him] to choose between [his] career and being with [his] wife." J.A. 306. Doe #1 maintains that "the anti-Muslim views that are driving the Executive Order, as well as the Order itself, have caused [him] significant stress and anxiety." J.A. 306. He is allegedly concerned for his safety.

Like Doe #1, Doe #3 is a lawful permanent resident, although nothing in the record indicates his religious preference.[3] In any event, Doe #3 applied for an immigrant visa on behalf of his wife, an Iranian national. In May 2016, the United States Embassy "informed [her] that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join her husband in two to three months." J.A. 246. With his wife in Iran, Doe #3 maintains that "[t]heir continued separation has placed extraordinary stress on John Doe #3 and his wife, and their relationship." J.A. 247. He "feel[s] as though they've been unable to start their lives together because of the delays and uncertainty caused by the Executive Order." J.A. 247. Doe #3 asserts that he and his wife "are being torn apart by this situation and the uncertainty and delay." J.A. 310. He believes that the anti-Muslim message of the Executive Order has caused him stress and anxiety and to feel like an outsider.

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[3] The pleadings make only one religious reference with respect to Doe #3: "The anti-Muslim attitudes that are driving this Executive Order have caused me stress and anxiety and made me question whether I even belong in this country despite everything I have sacrificed and invested in making a life here." J.A. 310.

Meteab is also a lawful permanent resident and Muslim. His wife and children are here in the United States. However, Meteab has three brothers who wish to resettle in North America as refugees. Two of the three have received approval for resettlement in the United States but have not yet obtained travel documents. The remaining brother has been approved for resettlement in Canada. Meteab contends that, as a result of the Executive Order, he "and his wife have experienced anti-Muslim sentiment and felt very uncomfortable and insecure in their community, causing them acute mental stress." J.A. 250. The couple "ha[s] experienced hostility in public, with people staring at Mr. Meteab's wife, who wears a hijab, and refusing to stop for them at crosswalks." J.A. 250.

C.

The district court held that, "where the [allegedly anti-Muslim] Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a personal injury as a consequence of the alleged Establishment Clause violation." J.A. 787. However, as the record reflects, the district court clearly erred in finding that Meteab had standing to challenge Section 2(c) of the Executive Order. Meteab's brothers are refugees, and Section 2(c) does not apply to refugees. The district court recognized in its opinion that "[t]he Plaintiffs' Establishment Clause . . . arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order." J.A. 809. The court elaborated that the plaintiffs had "not sufficiently develop[ed] . . . argument[s relating to refugees] to warrant an injunction on those sections at this time." J.A. 810. Therefore, Meteab cannot base standing to challenge Section 2(c) on any "prolonged separation" from his refugee brothers, who are covered by a different section of the Executive Order. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.") *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, 134 S. Ct. 1377 (2014). Thus, Meteab can show Establishment Clause standing only if his alleged stigmatization is a cognizable injury for standing purposes.

As for Doe #3, his wife was granted a visa during the pendency of this appeal, so he, too, is left with only stigma to make his Establishment Clause claim of standing. For the reasons stated below, such a stigma claim alone is insufficient to confer standing under the record in this case.

Perhaps recognizing these deficits, the majority bases its affirmation of the district court's standing determination only on Doe #1. But Doe #1 does not have standing either because the stigma that he alleges to have suffered and the potential denial of a visa to his wife are two distinct harms, neither of which meet basic standing requirements. Setting aside Doe #1's allegation that he experienced stigmatization himself, the imagined future denial of a visa to his wife is simply too vague and speculative to meet the constitutional standard of a concrete and "actual or imminent, not conjectural or hypothetical" injury. *Defenders of Wildlife*, 504 U.S. at 560. The majority's conception of "injury-in-fact" by Doe #1 is conjectural and hypothetical; he had no reasonable expectation that his wife would join him in the United States at any particular time either prior to the drafting of the Executive Order or at any time during the suspension period.

1.

The plaintiffs' pleadings show that their alleged injuries consist solely of their personal perception of stigmatization. In the complaint, they allege, "The March 6 Order also contains language that associates Muslims with violence, terrorism, bigotry, and hatred, inflicting *stigmatic and dignitary harms*." J.A. 207 (emphasis added). Despite the majority's holding, the stigma that plaintiffs claim to have suffered is not a cognizable injury because it is simply a subjective disagreement with a government action. To allow these plaintiffs to pursue their claims based on an idiosyncratic projection of stigmatization is to grant every would-be Establishment Clause plaintiff who develops negative feelings in response to some action by the Government a court proceeding in which to vent his subjective reactions as a legal claim. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause."). Indeed, to find standing here is to find standing for not only all Muslims in America, but *any* American who may find the Executive Order (or any other Government action) personally disagreeable, which is "beyond all reason." *See Defenders of Wildlife*, 504 U.S. at 566.

The Supreme Court "ha[s] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.* at 573-74; *accord Valley Forge*, 454 U.S. at 482-83 (stating that the Supreme Court "repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law"). The Court has rejected a generalized finding of standing based on "the need for an available plaintiff, without whom the Establishment Clause would be rendered virtually unenforceable by the judiciary." *Valley Forge*, 454 U.S. at 470. The plaintiffs here "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The majority does not provide any principled instruction on how its sweeping standing ruling is cabined to this particular case, and thus its holding far oversteps the bounds of traditional judicial authority. *See id.* at 471 (stating that Article III is a limitation on "judicial power"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."), *abrogated on other grounds by Lexmark*, 134 S. Ct. 1377; *Defenders of Wildlife*, 504 U.S. at 576 ("Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

The majority relies heavily on two Fourth Circuit cases, *Suhre* and *Moss*, but these cases are inapposite.[4] In *Suhre*, local officials displayed the Ten Commandments in the county courthouse where the plaintiff, a resident of the county, often visited. 131 F.3d at 1084-85. Suhre, an avowed atheist and serial litigant, took offense to the display and "aver[red] that contact with the display cause[d] him distress." *Id.* at 1085. We ultimately found that Suhre had alleged a "cognizable injury caused by personal contact with a public religious display." *Id.* at 1090.

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[4] *Suhre* is a religious display case, a type of Establishment Clause claim that arguably belongs in its own category. *See* 131 F.3d at 1086 ("Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence.").

In *Moss*, a school district "adopted a policy allowing public school students to receive two academic credits for off-campus religious instruction offered by private educators." 683 F.3d at 601. The plaintiffs, including two students and their parents, urged the Court to "adopt a per se rule that students and parents always have standing to bring suit against policies at their school when they allege a violation of the Establishment Clause, regardless of whether they allege or can prove personal injury." *Id.* at 605. We rejected that argument and held that, although injuries in such cases are often intangible, plaintiffs must have been "spiritually affronted as a result of direct and unwelcome contact with an alleged religious establishment within their community." *Id.* Because one student had no "personal exposure" to the policy other than mere awareness of its existence, we held that the student lacked standing, despite that student "feel[ing] like an outsider" in the school environment. *Id.* at 606. However, we found that the other student had standing to bring a claim because she actually received a solicitation letter from a religious institution that participated in the school's program and "changed [her] conduct in adverse ways as a result of [her] perceived outsider status." *Id.* at 607.

In both of these cases, local governments took direct actions in relation to their constituents in an immediate and concrete way. All residents who entered the courthouse in *Suhre* were personally exposed to the display of the Ten Commandments, while the academic policy in *Moss* was actually sent to the student. As a consequence, the plaintiffs in those cases did come into direct contact with the alleged Establishment Clause violations.[5]

In contrast, the Executive Order here applies only to prospective immigrants. The order's focus faces outward towards the alien residents of the subject countries, not inward towards persons in the United States like the plaintiffs. That circumstance is in direct distinction to the religious display in *Suhre* or the academic policy in *Moss*. Section 2(c) of the facially-neutral Executive Order applies only to "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." Section 3(b)(i) explicitly exempts "any lawful permanent resident of the United States," like the plaintiffs, from the travel suspension, thus not applying to Does #1 and #3 and Meteab. The majority posits that, because the policy at issue came from the President himself that somehow metamorphosizes into the "direct contact" *Suhre* requires. Majority Op. 39. This distorts the standing inquiry as the source of the directive is irrelevant. What matters is whether the plaintiff came into direct contact with the religious establishment.

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[5] The out-of-circuit cases on which the majority also relies are likewise inapposite for the same reasons that distinguish *Suhre* and *Moss*. *See Awad v. Ziriax*, 670 F.3d 1111, 1116, 1122 (10th Cir. 2012) (analyzing a "proposed constitutional amendment that would prevent Oklahoma state courts from considering or using Sharia law"); *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 624 F.3d 1043, 1048-53 (9th Cir. 2010) (reviewing standing in a case challenging a city resolution that ordered Catholics in San Francisco to cease discriminating against same-sex couples).

And that is not the case here simply because the President is the party signing an order.

Despite the majority's giving short shrift to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), the case is directly on point. There, "[a] group of Protestant Navy chaplains sued the Navy, alleging that the Navy's operation of its retirement system discriminates in favor of Catholic chaplains in violation of the Establishment Clause." *Id.* at 758.[6] The plaintiffs "conceded that the Navy did not deny them any benefits or opportunities on account of their religion." *Id.* at 760. Rather, they maintained "that *other* chaplains suffered such discrimination." *Id.* The plaintiffs contended that they had standing because "they ha[d] been subjected to the Navy's message of religious preference as a result of the Navy's running a retirement system that favors Catholic chaplains." *Id.* The D.C. Circuit rejected this argument and found that they did not "have standing based on their exposure to the Navy's alleged message of religious preference." *Id.* at 761. Like the Protestant Navy chaplains, the plaintiffs here claim offense to a message directed at others, who happen to be nationals of other countries. The plaintiffs' claims of stress or stigmatization are subjective reactions, not direct contact with the Executive Order, and amount to disagreements with a government policy. *See Moss*, 683 F.3d at 604-05. As a result, the plaintiffs' claim of injury by way of stigma is a general grievance, insufficient to confer standing. *Suhre*, 131 F.3d at 1086.[7]

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[6] It is irrelevant that *In re Navy Chaplaincy* is a favoritism case as opposed to a condemnation case as alleged here, as they are two sides of the same Establishment Clause coin.

2.

Perhaps recognizing the problems posed by basing standing only on the subjective feelings of the plaintiffs, the majority also holds that the alleged stigma suffered by Doe #1, combined with prolonged separation from his wife, is enough to support standing, thereby creating a kind of "stigma plus" standard.[8] However, the majority's construct erroneously conflates Doe #1's Establishment Clause standing claim with his claim under the Immigration and Nationality Act ("INA"), which the Supreme Court has prohibited. *See DaimlerChrysler Corp.*, 547 U.S. at 352 ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press.").

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[7] Some of the plaintiffs, including Doe #1, have expressed fear that they will be denied reentry into the country if they travel to the subject countries to visit their family while the Executive Order is in effect. This fear is unfounded and contradicted by the plain terms of the Executive Order. Does #1 and 3 and Meteab are all lawful permanent residents. Section 3(b)(i) of the Executive Order exempts "any lawful permanent resident of the United States" from the temporary suspension of entry.

[8] In its attempt to distinguish *In re Navy Chaplaincy*, the majority implicitly holds that stigma alone is not enough to support standing. The majority states that, "contrary to the Government's assertion, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it." Majority Op. 40 n.11. The majority avers that Doe #1 "is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." *Id.* at 40. The majority is right in that regard—stigma is not enough.

Plaintiffs are required to "demonstrate standing *separately* for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added). The majority haphazardly merges alleged injuries unique to two different claims, and personal to different people, to manufacture standing.[9]

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[9] Although not the focus of this dissent, I also would find that Doe #1 does not have standing to bring an INA claim; he lacks a concrete injury. It is pure speculation whether Doe #1's wife will receive a visa. Doe #1 has presented no evidence showing that his wife is likely to receive a visa, much less when, but for the operation of the executive order. Or that the executive order would tangibly affect the processing of her application in any way. *See* Opening Br. 19-20 ("Likewise, Doe #1's wife did not have her visa interview scheduled before the Revoked Order took effect, and had already been waiting roughly six weeks, making it similarly speculative whether the 90-day pause will affect her."); *see also The Immigrant Visa Process: Interview*, U.S. Dep't of State, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview.html (last visited May 23, 2017) (saved as ECF opinion attachment) (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Nor has the Government denied the visa application of Doe #1's spouse.

Any injury caused by the Executive Order is not redressable because an injunction will not establish that Doe #1's wife will receive a visa, as exemplified by her current status. *See The Immigrant Visa Process: Interview, supra* ("Based on U.S. law, not everyone who applies for a visa will be found eligible to come to the United States."). Doe #1 does not have standing under the INA.

The majority reasons that Doe #1 has third-party standing to bring an Establishment Clause claim. Not so. Plaintiffs do not have standing to allege violations of the Establishment Clause on behalf of their immigrant relatives. *See Whitmore v. Arkansas*, 495 U.S. 149, 161 n.2 (1990) (restating the general rule "that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *cf. Defenders of Wildlife*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."). The relatives, in turn, do not have rights of entry or any Establishment Clause rights. *Kerry v. Din*, 576 U.S. __, 135 S. Ct. 2128, 2131 (2015) ("But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that "the people protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). Doe #1 is "seeking to vindicate, not [his] own rights, but the rights of others." *Moss*, 683 F.3d at 606.

Doe #1 has no right to, or even a reasonable expectation of, a time certain meeting with his wife in America. His alleged injury is based on a mere conjecture that his wife will have her embassy interview and obtain a discretionary visa within the ninety-day suspension period of the Executive Order when the State Department has cautioned, well before the Executive Order, that it may take an indefinite period to schedule interviews much less adjudicate visa applications. *See The Immigrant Visa Process: Interview*, *supra* note 9 (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Any effect of the Executive Order on that speculative possibility is simply not determinable and thus fails to meet the constitutional standard of an injury "actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560.

The majority underscores the fragility of its standing hypotheses when it avers, without any citation to precedent or evidence, that the Executive Order creates harm to the plaintiffs because "dedicating time and resources to a global review process[, for which Section 2(c) was designed to facilitate,] will further slow the adjudication of pending [visa] applications." Majority Op. 36. Nothing in the record supports this assertion or ties any nexus to Doe #1 or his spouse. Doe #1 simply fails to carry his burden as to standing under the standard required by the Supreme Court. No constitutionally cognizable "harm" which is "certainly impending" to Doe #1 or to him via his spouse has been proffered. *Defenders of Wildlife*, 504 U.S. at 564 n.2.[10]

For all these reasons, Doe #1 has no "legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560, and no standing to pursue his Establishment Clause claim.[11]

II.

As the plaintiffs lack standing to pursue their cause of action, I respectfully dissent and would vacate the grant of a preliminary injunction by the district court.

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[10] Similarly, there is no feasible way to determine, except by pure speculation, how or whether the Executive Order's visa waiver process might affect a particular visa application. Nothing in the record supports the majority's conclusion that pursuing a waiver would affect any plaintiff. Rather, the majority has arbitrarily substituted its conjecture for evidence. The visa waiver process could just as likely allow Doe #1's wife to obtain her visa as not during the temporary suspension period.

[11] The district court did not determine whether other individual plaintiffs or the organizational plaintiffs have standing to bring the Establishment Clause claim. That would be a matter to be considered by the district court in the first instance in any further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. TDC-17-0361

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, MUHAMMED METEAB, PAUL HARRISON, IBRAHIM AHMED MOHOMED, JOHN DOES NOS. 1 & 3, AND JANE DOE NO. 2, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF STATE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, MICHAEL DEMPSEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

Filed: Mar. 16, 2017

MEMORANDUM OPINION

On March 6, 2017, President Donald J. Trump issued an Executive Order which bars, with certain exceptions, the entry to the United States of nationals of six predominantly Muslim countries, suspends the entry of refugees for 120 days, and cuts by more than half the number of refugees to be admitted to the United States in the current year. This Executive Order follows a substantially similar Executive Order that is currently the subject of multiple injunctions premised on the conclusion that it likely violates various provisions of the United States Constitution. Pending before the Court is Plaintiffs' Motion for a Temporary Restraining Order or a Preliminary Injunction, filed on March 10, 2017. At issue is whether the President's revised Executive Order, set to take effect on March 16, 2017, should likewise be halted because it violates the Constitution and federal law. For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

INTRODUCTION

On January 27, 2017, President Trump issued Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("First Executive Order" or "First Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). On February 7, 2017, Plaintiffs filed a Complaint alleging that the First Executive Order violated the Establishment Clause of the First Amendment to the United States Constitution, U.S. Const. amend. I; the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const.

amend. V; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-1524 (2012); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2012). On March 6, 2017, in the wake of several successful legal challenges to the First Executive Order, President Trump issued Executive Order 13,780 ("Second Executive Order" or "Second Order"), which bears the same title as the First Executive Order. 82 Fed. Reg. 13209 (Mar. 9, 2017). The Second Executive Order, by its own terms, is scheduled to go into effect and supplant the First Executive Order on March 16, 2017.

On March 10, 2017, Plaintiffs amended their Complaint to seek the invalidation of the Second Executive Order. Plaintiffs substituted certain individual plaintiffs and added an organizational plaintiff. Their causes of action remain the same. That same day, Plaintiffs filed the pending Motion, seeking to enjoin the Second Executive Order in its entirety before it takes effect. Defendants have received notice of the Motion and filed a brief in opposition to it on March 13, 2017. After Plaintiffs filed a reply brief on March 14, 2017, the Court held a hearing on the Motion on March 15, 2017. With the matter fully briefed and argued, the Court construes the Motion as a Motion for a Preliminary Injunction. The Court now issues its findings of fact and conclusions of law and rules on the Motion.[1]

FINDINGS OF FACT

I. Executive Order 13,769

The stated purpose of the First Executive Order is to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." 1st Order Preamble. To that end, the First Executive Order states that the United States must be "vigilant during the visa-issuance process," a process that "plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States." 1st Order § 1. The First Executive Order therefore mandates, as relevant here, two courses of action. The first, set forth in Section 3 entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern," invokes the President's authority under 8 U.S.C. § 1182(f) to suspend for 90 days "the immigrant and nonimmigrant entry into the United States of aliens" from the countries of Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen as "detrimental to the interests of the United States." 1st Order § 3(c). Each of these countries has a predominantly Muslim population, including Iraq, Iran, and Yemen which are more than 99 percent Muslim. In addition to providing certain exceptions for diplomatic travel, the provision contains exceptions on a "case-by-case basis" when such an exception is "in the national interest," a term not defined elsewhere in the Order. 1st Order § 3(g). During this 90-day period, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence are to "immediately conduct a review to determine the information needed from any country" to assess whether an individual from that country applying for a "visa, admission, or other benefit . . . is not a security or public-safety threat" and provide a report on their review to the President within 30 days of the issuance of the Order. 1st Order § 3(a)-(b).

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[1] On February 22, 2017, Plaintiffs filed a Motion for a Preliminary Injunction of § 5(d) of the Executive Order, ECF No. 64, requesting that the Court enjoin a specific provision of the First Executive Order. With the agreement of the parties, the Court set a briefing and hearing schedule extending to March 28, 2017. The Court will resolve that Motion, which the parties have agreed should be construed to apply to the successor provision of the Second Executive Order, in accordance with the previously established schedule.

The second course of action relates to refugees. As set out in Section 5(d), the President ordered, pursuant to § 1182(f), that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States" and thus suspended the entry of any refugees above that figure. 1st Order § 5(d). The Order also immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days and imposed an indefinite ban on the entry of refugees from Syria. The Order further required changes to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." 1st Order § 5(b).

The drafting process for the First Executive Order did not involve traditional interagency review by relevant departments and agencies. In particular, there was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security. When the Order was issued in the early evening of Friday, January 27, 2017, the State Department immediately stopped conducting visa interviews of, and processing visa applications from, citizens of any of the seven banned countries. Between 60,000 and 100,000 visas have been revoked.

II. Legal Challenges to the First Executive Order

The First Executive Order prompted numerous legal challenges, including an action filed by the State of Washington and the State of Minnesota in the United States District Court for the Western District of Washington based on the Due Process, Establishment, and Equal Protection Clauses of the Constitution that resulted in a nationwide temporary restraining order against several sections of the First Order. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit, construing the order as a preliminary injunction, upheld the entry of the injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). Although it did not reach the Establishment Clause claim, the Ninth Circuit noted that the asserted claim raised "serious allegations" and presented "significant constitutional questions." *Id.* at 1168. On February 13, 2017, the United States District Court for the Eastern District of Virginia found that plaintiffs had shown a likelihood of success on the merits of an Establishment Clause claim and issued an injunction against enforcement of Section 3(c) of the First Executive Order as to Virginia residents or students enrolled a Virginia state educational institution. *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). These injunctions remain in effect.

III. Executive Order 13,780

On March 6, 2017, President Trump issued a revised Executive Order, to become effective on March 16, 2017, at which point the First Executive Order will be revoked. 2d Order §§ 13, 14. The Second Executive Order reinstates the 90-day ban on travel for citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen ("the Designated Countries"), but removes Iraq from the list based on its recent efforts to enhance its travel documentation procedures and ongoing cooperation between Iraq and the United States in fighting ISIS. The scope of the ban, however, was narrowed expressly to respond to "judicial concerns." 2d Order § (1)(i). The Order states that it applies only to individuals outside the United States who did not have a valid visa as of the issuance of the First Executive Order and who have not obtained one prior to the effective date of the Second Executive Order. In addition, the travel ban expressly exempts lawful permanent residents ("LPRs"), dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. The Second Executive Order also provides a list of specific situations in which a case-by-case waiver "could be appropriate." 2d Order § 3(c).

The refugee provisions continue to suspend USRAP for 120 days and to reduce the number of refugees to be admitted in fiscal year 2017 to 50,000. However, the minority religion preferences in refugee applications and the complete ban on Syrian refugees have been removed entirely.

Unlike the First Executive Order, the Second Executive Order provides certain information relevant to the national security concerns underlying the decision to ban the entry of citizens of the Designated Countries. The Second Order notes that "the conditions in these countries present heightened threats" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." 2d Order § 1(d). It provides information from the State Department's *Country Reports on Terrorism 2015* identifying Iran, Sudan, and Syria as longstanding state sponsors of terrorism and describing the presence of members of certain terrorist organizations within those countries. The asserted consequences of these conditions are that the governments of these nations are less willing or less able to provide necessary information for the visa or refugee vetting process, and there is a heightened chance that individuals from these countries will be "terrorist operatives or sympathizers." 2d Order § (1)(d). In light of these factors, the Second Order concludes, the United States is unable "to rely on normal decision-making procedures about travel" as to individuals from these nations, making the present risk of admitting individuals from these countries "unacceptably high." 2d Order § 1(b)(ii), (f). The Second Order expressly disavows that the First Executive Order was motivated by religious animus.

The Second Order also states that "Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" and references two Iraqi refugees who were convicted of terrorism-related offenses and a naturalized U.S. citizen who came to the United States from Somalia as a child refugee and has been convicted of a plot to detonate a bomb at a Christmas tree lighting ceremony. 2d Order § 1(h). The Second Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations. It does not identify any instances of individuals who came from Iran, Libya, Sudan, Syria, or Yemen engaging in terrorist activity in the United States.

The same day that the Second Executive Order was issued, Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President recommending a temporary suspension on the entry to the United States of nationals of certain countries so as to facilitate a review of security risks in the immigration system, for reasons that largely mirror the statements contained in the Second Executive Order.

IV. Public Statements About the Executive Orders

On December 7, 2015, then-presidential candidate Donald Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. Trump promoted the Statement on Twitter that same day, stating that he had "[j]ust put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.R. 209. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then, in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.R. 261. In a July 24, 2016 interview on Meet the Press soon after he accepted the Republican nomination, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his December 2015 call for a "Muslim ban," Trump characterized it instead as an "expansion." J.R. 220. He explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, he lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

On January 27, 2017, a week after his inauguration, President Trump stated in an interview on the Christian Broadcasting Network that the First Executive Order would give preference in refugee applications to Christians. Referring to Syria, President Trump stated that "[i]f you were a Muslim you could come in, but if you were a Christian, it was almost impossible," a situation that he thought was "very, very unfair." J.R. 201. When President Trump was preparing to sign the First Executive Order later that day, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142 The day after the Order was issued, former New York City Mayor Rudolph W. Giuliani appeared on Fox News and asserted that

President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-248.

In response to the court-issued injunctions against provisions of the First Executive Order, President Trump maintained at a February 16, 2017 news conference that the First Executive Order was lawful but that a new Order would be issued. J.R. 91. Stephen Miller, Senior Policy Advisor to the President, described the changes being made to the Order as "mostly minor technical differences," emphasizing that the "basic policies are still going to be in effect." J.R. 319. White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. As of February 12, 2017, Trump's Statement on Preventing Muslim Immigration remained on his campaign website. J.R. 207.

Upon the issuance of the Second Executive Order, Secretary of State Rex Tillerson described it as "a vital measure for strengthening our national security." J.R. 115. In a March 7, 2017 interview, Secretary of Homeland Security Kelly stated that the Order was not a Muslim ban but instead was focused on countries with "questionable vetting procedures," then noted that there are 13 or 14 countries with questionable vetting procedures, "not all of them Muslim countries and not all of them in the Middle East." J.R. 150.

In a joint affidavit, 10 former national security, foreign policy, and intelligence officials who served in the White House, Department of State, Department of Homeland Security, and Central Intelligence Agency in Republican and Democratic Administrations, four of whom were aware of the available intelligence relating to potential terrorist threats to the United States as of January 19, 2017, have stated that "there is no national security purpose for a total bar on entry for aliens" from the Designated Countries and that they are unaware of any prior example of a president suspending admission for such a "broad class of people." J.R. 404, 406. The officials note that no terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001, and that no intelligence as of January 19, 2017 suggested any such potential threat. Nor, the former officials assert, is there any rationale for the abrupt shift from individualized vetting to group bans. J.R. 404.

V. The Plaintiffs

Plaintiffs, comprised of six individuals and three organizations, assert that they will be harmed by the implementation of the Second Executive Order. Collectively, they assert that because the Individual Plaintiffs are Muslim and the Organizational Plaintiffs serve or represent Muslim clients or members, the anti-Muslim animus underlying the Second Executive Order inflicts stigmatizing injuries on them all. The Individual Plaintiffs, who each have one or more relatives who are nationals of one of the Designated Countries and are currently in the process of seeking permission to enter the United States, also claim that if the Second Executive Order is allowed to go into effect, their separation from their loved ones, many of whom live in dangerous conditions, will be unnecessarily prolonged.

Two of the Organizational Plaintiffs, the Hebrew Immigrant Aid Society and the International Refugee Assistance Project, which provide services to refugees, assert that injuries they have suffered under the First Executive Order will continue if the Second Executive Order goes into effect, including lost revenue arising from a reduction in refugee cases that may necessitate reductions in staff. They also assert that their clients, many of whom are refugees now re-settled in the United States, will be harmed by prolonged separation from relatives in the Designated Countries currently seeking to join them. Plaintiff Middle East Studies Association, many of whose members are nationals of one of the Designated Countries, claims that the Second Executive Order would make it more difficult for certain members to travel for academic conferences and field work, and that the inability of its members to enter the United States threatens to cripple its annual conference, on which it relies for a large portion of its yearly revenue.

In light of these alleged imminent harms, Plaintiffs now ask this Court to preliminarily enjoin enforcement of the Second Executive Order.

CONCLUSIONS OF LAW

In this Motion, Plaintiffs seek a preliminary injunction based on their claims that the Second Executive Order violates (1) the Immigration and Nationality Act and (2) the Establishment Clause.

I. Standing

Article III of the Constitution limits the judicial power of the federal courts to actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. To invoke this power, a litigant must have standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). A plaintiff establishes standing by demonstrating (1) a "concrete and particularized" injury that is "actual or imminent," (2) "fairly traceable to the challenged conduct," (3) and "likely to be redressed by a favorable judicial decision." *Id.*; *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007). Standing must be demonstrated for each claim. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). The presence of one plaintiff with standing renders a claim justiciable. *Id.* at 370-71.

A. Immigration and Nationality Act

Several Individual Plaintiffs, specifically John Doe No. 1, John Doe No. 3 and Jane Doe No. 2, have standing to assert the claim that the travel ban for citizens of the Designated Countries violates the INA's prohibition on discrimination in the issuance of immigrant visas on the basis of nationality, 8 U.S.C. § 1152(a). These Individual Plaintiffs are all U.S. citizens or lawful permanent residents who have sponsored relatives who are citizens of one of the Designated Countries and now seek immigrant visas to enter the United States. They argue that the delay or denial of the issuance of visas will cause injury in the form of continued separation from their family members. *Cf. Covenant Media*, 493 F.3d at 428 (stating that not having an application processed in a timely manner is a form of cognizable injury).

Although neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has explicitly endorsed this basis for standing, the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner challenging the application of the immigration laws to that foreign individual. *See Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (considering an action brought by a U.S. citizen challenging the denial of her husband's visa that failed to result in a majority of the Court agreeing whether the plaintiff had a constitutionally-protected liberty interest in the processing of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (considering the merits of a claim brought by American plaintiffs challenging the denial of a visa to a Belgian journalist whom they had invited to speak in various academic forums in the United States); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (stating that because standing relates to a court's power to hear and adjudicate a case, it is normally "considered a threshold question that must be resolved in [the litigant's] favor before proceeding to the merits");

Abourezk v. Reagan, 785 F.2d 1043, 1050 (D.C. Cir. 1986) ("Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in *Mandel*, it would have raised the issue on its own motion."). Other courts have done the same. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (considering an action by a United States citizen challenging the denial of her husband's visa and holding that the citizen had a procedural due process right to a "limited judicial inquiry regarding the reason for the decision"); *Allende v. Shultz*, 845 F.2d 1111, 1114 & n.4 (1st Cir. 1988) (evaluating the merits of a claim brought by scholars and leaders who extended invitations to a foreign national challenging the denial of her visa).

The United States Court of Appeals for the District of Columbia Circuit has found that U.S. citizens and residents have standing to challenge the denial of visas to individuals in whose entry to the United States they have an interest. *See Abourezk*, 785 F.2d at 1050 (finding that U.S. citizens and residents had standing to challenge the denial of visas to foreigners whom they had invited to "attend meetings or address audiences" in the United States); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). In *Legal Assistance*, the court specifically held that U.S. resident sponsors had standing to assert that the State Department's failure to process visa applications of Vietnamese citizens in Hong Kong violated the provision at issue here, 8 U.S.C. § 1152. *Id.* at 471. The court articulated the cognizable injury to the plaintiffs as the prolonged "separation of immediate family members" resulting from the State Department's inaction. *Id.* Here, the three Individual Plaintiffs who seek the entry of family members from the Designated Countries into the United States face the same harm of continuing separation from their respective family members. This harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation, in barring their entry, would cause the prolonged separation, and the injury is "likely to be redressed by a favorable judicial decision" because invalidation of the relevant provisions of the Executive Order would remove a barrier to their entry. *Hollingsworth*, 133 S. Ct. at 2661.

Defendants nevertheless argue that the Individual Plaintiffs' harm does not arise from a "legally protected interest," citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing an "injury in fact" as a "legally protected interest" which is "concrete and particularized"). However, the case cited by *Lujan* in referencing the "legally protected interest" requirement referred to an injury "deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), *cited with approval in Lujan*, 504 U.S. at 561. Indeed, in *Lujan*, the Court also noted that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63. Since *Lujan*, courts have clarified that a party is not required to have a "substantive right sounding in property or contract" to articulate a legally protected injury. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (recognizing aesthetic and recreational enjoyment as a legally protected interest); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (explaining that although standing "often turns on the nature and source of the claim asserted," "standing in no way depends on the merits" of a plaintiff's claim); *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 363-66 (D.C. Cir. 2005) (Williams, J., concurring) (suggesting that a legally protected interest is merely another label for a judicially cognizable interest). Plaintiffs' interests arising from the separation from family members are consistent with the injury requirement.

Because this claim is a statutory cause of action, these Individual Plaintiffs must also meet the requirement of having interests that fall within the "zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 (1987). In the context of the APA, the "zone of interests" test is "not especially demanding." *Lexmark*, 134 S. Ct. at 1389. A plaintiff's interest need only "arguably" fall within the zone of interests, and the test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (internal quotation marks omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). Because implementing the "underlying intention of our immigration laws regarding the preservation of the family unit" is among the INA's purposes, the interests of these Individual Plaintiffs, who have sponsored family members who will be denied entry pursuant to the Second Executive Order, fall within the zone of interest protected by the statute. *Legal Assistance*, 45 F.3d at 471-72 (quoting H.R. Rep. No. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680). The Court therefore finds that these three Individual Plaintiffs have standing to assert the claim under 8 U.S.C. § 1152.

Finally, although some of the Individual Plaintiffs' relatives may be eligible for a waiver under the Second Executive Order, because the waiver process presents an additional hurdle that would delay reunification, their claims are ripe. *See Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (finding in a Fair Housing Act action that plaintiffs' claim was ripe where, "assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted").

B. Establishment Clause

At least three of the Individual Plaintiffs, Muhammed Meteab, John Doe No. 1, and John Doe No. 3, each of whom is a Muslim and a lawful permanent resident of the United States, have standing to assert the claim that the Second Executive Order violates the Establishment Clause. John Doe No. 1 and John Doe No. 3 each has a wife who is an Iranian national, currently residing in Iran, who would be barred from entry to the United States by the Executive Orders. John Doe No. 1 has stated that the travel ban has "created significant fear, anxiety, and insecurity" for him and his wife and that the "anti-Muslim views" underlying the Executive Orders have caused him "significant stress and anxiety" to the point that he "worr[ies] that I may not be safe in this country." J.R. 45. John Doe No. 3 has stated that the "anti-Muslim attitudes that are driving" the Executive Orders cause him "stress and anxiety" and lead him to "question whether I even belong in this country." J.R. 49. Meteab, who has Iraqi family members seeking entry as refugees but who are now subject to the Executive Orders' suspension of refugee admissions, has stated that the "official anti-Muslim sentiment" of the Executive Orders has caused "mental stress" and has rendered him "isolated and disparaged" in his community. J.R. 53.

Courts have recognized that for purposes of an Establishment Clause claim, noneconomic, intangible harms to "spiritual, value-laden beliefs" can constitute a particularized injury sufficient to support standing.

Suhre v. Haywood Cty., 131 F.3d 1083, 1086 (4th Cir. *1997)*; *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to "disfavored treatment" based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); *Catholic League v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a "psychological consequence" constitutes a concrete injury where it is "produced by government condemnation of one's own religion or endorsement of another's in one's own community"). The injury, however, needs to be a "personal injury suffered" by the plaintiff "*as a consequence* of the alleged constitutional error." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Such a "personal injury" can result, for example, from having "unwelcome direct contract with a religious display that appears to be endorsed by the state," *Suhre*, 131 F.3d at 1086, or from being a member of the geographic community in which the governmental action disfavoring their religion has an impact, *see Awad*, 670 F.3d at 1122-23; *Catholic League*, 624 F.3d at 1048 (finding that two devout Catholics and a Catholic advocacy group, all based in San Francisco, had standing to challenge an allegedly anti-Catholic resolution passed by the city government). Here, where the Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a "personal injury" as a "consequence" of the alleged Establishment Clause violation. *Valley Forge Christian Coll.*, 454 U.S. at 485.

The harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation will allegedly effect the disfavoring of Islam, and the injury is "likely to be redressed by a favorable judicial decision" invalidating the relevant provisions of the Executive Order. *Hollingsworth*, 133 S. Ct. at 2661. The Court therefore finds that these three Individual Plaintiffs have standing to assert an Establishment Clause challenge.

Having identified at least one plaintiff with standing to assert the claims to be addressed on this Motion, the Court need not address the standing arguments of the other Plaintiffs.

II. Legal Standard

To obtain a preliminary injunction, moving parties must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). A moving party must satisfy each requirement as articulated. *Real Truth About Obama, Inc. v. Fed. Election*

Comm'n, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Because a preliminary injunction is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

III. Likelihood of Success on the Merits

Because "courts should be extremely careful not to issue unnecessary constitutional rulings," *Am. Foreign Servo Ass'n v. Garfunkel*, 490 U.S. 153, 161 (1989) (per curiam), the Court first addresses the statutory claim and then proceeds, if necessary, to the constitutional claim.

A. Immigration and Nationality Act

Plaintiffs assert that the President's travel ban violated provisions of the INA. The formulation of immigration policies is entrusted exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954). In the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, Congress delegated some of its power to the President in the form of what is now Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f) ("§ 1182(f)"), which provides that:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-

> immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In the Second Executive Order, President Trump invokes § 1182(f) in issuing the travel ban against citizens of the Designated Countries. *See* 2d Order § 2(c).

Plaintiffs argue that by generally barring the entry of citizens of the Designated Countries, the Second Order violates Section 202(a) of the INA, codified at 8 U.S.C. § 1152(a) ("§ 1152(a)"), which provides that, with certain exceptions:

> No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]

8 U.S.C. § 1152(a)(1)(A).

Section 1152(a) was enacted as part of the Immigration and Nationality Act of 1965, which was adopted expressly to abolish the "national origins system" imposed by the Immigration Act of 1924, which keyed yearly immigration quotas for particular nations to the percentage of foreign-born individuals of that nationality who were living in the continental United States, based on the 1920 census, in order to "maintain, to some degree, the ethnic composition of the American people." H. Rep. No. 89-745, at 9 (1965). President Johnson sought this reform because the national origins system was at odds with "our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." *Id.* at 11.

At first glance, President Trump's action appears to conflict with the bar on discrimination on the basis of nationality. However, upon consideration of the specific statutory language, the Court finds no direct conflict. Section 1182(f) authorizes the President to bar "entry" to certain classes of aliens. 8 U.S.C. § 1182(f). Section 1152(a) bars discrimination based on nationality in the "issuance of an immigrant visa." *Id.* § 1152(a)(1)(A). Although entry is not currently defined in the INA, until 1997 it was defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, voluntary or otherwise." *Id.* § 1101(a)(13) (1994). In the same section of the current INA, the term "admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). The term "immigrant visa" is separately defined as "an immigrant visa required by this chapter and properly issued by a consular officer at his office outside the United States to an eligible immigrant under the provisions of this chapter." *Id.* § 1101(a)(16). The INA, in turn, makes clear that "[n]othing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States." *Id.* § 1201(h). Thus, § 1152(a) and § 1182(f) appear to address different activities handled by different government officials. When two statutory provisions "are capable of co-existence, it is the duty of the courts

. . . to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Accordingly, an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas.

Although the Second Executive Order does not explicitly bar citizens of the Designated Countries from receiving a visa, the Government acknowledged at oral argument that as a result of the Second Executive Order, any individual not deemed to fall within one of the exempt categories, or to be eligible for a waiver, will be denied a visa. Thus, although the Second Executive Order speaks only of barring entry, it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries. Under the plain language of the statute, the barring of immigrant visas on that basis would run contrary to § 1152(a). Just as § 1152(a) does not intrude upon the President's § 1182(f) authority to bar entry to the United States, the converse is also true: the § 1182(f) authority to bar entry does not extend to the issuance of immigrant visas. The power the President has in the immigration context, and certainly the power he has by virtue of the INA, is not his by right, but derives from "the statutory authority conferred by Congress." *Abourezk*, 785 F.2d at 1061. Notably, the Government has identified no instance in which § 1182(f) was invoked to bar the issuance of visas based on nationality, a step not contemplated by the language of the statute.

To the extent the Government argues that § 1152(a) does not constrain the ability of the President to use § 1182(f) to bar the issuance of immigrant visas, the Court finds no such exception. Section 1152(a) requires a particular result, namely non-discrimination in the issuance of immigrant visas on specific, enumerated bases. Section 1182(f), by contrast, mandates no particular action, but instead sets out general parameters for the President's power to bar entry. Thus, to the extent that § 1152(a) and § 1182(f) may conflict on the question whether the President can bar the issuance of immigrant visas based on nationality, § 1152(a), as the more specific provision, controls the more general § 1182(f). *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *United States v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987). Moreover, § 1152(a) explicitly excludes certain sections of the INA from its scope, specifically §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. 8 U.S.C. § 1152(a)(1)(A). Section 1182(f) is not among the exceptions. Because the enumerated exceptions illustrate that Congress "knows how to expand 'the jurisdictional reach of a statute,'" the absence of any reference to § 1182(f) among these exceptions provides strong evidence that Congress did not intend for § 1182(f) to be exempt from the anti-discrimination provision of § 1152(a). *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991)).

The Government further argues that the President may nevertheless engage in discrimination on the basis of nationality in the issuance of immigrant visas based on 8 U.S.C. § 1152(a)(1)(B), which states that "[n]othing in [§ 1152(a)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." As that statutory provision expressly applies to the Secretary of State, it does not provide a basis to uphold an otherwise discriminatory action by the President in an Executive Order. Even if the Court were to construe Plaintiffs' claim to be that the State Department's anticipated denial of immigrant visas based on nationality for a period of 90 days would run contrary to § 1152(a), the text of § 1152(a)(1)(B) does not comfortably establish that such a delay falls within this exception. Although § 1152(a)(1)(B) specifically allows the Secretary to vary "locations" and "procedures" without running afoul of the nondiscrimination provision, it does not include within the exception any authority to make temporal adjustments. Because time, place, and manner are different concepts, and § 1152(a)(1)(B) addresses only place and manner, the Court cannot readily conclude that § 1152(a)(1)(B) permits the imminent 90-day ban on immigrant visas based on nationality despite its apparent violation of the non-discrimination provision of § 1152(a)(1)(A).

Finally, the Government asserts that the President has the authority to bar the issuance of visas based on nationality pursuant to Section 215(a) of the INA, codified at 8 U.S.C. § 1185(a) ("§ 1185(a)"), which provides that:

> Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). As support for this interpretation, the Government cites President Carter's invocation of 8 U.S.C. § 1185(a)(1) to bar entry of Iranian nationals during the Iran Hostage Crisis in 1979. Crucially, however, President Carter used § 1185(a)(1) to "prescribe limitations and exceptions on the rules and regulations" governing "Iranians holding nonimmigrant visas," a category that is outside the ambit of § 1152(a). 44 Fed. Reg. 67947, 67947 (1979). The Government has identified no instance in which § 1185(a) has been used to control the immigrant visa issuance process. Under the principle of statutory construction that "all parts of a statute, if at all possible, are to be given effect," *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973), the Court concludes that, as with § 1182(f), the most fair reading of § 1182(a)(1) is that it provides the President with the authority to regulate and control whether and how aliens enter or exit the United States, but does not extend to regulating the separate activity of issuance of immigrant visas.

Because there is no clear basis to conclude that § 1182(f) is exempt from the nondiscrimination provision of § 1152(a) or that the President is authorized to impose nationality-based distinctions on the immigrant visa issuance process through another statutory provision, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas, which the statutory language makes clear is the extent of the scope of that anti-discrimination requirement. They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Beyond § 1152(a), Plaintiffs make the additional argument under the INA that because the Second Executive Order's nationality-based distinctions are ostensibly aimed at potential terrorist threats, the Order conflicts with 8 U.S.C. § 1182(a)(3)(B), which renders an individual inadmissible based on an enumerated list of terrorism considerations. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(I), (IV), and (VII). Plaintiffs contend that these provisions indicate that Congress has established a mechanism for the individualized assessment of the terror risk an immigrant poses, such that Congress did not envision that terrorism would be addressed through broad nationality- or religion-based bans pursuant to § 1182(f). But Plaintiffs provide no support for their contention and make no showing that § 1182(a)(3)(B) and § 1182(f) "cannot mutually coexist." *Radzanower*, 426 U.S. at 155.

Although Plaintiffs try to cast § 1182(a) as an emphatically individualized enterprise, neither § 1182(a) nor § 1182(f) purports to limit the President to barring entry only to classes of aliens delineated in § 1182(a). Thus, Plaintiffs are unlikely to succeed on the merits of this claim.

B. Establishment Clause

Plaintiffs assert that the travel ban on citizens from the Designated Countries is President Trump's fulfillment of his campaign promise to ban Muslims from entering the United States. They argue that the Second Executive Order therefore violates the Establishment Clause. The First Amendment prohibits any "law respecting an establishment of religion," U.S. Const. amend. I, and "mandates governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When a law does not differentiate among religions on its face, courts apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). Under the *Lemon* test, to withstand an Establishment Clause challenge (1) an act must have a secular purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not "foster 'an excessive government entanglement with religion.'" *Id.* at 612-613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). All three prongs of the test must be satisfied. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The mere identification of any secular purpose for the government action does not satisfy the purpose test. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 865 n.13 (2005). Such a rule "would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action." *Id.* ("[A]n approach that credits *any* valid purpose . . . has not been the way the Court has approached government action that implicates establishment." (emphasis added)). Thus, although governmental statements of purpose generally receive deference, a secular purpose must be "genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864. If a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is "secondary," the purpose test has not been satisfied. *Id.* at 860, 862-65; *see also Edwards*, 482 U.S. at 594 (finding a violation of the Establishment Clause where the "primary purpose" of the challenged act was "to endorse a particular religious doctrine").

An assessment of the purpose of an action is a "common" task for courts. *McCreary*, 545 U.S. at 861. In determining purpose, a court acts as an "objective observer" who considers "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). An "understanding of official objective" can emerge from "readily discoverable fact" without "judicial psychoanalysis" of the decisionmaker. *Id.*

Plaintiffs argue that the Second Executive Order fails the purpose prong because there is substantial direct evidence that the travel ban was motivated by a desire to ban Muslims as a group from entering the United States. Plaintiffs' evidence on this point consists primarily of public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order. Considering statements from these time periods is appropriate because courts may consider "the historical context" of the action and the "specific sequence of events" leading up to it. *Edwards*, 482 U.S. at 594-95. Such evidence is "perfectly probative" and is considered as a matter of "common sense"; indeed, courts are "forbid[den] . . . 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)); *cf Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1987) (including the "historical background of the decision," the "specific sequence of events leading up [to] the challenged decision," and "contemporary statements of the decision-making body" as factors indicative of discriminatory intent), *cited with approval in Edwards*, 482 U.S. at 595.

> One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first

> instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters.

McCreary, 545 U.S. at 866 n.14.

Specifically, the evidence offered by Plaintiffs includes numerous statements by President Trump expressing an intent to issue a Muslim ban or otherwise conveying anti-Muslim sentiments. For example, on December 7, 2015, then a Republican primary candidate, Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website "calling for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." into the country." J.R. 261. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, Trump lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

Significantly, the record also includes specific statements directly establishing that Trump intended to effectuate a partial Muslim ban by banning entry by citizens of specific predominantly Muslim countries deemed to be dangerous, as a means to avoid, for political reasons, an action explicitly directed at Muslims. In a July 24, 2016 interview on Meet the Press, soon after becoming the Republican presidential nominee, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his call for a "Muslim ban," he described it as an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. When President Trump was preparing to sign the First Executive Order, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142. The day after the First Executive Order was issued, Mayor Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-48. These types of public statements were relied upon by the Eastern District of Virginia in enjoining the First Executive Order based on a likelihood of success on an Establishment Clause claim, *Aziz*, 2017 WL 580855, at *11, and the Ninth Circuit in concluding that an Establishment Clause claim against that Order raised "serious allegations" and presented "significant constitutional questions." *Washington*, 847 F.3d at 1168.

These statements, which include explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban. In particular, the direct statements by President Trump and Mayor Giuliani's account of his conversations with President Trump reveal that the plan had been to bar the entry of nationals of predominantly Muslim countries deemed to constitute dangerous territory in order to approximate a Muslim ban without calling it one precisely the form of the travel ban in the First Executive Order. *See Aziz*, 2017 WL 580855, at *4 (quoting from a July 17, 2016 interview during which then-candidate Trump, upon hearing a tweet stating "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," responded "So you call it territories. OK? We're gonna do territories."). Such explicit statements of a religious purpose are "readily discoverable fact[s]" that allow the Court to identify the purpose of this government action without resort to "judicial psychoanalysis." *McCreary*, 545 U.S. at 862. They constitute clear statements of religious purpose comparable to those relied upon in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), where the court found that a Ten Commandments display at a state courthouse was erected for a religious purpose in part based on the chief justice stating at the dedication ceremony that "in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1286, 1296 ("[N]o psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.").

Relying primarily on this record, Plaintiffs asks this Court to issue an injunction against the Second Executive Order on Establishment Clause grounds. In considering this request, the same record of public statements by President Trump remains highly relevant. In *McCreary*, where the Court was reviewing a third attempt to create a courthouse display including the Ten Commandments after two prior displays had been deemed unconstitutional, it held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absentedminded objective observer, not one presumed familiar with the history of the government's action and competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

The Second Executive Order, issued only six weeks after the First Executive Order, differs, as relevant here, in that the preference for religious minorities in the refugee process has been removed. It also removes Iraq from the list of Designated Countries, exempts certain categories of individuals from the ban, and lists other categories of individuals who may be eligible for a case-by-case waiver from the ban. Despite these changes, the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as "mostly minor technical differences," and stated that the "basic policies are still going to be in effect." J.R. 319. When the Second Executive Order was signed on March 6, 2017, White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. The Second Executive Order itself explicitly states that the changes, particularly the addition of exemption and waiver categories, were made to address 'judicial concerns," 2d Order § 1(i), including those raised by the Ninth Circuit, which upheld an injunction based on due process concerns, *Washington*, 847 F.3d at 1156.

The removal of the preference for religious minorities in the refugee system, which was the only explicit reference to religion in the First Executive Order, does not cure the Second Executive Order of Establishment Clause concerns. Crucially, the core policy outcome of a blanket ban on entry of nationals from the Designated Countries remains. When President Trump discussed his planned Muslim ban, he described not the preference for religious minorities, but the plan to ban the entry of nationals from certain dangerous countries as a means to carry out the Muslim ban. These statements thus continue to explain the religious purpose behind the travel ban in the Second Executive Order. Under these circumstances, the fact that the Second Executive Order is facially neutral in terms of religion is not dispositive. *See Bd. Of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-702 (1994) (holding that a facially neutral delegation of civic power to "qualified voters" of a village predominantly comprised of followers of Satmas Hasidism was a "purposeful and forbidden" violation of the Establishment Clause); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 542 (1993) (holding that a facially neutral city ordinance prohibiting animal sacrifice and intended to target the Santeria faith violated the Free Exercise Clause because "the Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and action targeting religion "cannot be shielded by mere compliance with the requirement of facial neutrality").

Defendants do not directly contest that this record of public statements reveals a religious motivation for the travel ban. Rather, they argue that many of the statements may not be considered because they were made outside the formal government decisionmaking process or before President Trump became a government official. Although *McCreary*, relied upon by Defendants, states that a court considers "the text, legislative history, and implementation" of an action and "comparable" official acts, it did not purport to list the only materials appropriate for consideration.[2] 545 U.S. at 862. Notably, in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit considered quotes from county commissioners that appeared in news reports in finding that a Ten Commandments display violated the Establishment Clause. *Id.* at 701. Likewise, in *Glassroth*, the United States Court of Appeals for the Eleventh Circuit found an Establishment Clause violation based on a record that included the state chief justice's campaign materials, including billboards and television commercials, proclaiming him to be the "Ten Commandments Judge." 335 F.3d at 1282, 1284-85, 1297.

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[2] In *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006), cited by Defendants, the Court criticized a dissent's reliance on press statements by senior government officials, rather than the President's formal written determination mandated by the Uniform Code of Military Justice, to provide justification for the government's determination that applying court-martial rules to a terrorism suspect's military commission was impracticable. *Id.* at 624 & n.52. It did not address what facts could be considered in assessing government purpose under the Establishment Clause, where courts have held that facts outside the specific text of the government decision may be considered. *See Edwards*, 482 U.S. at 594-95.

Although statements must be fairly "attributed to [a] government actor," *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010), Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the "reasonable memory" of a "reasonable observer." *McCreary*, 545 U.S. at 866. Notably, the record in *Glassroth* also included the fact that the state chief justice, before securing election to that position, had made a campaign promise to install the Ten Commandments in the state courthouse, as well as campaign materials issued by members of his campaign committee. *Glassroth*, 335 F.3d at 1285. Because the state chief justice was the ultimate decisionmaker, and his campaign committee's statements were fairly attributable to him, such material is appropriately considered in assessing purpose under the Establishment Clause. *See id.* at 1285; *Glassman*, 628 F.3d at 147. Likewise, all of the public statements at issue here are fairly attributable to President Trump, the government decisionmaker for the Second Executive Order, because they were made by President Trump himself, whether during the campaign or as President, by White House staff, or by a close campaign advisor who was relaying a conversation he had with the President. In contrast, Defendants' cited case law does not involve statements fairly attributable to the government decisionmaker. *See, e.g.*, *Glassman*, 628 F.3d at 147 (declining to consider statements made by members of a church that was alleged to have benefited from government action); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) (declining to consider statements by the artist where the government's display of artwork is challenged); *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004) (declining to consider statements by a judge and county residents about a Ten Commandments display where the county government's purpose was at issue).

Defendants also argue that the Second Executive Order explicitly articulates a national security purpose, and that unlike its predecessor, it includes relevant information about national security concerns. In particular, it asserts that there is a heightened chance that individuals from the Designated Countries will be "terrorist operatives or sympathizers" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and those governments are therefore less likely to provide necessary information for the immigrant vetting process. 2d Order § 1(d). The Order also references a history of persons born abroad committing terrorism-related crimes in the United States and identifies three specific cases of such crimes. The Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Plaintiffs argue that the stated national security rationale is limited and flawed. Among other points, they note that the Second Executive Order does not identify examples of foreign nationals from Iran, Libya, Sudan, Syria, or Yemen who engaged in terrorist activity in the United States. They also note that a report from the Department of Homeland Security, Office of Intelligence and Analysis, concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity" and that "few of the impacted countries have terrorist groups that threaten the West." J.R. 158. Furthermore, they note that the 300 FBI investigations are dwarfed by the over 11,000 counterterrorism investigations at any one time, only a fraction of which lead to actual evidence of illegal activity. Finally, they note that Secretary of Homeland Security Kelly stated that there are additional countries, some of which are not predominantly Muslim, that have vetting problems but are not included among the banned countries. These facts raise legitimate questions whether the travel ban for the Designated Countries is actually warranted.

Generally, however, courts should afford deference to national security and foreign policy judgments of the Executive Branch. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). The Court thus should not, and will not, second-guess the conclusion that national security interests would be served by the travel ban. The question, however, is not simply whether the Government has identified a secular purpose for the travel ban. If the stated secular purpose is secondary to the religious purpose, the Establishment Clause would be violated. *See McCreary*, 545 U.S. at 864, 866 n.14 (stating that it is appropriate to treat two like acts differently where one has a "history manifesting sectarian purpose that the other lacks"). Making assessments on purpose, and the relative weight of different purposes, is a core judicial function. *See id.* at 861-62.

In this highly unique case, the record provides strong indications that the national security purpose is not the primary purpose for the travel ban. First, the core concept of the travel ban was adopted in the First Executive Order, without the interagency consultation process typically followed on such matters. Notably, the document providing the recommendation of the Attorney General and the Secretary of Homeland Security was issued not before the First Executive Order, but on March 6, 2017, the same day that the Second Executive Order was issued. The fact that the White House took the highly irregular step of first introducing the travel ban without receiving the input and judgment of the relevant national security agencies strongly suggests that the religious purpose was primary, and the national security purpose, even if legitimate, is a secondary *post hoc* rationale.

Second, the fact that the national security rationale was offered only after courts issued injunctions against the First Executive Order suggests that the religious purpose has been, and remains, primary. Courts have been skeptical of statements of purpose "expressly disclaim[ing] any attempt to endorse religion" when made after a judicial finding of impermissible purpose, describing them as a "litigating position." *E.g.*, *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 444, 448 (6th Cir. 2010). Indeed, the Second Executive Order itself acknowledges that the changes made since the First Executive Order were to address "judicial concerns." 2d Order § 1(i).

Third, although it is undisputed that there are heightened security risks with the Designated Countries, as reflected in the fact that those who traveled to those countries or were nationals of some of those countries have previously been barred from the Visa Waiver Program, *see* 8 U.S.C. § 1187(a)(12), the travel ban represents an unprecedented response. Significantly, during the time period since the Reagan Administration, which includes the immediate aftermath of September 11, 2001, there have been no instances in which the President has invoked his authority under § 1182(f) or § 1185 to issue a ban on the entry into the United States of all citizens from more than one country at the same time, much less six nations all at once. Kate M. Manuel, Congo Research Serv., R44743, Executive Authority to Exclude Aliens: In Brief (2017); J.R. 405-406. In the two instances in which nationals from a single country were temporarily stopped, there was an articulable triggering event that warranted such action. Manuel, *supra*, at 10-11 (referencing the suspension of the entry of Cuban nationals under President Reagan after Cuba stopped complying with U.S. immigration requirements and the revocation of visas issued to Iranians under President Carter during the

Iran Hostage Crisis). The Second Executive Order does not explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks. But while the travel ban bears no resemblance to any response to a national security risk in recent history, it bears a clear resemblance to the precise action that President Trump described as effectuating his Muslim ban. Thus, it is more likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban. Accordingly, there is a likelihood that the travel ban violates the Establishment Clause.

Finally, Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a "facially legitimate and bona fide reason" for its action. *See Mandel*, 408 U.S. at 777. This standard is most typically applied when a court is asked to review an executive officer's decision to deny a visa. *See, e.g.*, *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); or in other matters relating to the immigration rights of individual aliens or citizens, *see Fiallo v. Bell*, 430 U.S. 787, 790 (1977). The *Mandel* test, however, does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches." *Washington*, 847 F.3d at 1162 (holding that courts possess "the authority to review executive action" on matters of immigration and national security for "compliance with the Constitution"). In such situations, the power of the Executive and Legislative branches to create immigration law remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

Even when exercising their immigration powers, the political branches must choose "constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 941. Courts have therefore rejected arguments that they forgo the traditional constitutional analysis when a plaintiff has challenged the Government's exercise of immigration power as violating the Constitution. *See, e.g.*, *Zadvydas*, 533 U.S. at 695 (rejecting deference to plenary power in determining that indefinite detention of aliens violated the Due Process Clause); *Chadha*, 462 U.S. at 941-43 (stating that Congress's plenary authority over the regulation of aliens does not permit it to "offend some other constitutional restriction" and holding that a statute permitting Congress to overturn the Executive Branch's decision to allow a deportable alien to remain in the United States violated constitutional provisions relating to separation of powers); *Washington*, 847 F.3d at 1167-68 (referencing standard Establishment Clause principles as applicable to the claim that the First Executive Order violated the Establishment Clause). Thus, although "[t]he Executive has broad discretion over the admission and exclusion of aliens," that discretion "may not transgress constitutional limitations," and it is "the duty of the courts" to "say where those statutory and constitutional boundaries lie." *Abourezk*, 785 F.2d at 1061.

Mindful of "the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their Establishment Clause claim. Having reached this conclusion, the Court need not address Plaintiffs' likelihood of success on their Equal Protection Clause claim.

IV. Irreparable Harm

Having concluded that Plaintiffs have established a likelihood of success on the merits, the Court turns to whether they have shown a likelihood of irreparable harm. The Supreme Court has held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding irreparable harm upon a violation of the freedom of association). The Fourth Circuit has applied this holding to cases involving the freedom of speech and expression. *E.g.*, *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190, 191-92 (4th Cir. 2013); *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). Although the Fourth Circuit has not yet held that a violation of the Establishment Clause likewise necessarily results in irreparable harm, other circuits have. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303

(D.C. Cir. 2006); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (finding irreparable harm in an Establishment Clause case and stating that the "harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion").

Here, as in *Elrod*, "First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Elrod*, 427 U.S. at 373. "[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303. The Court accordingly finds that Plaintiffs have established a likelihood of irreparable harm when the Second Executive Order takes effect.

V. Balance of the Equities and the Public Interest

While Plaintiffs would likely face irreparable harm in the absence of an injunction, Defendants are not directly harmed by a preliminary injunction preventing them from enforcing an Executive Order likely to be found unconstitutional. *See Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Aziz*, 2017 WL 580855, at *10. Preventing an Establishment Clause violation has significant public benefit beyond the interests of the Plaintiffs. The Supreme Court has recognized the "fundamental place held by the Establishment Clause in our constitutional scheme." *Wallace v. Jajfree*, 472 U.S. 38, 60 (1985). The Founders "brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion" because they understood that "governmentally established religions and religious persecution go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 432-33 (1962). When government chooses sides among religions, the "inevitable result" is "hatred, disrespect, and even contempt" from those who adhere to different beliefs. *See id.* at 431. Thus, to avoid sowing seeds of division in our nation, upholding this fundamental constitutional principle at the core of our Nation's identity plainly serves a significant public interest.

At the same time, the Supreme Court has stated that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Defendants, however, have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history. Thus, the balance of the equities and the public interest favor the issuance of an injunction.

VI. Scope of Relief

Plaintiffs have asked the Court to issue an injunction blocking the Executive Order in its entirety. The Court declines to grant such broad relief. The Plaintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order. The Court will enjoin that provision only. Although Plaintiffs have argued that sections relating to the temporary ban on refugees also offend the Establishment Clause, they did not sufficiently develop that argument to warrant an injunction on those sections at this time. As for the remaining portions of the Second Order, Plaintiffs have not provided a sufficient basis to establish their invalidity. Thus, the Court declines to enjoin the Second Order in its entirety.

With respect to Section 2(c), the Court concludes that nationwide relief is warranted. It is "well established" that a federal district court has "wide discretion to fashion appropriate injunctive relief in a particular case." *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992); *see also Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (holding that the "Constitution vests the District Court with 'the judicial Power of the United States,'" which "extends across the country" (quoting U.S. Const. art. III § 1)), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). However, nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See id.*; *Richmond Tenants Org., Inc.*, 956 F.3d at 1308-39; *Texas*, 809 F.3d at 188.

The Court has found that Plaintiffs are likely to be able to establish that Section 2(c) of the Second Executive Order violates the Establishment Clause. Both the Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States, indicating that nationwide relief may be appropriate. *Richmond Tenants Org., Inc.*, 956 F.3d at 1309 (holding that a nationwide injunction was "appropriately tailored" because the plaintiffs lived in different parts of the country). Moreover, although the Government has argued that relief should be strictly limited to the specific interests of the Plaintiffs, an Establishment Clause violation has impacts beyond the personal interests of individual parties. *Joyner v. Forsyth Cty.*, 653 F.3d 341, 355 (4th Cir. 2011) ("[T]hese plaintiffs are not so different from other citizens who may feel in some way marginalized on account of their religious beliefs and who decline to risk the further ostracism that may ensue from bringing their case to court or who simply lack the resources to do so."); *City of St. Charles*, 794 F.2d at 275 (stating that a violation of the Establishment Clause causes "harm to society"). Here, nationwide relief is appropriate because this case involves an alleged violation of the Establishment Clause by the federal government manifested in immigration policy with nationwide effect. *See Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming a nationwide injunction in a facial challenge to a federal statute and regulations on Establishment Clause grounds).

Finally, under these facts, a "fragmented" approach "would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67. "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*, and the Supreme Court has described immigration policy as a comprehensive and *unified* system." *Texas*, 80 F.3d at 187-88 (footnotes and quotation marks omitted). In light of the constitutional harms likely to befall Plaintiffs in the absence of relief, and the constitutional mandate of a uniform immigration law and policy, Section 2(c) of the Second Executive Order will be enjoined on a nationwide basis.

CONCLUSION

For the foregoing reasons, the Motion is GRANTED IN PART and DENIED IN PART. The Court will issue an injunction barring enforcement of Section 2(c) of the Second Executive Order. A separate Order shall issue.

Date: Mar. 15, 2017

/s/ THEODORE D. CHUANG
THEODORE D. CHUANG
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. TDC-17-0361

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, MUHAMMED METEAB, PAUL HARRISON, IBRAHIM AHMED MOHOMED, JOHN DOES NOS. 1 & 3, AND JANE DOE NO. 2, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF STATE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, AND MICHAEL DEMPSEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

Filed: Mar. 16, 2017

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court finds that the Plaintiffs have standing to maintain this civil action and have established that they are likely to prevail on the merits, that they are likely to suffer irreparable harm in the absence of injunctive relief, and that the balance of the equities and the public interest favor an injunction.

Accordingly, it is hereby ORDERED that:

1. Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order is construed as a Motion for a Preliminary Injunction.

2. The Motion, ECF No. 95, is GRANTED IN PART and DENIED IN PART.

3. The Motion is GRANTED as to Section 2(c) of Executive Order 13,780 ("Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States"). **Defendants, and all officers, agents, and employees of the Executive Branch of the United States government, and anyone acting under their authorization or direction, are ENJOINED from enforcing Section 2(c) of Executive Order 13,780.**

4. This Preliminary Injunction is granted on a nationwide basis and prohibits the enforcement of Section 2(c) of Executive Order 13,780 in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas, pending further orders from this court.

5. Plaintiffs are not required to pay a security deposit.

6. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this Order be filed.

7. The Motion is DENIED as to all other provisions of Executive Order 13,780.

Date: Mar. 15, 2017

/s/ THEODORE D. CHUANG
THEODORE D. CHUANG
United States District Judge

APPENDIX D

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 8 U.S.C. 1152(a) provides:

Numerical limitations on individual foreign states

(a) Per country level

(1) Nondiscrimination

(A) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

(2) Per country levels for family-sponsored and employment-based immigrants

Subject to paragraphs (3), (4), and (5), the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 1153 of this title in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

(3) Exception if additional visas available

If because of the application of paragraph (2) with respect to one or more foreign states or dependent areas, the total number of visas available under both subsections (a) and (b) of section 1153 of this title for a calendar quarter exceeds the number of qualified immigrants who otherwise may be issued such a visa, paragraph (2) shall not apply to visas made available to such states or areas during the remainder of such calendar quarter.

(4) Special rules for spouses and children of lawful permanent resident aliens

(A) 75 percent of 2nd preference set-aside for spouses and children not subject to per country limitation

(i) In general

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, 75 percent of the 2-A floor (as defined in clause (ii)) shall be issued without regard to the numerical limitation under paragraph (2).

(ii) "2-A floor" defined

In this paragraph, the term "2-A floor" means, for a fiscal year, 77 percent of the total number of visas made available under section 1153(a) of this title to immigrants described in section 1153(a)(2) of this title in the fiscal year.

(B) Treatment of remaining 25 percent for countries subject to subsection (e)

(i) In general

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, the remaining 25 percent of the 2-A floor shall be available in the case of a state or area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign state or area is less than the subsection (e) ceiling (as defined in clause (ii)).

(ii) "Subsection (e) ceiling" defined

In clause (i), the term "subsection (e) ceiling" means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants who are natives of the state or area under section 1153(a)(2) of this title consistent with subsection (e).

(C) Treatment of unmarried sons and daughters in countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, the number of immigrant visas that may be made available to natives of the state or area under section 1153(a)(2)(B) of this title may not exceed—

(i) 23 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e), or

(ii) the number (if any) by which the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e) exceeds the number of visas issued under section 1153(a)(2)(A) of this title,

whichever is greater.

(D) Limiting pass down for certain countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(a)(2) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(a)(2) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying paragraphs (3) and (4) of section 1153(a) of this title under subsection (e)(2) all visas shall be deemed to have been required for the classes specified in paragraphs (1) and (2) of such section.

(5) Rules for employment-based immigrants

(A) Employment-based immigrants not subject to per country limitation if additional visas available

If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 1153(b) of this title for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

(B) Limiting fall across for certain countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(b) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(b) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 1153(b) of this title.

3. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(3) Security and related grounds

* * * * *

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or (bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

* * * * *

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

* * * * *

4. 8 U.S.C. 1185(a)(1) provides:

Travel control of citizens and aliens

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

5. Exec. Order No. 13,76[illegible], 82 Fed. Reg. 8977 (Feb. 1, 2017) provides:

Protecting the Nation from Foreign Terrorist Entry into the United States

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Purpose.* The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States.

Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 2. *Policy.* It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. *Implementing Uniform Screening Standards for All Immigration Programs.* (a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest —including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship —and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ DONALD J. TRUMP

THE WHITE HOUSE,

Jan. 27, 2017.

6. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) provides:

Protecting the Nation from Foreign Terrorist Entry into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: "(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists." 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the "political branches are far better equipped to make appropriate distinctions" about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State's *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran.* Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya.* Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia.* Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan.* Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria.* Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen.* Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ DONALD J. TRUMP

THE WHITE HOUSE,

Mar. 6, 2017.

ECORD
AND
RIEFS

FILED
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OFFICE OF THE CLER
SUPREME COURT, U.

No. 16-1436

IN THE

Supreme Court of the United States

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DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

—v.—

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether plaintiffs have standing to challenge the legality of Section 2(c) of the Executive Order where, among other harms, the Order subjects them to religious condemnation in a particularized manner and interferes with their ability to be reunited with family members.

2. Whether, in light of the overwhelming evidence that the Executive Order was enacted to fulfill President Trump's promise of a Muslim ban, the Fourth Circuit correctly held that Section 2(c) likely violates the Establishment Clause's prohibition against government condemnation of a particular religion.

3. Whether Section 2(c)'s ban on entry of more than 180 million noncitizens from six countries violates the Immigration and Nationality Act.

4. Whether a nationwide injunction was an appropriate exercise of discretion in light of the dispersed location of plaintiffs throughout the country, the nationwide scope of the Executive Order, and the nature of plaintiffs' injuries.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) The parent corporation of respondent International Refugee Assistance Project is the Urban Justice Center, Inc.

2) Respondents HIAS, Inc., and Middle East Studies Association of North America, Inc., do not have parent corporations.

3) No publicly held company owns ten percent or more of the stock of any respondent.

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INTRODUCTION

This is an important case. If challenges had not succeeded in the lower courts, our Nation would today be enforcing a travel ban—Section 2(c) of Executive Order 13,780—that the President ordered to further his publicly stated goal of preventing Muslims from entering the United States. Millions of American Muslims would know that, every day, their own government was enforcing a policy that denigrated their religion and their dignity. For many people in this country, including plaintiffs in this case, the ban would reach right into their families, jeopardizing their plans to reunite with loved ones.

Equally important, to allow the ban to go forward, the courts would have had to ignore a mountain of publicly available evidence—even though everyone else in the country, including those of the disfavored faith, could not ignore it. They would have had to set aside this Court's precedents and turn their backs on their traditional and crucial role in disputes where constitutional liberties are at stake.

As important as these issues are, the Court should not grant the petition. To do so would be pointless, because by its own terms, the President's ban expires on June 14, 2017, two days after the filing of this brief. At that point, the government's appeal of the preliminary injunction will be moot.

Even leaving mootness aside, the judgment of the court of appeals does not require this Court's review. The facts of this case are extraordinary, as is the damage that Section 2(c) would have caused. But the court of appeals carefully and correctly applied this Court's precedents to this unique situation.

The government does not dispute that the full record establishes that Section 2(c)'s primary purpose was to effectuate a ban on Muslims. Instead, it asks this Court to do what the courts below did not: look away from the evidence establishing that Section 2(c) violates one of our basic guarantees of religious liberty.

That is a request for abdication, not deference, and it is a request the court of appeals correctly declined. There is no need for further review.

STATEMENT

Before and after his inauguration, the President's continually updated website called for "preventing Muslim immigration" and "a total and complete shutdown of Muslims entering the United States." App. 10a & n.5. As a candidate, Mr. Trump declared that "Islam hates us" and said that "we're having problems with Muslims coming into the country." App. 11a. He reiterated his demand for a ban of Muslims on multiple occasions. *Id.*

After the election, President-elect Trump was asked whether he still planned to implement some form of a Muslim ban. He responded, "You know my plans. All along, I've proven to be right. 100% correct." App. 49a; *see also* App. 10a-11a, 48a-49a (reviewing multiple previous statements). By then, he had repeatedly announced that he would achieve his Muslim ban by banning individuals from Muslim countries rather than using an explicit religious test. He explained that "[p]eople were so upset when I used the word Muslim," and so he would now be "talking territory instead of Muslim." App. 12a (stating that constitutional equal treatment is "great" but "I view it differently"); *see also* App. 49a-50a.

i. The January Order

As the court of appeals observed, seven days after the President took office, he issued an Order that "appeared to take this exact form." App. 50a; *see* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) ("January Order") § 3(c). The January Order banned, for 90 days, entry into the United States by nationals of seven countries. The breadth of this Order was unprecedented. *See* App. 254a. The countries banned in the January Order range from 90 to 99 percent Muslim, and the Order provided for the possibility of an indefinite ban on those or other countries after the initial 90-day period. January Order §§ 3(e)-(f). The Order referenced "'honor' killings," which, as the Fourth Circuit observed, is a "well-worn tactic for stigmatizing and demeaning Islam." January Order § 1; App. 53a n.17; App. 137a-138a & nn.7-8 (Thacker, J., concurring). And it provided preferential treatment for religious minorities, a preference that the President himself explained was designed to give Christian refugees priority over Muslims. January Order § 5(b); App. 13a, 132a-133a (Thacker, J.).

At the signing ceremony, President Trump read the title aloud and then said, "We all know what that means." App. 13a; C.A. App. 403, 778. The following day, when asked how the President had decided to ban the seven designated countries, a presidential advisor explained that President Trump had approached him to help design a Muslim ban "legally," and his recommendation was that it operate on the basis of nationality. App. 13a; C.A. App. 508-509.

The President issued the January Order "without consulting the relevant national security agencies." App. 53a-54a; *see* App. 213a; C.A. App. 725-26, 804; *see also* App. 131a-132a (Thacker, J.) ("the President actively shielded" the acting Attorney General "from learning the contents" of the Order). Former national security officials aware of intelligence as of a week before the Order was signed submitted sworn evidence that "'[t]here is no national security purpose for a total ban on entry for aliens from the [designated countries].'" App. 9a (quoting C.A. App. 91); *see* App. 54a.

The January Order went into immediate effect and caused widespread chaos. *See, e.g.*, C.A. App. 207, 389-95, 531-34, 583-86. Lawful permanent residents ("LPRs"), individuals with valid visas, and refugees were detained at airports and threatened with removal; families were separated; patients were blocked from medical treatment; and people were stranded in harm's way. Many individuals were prevented from getting on planes to come to the United States; others who had made it here were forced or persuaded to leave without being admitted. The government supplied confusing and contradictory interpretations of the scope of the January Order's ban during the short time that it was in effect. *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (per curiam).

Multiple legal challenges ensued, and several courts enjoined aspects of the ban. After the Ninth Circuit declined to stay a nationwide injunction of the Order's ban provisions, *id.* at 1164-1169, the government announced that it would issue a revised Executive Order to replace the January Order.

The reason proffered for the 90-day period was "[t]o temporarily reduce investigative burdens" while the Secretary of Homeland Security reviewed vetting for the seven countries. January Order §§ 3(a), (c). In particular, the Secretary was directed to "immediately" conduct that review and submit a report within 30 days. *Id.* §§ 3(a), (b). These provisions were never enjoined, and remained in force for 48 days until the March Order took effect, but the government did not complete the report required by the January Order. *See* 4th Cir. Oral Arg. at 7:55-8:55.[1]

ii. The March Order

The government took three weeks after the Ninth Circuit's *Washington* decision to draft a replacement Executive Order, and reportedly deferred its release to maximize positive press coverage of an unrelated presidential speech. C.A. App. 537-38.

The President issued the revised Order on March 6, 2017. Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) ("March Order"). The revised Order is, in most relevant respects, identical to the January Order, including its title; its list of banned countries (with the exception of Iraq), § 2(c);[2] provision for a possible indefinite ban after the initial ban period expires, § 2(e); various provisions related to refugees, § 6; a discretionary waiver provision, § 3(c); and the reference to "honor killings," § 11(a)(iii). *See* App. 50a-51a. The 90-day, six-country ban appears in Section 2(c) of the revised Order. Section 3 of the Order exempts various categories of people from the Section 2(c) ban, including individuals who have valid visas or other travel permission as of the Order's effective date.

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[1] *Available at* http://www.uscourts.gov/courts/ca4/17-1351-20170508.mp3.

Although the assessment and reporting provisions of the January Order were not enjoined and had already been in effect for 48 days, the March Order restarted the 90-day ban period and 30-day assessment without explanation. *See* March Order § 2. By the express terms of the March Order, the ban will expire on June 14, 2017—90 days after the Order's effective date. *Id.* § 2(c). The effective-date provision governs all parts of the Order, and has never been enjoined. *Id.* § 14.

The Order pointed generally to security concerns about individuals born abroad. *Id.* §§ 1(h)-(i). It cited only two examples, however, in imposing a ban on some 180 million people, and neither example demonstrates a vetting problem with respect to any of the banned countries. The first involved two Iraqi nationals, which, because Iraq was excepted from the March Order, "does not support *this* ban at all." App. 134a (Thacker, J.). The second concerned a Somali national who was brought to the United States when he was two years old and committed an offense seventeen years later. App. 134a-135a (Thacker, J.); C.A. App. 547-48.

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[2] The banned countries are Iran, Libya, Syria, Somalia, Sudan, and Yemen.

Shortly before the President signed the revised Order, two internal Department of Homeland Security reports became public. One report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." C.A. App. 419. The other concluded that increased vetting of visa applicants was unlikely to significantly reduce the incidence of terrorism in the United States, because the vast majority of foreign-born extremists radicalized years after immigrating. C.A. App. 423, 426; *see* App. 54a; *see also* App. 9a (noting declaration from former national security officials that there is '"no national security purpose'" for the Order's blanket ban).

The President recently characterized the revised Order as a "watered down, politically correct version [the Justice Department] submitted to the S[upreme] C[ourt]" and asserted that the Department "should have stayed with the original Travel Ban."[3] The President also called for a "much tougher version."[4] Other White House officials have likewise underscored the common purpose of the two Orders. The White House Press Secretary affirmed that "[t]he principles of the executive order remain the same," and a senior advisor to the President echoed that the revised Order contains "mostly minor technical differences" and achieves "the same basic policy outcome for the country." App. 14a.

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[3] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128; *see also* App. 14a, 51a (noting previous time the President characterized the revised version as a "watered down" version of the original).

[4] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871677472202477568; *see also* Donald J. Trump, *A Message From Donald J.*

iii. The Plaintiffs

The plaintiffs in this case are individuals and organizations who are directly affected by the March Order. The individual Muslim plaintiffs are U.S. citizens and LPRs seeking to reunite with family members who are nationals of banned countries. They have experienced isolation, exclusion, fear, anxiety, and insecurity because of the "anti-Muslim attitudes" conveyed by the Executive Order. C.A. App. 306, 310, 786.

The individual plaintiffs' pending visa petitions are directly affected by the ban.[5] Plaintiff John Doe #1, for example, is a Muslim LPR from Iran with a pending petition for a visa to be reunited with his Iranian wife. C.A. App. 304-05. Other individual plaintiffs with relatives from the banned countries face similar harm. *See* C.A. App. 321-22 (Plaintiff Ibrahim Mohomed); C.A. App. 316-19 (Plaintiff Jane Doe #2).

Trump, Facebook (June 5, 2017), https://www.facebook.com/DonaldTrump/videos/10159253902870725/.

[5] Plaintiff John Doe #3's wife and Paul Harrison's fiancé have been issued visas and admitted to the United States since this suit was filed.

The ban also harms Muslim clients of organizational plaintiffs International Refugee Assistance Project ("IRAP") and HIAS. IRAP provides legal representation to vulnerable populations, particularly those from the Middle East, who are seeking safety and reunification with their family members in the United States. C.A. App. 263. Plaintiff HIAS is the oldest refugee assistance organization in the world. C.A. App. 272. Both IRAP and HIAS, which serve both refugees and non-refugees, have Muslim clients in the United States who are seeking to be reunited with loved ones from the six banned countries. C.A. App. 263, 273, 283. The Order has left their Muslim clients feeling marginalized, isolated, and afraid. C.A. App. 269-70, 285-87. Both organizations have also suffered direct organizational harms because of the Executive Orders. C.A. App. 267, 280-281.

Plaintiff Middle East Studies Association ("MESA") is a U.S.-based membership organization of students and scholars of Middle Eastern studies. C.A. App. 297-98. Muslim members similarly feel "marginalize[d]" and "fear that they will be singled out" because of the Order's "anti-Muslim message." C.A. App. 300. Among other things, the ban, if implemented, would seriously "reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees." App. 17a; *see* C.A. App. 300-03. The ban also harms MESA's U.S.-based members who seek to collaborate in the United States with individuals from the banned countries. C.A. App. 298-300.

iv. Decisions Below

On March 16, the district court issued a nationwide preliminary injunction of Section 2(c) of the Order. Looking to evidence from "before [the] election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order," App. 241a, the court held that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim.

A ten-member majority of the en banc court of appeals agreed that the preliminary injunction should be affirmed in substantial part[6] and that the Order likely violates the Establishment Clause. Seven judges joined the majority opinion in full, and two more concurred nearly in full. A tenth judge concurred in the judgment, also agreeing that Section 2(c) likely violates the Establishment Clause. Three judges dissented.

The majority first concluded that *at least* Plaintiff Doe #1 had standing to assert the Establishment Clause claim. App. 33a-34a. Doe #1, the court explained, would be subjected to "the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." App. 32a. Having concluded that "at least one Plaintiff possesses standing," the majority did not "need [to] decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim." App. 34a; *contra* Pet. 15 n.7; App. Stay 24 n.8 (implying that the court concluded other plaintiffs lacked standing).

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[6] The court of appeals vacated the portion of the district court's order that directly enjoined the President himself. App. 73a-74a.

The court likewise rejected the government's other justiciability arguments, observing that this Court "has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake." App. 34a-36a.

On the merits, the court applied the standard articulated in *Kleindienst v. Mandel*: A court will accept the government's proffered justification if it is "facially legitimate and bona fide." 408 U.S. 753, 770 (1972); *see* App. 38a-39a. Relying on Justice Kennedy's controlling concurrence (joined by Justice Alito) in *Kerry v. Din*, the court explained that "where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." App. 42a (quoting 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment)).

The court held that the plaintiffs had made a "substantial and affirmative showing" that the government's proffered justification was not bona fide. App. 43a-44a, 46a. The court relied on the "ample evidence" that the March Order was an effort to effectuate the promised Muslim ban, and "the comparably weak evidence" to the contrary. App. 44a. Having concluded that the Order failed *Mandel*'s threshold "bona fide" analysis, the court next examined it under the Establishment Clause. App. 45a-46a. Based on the "compelling" record in this case, the court of appeals concluded that the Order violated longstanding Establishment Clause principles. App. 48a-52a.

The court emphasized the narrowness of its holding: "[I]n this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the March Order.]" App. 61a-62a; *see also* App. 252a (district court explaining that this is a "highly unique case").

Three judges wrote opinions agreeing with the majority's Establishment Clause holding and further concluding that the Order is unlawful in various respects under the Immigration and Nationality Act ("INA"). *See* App. 94a-100a (Wynn, J., concurring) (INA analysis applying the canon of constitutional avoidance); App. 76a n.2, 85a (Keenan, J., concurring in part and concurring in the judgment) (finding that the Order violates the INA and is not "facially legitimate"); App. 127a-145a (Thacker, J., concurring) (concluding that the Order likely violates the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A), and that it fails constitutional scrutiny even looking only to post-inauguration evidence, App. 130a-131a, 138a).

REASONS TO DENY THE PETITION

I. THE INJUNCTION OF SECTION 2(c) WILL BE MOOT BEFORE THIS CASE IS CONFERENCED.

Review is not warranted because the ban imposed by Section 2(c) will expire on June 14, 2017. At that point, the injunction will be moot.

Section 2(c) plainly states that entry by nationals of the six countries is "suspended for 90 days *from the effective date of this order*" (emphasis added). The effective date of the Order is explicitly defined, in Section 14, as "March 16, 2017." No court has enjoined Section 14, so the entry suspension will terminate on June 14, 2017.

The government initially conceded this before the court of appeals. After the district court enjoined Section 2(c), the government represented in its stay motion in the court of appeals that "Section 2(c)'s 90-day suspension expires in early June." Gov't Stay Mot., Doc. 35, at 11, No. 17-1351 (4th Cir. filed Mar. 24, 2017). This representation was not merely a passing description; it was the premise of the government's argument against one plaintiff's standing. *Ibid.*

Just over a month later, however, the government reversed course, this time arguing that "it does not make sense to treat March 16 as the 'effective date' for purposes of Section 2(c)" because of the injunction. Gov't Resp. to Mot. to Supplement Record at 2, Doc. 291, at 2-3, No. 17-1351 (4th Cir. filed May 5, 2017). But only the President can revise the clear text of his own enactment. *Cf., e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76

(1996) (courts may not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted"). That rule makes particular sense in the context of an Executive Order, which the President can unilaterally revise at any time. He has not done so here.

Instead, the government argued that the *court* could rewrite Section 2(c)'s reference to the Order's effective date by substituting the date the injunctions are lifted. Gov't Resp. to Mot. to Supplement Record at 2, Doc. 291, at 2-3, No. 17-1351 (4th Cir. filed May 5, 2017). But nothing in the Order's text suggests that different provisions can have different effective dates. And the Order's effective date applies to *multiple* provisions, most of which were not enjoined.

And critically, the government's interpretation treats the ban provision as an end in itself, separate from its ostensible purpose of facilitating a review of vetting procedures. If the Court grants the government's request in *Hawai'i* to stay the portion of the injunction that blocks the Section 2 review process, App. Stay at 37-38 & n.10, *Hawai'i v. Trump*, No. 16A1191 (U.S. filed June 1, 2017), the review process will have concluded by the beginning of the Court's next Term. But in the government's view, if the Court lifted the injunction later in the fall, the Section 2(c) ban would still run its full 90-day course—even though all the review procedures the ban was supposed to facilitate would already be complete. That is inconsistent with the Order's stated purpose.[7]

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[7] However, it is not inconsistent with the President's call for a Muslim ban.

There is no reason to go down this atextual road. The Order's predecessor had been enjoined by multiple courts, and the March Order could easily have been written to provide that the effective date would be tolled in the event of an injunction. But it was not. "If [the President] enacted into law something different from what [he] intended, then [he can] amend the [Order] to confirm it to [his] intent." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004).

The Order means what it says. The ban will expire, and the appeal will be moot, in a matter of days. There is no reason for this Court to grant review.

II. THE COURT OF APPEALS' RULING IS NARROWLY BASED ON AN EXTRAORDINARY SET OF FACTS AND DOES NOT WARRANT REVIEW.

The government calls the court of appeals' holding "remarkable." Pet. 13. But it is the *facts* of this case that are remarkable. Although "[o]utright admissions of impermissible . . . motivation are infrequent," *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999), in this case there is an extraordinary volume of publicly available, undisputed evidence that the Order was intended to disfavor Muslims.

The lower courts' *legal* analysis hewed closely to existing precedents. Both courts avoided any broad holding, emphasizing that the case was *sui generis*. *See* App. 61a-62a (limiting holding to "this highly unique set of circumstances"); App. 252a (noting this is a "highly unique case").

A. This Case Is Justiciable.

"[O]ne of the core objectives" of the Establishment Clause is to ensure that one's standing within the political community is not a function of one's faith—an objective that is directly undermined when the government conveys an official message to adherents of a disfavored religion "that they are *outsiders*, not full members of the political community." App. 25a (internal quotation marks omitted); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). As the government concedes, "personal and unwelcome contact" with government displays and policies that violate the Establishment Clause has long sufficed to confer standing. *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (collecting cases); *see* Pet. 18 (acknowledging spiritual injuries are cognizable) (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982)).

Multiple plaintiffs—and clients and members of the organizational plaintiffs—have standing. Their lives have been directly and meaningfully affected by the Order, and they have been injured by Section 2(c)'s message that, as Muslims, they are not a welcome part of our national community.

The government attempts to escape this conclusion by inventing new standing requirements, and by ignoring all the plaintiffs other than John Doe #1. None of its proposed limitations withstands analysis. The government first suggests that condemnation injuries are cognizable only if inflicted by a "local or state government." Pet. 18. But there is no basis for that supposed rule. Indeed, the

Establishment Clause originally restricted *only* the federal government. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 13 (1947).

Next, the government argues that a statement or practice must "explicitly address[] religion" to cause cognizable harm. Pet. 18. But as this Court has explained, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *see Santa Fe*, 530 U.S. at 307 n.21. If the government's point is that "Section 2(c) does not [*in fact*] expose plaintiffs to a religious message," Pet. 18, the court of appeals rightly rejected this attempt to conflate the standing and merits inquiries. *See* App. 24a, 30a n.9.

Finally, the government argues that Muslims like Doe #1 have not been "personally exposed" to Section 2(c) because it targets "aliens abroad." Pet. 18. The Order's harm cannot be minimized so easily. For Doe #1, the ban "does not apply to arbitrary or anonymous 'aliens abroad.' It applies to his wife." App. 32a. It threatens to nullify his own visa petition on her behalf. And it could "force[] [him] to choose between [his] career and being with [his] wife." App. 25a-26a.[8]

This Court has long recognized that a governmental display targeted at no one in particular, such as a crèche, a cross, or the Ten

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[8] This case therefore bears no resemblance to *Valley Forge*, *see* Pet. 17-19, where the plaintiffs alleged "nothing else" beyond a bare claim that "the Constitution has been violated," 454 U.S. at 485-87, or to *In re Navy Chaplaincy*, 534 F.3d 756, 764-65 (D.C. Cir. 2008), where the plaintiffs were not "affected by [the] government *action*" in any way. *See* App. 32a n.11.

Commandments, can violate the Establishment Clause rights of those who come into unwelcome contact with the display. *Cf. McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (plaintiff injured by encountering Ten Commandments monument at county courthouse); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (same for crèche), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014).[9] If that kind of contact confers standing, surely plaintiffs, whose lives and families have been upended by the Order, also have standing to raise Establishment Clause challenges.

The Order is "a daily experience of contact with a government that officially condemns [their] religion." *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc); *see id.* at 1048. It has injected itself into plaintiffs' homes and families. That is precisely its point—to "delay the issuance of visas." App. 27a. In fact, the government has admitted that pending applications like Doe #1's may actually "not be delayed, but *denied*," in which case he would be forced to restart the lengthy process "*from the beginning*." App. 28a. The plaintiffs did not "roam the country in search of government wrongdoing." *Valley Forge*, 454 U.S. at 487. The President's Order found them.

Additionally, though the government largely ignores them, *see* Pet. 15 n.7, IRAP, HIAS, and MESA also have standing. Muslim clients of IRAP and HIAS are petitioning for visas for relatives to travel from the banned countries. C.A. App. 263, 270, 273, 283. Like other members of their religious community, IRAP and HIAS's Muslim clients have been marginalized and frightened by the Order's condemnation of their religion. C.A. App. 269-270, 286-287. IRAP and HIAS have standing as representatives to vindicate their clients' rights, and also have standing on their own, because the ban forces them to divert resources in order to find alternative routes to safety for their clients. C.A. App. 267; 280-281.

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[9] *Allen v. Wright*, 468 U.S. 737 (1984), is not to the contrary, as it involved a generalized equal protection claim, not a specific and personal Establishment Clause claim. *See Awad*, 670 F.3d at 1123 n.8.

MESA's annual conference is in November, and the ban would prohibit MESA members from obtaining visas in time to attend. C.A. App. 298-301; *cf.* Pet. 15 n.7 (ignoring that it takes time to obtain a visa). Section 2(c) thus imposes a concrete harm on MESA itself. *See McGowan v. Maryland*, 366 U.S. 420, 430-431 (1961). Additionally, MESA's Muslim members are injured by the Order's expression of condemnation, as well as other aspects of its operation. C.A. App. 300.

Finally, the doctrine of consular nonreviewability has no bearing here. *See* Pet. 14. The doctrine does not bar constitutional claims by persons in the United States. App. 35a (citing *Din*, 135 S. Ct. at 2132). Furthermore, the plaintiffs in this case suffer Establishment Clause injuries whether a visa is ultimately granted or denied.[10] As the court of appeals noted, "the casual assertion of consular nonreviewability" is really a request for "judicial abdication," which this Court has "not countenanced . . . , especially where constitutional rights, values, and principles are at stake." App. 36a.

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[10] For the same reason, the speculative possibility of a waiver does not make the claim unripe, because the injury derived from the Order's condemnation of plaintiffs' faith is immediate and ongoing, and not eliminated by the grant of a waiver. Pet. 16; *see* App. 34a-35a (rejecting this argument).

B. The Court of Appeals Correctly Applied This Court's Constitutional Precedents.

The court of appeals' conclusion that Section 2(c) violates the Establishment Clause by targeting Muslims for disfavor also does not warrant this Court's review. Government action condemning a particular denomination violates the "clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The decision below rested on a faithful application of this Court's precedents. The court of appeals afforded the executive "significant deference" and applied a "high bar" to the plaintiffs' constitutional claim. App. 43a. Even so, the court of appeals concluded that Section 2(c) "would likely fail *any* purpose test," because "[t]here is simply too much evidence" in the record demonstrating that its primary purpose was to disfavor Muslims. App. 65a n.22 (emphasis added).

1. *The Court of Appeals Correctly Applied* **Mandel.**

The court of appeals correctly applied the standard articulated in *Mandel* and Justice

Kennedy's controlling concurrence in *Din.*[11] Under that standard, courts do not look behind a "facially legitimate and bona fide reason" for an order. *Mandel*, 408 U.S. at 770. A "bona fide" reason is given "sincerely," "honestly," and "with good faith." Bona Fide, *Black's Law Dictionary* 223 (4th rev. ed. 1968); App. 42a. Thus, as Justice Kennedy and Justice Alito explained, if a challenger makes "an affirmative showing of bad faith," it *is* appropriate to "look behind" the explanation on the face of the order. *Din*, 135 S. Ct. at 2141 (quoting *Mandel*, 408 U.S. at 770).

The "affirmative showing" is a high bar, and plaintiffs in other cases have consistently failed to clear it. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1172-73 (9th Cir. 2016); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009). But, as the court below correctly found, the "ample evidence" in this "unique" case is more than sufficient to satisfy that standard. App. 44a, 61a.

The government would revise *Mandel* and *Din* to hold that courts may *never* "look behind" the explanation on the face of an order. The government's revision would render the *Mandel* standard virtually meaningless and permit the executive branch to act in open bad faith. On the government's theory, the President could have explained, while signing the Order, that "the purpose of this ban is to establish that Muslims are not welcome in America," and courts would have had to look away. The court of appeals was correct to reject such a radical principle.

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[11] Plaintiffs have consistently argued that the Order fails under *Mandel*. Plaintiffs also maintain that *Mandel* does not apply where, as here, plaintiffs' claims ultimately turn on the effect of the Order on their religious freedom, and not on whether their loved ones, clients, and members are ultimately denied visas.

None of the cases in which this Court has applied *Mandel* has involved an allegation, much less an affirmative showing, of bad faith. The plaintiffs in *Mandel* and *Din* alleged that the government had not provided enough explanation for its conclusions, but they did not allege that it had acted with an impermissible purpose. *See Mandel*, 408 U.S. at 769; *Din*, 135 S. Ct. at 2131; *see also Fiallo v. Bell*, 430 U.S. 787 (1977) (applying *Mandel* in facial challenge to statutory criteria for visas, with no allegation of an impermissible purpose).[12] The Court rejected these arguments, because the government *had* provided a facially legitimate explanation. But the Court emphatically *also* required that the government's reason be bona fide.

Justice Kennedy's concurrence in *Din* confirms this. It begins the "bona fide" analysis by citing a case (relied on by the government here) in which the Court had considered an improper-purpose allegation—that a government action was motivated by "conspiracy, fraud or deception." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) (cited in *Din*, 135 S. Ct. at 2140; Pet. 29). There, the Court explained that it would presume a proper purpose, but *only* "in the absence of clear evidence to the contrary." *Ibid.* There is precisely such clear evidence here.

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[12] The government was wrong when it told the court of appeals that Mandel's visa was denied for the illicit reason that "he was a communist." 4th Cir. Oral Arg. at 49:13-49:30. There was no secret about that: *Everyone* who was subject to the same provision as Mandel was deemed a communist, 408 U.S. at 755, 768 n.7, and Mandel conceded he could validly be excluded on that basis, *id.* at 767.

The lower courts have understood *Mandel*'s "bona fide" prong the same way—especially after *Din*. *See, e.g., Cardenas*, 826 F.3d at 1173 (rejecting claim of racial discrimination because the plaintiff did "not plausibly establish that the decision . . . was made on a forbidden racial basis"); *Am. Acad. of Religion*, 573 F.3d at 137 (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide"). No court has ever adopted the government's illogical interpretation of "bona fide."

The government is thus wrong about both "what *Mandel* said" and "what it did." Pet. 23. This Court has never held that courts must close their eyes to affirmative evidence that the executive branch has acted with an unconstitutional purpose.[13]

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[13] In addition to its improper purpose, the Order is not "facially legitimate." *Mandel*, 408 U.S. at 770. The text of the Order effectuates a religious gerrymander, targeting Muslims almost exclusively. App. 4a n.2; App. 137a (Thacker, J., concurring). It invokes the religious stereotype of "honor killings," which "is a well-worn tactic for stigmatizing and demeaning Islam," and amounts to "anti-Islamic dog-whistling." App. 53a n.17; *see also* App. 138a (Thacker, J., concurring) (noting that "honor killings have no connection whatsoever to the stated purpose of the Order"). The Order is illogical, factually incorrect, and does not conform to the statutory authority it invokes. App. 76a n.2, 82a-87a (Keenan, J.); App. 134a-138a (Thacker, J., concurring).

2. *The Order Fails Any Purpose Test.*

In reviewing Section 2(c)'s purpose, the court of appeals followed this Court's precedents. It has long been settled that the Establishment Clause "forbids an official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532. In applying that prohibition, the court of appeals did not attempt to divine the President's subjective intent. Rather, in line with this Court's cases, it considered what "members of the listening audience [would] perceive," and in doing so, declined to "turn a blind eye to the context in which th[e] policy arose." *Santa Fe*, 530 U.S. at 308, 315.

The condemnatory character of the government's action is highly significant and extremely unusual. Many Establishment Clause cases involve challenges to government actions that, by *promoting* a particular religion, are said to implicitly treat non-adherents as outsiders. These cases have produced a variety of results, based on the particular facts and circumstances at issue. But governmental *condemnation* of a religion has no conceivable legitimate purpose, and as a result is exceedingly rare. Where it occurs, courts must be especially vigilant. *See Lukumi*, 508 U.S. at 532 (collecting cases).[14]

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[14] *Accord* Joseph Story, *Commentaries on the Constitution of the United States* § 1870 (1833) ("supporting" religion and its adherents "is very different from . . . punish[ing] them for worshipping God in the manner, which, they believe, their accountability to him requires").

One week into office, the President signed the first Order, which singled out overwhelmingly Muslim countries, and invoked the term "honor killings." January Order § 1. The Order also established a preference that was intended to benefit Christians over Muslims, as the President explained on national television. *Id.* §§ 5(b), (e); App. 13a. That day, and every day for the first three months after the inauguration, the President's regularly-updated campaign website called for "preventing Muslim immigration." App. 10a n.5; App. 130a n.2 (Thacker, J.).[15] The day after the President signed the Order, his close advisor explained that the President had asked him to design a Muslim ban that could survive litigation, and that the advisor had suggested using geography. App. 13a. The President and his administration have been clear that the second Order is a continuation of the first, with "the same basic policy," albeit in a "watered down" form. App. 50a-51a; *see also* App. 127a (Thacker, J.) (finding improper purpose based solely on post-inauguration events). Most recently, the President stated that he preferred the first Order, and dismissed his own second Order as a "politically correct" version of the first.[16]

The court of appeals appropriately considered the context in which the President signed these Orders. He repeatedly called for a "shutdown of

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[15] The call to block Muslim immigration was not taken down until shortly before the Fourth Circuit argument on May 8, 2017. *See* App. 10a-11a n.5.

[16] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

Muslims entering the United States" on the rationale that "Islam hates us." App. 49a. When people became "upset" that he had "used the word Muslim," he explained, he decided to start "talking territory instead of Muslim." App. 12a. The first Order was signed a week into his Administration. As the President himself observed when he read the Order's title, "We all know what that means." App. 13a.

In short, there is a surfeit of publicly available evidence demonstrating that the Order's purpose is to disfavor Muslims. And the government has chosen not to "meaningfully address[]" that evidence—a notable omission. App. 52a; App. 247a.

The purported national security rationale for the Order has never been supported by more than *ipse dixit* and self-evidently faulty logic. *See* App. 82a-86a (Keenan, J.). The March Order's stated reasoning, applied neutrally, would have resulted in non-Muslim countries being banned. App. 135a-36a (Thacker, J.). The Order cites only a single inapposite incident involving a person from any of the banned countries, a Somali who was brought to the United States when he was two years old. March Order § 1(h); App. 102a (Wynn, J.); *cf. Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).[17] Even this half-hearted evidence was "offered only after courts issued injunctions against the First Executive Order." App. 252a. Indeed, as the government explained, it "compile[d]" this "additional factual support" following the *Washington* decision as a post hoc defense of the already-chosen policy. Gov't Stay Reply, Doc. 102, at 2-3 (4th Cir. filed Apr. 5, 2017). March Order §§ 1(c), (h)(i); App. 54a ("[A]gencies only offered a national security rationale *after* [the January Order] was enjoined.").

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[17] The original version was dramatically over-inclusive: It covered tens of thousands of LPRs, *see Washington*, 847 F.3d at 1165-66, who do not require visas; improved visa vetting procedures could not have affected them. January Order § 3(c). The revised version is dramatically under-inclusive: Despite its professed security rationale, the Order would allow tens of thousands of nationals from the banned countries with existing visas or other travel permission to freely enter the country without any additional vetting. March Order §§ 3(a)(ii), (a)(iii), (b)(iii); *see Republican Party of Minn. v. White*, 536 U.S. 765,

As the government has conceded, the President issued the January Order without consulting *any* of the relevant national security agencies. App. 53a-54a. In fact, he "actively shielded" officials with relevant expertise from learning about the ban before issuing it. App. 131a (Thacker, J.). In light of these facts, the government's repeated assertion that the President "consult[ed]" multiple agencies and its suggestion that he chose to institute a ban because of their "recommendation" rings hollow. Pet. 2, 5, 6, 13, 29, 33.[18] The contention that the revision of the Order

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780 (2002) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest.") (citation and quotation marks omitted).

[18] The two-page letter on which the government seeks to rely, dated March 6, 2017—the same day the *revised* ban was issued—recommended exactly what the President had already done without any consultation. Pet. 6 n.3. The boilerplate letter, plainly prepared in contemplation of litigation, does not refer to any particular countries, is not mentioned in the Order, and does not indicate that the officials actually consulted on the development of the Order released that day or the January Order in which the ban was originally set forth.

demonstrates "good faith" on the President's part is also belied by the record, especially the President's own statements. *See, e.g.*, Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, Time (Mar. 16, 2017) ("I wasn't thrilled, but the lawyers all said, oh, let's tailor it. This is a watered down version of the first one . . . . And let me tell you something. I think we ought to go back to the first one . . . .");[19] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017) (attributing the "watered down, politically correct" March Order to the "Justice Dept." and saying the Department "should have stayed with the original");[20] Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017) ("We need . . . a MUCH TOUGHER version" of the "Travel Ban").[21]

The government's own expert studies confirm that, without the purpose to exclude Muslims, Section 2(c) never would have existed. One report concluded that increased vetting procedures were "unlikely to significantly reduce terrorism-related activity in the United States." App. 9a; C.A. App. 426. Another concluded that a person's nationality is not a reliable indicator of whether a noncitizen presents a security risk. App. 9a; C.A. App. 423-424.

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[19] *Available at* http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

[20] *Available at* https://twitter.com/realDonaldTrump/status/871675245043888128.

[21] *Available at* https://www.facebook.com/DonaldTrump/videos/10159253902870725/.

Likewise, national security officials who were aware of all the relevant intelligence *one week* before the first Order submitted evidence that the ban served no national security purpose at all. C.A. App. 663-668. History counsels against ignoring such evidence in these circumstances. *See Korematsu v. United States*, 584 F. Supp. 1406, 1417-1419 (N.D. Cal. 1984) (detailing how internal reports undermined any basis for Japanese internment).

Understanding Section 2(c)'s purpose does not require any "judicial psychoanalysis"; it does not turn on what the drafters felt in their "heart of hearts." *McCreary*, 545 U.S. at 862. It simply requires paying attention to public, "readily discoverable fact[s]": the text and operation of the ban, its context, and the President's words. *Ibid.*; *see* App. 51a-52a. The court of appeals committed no error in weighing the remarkable evidence in this case, or in its application of this Court's Establishment Clause precedents to those facts.

3. *The Government's Proposed Evidentiary Restrictions Do Not Warrant Consideration.*

The government suggests a variety of categorical restrictions on the evidence that courts can consider, none of which is supported by logic or precedent. Adherents of a disfavored faith cannot artificially limit the expressions of condemnation they perceive. This Court should not either.

1. The government first proposes limiting review to the text of the Order itself or, perhaps, to what the government deems "official" statements. Pet. 26-28; *but see* Elizabeth Landers, *White House:*

Trump's Tweets Are "Official Statements," CNN (June 6, 2017).[22] The court of appeals rightly rejected that approach as "unworkable" and "an artificial distinction between 'official' and 'unofficial' context." App. 58a. The government's suggestion clashes with this Court's repeated instruction not to "turn a blind eye to the context in which [a] policy arose." *Santa Fe*, 530 U.S. at 315. In analyzing governmental purpose, the Court has relied on relevant statements by private pastors, *McCreary*, 545 U.S. at 869, statements by members of the public, *Lukumi*, 508 U.S. at 541, letters to the editor and newspaper advertisements, *Epperson v. Arkansas*, 393 U.S. 97, 107-08 & n.16 (1968), and speeches by students, *Santa Fe*, 530 U.S. at 295 & n.2, 297 n.4.[23]

2. The government alternatively contends that the Court should ignore what President Trump said about the ban before the election. Pet. 28-30; *cf.* App. 130a-136a (Thacker, J.) (finding improper purpose without reference to campaign statements).

That, again, is simply not the law. This Court has considered statements from political campaigns when they are probative. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982)

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[22] *Available at* http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

[23] The Court has also relied on public presidential statements in a variety of contexts. *See, e.g.*, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 n.27 (1987) (relying on remarks by President Carter and the Attorney General); *Myers v. United States*, 272 U.S. 52, 152, 167-170 (1926) (relying on statements in speeches by Presidents Jackson, Grant, Cleveland, Wilson, and Coolidge).

(relying on campaign statements in equal protection challenge); *Epperson*, 393 U.S. at 108 n.16 (relying on campaign materials in Establishment Clause challenge); *see also Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (relying on campaign promises in Establishment Clause challenge).

Virtually all of the government's observations about campaign statements, *see* Pet. 28 ("short-hand for larger ideas"); *ibid.* (often "modified, retracted"), apply equally to post-campaign statements. And the fact that they "often are made without the benefit of advice from an as-yet-unformed Administration," *ibid.*, hardly minimizes their relevance to the Orders' purpose—especially when those statements continue to be repeated and reinforced post-election, and the policy was in fact set without agency consultation. The government's contentions boil down to unsubstantiated speculation that courts will misuse campaign statements. *See* Pet. 29-30. But "[e]xamination of purpose . . . makes up the daily fare of every appellate court in the country," *McCreary*, 545 U.S. at 861; *see* C.A. App. 63a-64a, and courts are well equipped to determine what weight to give to any particular statement.

Likewise, the government's specter of "chill[ing] campaign speech" is a red herring. *See* Pet. 30. Here, the Order could be invalidated purely on the basis of post-election statements, App. 127a (Thacker, J.), and in any case the relevant campaign promises were specific, repeated, never repudiated, confirmed post-election, immediately enacted, and amply corroborated in the Order's text, operation, and contemporaneous statements.

Far more troubling consequences flow from the government's request for absolute deference. Such a holding would, as Justice Jackson warned in *Korematsu v. United States*, "lie[] about like a loaded weapon." 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The government conceded at oral argument that, under its view of the law, if a President made repeated anti-Semitic statements, said he wanted to exclude Jews from the United States, explained that he was going to do it by focusing on geography, and then issued an Executive Order banning all travel from Israel, citing recent terrorism in that country in the Order itself, that ban would be valid. 4th Cir. Oral Arg. at 1:55:20-1:58:00. That extraordinary concession reveals the lengths to which the government has had to go to defend this Order.

C. The Scope of the Injunction Is Reasonable and Appropriate.

The scope of the injunction likewise offers no reason for review. The scope and nature of plaintiffs' injury defines the necessary relief. *See* Pet. 31 (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996)); *see Lewis*, 518 U.S. at 359 (affirming that "a systemwide impact" calls for "a systemwide remedy" (citation omitted)). Here, the nationwide injunction is amply justified by the nature of the injuries and their "systemwide" impact on the plaintiffs and their clients and members.

The government posits that an injunction limited to Doe #1 would be sufficient, Pet. 31-32, ignoring the other plaintiffs in the case, all of whom, as noted above, have standing. The government has not even attempted to explain how limited relief would remedy the nationwide harms to the organizational plaintiffs. The organizations have Muslim clients and members throughout the country. During the course of the chaotic implementation of the original Order, IRAP responded to more than 800 queries on an emergency basis and developed guidance for its network of more than 2,000 pro bono attorneys and law students. C.A. App. 264-65. It will bear a similar burden if the current injunction is lifted. MESA anticipates that many of its members will be unable to travel to its annual meeting in November, which provides almost half of its revenue. C.A. App. 300-301. The government has not suggested that anything short of a nationwide injunction could "provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (citation omitted).

The government suggests that even if Section 2(c) is facially unconstitutional, the district court should have enjoined it only as to Doe #1. By that reasoning, the proper remedy in *Santa Fe* would have been earplugs so the student plaintiffs would not hear the invocation at football games, and in *McCreary* would have been temporarily covering the Ten Commandments display when the individual plaintiffs visited the courthouse. That approach is both incorrect and unworkable, particularly given that plaintiffs and their clients and members are spread out across the country.

III. THE PRESIDENT HAS EXCEEDED HIS STATUTORY AUTHORITY, ESTABLISHING AN ALTERNATIVE BASIS TO AFFIRM.

The court of appeals did not decide whether Section 2(c) is statutorily authorized. App. 22a. It is not, and, were the Court to grant certiorari, the President's lack of authority under the INA would provide an alternative ground to affirm. *See* App. 76a-77a (Keenan, J.); 89a-90a (Wynn, J.); 127a (Thacker, J.); 231a-39a (district court).

First, the President has not fulfilled the express requirements of 8 U.S.C. § 1182(f) itself. He did not make an actual finding that these noncitizens' entry "would be detrimental to the interests of the United States," as required by § 1182(f). App. 82a-87a (Keenan, J.). For example, while the Order alludes to "hundreds" of crimes by "persons born abroad," it only cites *one* such individual from *any* of the six countries it bans—and he came to the United States as a two-year-old. App. 134a (Thacker, J.). Indeed, as the government conceded, the premise of Section 2(c) is the *lack* of a finding: "[T]he President is 'not sure' whether any of the 180 million nationals from the six identified countries present a risk." App. 85a (Keenan, J.). Section 1182(f) requires more than stereotypes and unsupported doubt.[24]

Second, Congress could not have intended to grant the President the authority to "act in total disregard of other material provisions of the INA, thereby effectively nullifying that complex body of law enacted by Congress." App. 82a (Keenan, J.); *cf. Clinton v. City of N.Y.*, 524 U.S. 417, 439-440 (1998) (repeal of statutes must take place within the Constitution's "single, finely wrought and exhaustively considered, procedure" (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983))). If the government's expansive interpretation of § 1182(f) were correct, the President could impose a blanket ban on all immigration with exceptions and waivers of his choosing, thereby unilaterally supplanting Congress's detailed criteria for admission and grounds for inadmissibility. *See, e.g.*, 8 U.S.C. § 1182(a).

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[24] Every prior invocation of § 1182(f) has offered a factual basis that logically supported the exclusion of the relevant class of noncitizens. C.A. App. 116-20.

Third, Congress has rejected just the kind of generalization underlying the broad sweep of Section 2(c)'s exclusion. The INA's anti-discrimination provision forbids discrimination "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This provision reflects a common principle in our law: Reducing individuals to such characteristics is "odious to a free people whose institutions are founded upon the doctrine of equality." App. 91a (Wynn, J.) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *cf. Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."). Section 1152(a)(1)(A) thus provides further proof that Section 2(c)'s broad-brush approach is not authorized under the INA.

Finally, "construing Section 1182(f) as authorizing the President to engage in invidious discrimination is plainly inconsistent with basic constitutional values" and therefore "raise[s] serious constitutional problems." App. 106a-107a (Wynn, J.) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)); *see also* App. 109a (rejecting a classification "inexplicable by anything but animus towards the class it affects") (quoting *Romer v. Evans*, 517 U.S. 620, 632, 636 (1996)). The government's "expansive" reading of the statute, Pet. 22, raises just such problems. For all these reasons, Section 2(c) violates not only the Establishment Clause but also congressional intent.

***

Immigration authority and national security concerns "cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within [their] ambit." *Unites States v. Robel*, 389 U.S. 258, 263 (1967). "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Id.* at 264. The blank check the government seeks in this case is not consistent with our Constitution. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). The Fourth Circuit carefully and faithfully applied these hard-learned lessons. There is no need for further review—especially given the looming mootness of the government's appeal.

CONCLUSION

The Court should deny the petition.

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In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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JUN 14 2017
OFFICE OF THE CL
SUPREME COURT,

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) The parent corporation of respondent International Refugee Assistance Project is the Urban Justice Center, Inc.

2) Respondents HIAS, Inc., and Middle East Studies Association of North America, Inc., do not have parent corporations.

3) No publicly held company owns ten percent or more of the stock of any respondent.

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INTRODUCTION

The government asks this Court, without full briefing and argument, without any concrete assertion of irreparable injury, and despite its own significant delay, to allow it to immediately implement the 90-day entry ban set forth in Section 2(c) of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) ("March Order"). That would dramatically upend the status quo. Section 2(c) has never been operative, and both the en banc court of appeals and the district court concluded that the President's ban violates the cherished values of religious neutrality "rooted in the foundation soil of our Nation." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). Moreover, the ban's predecessor unleashed widespread chaos and caused substantial harm to individuals, institutions, states, and municipalities in the brief period that it was in effect before being enjoined by the courts and abandoned by the government.

The Court should deny the application for a stay. First, a stay would serve no practical purpose because, under the plain terms of the Order, the ban expires on a date certain: June 14, 2017. A stay from this Court would thus not stop Section 2(c)'s ban from running out on its own terms two days from the filing of this brief.

Second, even if the ban did not expire on June 14, the application should still be denied because granting a stay would allow the government to effectuate the *entire* 90-day ban before this Court resumes oral arguments next Term. Entering a stay would therefore hand the government a complete victory in practical terms without full merits consideration from this Court, even though the courts below and the district court in *Hawai'i* found that the ban was likely unconstitutional.

Granting a stay would thus accomplish the *reverse* of a stay's proper purpose: providing *interim* relief to allow for considered review. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (explaining that one purpose of the stay mechanism is to *avoid* "justice on the fly"); *Nat'l Socialist Party of Am. v. Village of Skokie*, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers) (denying application for stay that "would be tantamount to a decision on the merits in favor of the applicants").

Third, the government has not established that the "extraordinary" relief of a stay is warranted. It has not demonstrated *any* need to implement the ban *now* (nearly four months after the original ban was enjoined) rather than after this Court can give the case full consideration. In fact, the government *delayed* issuance of the current Order for weeks, C.A. App. 537-538, asked for briefing schedules that ensured Section 2(c) would remain enjoined for additional weeks at a time, *see* Gov't Corr. Mot. to Expedite Appeal, Doc. 14, at 7 (4th Cir. filed May 22, 2017); Gov't Mot. to Expedite Consideration, Doc. 12, at 7-8 (9th Cir. filed May 31, 2017), and for months declined to seek a stay from this Court. The government's conduct belies the suggestion that it needs the ban immediately.

Moreover, the injunction of Section 2(c) does not prevent the government from changing vetting procedures or other policies relating to travel and entry. Indeed, in recent months the government has prescribed heightened screening and questioning for visa applicants; instituted mandatory review of social media accounts for certain visa applicants; issued a "laptop ban" on flights from certain countries; and continued to exercise its statutory authority to deny visas or entry in individual cases, without raising any question of its compliance with this injunction. In the course of addressing the ban and the injunctions, the President himself recently wrote that "[i]n any event we are EXTREME VETTING people coming into the U.S."[1]

It is therefore unsurprising that the government's claim of irreparable injury rests on conclusory assertions of injury to abstract institutional interests rather than actual or potential concrete harms. In essence, the government argues that it is always irreparably injured when a court enjoins executive action—and, therefore, that it automatically satisfies this requirement of the stay standard. That is incorrect. Eventual victory on the merits would cure any institutional injury. And the government has made no showing whatsoever that its asserted injury would worsen absent a stay.

By contrast, staying the injunction, and reviving the ban's official condemnation of a religion, would cause immediate and widespread harm to the plaintiffs and others like them. The ban would prolong individuals' painful separation from their loved ones, imposing daily the hardships of distance and uncertainty. App. 32a. And allowing it to go forward would strike at our constitutional bedrock. The "clearest command of the Establishment Clause" is that the government may not single out a disfavored religion for condemnation. *Larson*

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[1] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realdonaldtrump/status/871679061847879682.

v. Valente, 456 U.S. 228, 244 (1982). Yet, as the courts below concluded, that is just what the President's Order does, sending the unmistakable message to plaintiffs, including members and clients of the organizational plaintiffs across the country, "that they are outsiders, not full members of the political community." App. 25a (internal quotation and emphasis marks omitted); *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000). Resurrecting this ban would renew that message and would denigrate, isolate, and exclude plaintiffs and other Muslims from our national community.

Finally, allowing the ban to immediately go into effect would create enormous confusion, just as its predecessor did in January. The government already promises to implement the ban not according to its text but according to what "make[s] sense." Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2-3 (4th Cir. filed May 5, 2017). But what does that mean? Would it "make sense" to apply the ban to those who had been approved for visas before a stay issued, but had not yet received their visas? March Order § 3(a)(iii). To those who were in the United States on the original effective date but not when a stay is granted? *Id.* § 3(a)(i). To those who were previously admitted to the country after March 16 but before a stay is granted? *Id.* § 3(b)(ii). The potential for "confusion and disruption" is clear, *Graddick v. Newman,* 453 U.S. 928, 936 (1981) (Powell, J.), particularly in light of the government's "shifting interpretations" of its January ban order. *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (per curiam).

This Court should decline the government's invitation to plunge us back into such uncertainty. The Fourth Circuit's decision vindicates the plaintiffs' rights, our deeply-held constitutional values, and the duties of an independent judiciary. And it maintains the status quo. No stay is warranted.

STATEMENT

Before and after his inauguration, the President's continually updated website called for "preventing Muslim immigration" and "a total and complete shutdown of Muslims entering the United States." App. 10a & n.5. As a candidate, Mr. Trump declared that "Islam hates us" and said that "we're having problems with Muslims coming into the country. App. 11a. He reiterated his demand for a ban of Muslims on multiple occasions. App. 11a.

After the election, President-elect Trump was asked whether he still planned to implement some form of a Muslim ban. He responded, "You know my plans. All along, I've proven to be right. 100% correct." App. 49a; *see also* App. 10a-11a, 48a-49a (reviewing multiple previous statements). By then, he had repeatedly announced that he would achieve his Muslim ban by banning individuals from Muslim countries rather than using an explicit religious test. He explained that "[p]eople were so upset when I used the word Muslim," and so he would now be "talking territory instead of Muslim." App. 12a (stating that constitutional equal treatment is "great" but "I view it differently"); *see also* App. 49a-50a.

i. The January Order

As the court of appeals observed, seven days after the President took office, he issued an Order that "appeared to take this exact form." App. 50a; *see* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, § 3(c), 82 Fed. Reg. 8977 (Feb. 1, 2017) ("January Order"). The January Order banned, for 90 days, entry into the United States by nationals of seven countries. The breadth of this Order was unprecedented. *See* App. 254a. The countries banned in the January Order range from 90 to 99 percent Muslim, and the Order provided for the possibility of an indefinite ban on those or other countries after the initial 90-day period. January Order §§ 3(e)-(f). The Order referenced "'honor' killings," *id.* §§ 1, 10(a)(iii), which, as the Fourth Circuit observed, is a "well-worn tactic for stigmatizing and demeaning Islam." App. 53a n.17; App. 137a-138a & nn.7-8 (Thacker, J., concurring). And it provided preferential treatment for religious minorities, a preference that the President himself explained was designed to give Christian refugees priority over Muslims. January Order § 5(b); App. 13a, 132a-133a (Thacker, J., concurring).

At the signing ceremony, President Trump read the title aloud and then said, "We all know what that means." App. 13a; C.A. App. 403, 778. The following day, when asked how the President had decided to ban the seven designated countries, a Presidential advisor explained that President Trump had approached him to help design a Muslim ban "legally," and his recommendation was that it operate on the basis of nationality. App. 13a; C.A. App. 508-509.

The President issued the January Order "without consulting the relevant national security agencies." App. 53a-54a; *see* App. 213a; C.A. App. 725-726, 804; *see also* App. 131a-132a (Thacker, J., concurring) ("the President actively shielded" the acting Attorney General "from learning the contents" of the Order); C.A. App. 531-534. Former national security officials aware of intelligence as of a week before the Order was signed submitted sworn evidence that "[t]here is no national security purpose for a total ban on entry for aliens from the [designated countries]." App. 9a (quoting C.A. App. 91); *see* App. 54a.

The January Order went into immediate effect and caused widespread chaos. *See, e.g.*, C.A. App. 207, 389-395, 531-534, 583-586. Lawful permanent residents, individuals with valid visas, and refugees were detained at airports and threatened with removal; families were separated; patients were blocked from medical treatment; and people were stranded in harm's way. Many individuals were prevented from getting on planes to come to the United States; others who had made it here were forced or persuaded to leave without being admitted. The government supplied confusing and contradictory interpretations of the scope of the January Order's ban during the short time that it was in effect. *Washington*, 847 F.3d at 1166.

Multiple legal challenges ensued, and several courts enjoined aspects of the ban. After the Ninth Circuit declined to stay a nationwide injunction of the Order's ban provisions, *id.* at 1164-69, the government announced that it would issue a revised Executive Order to replace the January Order.

The reason proffered for the 90-day period was "[t]o temporarily reduce investigative burdens" while the Secretary of Homeland Security reviewed vetting for the seven countries. January Order §§ 3(a), (c). In particular, the Secretary was directed to "immediately" conduct that review and submit a report within 30 days. *Id.* §§ 3(a), (b). These provisions were never enjoined and remained in force for 48 days until the March Order took effect, but the government did not complete the report required by the January Order. *See* 4th Cir. Oral Arg. at 7:55-8:55.[2]

ii. The March Order

The government took three weeks after the Ninth Circuit's *Washington* decision to draft a replacement Executive Order, and reportedly deferred its release to maximize positive press coverage of an unrelated presidential speech. C.A. App. 537-538.

The President issued the revised Order on March 6, 2017. The revised Order is, in most relevant respects, identical to the January Order, including its title; its list of banned countries (with the exception of Iraq), § 2(c);[3] provision for a possible indefinite ban after the initial ban period expires, § 2(e); various provisions related to refugees, § 6; a discretionary waiver provision, § 3(c); and the reference to "honor killings," § 11(a)(iii). *See* App. 50a-51a. The 90-day, six-country ban appears in Section 2(c) of the revised Order. Section 3 of the Order exempts various categories of people from the Section 2(c) ban, including individuals who have valid visas or other travel permission as of the Order's effective date.

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[2] *Available at* http://www.uscourts.gov/courts/ca4/17-1351-20170508.mp3.

[3] The banned countries are Iran, Libya, Syria, Somalia, Sudan, and Yemen.

Although the assessment and reporting provisions of the January Order were not enjoined and had already been in effect for 48 days, the March Order restarted the 90-day ban period and 30-day assessment without explanation. *See* March Order § 2. By the express terms of the March Order, the ban will expire on June 14, 2017—90 days after the Order's effective date. *Id.* § 2(c). The effective date provision governs all parts of the Order, and has never been enjoined. *Id.* § 14.

The Order pointed generally to security concerns about individuals born abroad. *Id.* §§ 1(h)-(i). It cited only two examples, however, in imposing a ban on some 180 million people, and neither example demonstrates a vetting problem with respect to any of the banned countries. The first involved two Iraqi nationals, which, because Iraq was excepted from the March Order, "does not support *this* ban at all." App. 134a (Thacker, J., concurring). The second concerned a Somali national who was brought to the United States when he was two years old and committed an offense seventeen years later. App. 134a-135a (Thacker, J., concurring); C.A. App. 547-548.

Shortly before the President signed the revised Order, two internal Department of Homeland Security ("DHS") reports became public. One report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." C.A. App. 419. The other concluded that increased vetting of visa applicants was unlikely to significantly reduce the incidence of terrorism in the United States, because the vast majority of foreign-born extremists radicalized years after immigrating. C.A. App. 423, 426; *see* App. 9a, 54a; *see also* App. 9a (noting declaration from former national security officials that there is "no national security purpose" for the Order's blanket ban).

The President recently characterized the revised Order as a "watered down, politically correct version [the Justice Department] submitted to the S[upreme] C[ourt]" and asserted that the Department "should have stayed with the original Travel Ban."[4] The President also called for a "much tougher version."[5] Other White House officials have likewise underlined the common purpose of the two Orders. The White House Press Secretary affirmed that "[t]he principles of the executive order remain the same," and a senior advisor to the President echoed that the revised Order contains "mostly minor technical differences" and achieves "the same basic policy outcome for the country." App. 14a.

iii. The Plaintiffs

The plaintiffs in this case are individuals and organizations who are directly affected by the March Order. The individual Muslim plaintiffs are U.S. citizens and lawful permanent residents seeking to reunite with family members who are nationals of banned countries. They have experienced isolation, exclusion, fear, anxiety, and insecurity because of the "anti-Muslim attitudes" conveyed by the Executive Order. C.A. App. 306, 310, 786.

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[4] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128; *see also* App. 14a, 51a (noting previous time the President characterized the revised version as a "watered down" version of the original).

[5] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871677472202477568; *see also* Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017), https://www.facebook.com/DonaldTrump/videos/10159253902870725/.

The individual plaintiffs' pending visa petitions are directly affected by the ban.[6] Plaintiff John Doe #1, for example, is a Muslim lawful permanent resident from Iran with a pending petition for a visa to be reunited with his Iranian wife. C.A. App. 304-305. Other individual plaintiffs with relatives from the banned countries face similar harm. *See* C.A. App. 321-322 (Plaintiff Ibrahim Mohomed); C.A. App. 316-319 (Plaintiff Jane Doe #2).

The ban also harms Muslim clients of organizational plaintiffs International Refugee Assistance Project ("IRAP") and HIAS. IRAP provides legal representation to vulnerable populations, particularly those from the Middle East, who are seeking safety and reunification with their family members in the United States. C.A. App. 263. Plaintiff HIAS is the oldest refugee assistance organization in the world. C.A. App. 272. Both IRAP and HIAS, which serve both refugees and non-refugees, have Muslim clients in the United States who are seeking to be reunited with loved ones from the six banned countries. C.A. App. 263, 273, 283. The Order has left their Muslim clients feeling marginalized, isolated, and afraid. C.A. App. 269-270, 285-287. Both organizations have also suffered direct organizational harms because of the Executive Orders. C.A. App. 267, 280-281.

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[6] John Doe #3's wife and Paul Harrison's fiancé have been issued visas and admitted to the United States since this suit was filed.

Plaintiff Middle East Studies Association ("MESA") is a U.S.-based membership organization of students and scholars of Middle Eastern studies. C.A. App. 297-298. Muslim members similarly feel "marginalize[d]" and "fear that they will be singled out" because of the Order's "anti-Muslim message." C.A. App. 300. Among other things, the ban, if implemented, would seriously "reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees." App. 17a; *see* C.A. App. 300-303. The ban also harms MESA's U.S.-based members who seek to collaborate in the United States with individuals from the banned countries. C.A. App. 298-300.

iv. Decisions Below

On March 16, the district court issued a nationwide preliminary injunction of Section 2(c) of the Order. Looking to evidence from "before [the] election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order," App. 241a, the court held that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim. A ten-member majority of the en banc court of appeals agreed that the preliminary injunction should be affirmed in substantial part[7] and that the Order likely violates the Establishment Clause. Seven judges joined the majority opinion in full, and two more concurred nearly in full. A tenth judge concurred in the judgment, also agreeing that Section 2(c) likely violates the Establishment Clause. Three judges dissented.

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[7] The court vacated the portion of the district court's order that directly enjoined the President himself. App. 73a-74a.

The majority first concluded that *at least* Plaintiff Doe #1 had standing to assert the Establishment Clause claim. App. 33a-34a. Doe #1, the court explained, would be subjected to "the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." App. 32a. Having concluded that "at least one Plaintiff possesses standing," the majority did not "need [to] decide whether the other individual plaintiffs or the organizational plaintiffs have standing with respect to this claim." App. 34a; *contra* Pet. 15 n.7; App. Stay 24 n.8 (implying that the court concluded other plaintiffs lacked standing). The court likewise rejected the government's other justiciability arguments, observing that this Court "has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake." App. 34a-36a.

On the merits, the court applied the standard articulated in *Kleindienst v. Mandel*: A court will accept the government's proffered justification if it is "facially legitimate and bona fide." 408 U.S. 753, 770 (1972); *see* App. 38a-39a. Relying on Justice Kennedy's controlling concurrence (joined by Justice Alito) in *Kerry v. Din*, the court explained that "where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." App. 42a (quoting 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment)).

The court held that the plaintiffs had made a "substantial and affirmative showing" that the government's proffered justification was not bona fide. App. 43a-44a, 46a. The court relied on the "ample evidence" that the March Order was an effort to effectuate the promised Muslim ban, and "the comparably weak evidence" to the contrary. App. 44a. Having concluded that the Order failed *Mandel*'s threshold "bona fide" analysis, the court next examined it under the Establishment Clause. App. 45a-46a. Based on the "compelling" record in this case, the court of appeals concluded that the Order violated longstanding Establishment Clause principles. App. 48a-52a.

The court emphasized the narrowness of its holding: "[I]n this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the March Order.]" App. 61a-62a; *see also* App. 252a (district court explaining that this is a "highly unique case").

Three judges wrote opinions agreeing with the majority's Establishment Clause holding and further concluding that the Order is unlawful in various respects under the Immigration and Nationality Act ("INA"). *See* App. 94a-100a (Wynn, J., concurring) (INA analysis applying the canon of constitutional avoidance); App. 85a, 76a n.2 (Keenan, J., concurring in part and concurring in the judgment) (finding that the Order violates the INA and is not "facially legitimate"); App. 127a-145a (Thacker, J., concurring) (concluding that the Order likely violates the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A), and that it fails constitutional scrutiny even looking only to post-inauguration evidence, App. 130a-131a, 138a).

v. Previous Stay Proceedings

Both the January and March Orders resulted in injunctions and subsequent stay litigation. In litigation regarding the January Order, the government initially moved quickly to reinstate its ban. The day after the district court in *Washington* issued a temporary restraining order ("TRO"), the government filed a notice of appeal, motion to stay, and motion for an emergency administrative stay in the Ninth Circuit. The court of appeals issued its written decision denying the stay five days later. *Washington*, 847 F.3d at 1158. The government did not seek a stay or review in this Court, and announced that it would instead issue a revised Order.

It proceeded at a different pace in litigation regarding the March Order. In the instant case, the district court ruled on March 16. The government moved for a stay in the Fourth Circuit on March 24, and requested and received a schedule on the stay motion that ran through April 5. The Fourth Circuit held the stay motion for the merits, denying it as moot on May 25.

In the parallel *Hawai'i* case addressing the March Order, No. 16A1191, the district court for the District of Hawai'i issued a TRO against Sections 2 and 6 of the revised Order on March 15. *Hawai'i v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). The government then stipulated to extend the TRO by two weeks and litigated further in the district court. The district court converted the TRO to a preliminary injunction on March 29. *Hawai'i v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). The government appealed the Hawai'i preliminary injunction, and requested and received a four-week briefing schedule for its Ninth Circuit stay motion; the motion was fully briefed on April 28. A Ninth Circuit panel heard oral argument on May 15.

On June 12, 2017, the Ninth Circuit affirmed the district court's preliminary injunction of the bans in Sections 2(c) and 6(a) of the Order. The Ninth Circuit vacated the portion of the injunction, however, that had enjoined the internal review and reporting provisions in Sections 2 and 6. Therefore, Section 2's 90-day review process should be complete by the beginning of the Court's next Term, vitiating any asserted need for the Section 2(c) ban.

Other provisions of the March Order, including Sections 4, 5, and 9 relating to vetting procedures, have never been enjoined.

ARGUMENT

The government bears a "heavy burden" in justifying the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers); *see Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).[8] The government has not sustained that heavy burden. First, there is

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[8] The government did not request a stay pending certiorari from the Fourth Circuit before applying to this Court for a stay, notwithstanding Rule 23.3, because it believes that doing so "would be futile." App. Stay at 4 n.1. Rule 23.3 does not excuse a party from its obligation to first apply to the lower court for a stay on the ground of futility except "in the most extraordinary circumstances." The government has not established "extraordinary circumstances" that would justify bypassing the court of appeals, and on that ground alone the stay should be denied.

no point in granting the government's application because the ban period, properly interpreted, has all but expired. Second, even if that were not so, the application should be denied because granting a stay would accomplish the *reverse* of a stay's proper purpose, which is to allow considered review of the applicant's claims. *Nken*, 556 U.S. at 427; *see Nat'l Socialist*, 434 U.S. at 1328.

Further, even if the government could get over those hurdles, it would still have to show:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; *and* (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (emphasis added). "An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers); *see also Nken*, 556 U.S. at 438-39.

The government has not shown irreparable injury here, and the application can be denied for that reason alone. In addition, as both courts below concluded, the balance of the equities tips sharply against the government. Finally, as plaintiffs explain further in their simultaneously filed brief in opposition to the

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At a minimum, the Court should treat this application as if it had been denied below, and thus subject to a presumption that it should be denied here. *See Whalen*, 423 U.S. at 1316; *Rostker*, 448 U.S. at 1308.

petition for certiorari, the Court should not grant the government's certiorari petition, and in any event the court of appeals' decision is correct.

I. A STAY IS NOT WARRANTED BECAUSE THE BAN WILL EXPIRE THIS WEEK.

Under the clear terms of the March Order, a stay is pointless and therefore inappropriate. Section 2(c) expires on June 14—two days after this opposition is filed. *See* March Order § 2(c) (banning entry "for 90 days from the effective date of this order"); *id.* § 14 (defining the effective date as March 16, 2017); *see also* Opp'n Cert. 13-15 (explaining that certiorari should be denied on this basis).

Notably, the government has previously recognized the ban's clear temporal limit, explaining to the court of appeals in its stay motion that "Section 2(c)'s 90-day suspension expires in early June." Gov't Stay Mot., Doc. 35, at 11 (4th Cir. filed Mar. 24, 2017). However, shortly before oral argument in the court of appeals, the government reversed itself, without explanation. Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2-3 (4th Cir. filed May 5, 2017) (contending that the 90-day period will begin if and when the injunctions are lifted); *see also* Pls.' Reply to Resp. to Mot. to Supp. R., Doc. 292, at 1-2 (4th Cir. filed May 7, 2017) (plaintiffs explaining that view is wrong); Opp'n Cert. 13-15.

Despite the government's shifting views, the Order's effective date is explicit and unambiguous, as is Section 2(c)'s incorporation of that effective date into its text. There is no point in staying an injunction against an expired entry ban. *Cf. Graddick*, 453 U.S. at 936 (stay denied where the order had already been executed, so a stay would not benefit applicant).

II. A STAY IS NOT APPROPRIATE BECAUSE IT WOULD ALLOW THE GOVERNMENT TO IMPLEMENT THE ENTIRE SECTION 2(C) BAN BEFORE THE COURT CAN REVIEW THE MERITS.

If the government's recent reinterpretation of the effective date provision is accepted, and the 90-day ban clock does not begin to run until the injunction is lifted, the stay should still be denied, because granting it would effectively predetermine the merits of this case.

"A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken*, 556 U.S. at 421. Its purpose is to "allow[] an appellate court to act responsibly" by "bring[ing] considered judgment to bear on the matter before it" and *avoid* "justice on the fly." *Id.* at 427; *see, e.g., Boston v. Anderson*, 439 U.S. 1389, 1390 (1978) (Brennan, J., in chambers) ("[U]nless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views."). On the other hand, where staying the lower court's ruling "would be tantamount to a decision on the merits in favor of the applicants," the application should be denied. *Nat'l Socialist*, 434 U.S. at 1328; *see also, e.g., Cousins v. Wigoda*, 409 U.S. 1201, 1206 (1972).

That is what the government asks for here: a stay that short-circuits the merits stage of the case. The government asks the Court to stay the preliminary injunction now, grant certiorari, and hear argument on the merits early next Term, more than 90 days from now. The government would then be free to execute the full ban to its conclusion without this Court ruling on the merits (or receiving full briefing or hearing argument), even though all four lower courts in this case and *Hawai`i* have found the ban invalid.

The government's application thus turns this Court's stay doctrine on its head. "The whole idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits." *Nken*, 556 U.S. at 432. Here, granting the government's application would *deprive* this Court of an opportunity to render a decision on the merits before the ban expires. Rather than allowing this Court to exercise its "considered judgment," the government is effectively asking the Court to grant it full relief "on the fly." *Nken*, 556 U.S. at 427. The application should therefore be denied.

III. THE GOVERNMENT HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

1. The government's own conduct in this and related cases "blunt[s] [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus*, 463 U.S. at 1318; *see also Graddick*, 453 U.S. at 936 (potential for "confusion and disruption" weighs "most heavily" where the stay applicant "has moved with unexplained tardiness"). Since the Ninth Circuit denied the government's request to stay the *Washington* injunction of the January Order on February 9, the government has failed to move with real or consistent urgency.

Indeed, the government has repeatedly delayed actions that could have moved the ban forward. As a result, some four months have elapsed since the original ban was enjoined. This delay undermines the government's contention that it needs to implement the ban now.

After informing the Ninth Circuit on February 16 that a new Order was "forthcoming," *see* Supp. Br. on En Banc Consideration, *Washington v. Trump*, No. 17-35105, Doc. 154, at 46 (9th Cir. filed Feb. 16, 2017), the government took three weeks to issue a replacement Executive Order. It is uncontested that part of that delay was to avoid distracting from press coverage of an unrelated speech by the President. C.A. App. 537-539. Thus, even without any further litigation, the Section 2(c) ban would have gone into effect forty-one days after the original ban was enjoined. That does not suggest an urgent need to impose a 90-day entry ban covering a particular time period.

Later developments underlined the government's lack of urgency. In this case, unlike in *Washington*, the government did not file an emergency request for a stay within 24 hours of the injunction, which would have set up a rapid stay decision. Rather, the government took over a week to file. And, in accordance with the timeline *the government* proposed to the Fourth Circuit, its stay motion was not fully briefed until two weeks later, on April 5. The court of appeals then did not act on the motion until May 25, seven weeks later. At no point did the government seek a stay before judgment from this Court.

And strikingly, in the *Hawai'i* litigation, the government did not immediately appeal the district court's TRO to the Ninth Circuit—even though it had just obtained immediate appellate review of the *Washington* TRO. Instead, the government agreed to remain before the district court for two more weeks. And when it finally went to the Ninth Circuit, it proposed a lengthy briefing schedule.

The eventual stay motion was not fully briefed until April 28—*84 days* after the January Order's ban was enjoined.

Finally, in the Ninth Circuit, as in the Fourth, it was quickly apparent that a decision on the stay application would not be issued soon. Yet the government did not seek a stay from this Court in either case until June 1—*118 days* after the *Washington* injunction. Thus, the cumulative and predictable effect of the government's decisions is that some four months have gone by with no ban in place. Despite that passage of time, the government has provided no evidence that it has been harmed by the injunctions. And even now, the government has sought to expedite only the threshold decision whether to grant certiorari, and not the merits itself should the stay application be denied.

Of course, the government can move much more quickly when it feels there is a genuine need. For example, in *Kiyemba v. Obama*, 555 F.3d 1022, 1024 n.2 (D.C. Cir. 2009), when the district court issued an injunction requiring the release of a detainee at Guantanamo Bay, the government moved for a stay the same day. In *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971), the government moved for a stay from the Second Circuit the same day that the district court issued its order. *See* Brief for Pet. at 9-10, *New York Times Co. v. United States*, No. 70-1873 (U.S. filed June 26, 1971), 1971 WL 134368. And in the litigation over the January Order, the government moved for a stay of the TRO issued in *Washington v. Trump* within 24 hours. 847 F.3d at 1158. The suggestion that there is any urgent need to change the status quo and impose the 90-day ban *now* is belied by the government's own conduct.

2. **The government does not actually assert any concrete or specific security-related need to proceed immediately with Section 2(c)'s 90-day ban. All it asserts is an abstract institutional injury that arises any time a policy is enjoined.**

In fact, the record evidence all points in the opposite direction. The government's own intelligence analysts concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," C.A. App. 419, and that increased vetting of visa applicants was of limited value in preventing terrorism in the United States. C.A. App. 426; *see* App. 9a, 54a. Similarly, a bipartisan group of former national security officials, including individuals who had access to relevant nonpublic intelligence information through January 19, concluded that the Order "serves no persuasive national security or foreign policy purpose" and that it will actually "do long-term damage to our national security and foreign policy interests." Corrected Br. for Fmr. Nat'l Sec. Officials as Amici Curiae Supporting Appellees at 5-8, Doc. 126; *see* App. 54a.

Even the Order itself demonstrates that individuals from the banned countries do not present a categorical risk. By its express terms, the Order does not bar entry to nationals of the banned countries who were issued visas before March 16, *see* March Order § 3(b)(iii), even though the ban is ostensibly predicated on a concern that the government has insufficient information to assess whether such individuals pose a security risk. And the government has now taken the position that if the injunction were stayed, those who obtained a visa *after* March 16, but before the stay, would also be allowed to enter the United States—even though, absent the injunctions, the Order would have prevented those same individuals from entering. *See* Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2-3.

And of course, the injunction of section 2(c) at issue here does not have any effect on the government's ability to take *other* actions relating to travel or entry. Indeed, since the injunction issued the government has taken a number of steps in this area without the injunction presenting an obstacle. *See generally* Amicus Br. of T.A. at 11-15.[9]

For example, the government has prescribed heightened screening requirements for visas and rigorous enforcement of existing grounds of inadmissibility,[10] and it is requiring significant additional information from visa applicants. *See* Department of State, Supplemental Questions for Visa Applicants.[11] And contrary to the government's invocation of a cloud of "uncertainty . . . over what action the President may take concerning Muslim-majority countries," App. Stay 22, it has also instituted new measures, apart from the Order, directed at groups of Muslim-majority countries. It has imposed additional rules for all air passengers departing from ten airports in Muslim-majority countries and arriving in the United States.[12] And it has imposed additional review procedures on applicants who have been to a territory controlled by ISIS.[13] The injunction did not prevent the government from instituting these measures.

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[9] *See also* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871679061847879682 ("In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe.").

[10] Memorandum from the President to the Sec'y of State, the Att'y Gen., and the Sec'y of Homeland Sec. (Mar. 6, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security.

[11] Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 20,956 (May 4, 2017).

The injunction also does not interfere with the government's longstanding authority to deny a visa or entry to individual noncitizens based on a wide range of grounds of inadmissibility, including terrorism-related grounds. *See* 8 U.S.C. § 1182(a)(3)(B); App. 115a-116a (Wynn, J., concurring). Consular officers and border control officials retain their statutory authority to demand further information or deny visas or admissions in appropriate circumstances. 8 U.S.C. § 1201(g); 9 FAM 306.2-2(A)(a)(1); 8 C.F.R. § 235.1(f)(1). And the President retains authority to issue additional Executive Orders addressing screening, vetting, entry, and travel procedures.

3. In lieu of any claim of concrete harm, the government's sole, perfunctory claim of irreparable injury is that *any* time the executive is enjoined from effectuating its policy, it is irreparably injured. App. Stay. 33 (citing *Maryland*

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[12] DHS Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States, Dep't of Homeland Sec. (Mar. 21, 2017), *available at* https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports.

[13] See, e.g., Michael D. Shear, Trump Administration Orders Tougher Screening of Visa Applicants, N.Y. Times (Mar. 23, 2017), *available at* https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html.

v. King, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

But, unlike the government's argument in this case, neither *King* nor *New Motor Vehicle Board* based their findings of irreparable injury *solely* on the fact that a government policy was enjoined, but rather found that specific concrete harms would arise absent a stay. *See King*, 567 U.S. at 1301 (discussing "ongoing and concrete harm to Maryland's law enforcement and public safety interests"); *New Motor Vehicle Bd.*, 434 U.S. at 1351 (noting that, absent a stay, numerous dealerships would be sited without state review); Amicus Br. of T.A. at 6-7; *see generally Nken*, 566 U.S. at 433-36 (rejecting categorical presumption of irreparable injury). Moreover, here, the executive branch retains ample authority to regulate immigration, including to deny visas and entry to persons who are not clearly admissible. It is only barred from implementing a single directive that targets a particular religion for condemnation. *Cf.* U.S. Mem. in Opp. to Stay 55, *West Virginia v. EPA*, No. 15A773 (U.S. filed Feb. 2016) (characterizing *King* and *New Motor Vehicle Board* as cases "where the Court stayed a judicial decision that prevented a State from exercising its regulatory authority at all" and arguing that the stay applicants could "identify no decision" holding that merely "constrain[ing]" authority is sufficient).

In any event, even assuming that the federal executive suffers some abstract institutional injury when federal courts enjoin it from taking unconstitutional actions, the government has not explained how that injury would be exacerbated absent a stay, particularly in light of the time that has already passed. "[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect [separation-of-powers] principles." *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Washington*, 847 F.3d at 1168 (observing the government "may yet pursue and vindicate its interests in the full course of this litigation").

IV. NO OTHER FACTOR SUPPORTS THE ISSUANCE OF A STAY.

1. As explained more fully in the plaintiffs' Brief in Opposition to the government's certiorari petition, the court of appeals correctly applied this Court's precedents to the extraordinary facts of this case. Opp'n Cert. 20-32. The record contains a mountain of publicly available evidence of the purpose of Section 2(c)—including statements from the President and his close aides before and after the election; indicia of anti-Muslim purpose in the text of both versions of the Order; the illogic of, and lack of factual support for, the proffered justification; and unrebutted evidence that the ban would not advance national security. *Id.* at 24-29. The government therefore cannot establish that it is likely to prevail on the merits.

The Fourth Circuit rightly rejected the government's various justiciability arguments, concluding that plaintiffs who are singled out, condemned, and harmed by the ban have standing to challenge it. App. 22a-36a. It applied *Mandel* but concluded that the "ample evidence" in this case was enough to show the facial justification was not "bona fide." App. 44a-45a. And, under the Establishment

Clause, it appropriately followed this Court's instruction and refused the government's entreaties to "turn a blind eye to the context in which [the Order] arose." *Santa Fe*, 530 U.S. at 315; *see* App. 64a ("The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action.").

As the court explained, its holding was narrow but ultimately compelled by the remarkable record: "[I]n this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the March Order.]" App. 61a-62a. Indeed, it concluded, the President's ban "would likely fail *any* purpose test." App. 65a n.22 (emphasis added).

Accordingly, the government cannot demonstrate that it is likely to prevail on the merits. The court of appeals correctly applied this Court's precedents to the singular facts of this case. Its careful analysis does not warrant this Court's review, much less the issuance of a stay that would grant the government full relief without briefing or argument on the merits.

2. The courts below carefully weighed the parties' interests and correctly concluded that the balance of harms, along with the public interest, tips sharply in the plaintiffs' favor. App. 65a-71a; 256a-258a. Section 2(c), understood in the full relevant and probative context, sends an unequivocal message "emanat[ing] from the highest elected office in the nation." App. 31a. This message from the federal

government condemning plaintiffs' religion and their identity tells plaintiffs in unambiguous terms "that they are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (internal quotation marks omitted). It demeans them, attacks them, and leaves them feeling isolated, disparaged, unsafe, unwelcome, and excluded from our national community. *See* App. 16a, 26a, 31a. The same is true for many of the organizational plaintiffs' clients and members, spread out all across the country. C.A. App. 269-270, 300. The injury imposed by a reinstituted ban would be severe and irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

A reinstituted ban would also upend the plaintiffs' plans and prolong their separation from their families. App. 32a. Plaintiff Doe #1, for example, has been exposed to "fear, anxiety, and insecurity" and would be put in the position of choosing between his work as a scientist in the United States and "being with [his] wife" in Iran. App. 25a-26a. Those whose visas are denied during the ban "would have to restart *from the beginning* the lengthy visa application process." App. 28a.

Moreover, allowing the ban to take effect now would create confusion and disruption. The scope of the ban would once again be subject to on-the-fly determinations by governmental officials about what "make[s] sense." Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2 (4th Cir. filed May 5, 2017). *See supra* at 4. The promise of confusion and uncertainty weighs heavily against granting the stay.

A partial stay would impose these same harms, and would also short-circuit the merits. Granting the government's alternative request to dramatically narrow the injunction at this stage would give the government a near-complete victory, allowing it to implement the ban before the Court can consider the merits.

An injunction limited to individuals would also leave multiple plaintiffs unprotected from the harm of the Order. As the Court has explained, a "systemwide impact" warrants a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359 (1996) (citation omitted). A narrowed injunction would force Muslim plaintiffs and other Muslims throughout the United States to endure the ban's message of religious condemnation. The full injunction is likewise necessary to protect the organizational plaintiffs, who have clients and members across the country.[14] For instance, during the chaos of the January Order, plaintiff IRAP responded to more than 800 emergency queries and developed guidance for its network of more than 2,000 pro bono attorneys and law students nationwide. C.A. App. 264-265. A partially reinstated ban would impose comparable burdens.

CONCLUSION

The government's application for a stay asks this Court to grant extraordinary relief without any showing of concrete need. Granting it would impose grave harms on the plaintiffs, subject the nation to a policy that the lower courts have found unconstitutional without merits review by this Court, and replace the status quo with disruption and uncertainty. The application should be denied.

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[14] The circumstances in *U.S. Department of Defense v. Meinhold*, 510 U.S. 939 (1993), were completely different. No time-limited policy was at issue in that case, and the stay therefore did not pretermit the merits. Nor did the case involve Establishment Clause harm. Instead, it was brought by a single plaintiff for whom the harm could be redressed by individual relief. Here, by contrast, a more limited injunction would neither relieve plaintiffs' nationwide harms nor address the religious condemnation they would experience. *Cf. Catholic League*, 624 F.3d at 1048.

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No. 16-1436 (16A1190)

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

RESPONDENTS' MOTION FOR LEAVE TO ADD PARTIES MOHAMAD MASHTA AND GRANNAZ AMIRJAMSHIDI

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents refer the Court to the disclosures made in their Brief in Opposition.

Pursuant to Rule 21, Respondents respectfully move for an Order adding Mohamad Mashta and Grannaz Amirjamshidi as plaintiffs and respondents in *Trump v. International Refugee Assistance Project*, No. 16-1436. Adding Mr. Mashta and Ms. Amirjamshidi will advance the interests of judicial efficiency without providing either side of this litigation with an unfair advantage.

BACKGROUND

The operative complaint in this case was brought by six individual plaintiffs and three organizations, on behalf of themselves and their clients and members. Each of the individuals is a U.S. citizen or lawful permanent resident. J.A. 54-56. Each has a relative or relatives subject to the Executive Order's six-country ban who, at the time the complaint was filed, had a pending application for a visa or refugee status. J.A. 95-104.

Since the complaint was filed, the government has issued visas to the relatives of three individual plaintiffs. Plaintiff Paul Harrison's fiancé was granted a visa on the same day the district court held a preliminary injunction hearing—the day before the Order was set to go into effect. U.S. 4th Cir. Br. 19 n.6. Plaintiff John Doe #3's wife received her visa one week before oral argument in the Fourth Circuit. C.A. Supp. J.A. 819. And Plaintiff John Doe #1's wife was issued a visa the same day this Court considered the petition for certiorari. Resp. Letter to Clerk, June 24, 2017. The visas for the latter two plaintiffs' relatives were issued after the injunctions in these consolidated cases were in place—and would have been subject to Section 2(c) if it had not been enjoined.

The government has argued that the claims of these three plaintiffs are moot because their relatives have received visas. Br. 28 n.10, 30. It has also contended that the other individual and organizational plaintiffs lack standing for other reasons. Br. 28 n.10. Respondents will address why those contentions are incorrect in their merits brief.

Mr. Mashta, the first proposed new plaintiff, is in the same position as Doe #1 was before the government issued his wife's visa. He is a U.S. lawful permanent resident who in 2012 filed an immigrant visa petition for his wife, who is a national of Syria, one of the banned countries. Declaration of Mohamad Mashta ("Mashta Decl.") (attached hereto as Exhibit A) ¶¶ 1, 4-5. He submitted her visa application in June 2016, she was interviewed in July 2017, and her visa application remains pending. *Id.* at ¶ 5. An immigrant visa is currently available for her. *Id.* Mr. Mashta is Muslim and understands the Executive Order at issue in this case to have relayed a message of condemnation and exclusion to him as a Muslim. *Id.* at ¶¶ 7-10. He seeks the same relief as Doe #1 and the other plaintiffs. Counsel for respondents first learned of Mr. Mashta on August 31, 2017.

Similarly, Ms. Amirjamshidi, the second proposed plaintiff, is a U.S. citizen whose mother, a national of Iran, one of the banned countries, has a pending nonimmigrant visa application. Declaration of Grannaz Amirjamshidi ("Amirjamshidi Decl.") (attached hereto as Exhibit B) ¶¶ 1, 4-6. She was interviewed in July 2016, and her application remains pending. *Id.* at ¶ 6. Ms. Amirjamshidi is Muslim and likewise understands the executive order to have relayed a message of condemnation and exclusion of her and other Muslims. *Id.* at ¶¶ 13-15. She seeks the same relief as Doe #1 and the other plaintiffs in this case. Counsel for respondents first learned of Ms. Amirjamshidi on August 12, 2017.

ARGUMENT

The addition of Mr. Mashta and Ms. Amirjamshidi as plaintiffs and respondents is warranted under this Court's precedent. The government's justiciability arguments rely on the issuance of the visa to Doe #1's wife, which occurred after the Fourth Circuit decided this case and through a process that was in the control of the government itself. The equitable, reasonable, and efficient path forward would be to permit the addition of Mr. Mashta and Ms. Amirjamshidi, whose relatives' visa applications remain pending.

This Court has taken a flexible and common-sense approach to the addition of parties in cases pending before the Court. In *Mullaney v. Anderson*, 342 U.S. 415 (1952), the Court granted a motion to add parties in this Court after certiorari had been granted. *Mullaney* was a suit brought by a union and one of its officers on behalf of union members. Before this Court, the defendant challenged the standing of the union and its officer to sue on behalf of its members, a legal issue that was unsettled at that time. *See Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 834 n.8 (1989). "To remove the matter from controversy," the plaintiffs sought to add two members as plaintiffs. *Mullaney*, 342 U.S. at 416. This Court granted the request, observing that the federal rules permit the addition of parties "'at any stage of the action and on such terms as are just.'" *Id.* at 417 (quoting Fed. R. Civ. P. 21).

Reflecting the rule's admonition that the addition of parties must be "just," the Court emphasized several equitable considerations: (1) earlier joinder of the new plaintiffs would not "have in any way affected the course of the litigation"; (2) dismissal of the case, refiling by the new parties in district court, and a repeat of the prior litigation path, "would entail needless waste and run[] counter to effective judicial administration"; and (3) the addition of the new parties would "in no wise embarrass the defendant." *Id.*; *see also Rogers v. Paul*, 382 U.S. 198, 199 (1965) (per curiam) (granting motion to add parties in this Court); Resp't's Mot. for Leave to Add Party John Doe, *Trump v. Hawai'i* 2-3, No. 16-1540 (discussing this Court's grant of a similar motion in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)).

This approach has been confirmed in the Court's subsequent decisions. *Newman-Green* held that courts of appeals may dismiss nondiverse parties on appeal in order to ensure subject matter jurisdiction. Analogizing to the addition of parties in *Mullaney*, the Court again underscored the equitable nature of the analysis. 490 U.S. at 833-34. Practical considerations were particularly crucial: Allowing adjustment of the parties on appeal to address diversity concerns avoided "unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. Indeed, a contrary ruling would require the plaintiff to "jump through . . . judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Id.* 837; *see also Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 64 (1996) (similar).

Here, the equitable considerations dispositive in *Mullaney* strongly support addition of Mr. Mashta and Ms. Amirjamshidi as plaintiffs. First, both Mr. Mashta and Ms. Amirjamshidi could have been plaintiffs from the beginning of this suit without affecting the course of the litigation. Mr. Mashta's wife's application has been pending since June 2016 and Ms. Amirjamshidi's mother's since July 2016, both well before this suit was filed. Mashta Decl. ¶ 5; Amirjamshidi Decl. ¶ 6. At the time the complaint was filed, both potential plaintiffs were similarly situated to the other plaintiffs with affected visa-applicant family members. And, because both the district court and the court of appeals held that standing was satisfied by the existing set of plaintiffs, the addition of Mr. Mashta and Ms. Amirjamshidi would not have changed the course of litigation in any material way.

Second, as in *Mullaney*, adding plaintiffs here helps ensure that there is no unjustifiable waste of judicial resources. Were this Court to hold that none of the current plaintiffs have standing for lack of a plaintiff in the same situation as Doe #1 was at the time the Fourth Circuit issued its opinion, and to vacate the decisions below on that basis as the government has urged, respondents would seek leave from the district court to amend their complaint to add additional plaintiffs such as Mr. Mashta, Ms. Amirjamshidi, and other similarly situated individuals, and would again seek a preliminary injunction. There is no reason to require the parties to reenact the proceedings below, when the same district court and the same court of appeals would be faced with essentially the same questions, on essentially the same record, at issue here. *Newman–Green*, 490 U.S. at 837. This Court has already rejected such judicial hoop-jumping "merely for the sake of hypertechnical jurisdictional purity." *Id.*

Finally, nothing about the addition of Mr. Mashta and Ms. Amirjamshidi to the case at this stage of the litigation will unfairly prejudice the government. The government has *already* argued that individuals in Mr. Mashta's and Ms. Amirjamshidi's position do not have justiciable claims, offering the asserted mootness of Doe #1's claim as an alternative argument. Br. at 28-30 (asserting that Doe #1's injuries "were never cognizable" and, even if they were, "are now moot"). Thus, the addition of Mr. Mashta and Ms. Amirjamshidi to this case would not add any new issues or require new briefing, but would merely eliminate one proffered argument concerning mootness that arose only after the Fourth Circuit held the case was justiciable. Certainly the government can claim no prejudice from an order ensuring this Court's subject matter jurisdiction, as that is precisely what the Court issued in *Mullaney*. Nor did the government lose any opportunity to engage in discovery related to Mr. Mashta or Ms. Amirjamshidi it would otherwise have had, as this case has not proceeded to discovery at all.

Rather, the danger of unfair prejudice in this situation falls entirely on respondents. Respondents prevailed at the district court and the court of appeals on standing and other justiciability questions as well as the merits. During the course of that expedited litigation schedule, the government has issued visas, through a process entirely under its own control, to three named plaintiffs—and then argued that their claims are moot. *Compare, e.g.*, Pet. 16, 20 (suggesting that the chance of John Doe #1's wife being eligible for a visa was too speculative to support standing) *with, e.g.*, Br. 30 (arguing, having granted that visa, that John Doe #1's claim was moot). Respondents are not attempting to "reshap[e] the litigation at the thirteenth hour," Pet's Opp. to Resp't's Mot. for Leave to Add Party John Doe, *Trump v. Hawai'i* 3, No. 16-1540, but instead restore the litigation to the shape it was in when petitioners filed their petition—and before petitioners' action injected a new question into the case. Adding Mr. Mashta and Ms. Amirjamshidi as plaintiffs to "remove" any mootness question raised by the visa issuance "from controversy" would be eminently "just." *Mullaney*, 342 U.S. at 417.

Respectfully Submitted,

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Dated: September 8, 2017

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Omar C. Jadwat, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Motion for Leave to Add Parties Mohamad Mashta and Grannaz Amirjamshidi was served via electronic mail and Federal Express on September 8, 2017 on:

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EXHIBIT A

DECLARATION OF MOHAMAD MASHTA

I, Mohamad Mashta, upon my personal knowledge, hereby submit this declaration pursuant 28 U.S.C. § 1746 and declare as follows:

1. I am a U.S. lawful permanent resident and a Syrian citizen.

2. I came to the United States in 2012 on a student visa. I applied for and was granted asylum and later became a lawful permanent resident. I believe in the "American Dream."

3. I have a Master's degree in electrical engineering and work as an engineer.

4. My wife is also a Syrian citizen. She left Syria in 2012 because the civil war made the country unsafe. She has lived in Sudan since then with her family. We married in 2015.

5. I applied for an immigrant visa for my wife in 2012, shortly after we married. My petition was granted about four months later. I submitted her visa application in June 2016. We waited a long time, but she was finally scheduled for an interview in Sudan in July 2017. At the interview, the officer asked for some additional information, which she provided. Her case has been in administrative processing since then. According to the monthly visa bulletin from the Department of State, a visa is currently available for her. I do not believe there is any legitimate reason for my wife's application to be delayed or denied. I fear that she is being unfairly processed because she is Muslim.

6. Being separated from my wife is depressing and painful. We have now been living apart for two years, and every day we spend apart hurts. I have struggled during this time, and sometimes lose hope that we will ever be able to be together. When I can, I take vacations to visit her in Sudan. But that is no replacement for really being together.

7. I am a practicing Muslim, as is my wife.

8. I am familiar with the President's promises for a "Muslim Ban" and with the two executive orders he signed banning people from Syria and other countries. I see those orders as an attempt to follow through on the President's promise of a ban on Muslims.

9. When the first ban was announced in January, I was devastated. I could not sleep and could not work, and had to take a week of vacation time. I still have trouble sleeping because of the ban, which has left me feeling scared, depressed, and anxious about what will happen next. To me, the President's ban says that as Muslims we are not welcome in this country. It tells me the government does not want us here. It feels like an accusation for no reason that my wife and I are terrorists, and that we as Muslims cannot get along with other people in America. Those accusations are totally wrong and hurtful.

10. I have felt my interactions with Americans change since the first ban. The message of the ban, that Muslims like me are bad people unless proven otherwise, affects conversations I have all the time. I feel a lot of pressure to defend myself and other Muslims, to prove to people that I am not bad. I never felt that way before the first ban.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed in Celina, OH on September 6, 2017

MHMD MASHTA
Mohamad Mashta

EXHIBIT B

DECLARATION OF GRANNAZ AMIRJAMSHIDI

I, Grannaz Amirjamshidi, upon my personal knowledge, hereby submit this declaration pursuant 28 U.S.C. § 1746 and declare as follows:

1. I am a U.S. citizen of Iranian origin, and I live in Campbell, California with my husband and 20-month-old son, who are both U.S. citizens.

2. I work in San Jose, California, as an engineer manager at a manufacturing company. I have a Master's degree in Operations Management.

3. I came to the United States as a lawful permanent resident in 2009 as part of the annual diversity visa lottery. At that time my husband and I were Iranian citizens living in Sweden, where I was studying. I applied to naturalize as soon as I was allowed to.

4. My mother is an Iranian citizen.

5. My mother lives in Toronto, Canada. From the time I moved to the United States up until last year, she would regularly travel to the United States to visit me. She applied for and received tourist visas 12 times during seven years. Her applications were always granted until last year. Sometimes her applications would be granted quickly, in a matter of days. But more recent applications took months to process and grant.

6. My mother's most recent visa application was in 2016. She attended her interview on July 7th, 2016, and was told that her application had been accepted and she should wait to be processed. We have regularly contacted the embassy for updates, and have been told the case is being processed. Most recently, in April 2017, the embassy told my mother that her application "remains pending." We do not know of any reason why she would be denied a tourist visa, which she has applied for and received many times before. Her visits would always be from a couple of days to a couple of weeks, never to exceed her visa expiration date.

7. My mother comes to the United States primarily to visit me and my family. We are very close, and we talk on the phone at least once a day. But that kind of communication is just not the same as being in the same place and spending time together. I miss her and it is painful not to be able to see her.

8. Even worse is the separation of my mother and my son. I want her to see him grow up and to spend time with him, and for him to get to know his grandmother. But phone calls and internet video cannot take the place of being together, especially for a young child like my son. I think it is unfair, cruel, and unacceptable to keep a child and his grandmother apart like this.

9. Having my mother come to visit is also very important as a support to my husband and me in raising our son. We do not have family in the area we live. When my mother is here, she can help with childcare, giving my husband and me a break and allowing us to save money on expensive child care. Without her visits, we are on our own.

10. It is extremely difficult for us to visit my mother, especially for any significant period of time. My husband and I both have demanding work schedules, making it next to impossible to travel for more than a long weekend. It is very hard to travel with my young son, especially to go such a long distance and for such a short period of time. Because of these difficulties, my mother has seen my son only once in the last year, when we travelled to Canada. The long flight and time-zone change were very hard on my son, so we are very hesitant to make the trip again.

11. The separation from my mother has recently gotten even worse. I am pregnant with our second child. This will make it even harder to travel. I cannot stand the idea of my mother not being able to visit while I am pregnant, for the birth, or to meet her new grandchild.

And the pregnancy and having a second young child will make not being able to lean on help and support from my mother even more difficult.

12. We have been waiting for my mother's visa for a long time, but every day we are kept apart is painful and unfair. If the ban on Iranians challenged in this case is allowed to be enforced, we will be faced with 90 more days of separation. If an officer denies her visa outright because of the ban, we would need to start over, and may face another extended period of processing—which has taken over a year already for her current application—before she is granted a visa.

13. I am a non-practicing Muslim.

14. I have followed the news about the President's statements about Muslims and the two orders he signed banning people from Iran and other Muslim countries. I understand those orders as an attempt to put in place at least part of the ban on Muslims he promised. The orders send the message that Muslims like me are not welcome in this country, that Muslim communities are bad or dangerous. This makes me feel singled out and condemned just because of who I am.

15. I have noticed the overall atmosphere towards Muslims change in the last year. People ask me whether I am a Muslim more than they used to, in ways that make me feel uncomfortable and singled out. I see people who are conspicuously Muslim, for example wearing head scarves, being stared at and drawing more seemingly suspicious attention. The hostility I sense is usually subtle here, but I think it is probably more blatant and explicit in other parts of the country. I believe these changes are at least in part because of what the President has said about Muslims and the orders he signed.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed in Campbell, California on September 7, 2017

Grannaz Amirjamshidi

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In the Supreme Court of the United States

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v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

According to respondents, "[t]his is an important case." Br. in Opp. 1. That is a considerable understatement. At the behest of a single individual (John Doe #1), the divided en banc court of appeals affirmed a global injunction against a provision of an Executive Order of the President that concerns matters of national security and immigration. Respondents do not address the government's arguments for why this Court's review is warranted, see Pet. 33-34; Stay Appl. 18-22, and they do not seriously dispute that the "court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Respondents instead primarily argue that the case is moot and that the decision below is correct. Both arguments are mistaken.

I. THE GOVERNMENT'S APPEAL IS NOT MOOT

Respondents contend (Br. in Opp. 13-15) that the government's appeal of the preliminary injunction becomes moot today, June 14, 2017. As a matter of both the Executive Order, No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), and common sense, a 90-day period that was never permitted to run is not now elapsing. As discussed more fully in the government's accompanying reply in support of its application for a stay, see Gov't Stay Reply Br. 1-4, Section 2(c) provides that entry will be "suspended for 90 days from the effective date of this order." Pet. App. 299a (§ 2(c)). That effective date originally was, as Section 14 provides, "12:01 a.m., eastern daylight time on March 16, 2017." *Id.* at 311a (§ 14). The injunction in this case, however, prevented Section 2(c) from becoming "effective" and "suspend[ing]" entry for 90 days after March 16. Section 2(c)'s 90-day suspension thus will take effect and begin to run only when the injunction in this case, along with the overlapping global injunction at issue in *Trump* v. *Hawaii*, No. 16A1191 (filed June 1, 2017), is lifted or stayed. And if any doubt existed on that score, the President has resolved it in his memorandum clarifying and amending the relevant provisions of the Order. See Memorandum from President Donald J. Trump to Sec'y of State et al., *Effective Date in Executive Order 13780* (June 14, 2017); see also Br. in Opp. 13-14. The government's challenge is not moot.[1]

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[1] If the Court were to conclude that the challenge is moot, the appropriate course would be to grant, vacate, and remand the court of appeals' decision with direction to dismiss the case, including the injunction. Gov't Stay Reply Br. 4 n.2; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

II. THE DECISION BELOW IS WRONG

A. Doe #1's Challenge To Section 2(c) Is Not Justiciable

Respondents do not dispute that they may seek review of the denial of entry to aliens abroad only to assert violations of respondents' own constitutional rights. See Br. in Opp. 19 ("The doctrine [of consular nonreviewability] does not bar constitutional claims by persons in the United States."). The court of appeals held that Doe #1 has pointed to two supposed injuries that stem from a violation of his own Establishment Clause rights: (1) possible delay in his wife's entry and (2) condemnation of his religious faith. Pet. App. 25a-26a. Respondents fail to show that either putative injury allows Doe #1 to challenge Section 2(c).

1. Doe #1's allegation that Section 2(c) will delay his wife's entry is not ripe for adjudication, because the Order provides that she may seek a waiver as a close family member of a U.S. citizen. Pet. App. 302a-303a (§ 3(c)(iv)). Indeed, in *Kerry* v. *Din*, 135 S. Ct. 2128 (2015), and *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Court considered the constitutional claim only after the alien abroad had been denied a visa (and in *Mandel*, a waiver). Respondents' only answer is that Doe #1's *condemnation* injury "is immediate and ongoing." Br. in Opp. 19 n.10. By shifting to Doe #1's asserted condemnation injury, respondents implicitly concede that his asserted delay-of-entry injury alone does not satisfy Article III. Moreover, respondents do not address this Court's cases holding that individuals derivatively injured by government action directed at others may not sue under the Establishment Clause, because they have not suffered violations of their *own* religious-freedom rights. See Pet. 16-17 (citing cases).

2. Respondents focus on Doe #1's asserted condemnation injury. They rely (Br. in Opp. 16, 18) on domestic cases in which U.S. citizens were directly exposed to explicitly religious displays or speech in public places like a courthouse, public park, or city council meeting. But respondents do not dispute that Section 2(c) is not explicitly religious, and it applies only to aliens abroad, not U.S. citizens.[2] Their claim is only that, by allegedly discriminating against aliens abroad on the basis of their religious faith, Section 2(c) sends a message of condemnation to *respondents* (as well as to all Muslims in the United States, and perhaps even all those offended by the Order's putative message). No case holds that type of injury cognizable, and recognizing such injury would be contrary to *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), cert. denied, 556 U.S. 1167 (2009).

On respondents' approach, virtually any government action could be recharacterized as sending a message of condemnation (or endorsement). Respondents say (Br. in Opp. 17) that Doe #1 is personally affected by the Order because it applies to his wife. But any such effect would have nothing to with Doe's *condemnation* injury, which stems from the Order's supposed message to him—not its alleged impact on his wife's entry. Respondents also suggest (*id.* at 18 n.9) that the rule of *Allen* v. *Wright*, 468 U.S. 737 (1984)—*i.e.*, only "'those persons who are personally denied equal treatment' by the challenged discriminatory conduct" may sue to redress its "stigmatizing injury"—is limited to the equal-protection context. *Id.* at 755 (citation omitted). This Court, however, applied that rule to Establishment Clause claims in *Valley Forge*. See 454 U.S. at 485-486. Respondents offer no legal basis for their Establishment Clause exceptionalism.

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[2] This case is also unlike *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), which upheld third-party standing for a U.S. resident who was denied U.S. citizenship based on the gender of his now-deceased U.S. citizen-parent. Slip op. 6-7. By contrast, the relative in this case is not a U.S. citizen but an alien abroad who lacks constitutional rights in connection with her admission, she is alive, the challenged provision has not yet been applied to her, and that provision does not impose a direct personal injury on the U.S. resident who is challenging it.

3. Respondents do not dispute that the court of appeals relied only on Doe #1's standing. And they do not rely on any of the other individual plaintiffs. See Pet. 15 n.7. Respondents instead argue (Br. in Opp. 18-19, 32-33) that the organizational plaintiffs have justiciable claims—even though neither court below so held. Of the three organizations, two resettle refugees. See Gov't C.A. Br. 25. The Order's refugee provisions are not at issue here, and those groups cannot assert third-party standing (Br. in Opp. 18-19) on the ground that some unidentified clients also happen to be petitioning for visas for unidentified relatives. As for the remaining group (the Middle East Studies Association), respondents continue to assert (*id.* at 19) that one member may be unable to attend an annual meeting in November 2017. But standing is measured as of the commencement of the action. See *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008). And when this suit was filed, Section 2(c) would have expired today—long before that conference.

B. Section 2(c) Is Lawful

1. Section 2(c) does not violate the Establishment Clause

a. In the court of appeals, respondents argued that their constitutional challenge to the Order's exclusion of aliens abroad is not subject to *Mandel*'s standard. Resps. C.A. Br. 35-38. Respondents all but abandon that contention in this Court. Br. in Opp. 21 n.11. Just days ago, this Court reiterated that *Mandel*'s test—whether Section 2(c)'s national-security purpose is "facially legitimate and bona fide," 408 U.S. at 770—constitutes "minimal scrutiny (rational-basis review)." *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), slip op. 15. Apart from a passing footnote, respondents do not dispute that Section 2(c)'s national-security purpose based on risks presented by countries that sponsor or shelter terrorism (Pet. 6-7) is facially legitimate. Nor do they dispute that Section 2(c)'s temporary suspension of entry bears a rational relation to that objective. Br. in Opp. 23 n.13.[3] It therefore is facially bona fide as well. That should be the end of the analysis under *Mandel*'s deferential standard of review.

Respondents distort *Mandel*, insisting that "it is appropriate to 'look behind' the explanation on the face of [the] order" because they allege bad faith. Br. in Opp.

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[3] Respondents' contention (Br. in Opp. 23 n.13) that Section 2(c) is a "religious gerrymander" disregards the Order's explanation that the six countries were chosen based on specific national-security risks previously identified by Congress and the Executive, and ignores Section 2(c)'s exclusion of the overwhelming majority of Muslim-majority nations. Respondents' challenge to collection of data about "honor killings" (*ibid.*) ignores that they are not confined to any religion and that the government has a strong interest in combatting gender-motivated violence. Gov't C.A. Reply Br. 20-21.

21 (citations and emphasis omitted). That is precisely the approach this Court rejected in *Mandel*. Compare 408 U.S. at 770, with *id.* at 778 (Marshall, J., dissenting). Contrary to respondents' argument, *Mandel* was not a dispute over whether the government had "provided enough explanation for its conclusions." Br. in Opp. 22. In dissent, Justice Marshall (joined by Justice Brennan) contended that "the Attorney General's reason for refusing a waiver * * * [was] a sham" because it was affirmatively belied by representations of the Department of State. 408 U.S. at 778. This Court declined to entertain that contention, refusing to look behind the Attorney General's "facially legitimate and bona fide reason" for denying entry (*i.e.*, Mandel's failure to comply with the terms of previous visas). *Id.* at 770. There is no basis for distinguishing *Mandel* from this case.

b. Respondents rely primarily (Br. in Opp. 21-22) on Justice Kennedy's concurrence in *Din*, *supra*. But *Din* involved a claim by a U.S. citizen challenging the denial of a visa to her husband on the ground that due process required that she be provided the facts underlying that determination. In discussing that claim, respondents never grapple with the concurrence's language or logic: it addressed only the hypothetical circumstance where a consular officer's decision to refuse a visa lacked a "bona fide *factual basis*," which might entitle the U.S. citizen to "additional factual details" about the reason for the denial beyond citation of the statutory basis. 135 S. Ct. at 2140, 2141 (emphasis added).

Indeed, as respondents acknowledge, the U.S. citizen in *Din* "did not allege that [the government] had acted with an impermissible purpose." Br. in Opp. 22. The case therefore did not present any question of how courts should evaluate such allegations. And to the extent the brief discussion in the *Din* concurrence suggests that a U.S. citizen-plaintiff might be permitted in rare circumstances to obtain additional factual details for a consular officer's decision, that type of inquiry does not apply here. See Pet. 24. This case involves a formal national security and immigration determination by the President himself, not a consular officer's fact-based decision in an individual case. And the court of appeals did not hold that the Order lacks an adequate factual basis for Section 2(c)'s temporary suspension.

c. Respondents' Establishment Clause challenge fails even under domestic precedent. Pet. 26-31. They do not dispute that Section 2(c)'s stated national-security purpose is religion-neutral. Respondents instead argue (Br. in Opp. 26-29), based on the opinions of former officials and leaked drafts of internal agency documents, that Section 2(c) is not necessary to national security. But the Constitution and Acts of Congress entrust the *President* with the responsibility of weighing competing priorities and risks and determining the appropriate course in consultation with his Cabinet and other advisors. Pet. 22. The fact that respondents and their amici disagree with the current Executive's judgment does not demonstrate that Section 2(c) aims at an impermissible end.

Respondents' related suggestion that the Order does not reflect the input of the President's advisors is unfounded. The President consulted with multiple Cabinet officials. See Pet. 5-7. And as the Secretary of Homeland Security recently reaffirmed in testimony before Congress, Section 2 has "nothing to do with religion," but rather is "about security for the United States and nothing else"; it focuses on "countries that are either unable or unwilling to help [the government] validate the identities and backgrounds of persons within their borders"; and the injunctions in this case and the *Hawaii* litigation barring implementation of Section 2(c) and other provisions "prevent[] [the government] from taking steps right now to improve the securit[y] of the homeland." S. Comm. on Homeland Sec. & Governmental Affairs, *The Department of Homeland Security Fiscal Year 2018 Budget Request* (June 6, 2017) (statement of John F. Kelly, at 38:09-39:04, 40:18-40:36), https://www.hsgac.senate.gov/hearings/the-department-of-homeland-security-fiscal-year-2018-budget-request.

Respondents are left to rely (Br. in Opp. 24-26), as the court of appeals did, on extrinsic material and especially on campaign statements. Such statements are irrelevant because only an "*official* objective" regarding religion can violate the Establishment Clause, *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (emphasis added). Respondents are wrong to suggest (*id.* at 30-31) that this Court has ever approved reliance on such statements. The plurality opinion in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 541 (1993), noted a debate at a city-council meeting. See *Glassroth* v. *Moore*, 335 F.3d 1282, 1284-1285, 1297 (11th Cir.) (state chief justice confirmed after taking office that Ten Commandments display was erected for religious purpose), cert. denied, 540 U.S. 1000 (2003). And *Epperson* v. *Arkansas*, 393 U.S. 97, 107-108 & n.16 (1968), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457, 463 (1982), involved initiative campaigns, in which public debate was more akin to legislative history. See Gov't C.A. Reply Br. 22-23. Respondents do not point to any case that supports impugning an Executive Order that is neutral on its face and in operation based on a candidate's campaign-trail comments.

Respondents' remaining arguments lack merit. Respondents say that the difficulties with relying on campaign statements "apply equally to post-campaign statements." Br. in Opp. 31. That is all the more reason why courts should look to the "text, legislative history, and implementation of the statute," without engaging in any "judicial psychoanalysis" of officials' motives based on extrinsic material. *McCreary*, 545 U.S. at 862 (citation omitted). Finally, respondents assert in passing (Br. in Opp. 31) that they can carry their burden based only on post-inauguration materials, but they do not seriously grapple with the government's showing to the contrary. See Pet. 30-31; Stay Appl. 21.

2. *Section 2(c) does not exceed the President's statutory authority*

Respondents argue (Br. in Opp. 34-36) that the judgment below can be affirmed on alternative statutory grounds that the court of appeals did not address. But as respondents do not dispute, the limited exception to consular nonreviewability in *Mandel* and *Din* applies to "*constitutional* claims," not statutory claims, by U.S. citizens. *Id.* at 19 (emphasis added). Respondents do not cite any authority for permitting statutory challenges by U.S. citizens to the denial of entry to aliens abroad. In any event, respondents' statutory arguments lack merit for reasons that the government explained below, see Gov't C.A. Br. 27-35, and that the government will address in further briefing on its application to stay the *Hawaii* injunction. Whatever the merits of respondents' statutory arguments, the appropriate course is for this Court to grant certiorari both here and in *Hawaii* and consolidate the cases for argument.

C. The Global Injunction Against Section 2(c) Is Vastly Overbroad

The global injunction here is radically overbroad. Even if Doe #1 had a justiciable challenge, he could not obtain an injunction that invalidates Section 2(c) in all of its applications. Rather, he could obtain at most an order enjoining Section 2(c)'s application to his wife. See Pet. 31-32. Respondents contend (Br. in Opp. 33) that such a tailored remedy would be akin to giving earplugs to the students in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), or temporarily covering the Ten Commandments display in *McCreary* when the individual plaintiffs visited the courthouse. That is wrong.

Respondents' analogy to cases involving school prayer and religious displays fails because the injury respondents assert is fundamentally different. In *Doe* and *McCreary*, the practice or display was directed to the audience of which the plaintiff was a part. Thus, the injury to the plaintiffs challenging school prayer in *Doe* and the Ten Commandments display in *McCreary* could realistically be redressed only by ending the practice or removing the display altogether. By contrast, any cognizable injury to Doe #1 does not stem from merely observing a government message or display—an untenable theory of injury that, in the context of this Order, would enable anyone claiming offense at the Order to sue. Rather, respondents argue (Br. in Opp. 17 & n.8), and the court of appeals held (Pet. App. 32a-33a & n.11), that Doe #1's purported injury results from the combination of the stigmatizing message he alleges coupled with the Order's potential application to his wife. Because that purported injury rests on the possible effect of Section 2(c) on his wife's admission, it could be fully redressed by relief limited to her admission.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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No. 16A1190

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND FOR EXPEDITED BRIEFING AND CONSIDERATION

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A divided en banc court of appeals upheld a global injunction against an Executive Order that the President of the United States determined is necessary to protect the Nation's security. Respondents do not question the vital importance of this case, and our reply in support of the petition for a writ of certiorari demonstrates that this Court is likely to grant review and reverse the court of appeals' unprecedented and erroneous decision. Here, we show that respondents have identified no sound reason to allow the district court's sweeping injunction to remain in place pending this Court's review.

1. Respondents' lead argument in opposing both a stay and certiorari is that the government's challenge to the injunction

has become "moot" because Section 2(c)'s 90-day suspension purportedly ended on June 14, 2017. Br. in Opp. 13-15; see Opp. 18.[1] That argument rests on a misreading of the Order and the government's briefing below. And in any event, the President has now clarified that Section 2(c)'s 90-day suspension will not begin to run until the current injunctions are lifted or stayed.

a. Section 2(c) provides that the entry of certain aliens into the United States will "be suspended for 90 days from the effective date" of the Order, which was originally March 16, 2017. Order § 14. By its plain terms, that provision calls for a 90-day period after the effective date during which entry is "suspended." But because Section 2(c) was enjoined before it could take effect, that 90-day suspension has not yet begun to run, and will do so only once the injunctions are lifted or stayed. In other words, the injunctions have effectively delayed or tolled the Order's effective date for purposes of Section 2(c) and the other enjoined provisions.

Respondents err in asserting (Opp. 18) that this common-sense interpretation reflects a change in the government's position. In its stay motion in the court of appeals, the government stated that Section 2(c)'s 90-day suspension "expires in early June." C.A. Doc. 35, at 11 (Mar. 24, 2017). The government was addressing the assertion by respondent Middle East Studies Association of North America (MESA) that it had standing because Section 2(c) may interfere with a meeting scheduled for November 2017, five months after Section 2(c)'s suspension was set to expire. Id. at 10-11. The government's point was that, if Section 2(c) had been permitted to go into effect as originally scheduled, MESA would not have suffered any cognizable injury. See Davis v. FEC, 554 U.S. 724, 734 (2008) (standing inquiry "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). The government's statement did not address the effect of the injunctions on the running of the 90-day period, much less endorse the exceedingly odd notion that Section 2(c)'s suspension could end before it begins.

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[1] References to "Br. in Opp." refer to the brief in opposition to the certiorari petition. References to "Opp." refer to the opposition to the stay application.

b. In any event, even if the Order had been ambiguous on this point, the President has now issued a formal Presidential Memorandum clarifying that Section 2(c)'s 90-day suspension will not begin to run until the current injunctions "are lifted or stayed." Memorandum from President Donald J. Trump to Sec'y of State et al., Effective Date in Executive Order 13780 (June 14, 2017) (Memorandum), https://www.whitehouse.gov/briefing-room/presidential-actions. The Memorandum further provides that, "[t]o the extent it is necessary, this memorandum should be construed to

the Executive Order." Ibid. That clarification forecloses respondents' mootness argument. Respondents themselves have conceded (Br. in Opp. 14) that "the President can unilaterally revise" the Order's temporal scope "at any time." Now that he has done so, there is no question that this case presents a live dispute and that a stay would provide meaningful relief.[2]

2. A stay is warranted because the district court's injunction inflicts irreparable injury on the government and the public. Section 2(c) temporarily suspends the entry of certain nationals of six countries because the President determined, in consultation with Cabinet-level advisors, that conditions in those countries (i) "present heightened threats" of terrorism and (ii) "diminish[]" their governments' "willingness or ability to share or validate important information about individuals seeking to travel to the United States." Order § 1(d). The injunction nullifies that national-security judgment and compels the admission into this country of aliens whose entry the President has determined, in the exercise of authority expressly conferred by Congress, "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f).

By nullifying a measure that the President has deemed necessary to protect the Nation against terrorism, the injunction undermines "an urgent objective of the highest order." Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) (HLP). The court of appeals dismissed that injury based primarily on its assertion that the government "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing restrictions likely to be found unconstitutional." Pet. App. 68a (brackets, citation, and internal quotation marks omitted). Respondents do not defend that reasoning, which improperly conflates the merits with the balance of harms. Stay Appl. 34. And respondents' various alternative attempts to minimize the harm to the government and the public are unpersuasive.

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[2] Even if respondents' mootness argument were correct, it would not justify the denial of relief. This Court's "established practice" when a federal civil case "has become moot while on its way here or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950); see Stephen M. Shapiro et al., Supreme Court Practice § 19.5, at 970-971 (10th ed. 2013).

a. Rather than directly addressing the government's showing of irreparable harm, respondents begin by asserting (Opp. 20-23) that the government has been dilatory. But as we have explained, the government has moved with dispatch at every step of the process. Stay Appl. 34-35. The President issued the revised Order less than three weeks after the government informed the Ninth Circuit that he intended to do so -- hardly an unreasonable length of time for an interagency process that culminated in a revised Order reflecting material substantive changes and detailed factual findings. After the district court entered a preliminary injunction, the government filed an immediate notice of appeal and then filed both its opening brief and a motion for a stay within a week. Id. at 35. The government also proposed a highly expedited schedule under which both the merits and the stay would have been fully briefed in just two weeks, but respondents objected and the Fourth Circuit adopted a longer schedule. Ibid. Finally, the government filed a certiorari petition and sought a stay in this Court just one week after the Fourth Circuit issued its decision.[3]

Respondents cite no case in which this Court (or one of its Members) has deemed such expedited litigation to be dilatory. To the contrary, in the case on which respondents rely (Opp. 20), the government waited "more than seven weeks" after the district court's decision before seeking a stay and "requested and received a 30-day extension" in this Court. Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Even then, Justice Blackmun emphasized that the delay was "certainly not dispositive." Id. at 1318; see Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (granting stay despite applicant's "eight-week delay" in seeking relief). Here, the government's expeditious conduct only reinforces the need for a stay.

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[3] Respondents also criticize (Opp. 21-22) the government's failure to immediately appeal the temporary restraining order (TRO) entered in the Hawaii litigation. But the government cannot be faulted for asking the Hawaii district court to clarify and narrow the scope of relief before converting the TRO to an appealable preliminary injunction -- particularly because the district court itself invited briefing on the conversion and the Ninth Circuit ultimately agreed with the government that the injunction was overbroad. See Hawaii v. Trump, No. 17-15589, 2017 WL 2529640, at *26, *29 (9th Cir. June 12, 2017).

b. The district court's injunction nullifying the President's national-security judgment imposes irreparable harm on the government and the public. Even a single State "suffers a form of irreparable injury" "any time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." King, 567 U.S. at 1303 (citation omitted). That harm is magnified here given "the singular importance of the President's duties" to the entire Nation, Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982), and the government's overriding interest in "combatting terrorism," HLP, 561 U.S. at 28.

Respondents attempt (Opp. 26) to distinguish King on the ground that the district court's injunction bars the government only from "implementing a single directive" and does not prevent it from undertaking other related steps. But the same was true in King: The decision at issue there barred Maryland from implementing a DNA-collection program that had led to fewer than ten convictions in the prior year, but left the State free to pursue any number of other measures to improve law enforcement and protect public safety. See 567 U.S. at 1301-1302.

More broadly, respondents err in attempting to minimize as "abstract institutional injury" (Opp. 26) the harm that the government and the public suffer when a district court's nationwide injunction interferes with the Executive Branch's administration of the laws. Members of this Court have often concluded that the balance of equities favors a stay where, as here, an injunction is claimed to be "not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government." INS v. Legalization Assistance Project, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers); see, e.g., Heckler v. Lopez, 463 U.S. 1328, 1336-1337 (1983) (Rehnquist, J., in chambers). Those considerations have special force when the injunction at issue runs against a policy adopted by the President of the United States and when that policy concerns immigration and national security, areas where "the President has unique responsibility." Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993).

c. Respondents contend (Opp. 23) that the government has not "assert[ed] any concrete or specific security-related need" for a stay. That is wrong. The Order itself describes in detail the considerations underlying the President's determination that, "[i]n light of the conditions in" six countries previously identified by Congress and the Executive Branch as being associated with a heightened threat of terrorism, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Order § 1(f); see id. § 1(d) and (e); see also Stay Appl. 8-10. And the Secretary of Homeland Security recently reiterated those concerns and emphasized that "fully implementing the [Order] would clearly and substantively increase [the Department of Homeland Security's] ability to secure the nation from those who seek to do us harm."[4]

In nonetheless insisting that the government has not identified a "concrete" or "specific" need for the Order, respondents apparently mean that the government has not offered what they regard as sufficient evidence of past terrorist acts by nationals of the six countries covered by Section 2(c) -- countries that are either state sponsors of terrorism or that are compromised by the presence of major terrorist organizations. That demand for a specific showing of past injury is inconsistent with the Order's very nature as a "preventive measure," HLP, 561 U.S. at 35, based on the President's "[p]redictive judgment," Department of the Navy v. Egan, 484 U.S. 518, 529 (1988).

d. Respondents also assert (Opp. 23-24) that the "record evidence" contradicts the President's judgment. But respondents' three types of contrary "evidence" actually reflect nothing more than policy disagreement with the President's national-security determination.

First, respondents invoke (Opp. 23) an amicus brief filed by "former national security officials" and a draft internal report from the Department of Homeland Security. The President, however, is entitled to disagree with those sources and instead follow the final recommendations of his current Cabinet-level advisors, including the Attorney General and the Secretary of Homeland Security -- recommendations that built on country-specific judgments previously made by Congress and the Executive Branch. And that is particularly true where, as here, the question involves a sensitive policy judgment about the degree of acceptable risk. Respondents and their amici disagree with the President's policy judgment, but the Executive is empowered and obligated by the Constitution and Acts of Congress to make that judgment for the Nation.

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[4] U.S. Dep't of Homeland Security, Oral Testimony of DHS Secretary Kelly for a House Committee on Homeland Security Hearing (June 7, 2017) (prepared statement of John F. Kelly), https://www.dhs.gov/news/2017/06/07/oral-testimony-dhs-secretary-kelly-house-committee-homeland-security-hearing-titled.

Second, respondents object (Opp. 23) that the Order is too narrow because it contains limitations and exceptions, including a waiver provision and an exception for individuals who already hold visas. Order § 3. But the Order's accommodation of competing considerations -- including due process concerns identified by courts -- hardly undermines the compelling interests at stake. Even policies that serve interests of the highest order often include limitations or exceptions to protect other important interests.

Third, respondents assert (Opp. 24-25) that the district court's injunction against Section 2(c) does not prevent the government from taking "other actions relating to travel or entry."

But the President is entitled to adopt more than one preventive measure to protect the Nation from a given threat. And the other steps respondents identify do not address the same concerns as Section 2(c). For example, respondents note (ibid.) that the Department of State is implementing new screening procedures that require certain visa applicants to provide additional information to consular officers. See 82 Fed. Reg. 20,956 (May 4, 2017). Those new procedures improve the visa screening process, but seeking additional information from visa applicants themselves addresses a concern different from, and is not an adequate substitute for, ensuring that foreign governments are willing and able to "share or validate important information about individuals seeking to travel to the United States." Order § 1(d).

3. In contrast to the serious irreparable injury that the injunction imposes on the government and the public, a stay would not impose any substantial harm on respondents. Respondents scarcely argue otherwise, devoting barely more than a page of their opposition to the balance of harms (Opp. 28-29). Like the court of appeals, Pet. App. 65a-66a, respondents principally rely (Opp. 28-29) on their assertion that the Order injures them because they perceive it as a "message from the federal government condemning [their] religion." But as the government has demonstrated, that asserted harm from an Executive Order addressed to aliens abroad does not qualify as a cognizable Article III injury to respondents

at all. See Cert. Reply Br. 4-5. It certainly cannot outweigh the governmental and public interests that support a stay.

In practical terms, respondents contend (Opp. 29) that allowing Section 2(c) to go into effect would prolong John Doe #1's separation from his wife. That assumes Doe #1's wife would be found otherwise eligible for a visa and then denied a waiver under Section 2(c), notwithstanding the provision of the Order contemplating waivers for foreign nationals who seek to enter the United States "to visit or reside with a close family member" such as "a spouse." Order § 3(c)(iv). And even if that happened, a temporary delay in the entry of Doe #1's wife would not constitute irreparable harm. Cf. Nken v. Holder, 566 U.S. 418, 435 (2009) (holding that even the far more drastic step of removal from the United States "is not categorically irreparable [harm]").[5]

Respondents also assert (Opp. 29) that staying the injunction "would create confusion and disruption" about the suspension's effective date and implementation. The President's Memorandum eliminates any confusion and ensures "an orderly and proper implementation" by specifying that Section 2(c)'s suspension of entry will not be implemented until "72 hours after all applicable injunctions are lifted or stayed." Memorandum.

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[5] Respondents also attempt to invoke (Opp. 29) the organizational respondents' unidentified "clients and members." But neither the district court nor the court of appeals found that the organizational respondents even have Article III standing. Pet. App. 34a, 230a; see Cert. Reply Br. 5.

4. Although the balance of harms tips decisively in favor of a stay, respondents separately contend (Opp. 19-20) that a stay is not warranted because it would "effectively predetermine the merits of th[e] case" by allowing Section 2(c)'s 90-day suspension to run before this Court issues a decision on the merits. But respondents do not cite any decision treating this factor as a bar to a stay where, as here, this Court's well-established four-factor standard for a stay is otherwise satisfied. Indeed, such a rule would effectively prevent this Court or a court of appeals from staying any injunction against a one-time event or a temporary measure of short duration.

5. At a minimum, this Court should stay the district court's sweeping global injunction because it goes far beyond the relief necessary to protect the only respondent the court of appeals found to have Article III standing. "The purpose of a preliminary injunction," after all, "is merely to preserve the relative positions of the parties." University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (emphasis added). And both Article III and fundamental equitable principles require that, like any other judicial relief, a preliminary injunction must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Lewis v. Casey, 518 U.S. 343, 357 (1996); see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

Here, the court of appeals held that a single respondent -- Doe #1 -- has standing to challenge Section 2(c). Pet. App. 34a. Even assuming that Doe #1 has a ripe claim, any cognizable harm he suffers could be eliminated by a preliminary injunction barring the application of Section 2(c) to his wife. See id. at 32a-33a & n.11 (holding that Doe #1 has standing only because the court concluded that the application of Section 2(c) to his wife inflicts a "direct, cognizable injur[y]"). Accordingly, the Court should stay "so much of [the district court's injunction] as grants relief to persons other than [Doe #1]." United States Department of Defense v. Meinhold, 510 U.S. 939 (1993).[6]

Respondents do not dispute that such a narrowed injunction would completely redress the particularized injury alleged by Doe #1, and they also do not identify any precedent or principle that would support the entry of a global preliminary injunction when a narrower injunction would fully protect the only plaintiff whom the court of appeals found to have Article III standing. Instead, respondents contend (Opp. 29-30) that a broader injunction is needed to protect the organizational respondents and "other Muslims throughout the United States" who are not parties to this litigation. But because the organizational plaintiffs lack Article III standing, their asserted injuries cannot justify the injunction. See Pet. App. 34a, 230a; Cert. Reply Br. 5. And here, as in Meinhold, Article III and fundamental equitable principles foreclose the grant of injunctive relief to protect nonparties.

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[6] Respondents seek to distinguish Meinhold on the ground that it did not involve an "Establishment Clause harm." Opp. 30 n.14. But Meinhold likewise involved a claim of unconstitutional discrimination: the injunction there rested on equal-protection principles and barred the Department of Defense "from taking any actions against gay or lesbian servicemembers based on their sexual orientation." Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1473 (9th Cir. 1994). The Court's decision in that case stands for the proposition that a district court's grant of injunctive relief should not extend beyond what is necessary to afford relief to the parties with Article III standing. That bedrock principle applies equally here.

CONCLUSION

The injunction should be stayed in its entirety pending this Court's disposition of the government's petition for a writ of certiorari, and, if review is granted, pending a decision on the merits. At a minimum, the injunction should be stayed as to all persons other than Doe #1's wife.

Respectfully submitted.

Jeffrey B. Wall

JEFFREY B. WALL
Acting Solicitor General

JUNE 2017

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RIEFS

No. 16-1436

FILED
JUN - 9 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

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DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSOCIATION PROJECT, ET AL.,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

BRIEF *AMICUS CURIAE* OF SUSAN ABELES IN SUPPORT OF NEITHER PARTY

◆

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Interest of the *Amicus* [1]

A dispositive legal issue in this case parallels a legal issue that the Court of Appeals for the Fourth Circuit decided recently against *amicus* Susan Abeles. Ms. Abeles will shortly be filing with this Court a Petition for a Writ of Certiorari to review that erroneous decision. The *amicus* is submitting this brief not to support either side in this particular litigation, but to alert this Court (a) to the conflicting rulings of the Fourth Circuit and (b) to the inconsistency between the Fourth Circuit's attitude to claims of religious discrimination by Muslims and a comparable claim of religious bias with more compelling facts made by an Orthodox Jew.

Susan Abeles is the plaintiff-appellant in *Abeles v. Metropolitan Washington Airports Authority*, a 16-page decision of the United States Court of Appeals for the Fourth Circuit that can be found at 2017 WL 374741 (4th Cir. Jan. 26, 2017). The Fourth Circuit's "Unpublished" decision appears as Appendix I to this Brief *Amicus Curiae*.

On February 9, 2017, Ms. Abeles filed a Petition for Rehearing and Rehearing En Banc with the Fourth Circuit, noting, *inter alia*, a patent factual error in the panel's opinion. A copy of the Petition for

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *amicus* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Rehearing and Rehearing En Banc appears as Appendix II to this Brief *Amicus Curiae*.

On February 23, 2017, the Court of Appeals for the Fourth Circuit denied Ms. Abeles' Petition for Rehearing En Banc. The Chief Justice thereafter extended the time within which to file a Petition for a Writ of Certiorari to July 23, 2017.

Undersigned counsel represents that Ms. Abeles intends to file a Petition for a Writ of Certiorari with this Court on or before July 23, 2017.

Ten Judges of the Court of Appeals for the Fourth Circuit have determined in this case that the President's "temporary suspension of entry" to the United States constitutes impermissible anti-Muslim religious bias in violation of the Establishment Clause of the First Amendment because candidate Trump's expressed motivation "drips with religious intolerance, animus, and discrimination." Pet. App. 168a.

This factual finding – described by the Fourth Circuit Judges as based on "evidence [that] . . . stares us in the face" (Pet. App. 60a) – cannot be reconciled with the tacit approval by the same Fourth Circuit Judges of much more flagrant religious anti-Jewish prejudice suffered by Susan Abeles. She was punished by the Metropolitan Washington Airports Authority – a quasi-governmental agency – for having been absent from work on the last two days of Passover 2013 after she had received e-mailed approval from her supervisor to take annual leave on those days.

Such conduct by an employer is anti-Jewish religious prejudice that violates the Civil Rights Act. The undisputed evidence in Susan's case "stared" the Judges of the Fourth Circuit in their faces. When they ignored this evidence, the Fourth Circuit Judges proved the aphorism by Jonathan Swift that the majority opinion quoted – "There's none so blind as they that won't see."

A strong correlation exists between Susan Abeles' case and the second Question Presented in the Solicitor General's Petition for Certiorari. The evidence on which 10 judges of the Fourth Circuit relied to find anti-Muslim bias in the issuance of a Presidential Executive Order was less convincing and more equivocal than the proof of anti-Jewish religious bias in *Abeles v. Metropolitan Washington Airports Authority.* Yet the Fourth Circuit summarily rejected Susan Abeles' claim while sustaining the allegation of religious prejudice in the present case.

Statement of Facts

Susan Abeles (hereinafter "Susan") is an Orthodox Jew who was employed by the Metropolitan Washington Airports Authority ("MWAA"), The MWAA's Board of Directors is appointed by the Governors of Maryland and Virginia, the Mayor of the District of Columbia, and the President of the United States. The MWAA administers Ronald Reagan Washington National Airport and Washington Dulles International Airport.

In 2013 Susan was suspended without pay for having taken annual leave to observe the last two days of Passover. During the 26 previous years that she worked at the same job for MWAA, she had given her supervisors a list of Jewish holidays at the beginning of every calendar year. They knew that on Jewish holidays like Rosh Hashanah, Yom Kippur, Sukkot, and Passover she would be out on annual leave.

Susan had relatively new supervisors in 2013, and they did not like her. She disputed their allegation that she was "insubordinate." Her past performance evaluations by many different supervisors had been excellent, and she had won several awards. When the Passover holiday approached, Susan noted the four dates when religious observance would keep her out of the office on her supervisors' Outlook calendars as they requested.

The concluding two days of Passover in 2013 were on Monday and Tuesday. Neither of her supervisors was in the office on the Friday before the holiday, so Susan sent them an e-mail reminder at noon that she would be out of the office to observe the religious holiday on Monday and Tuesday. Her second-level supervisor replied in an e-mail: "Thanks. Please see my note about providing us a status update before you leave today."

This was full compliance with the language of the MWAA's "Absence and Leave Directive" which specified that employees should have "an exchange of e-mails between the employee and supervisor" in order to take annual leave. Nonetheless, when Susan returned to work the following week she was told she had been "AWOL" for the last two days of Passover because her immediate supervisor had not given her oral approval. Susan was suspended without pay for an additional 5 days for "failure to follow leave procedures" and "being absent without leave." The AWOL punishment and suspension without pay were approved by MWAA's Vice-President for Finance and Chief Financial Officer. In such a hostile work environment that failed to respect her religion, Susan felt she had no choice other than to take early retirement.

Section 701(j) of the federal Civil Rights Act, 42 U.S.C. § 2000e(j), defines "religion" as requiring government and private employers to make a "reasonable accommodation" for the religious observances of their employees. Susan filed a complaint with the Equal Employment Opportunity Commission, and then brought a federal lawsuit against the MWAA. The MWAA moved the case from the District of Columbia to Virginia, and 16 days before a jury trial was to begin, the federal judge in Virginia threw out Susan's case on summary judgment. In an opinion he issued more than two weeks after his decision (*Abeles v. Metropolitan Washington Airports Authority*, 2016 WL 6892103 (E.D. Va. April 1, 2016), the district judge did not even mention the "reasonable accommodation" provision of federal law.

Although her appeal was supported by both the American Jewish Committee and the Becket Fund for Religious Liberty, three judges of the Fourth Circuit rejected Susan's appeal on the ground that Susan did "not establish... a religious conflict with an employment requirement." Contradicting undisputed documentary evidence, the three appellate judges declared that Susan had "failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013."

Susan's Petition for Rehearing En Banc called to the attention of the full complement of active Fourth Circuit judges the language of the MWAA's directive on annual leave, which did not require approval by an employee's "immediate" supervisor. It also noted the exchange of e-mails between Susan and her second-level supervisor that had been set forth in detail in the appellate briefs. See pp. 20a-21a, *infra*. The full court – including all 10 judges who later concluded that anti-Muslim bias invalidated Section 2(c) of Executive Order No. 13,780 — were oblivious to flagrant anti-Jewish religious discrimination and rejected Susan's request for rehearing.

Argument

Susan Abeles is an American citizen who has no legal standing to support or oppose enforcement of Section 2(c) of Executive Order No. 13,780. As a religiously observant Orthodox Jew, however, she is entitled to the same legal protection against anti-Jewish religious bias under Title VII of the Civil Rights Act as Muslim Americans are granted against anti-Muslim bias by government agencies under the Establishment Clause of the First Amendment.

Apparently moved by "political correctness" in today's climate, ten Judges of the Fourth Circuit brushed aside the flagrant anti-Jewish bias shown in Susan's case while finding, on more equivocal and debatable evidence, that an Executive Order issued by the President to protect the security of the American homeland "drips with religious intolerance, animus, and discrimination."

This *amicus* brief takes neither side in the politically charged battle over the breadth of the President's authority. It is filed to draw the Court's attention to the probability, demonstrated vividly by the Fourth Circuit's inconsistent rulings, that, in the current concern over protecting the rights of American Muslims, religious minorities other than Muslims may now be slighted and ignored.

For at least the two reasons summarized below the Fourth Circuit should have been more receptive to the claim made by Susan Abeles in her allegation of religious discrimination in employment than it was to the charge of anti-religious animus that it approved in this case.

A. The *Kleindienst v. Mandel* Standard Does Not Govern Lawsuits Challenging Religious Discrimination in Employment.

The Fourth Circuit could not invalidate the President's Executive Order without countering the restriction articulated in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), that secures "facially legitimate and bona fide" exercises of executive discretion in the immigration context against constitutional challenge. The Judges of the Fourth Circuit pierced that legal shield in determining that Section 2(c) of Executive Order No. 13,780 was anti-Muslim religious discrimination. Susan's claim of anti-Jewish religious bias in employment had no comparable obstacle. A "facially legitimate" pretext and an assertion of good faith could not validate the

AWOL punishment imposed by the MWAA. Nonetheless, the Fourth Circuit sustained the claim of anti-Muslim bias in the immigration context while rejecting Susan's claim that she was victimized by anti-Jewish punishment in her employment.

B. Absent "Undue Hardship," Religious Discrimination in Employment Is Unlawful.

In the present case, President Trump and the Solicitor General offer multiple reasons why, absent religious prejudice, the Executive Order is a necessary and proper means of protecting national security. This record contains substantial national-policy justifications for the measure that the Fourth Circuit found religiously discriminatory.

In Susan's case, by contrast, no claim has ever been made by MWAA that the punishment imposed for Susan's absence on the last two days of Passover is justified by harm attributable to her absence. The MWAA has not invoked "undue hardship," which is the ***only*** available defense for denying an employee's religious observance under Section 701(j) of the Civil Rights Act. The Fourth Circuit was demonstrably inconsistent and unjustifiably hostile to the claim of an Orthodox Jew when it accepted the religious discrimination claim of the respondents in this case while rejecting Susan Abeles' claim that she was the victim of anti-Jewish religious bias in her employment with the Metropolitan Washington Airports Authority.

Respectfully submitted,

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APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1330

SUSAN H. ABELES,
Plaintiff – Appellant,
v.
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, Defendant – Appellee,
and JULIA HODGE; VALERIE O'HARA,
Defendants.

THE AMERICAN JEWISH COMMITTEE; THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS; THE BECKET FUND FOR RELIGIOUS LIBERTY, Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:15-cv-00792-CMH-IDD)

Argued:December 8, 2016 Decided: January 26, 2017 Before WILKINSON, SHEDD, and DUNCAN, Circuit Judges. Affirmed by unpublished opinion. Judge Duncan wrote the opinion, in which Judge Wilkinson and Judge Shedd joined.

ARGUED: Nathan Lewin, LEWIN & LEWIN, LLP, Washington, D.C., for Appellant. Bruce P. Heppen, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellee. ON BRIEF: Joseph W. Santini, Morris Kletzkin, FRIEDLANDER MISLER, PLLC, Washington, D.C., for Appellee. Dennis Rapps, New York, New York; Meir Katz, MAGEN LEGAL, Baltimore, Maryland, for Amicus The National Jewish Commission on Law and Public Affairs "COLPA". Eric C. Rassbach, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., for Amici The American Jewish Committee and The Becket Fund for Religious Liberty.

Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge: Plaintiff-Appellant Susan H. Abeles sued her employer Metropolitan Washington Airports Authority ("MWAA" or "Defendant") and her supervisors, alleging religious discrimination in violation of Title VII, deprivation of civil rights under 42 U.S.C. § 1983, and violations of federal and state religious freedom acts. The district court granted the individual supervisors' motions to dismiss but denied MWAA's motion to dismiss. After discovery, the district court granted summary judgment to MWAA on all claims. Plaintiff appeals each of these rulings. For the reasons that follow, we affirm.

I. A. Plaintiff, a practicing Orthodox Jew, began working at MWAA in 1987.[1] MWAA knew Plaintiff's religious beliefs prohibited her from working on Jewish holidays. During 2012 and 2013--the relevant time period for this case--Plaintiff reported to Valerie O'Hara ("O'Hara"), who in turn reported to Julia Hodge ("Hodge"). In her 26 years of working at MWAA, Plaintiff's supervisors always allowed Plaintiff to leave early on Fridays so that she could arrive home before sundown to observe the Sabbath in the winter months. On occasion, MWAA also provided kosher food at staff events in recognition of Plaintiff's religious dietary requirements. MWAA--including Plaintiff's first-level supervisor, O'Hara--never denied Plaintiff leave to observe a religious holiday when she requested leave prior to being out of the office. The instant dispute arises from Plaintiff's failure to follow MWAA's formal procedure for requesting leave. MWAA's Absence and Leave Program ("Leave Policy") specifies that employees must request leave by form or email and receive approval before taking leave. Plaintiff was aware of the Leave Policy and had seen the document before.

In addition to MWAA's formal process, the department in which Plaintiff worked used an informal planning calendar to help determine coverage based on when people would be in the office. In January 2013, Plaintiff noted on this internal planning calendar the dates she anticipated she would be out on leave that year. After marking the internal planning calendar, Plaintiff did not discuss the specific dates with her supervisors. O'Hara and Hodge never told Plaintiff that putting dates on the internal planning calendar relieved her of her responsibility to request leave properly and receive advance approval.[2]

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[1] MWAA is a "regional entity" that the Virginia General Assembly and the District of Columbia City Council, acting pursuant to an interstate compact, jointly created for the purpose of operating the federally owned Washington-Dulles International Airport and Ronald Reagan Washington National Airport. *Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 373 (4th Cir. 2001)

In February 2013, Plaintiff had multiple meetings with O'Hara and Hodge, as well as MWAA's Labor Relations Specialist Juan Ramos, regarding her "2013 Work Goals and Performance Factors." That plan highlighted the need for her to submit her reports on time and that she must "[u]se leave according to the Airports Authority's Absence and Leave Policy." J.A. 347.

In 2013, the eight-day Jewish holiday of Passover occurred between Tuesday, March 26 and Tuesday, April 2. Plaintiff's religious beliefs preclude labor on the first two days and last two days of Passover. On Thursday, March 21, 2013, at a weekly meeting, Plaintiff requested leave from O'Hara to observe the first two days of Passover on March 26 and 27, 2013. Plaintiff discussed her leave with O'Hara, received advance approval, and then sent O'Hara an Outlook calendar invitation. On March 21, Plaintiff knew that she would also need to take leave on Monday, April 1 and Tuesday, April 2, but did not request leave for those days.

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[2] Plaintiff alleges that the MWAA left leave policy to the discretion of individual supervisors. However, MWAA maintains that the internal planning calendar did not substitute for formal procedure as stipulated by the Leave Policy.

After observing the first two days of Passover, Plaintiff returned to work on Thursday, March 28, 2013. O'Hara was also in the office on March 28, but Plaintiff did not request leave that day for April 1 and 2, 2013, the last two days of Passover.

On Friday, March 29, 2013, Plaintiff sent an Outlook calendar invitation to O'Hara and Hodge, "notifying" them that she would be out of the office on April 1 and 2, 2013. Plaintiff did not intend this Outlook calendar invitation to be a request for leave, but merely a "reminder" of the dates she had placed on the internal calendar. J.A. 283, 289. Plaintiff planned to discuss her leave request with O'Hara in person on March 29, 2013, but O'Hara was out of the office that day. O'Hara did not respond to Plaintiff's March 29, 2013, Outlook calendar invitation.[3]

On April 3, 2013, when O'Hara returned to the office, she sent an email to Plaintiff that stated her absence on April 1 and 2 "was not pre-approved" by O'Hara or Hodge and that "[a]s a matter of process" the internal planning calendar "is for the Manager's resource planning" and "not for pre-approving leave." J.A. 10; *see also* J.A. 114. O'Hara continued: "Sending a meeting request on a day that I'm on leave to request leave for the following two days is unacceptable." J.A. 10; *see also* J.A. 114. In the email, O'Hara also granted Plaintiff's telephone request for leave on April 3, 2013--leave Plaintiff requested due to the death of an uncle. O'Hara subsequently classified Plaintiff's absence on April 1 and 2 as "Absent Without Leave" or "AWOL."

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[3] Although Hodge, Plaintiff's second-level supervisor, responded to Plaintiff's March 29, 2013, Outlook calendar invitation, Hodge stated in her deposition that she assumed Plaintiff had already sought and received approval consistent with the Leave Policy from O'Hara, in part because Plaintiff explained in a reply email that the calendar invitation was a "reminder of [her] scheduled leave." J.A. 326.

On April 12, 2013, Plaintiff received a letter from Hodge proposing a five-day suspension as discipline for (1) insubordination, for failing to meet deadlines regarding deliverables including a plan to automate her work and completion of her annual performance goals; (2) failure to follow the procedure for requesting leave; and (3) absence without leave on April 1 and 2. In her deposition testimony, Plaintiff did not refute any of the facts in the letter, other than to clarify that she failed to meet one deadline because of the death of an aunt.

Regarding insubordination, the Table of Penalties in MWAA's Conduct and Discipline Directive states that the penalty for a first offense of "failure to carry out orders" is "oral reprimand to 5 days suspension," and the penalty for a first offense of "refusal to carry out orders" is "5 days suspension to removal." J.A. 131, 220. Plaintiff's suspension became final on May 3, 2013.

Later, Plaintiff requested leave to observe another Jewish holiday in May 2013, which O'Hara granted. Plaintiff retired from MWAA on May 31, 2013.

On September 17, 2013, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging religious discrimination in violation of Title VII. On February 7, 2015, Plaintiff received a "Dismissal and Notice of Rights" letter from the EEOC, which provides a potential plaintiff the right to sue.

B. On May 5, 2015, Plaintiff filed suit in the United States District Court for the District of Columbia against MWAA, and supervisors O'Hara and Hodge, alleging violations of Title VII, 42 U.S.C. § 2000e-2(a)(1) (employment discrimination on the basis of religion), 42 U.S.C. § 1983 (deprivation of civil rights), the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq., and the Virginia Religious Freedom Act ("VRFA"), Va. Code Ann. Section 57-2.02. The district court transferred the case to the United States District Court for the Eastern District of Virginia.

On August 17, 2015, the district court granted Hodge and O'Hara's motions to dismiss, but denied MWAA's motion to dismiss. The district court later granted summary judgment to MWAA on all claims, finding that the record does not reflect direct or circumstantial evidence of religious discrimination, the § 1983 claim is time barred, and the federal and state religious freedom acts do not apply.[4] Plaintiff appeals each of these rulings.

II. We review de novo a district court's decisions to grant a motion to dismiss and a motion for summary judgment. *White v. BFI Waste Services, LLC*, 375 F.3d 288,291,294 (4th Cir. 2004). In reviewing the district court's grant of summary judgment, we view the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 294. However, the nonmoving party must set forth specific facts that go beyond the "mere existence of a scintilla of evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242, 252 (1986). The nonmoving party bears the burden of demonstrating a genuine issue of material fact for trial; conclusory or speculative allegations do not suffice. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002).

III. A. Title VII of the Civil Rights Act of 1964 provides two ways of proving discrimination in employment by showing: (1) "disparate treatment" or (2) "disparate impact." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015); 42 U.S.C. § 2000e-2(a). Plaintiff alleges "disparate treatment"--that is, "intentional discrimination"--under 42 U.S.C. § 2000e-2(a)(1) on the basis of her religion. That provision prohibits an employer from (1) "discriminat[ing] against any individual" (2) "because of" (3) "such individual's . . . religion." *Id.* § 2000e-2(a)(1). Title VII, in turn, defines religion to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j) (emphasis added). "Because this definition includes a requirement that an employer 'accommodate' an employee's religious expression," an employee alleging intentional discrimination under § 2000e-2(a)(1) can bring suit based on a disparate-treatment theory or a failure-to-accommodate theory. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (4th Cir. 1996) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)).

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[4] Because we conclude that MWAA did not discriminate against Plaintiff on the basis of her religion in violation of Title VII, and the record indicates MWAA always allowed Plaintiff to observe the Sabbath and religious holidays if she complied with formal procedure, MWAA necessarily did not "substantially burden" Plaintiff's "exercise of religion" in violation of the federal and state religious freedom acts. 42U.S.C.§2000bb-1(u); Va. Code Ann. §57-2.02(B). Therefore, we decline to reach the issue whether those statutes--which apply only to "government" and a "government entity"--apply to MWAA.

Plaintiff argues that the district court erred by granting summary judgment to Defendants on her Title VII claim because it (1) impermissibly resolved factual issues when evaluating her claim under a disparate-treatment theory and (2) failed to consider her claim under a failure-to-accommodate theory. Plaintiff also argues (3) that the district court erred in granting her supervisors' motions to dismiss. We consider each argument in turn.

1. "To prove a claim under the disparate treatment theory, an employee must demonstrate that the

employer treated her differently than other employees because of her religious beliefs." *Chalmers*, 101 F.3d at 1017 (emphasis omitted). Absent direct evidence of discrimination,[5] a plaintiff can establish discrimination via circumstantial evidence under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden-shifting framework first requires the plaintiff to establish a prima facie case of discrimination before the burden shifts to the employer to provide evidence of a legitimate, nondiscriminatory reason for its employment action; if the employer does so, the burden shifts back to the employee to show that the employer's proffered reason is pretextual. *Chalmers*, 101 F.3d at 1018. To establish a prima facie case, a plaintiff must show "(1) membership in a protected class, (2) satisfactory job performance, (3) adverse employment action, and (4) different treatment"--which here means more severe discipline--"than similarly situated employees outside the protected class." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010); *Cook v. CSX Transp. Co.*, 988 F.2d 507, 511 (4th Cir. 1993).

Applying this framework, the district court concluded that Plaintiff had not established a prima facie case of discrimination under a disparate-treatment theory. As an individual alleging discrimination on the basis of her faith, Plaintiff is a member of a protected class. And she suffered an adverse employment action because MWAA suspended her, in part, because of the allegedly discriminatory AWOL finding. However, the district court concluded that "Plaintiff fails to establish a prima facie case of discrimination under Title VII because she cannot demonstrate satisfactory job performance or that she was treated differently from similarly situated employees outside the protected class." J.A. 514. We agree.

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[5] Plaintiff does not contest the district court's conclusion that Plaintiff adduced no direct evidence of discrimination.

First, as to her job performance, Plaintiff argues that the district court incorrectly determined that she did not dispute the charge of insubordination and that it alone merited a five-day suspension, regardless of the allegedly discriminatory AWOL classification. The record belies Plaintiff's argument. As MWAA notes, the Table of Penalties contained in MWAA's Conduct and Discipline Directive states that the penalty for a first offense of "failure to carry out orders" is "oral reprimand to 5 days suspension," and the penalty for a first offense of "refusal to carry out orders" is "5 days suspension to removal." J.A. 131, 220. Plaintiff points to a portion of Hodge's deposition to suggest that, absent Plaintiff's failure to request leave properly, MWAA would only have "reprimanded" Plaintiff for insubordination. But Hodge did not so concede.[6]

Plaintiff also asserts that she disputed the allegations regarding insubordination in her deposition. But the portion she cites reveals that she did not refute any of the charges. J.A.292-94. MWAA attorneys asked Plaintiff several times whether the contents of the April 12 disciplinary letter, including the charge of insubordination--paragraph by paragraph--were inaccurate. She disputed nothing, and only explained the tardiness of one report by citing the death of an aunt. Plaintiff also asserts that she "disputed" part of MWAA's Statement of Undisputed Material Facts, which cited deposition testimony explaining that Plaintiff's "supervisors had concerns regarding her deteriorating performance and attendance and began to supervise her more closely in an effort to improve both. Numerous meetings were held throughout the first three months of 2013 in an effort to improve [Plaintiff's] performance and attendance." J.A.127 ¶17. Without any citation to the record, Plaintiff simply stated "False" in her Response to Defendant's Statement of Undisputed Material Facts. J.A.427.[7]Conclusory allegations do not suffice to create a genuine issue of material fact for trial. *SeeThompson*, 312 F.3dat 649.

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[6] Hodge stated: "*At a minimum,* [Plaintiff] would have been reprimanded." J.A. 334 (emphasis added).

Even if Plaintiff could establish a genuine issue of material fact regarding whether her work performance was satisfactory, Plaintiff adduces no evidence that MWAA treated her differently from similarly-situated employees outside her protected class. In Plaintiff's Statement of Undisputed Material Facts, she states--again, with no citation to the recordor other evidence--that: "No employee of MWAA has ever been suspended for as much as three (3) days for being AWOL or for taking annual leave without approval of a request of annual leave." J.A. 435. Plaintiff provides no evidence that she received more severe discipline than similarly-situated employees outside her protected class, nor any comparators on the basis of which to make this assessment. *See Cook*, 988 F.2d at 511.

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[7] Plaintiff also argues that she disputed the charge of insubordination in a letter written by her attorney to MWAA. However, that letters not included in the record on appeal. An "appellate court normally will not consider facts outside the record on appeal," and we decline to do so with regard to this letter. *Colonial Penn Ins. Co. v. Coil*, 887 F.2d1236, 1239 (4th Cir. 1989).

Plaintiff does not establish a genuine dispute of material fact either that she performed her work satisfactorily or that MWAA disciplined her more severely than other similarly-situated employees outside her protected class. Plaintiff thus fails to establish a prima facie case of discrimination under a disparate-treatment theory.

2. Plaintiff's "primary argument is not that the district court erred in its analysis of its claim under the disparate treatment theory, but that the court erred in failing to analyze her suit under the accommodation theory." *Chalmers*, 101 F.3d at 1018. Unlike disparate treatment, under a failure-to-accommodate theory "an employee can establish a claim even though she cannot show that other (unprotected) employees were treated more favorably or cannot rebut an employer's legitimate, non-discriminatory reason for her discharge." *Id.* To establish a prima facie failure-to-accommodate claim, a plaintiff must show (1) she has a bona fide religious belief or practice that conflicts with an

employment requirement and (2) the need for an accommodation of that religious belief or practice served as a motivating factor in the employer's adverse employment action. *See id.* at 1019; *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (clarifying that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an [employee's] religious practice, confirmed or otherwise, a factor in employment decisions"). Here, Plaintiff adduced evidence of neither, although we need not proceed beyond the first.

With respect to the leave at issue, Plaintiff does not establish the first element of her claim: a religious conflict with an employment requirement. Her observance of the Sabbath during winter months when the sun sets earlier created a conflict with her normal working hours on Fridays, and MWAA consistently accommodated her request to leave work early. Regarding Jewish holidays, however, no conflict existed between Plaintiff observing religious holidays and following MWAA's neutral rules requiring advance approval of leave following specified procedures. Nor could she establish such a conflict. The Leave Policy merely requires employees to request leave by form or email, and obtain advance approval.

Of particular significance is the fact that Plaintiff points to no occasion on which MWAA denied leave when she requested leave in compliance with MWAA's Leave Policy. To the contrary, the evidence indicates MWAA would have granted her request to take leave if she had abided by the Leave Policy. MWAA regularly granted her leave to observe religious holidays for the prior 26 years and, in 2013, approved leave for the first two days of Passover and another religious holiday several weeks later. Plaintiff followed the Leave Policy on those occasions. She failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013, and that failure to comply is the sole differentiating factor from every occasion on which leave was granted.

3. Plaintiff also argues that the district court erred in dismissing respondents O'Hara and Hodge, Plaintiff's first- and second-level supervisors. In *Lissau v. Southern Food Services, Inc.*, we held that supervisors are not liable in their individual capacities for Title VII violations. 159 F.3d 177, 180 (4th Cir. 1998).[8] Plaintiff concedes that *Lissau* dictates dismissing her Title VII claim against Hodge and O'Hara. See Reply Br. at 17–18.[9]

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[8] The district court dismissed the individual defendants on the basis that individual supervisors may not be sued personally when they are carrying out personnel decisions of a plainly delegable character, relying on *Brubeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 n.1 (4th Cir. 1994). J.A. 107. We affirm, however, under the blanket rule this court announced in *Lissau*, 159 F.3d at 180.

[9] Plaintiff nevertheless contends that her § 1983 claim should remain against these individuals. However, because we conclude that Plaintiff's § 1983 claim is time barred, *see infra* Part IV, the district court properly dismissed the individual supervisors.

IV. Plaintiff next argues that the district court erred by granting summary judgment to MWAA on the § 1983 claim when it found that the applicable statute of limitations barred the claim. Because § 1983 does not contain an express statute of limitations, we use state statutes of limitations, and here Virginia's two-year statute-of-limitations period applies. *See A Soc'y Without A Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011). Federal law controls when the applicable statute-of-limitations period begins to run; this occurs when the claim accrues--that is, when the plaintiff "knows or has reason to know of the injury which is the basis of the action."Id.(quoting *Cox v. Stanton*, 529 F.2d 47,50 (4th Cir. 1975)). Plaintiff does not dispute that the action accrued on May 3, 2013, when her disciplinary action became final. *See* Appellant's Br. at 37–38. Plaintiff filed suit on May 5, 2015, more than two years later. The statute of limitations therefore bars her claim.[10]

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[10] Plaintiff suggests that she could not file her §1983 claim earlier. That is incorrect. Plaintiff filed a Charge of Discrimination with the EEOC on September 17,2013. Although she did not receive a right-to-sue letter until February7, 2015, she could have requested one after the 180-day statutory period expired. See42 U.S.C. §2000e-5(f)(1); *seealso*29C.F.R. §1601.28 (explaining that upon request by an aggrieved party "the Commission shall promptly issue" notice of right to sue "at any time after the expiration of one hundred eighty(180) days from the date of filing of the charge with the Commission"). For this reason, Plaintiff's suggestion that Virginia's tolling provision, Va. Code Ann. Section8.01-229(E)(1), tolled her case while her claim was pending before the EEOC lacks merit.

V. The district court properly dismissed Plaintiff's individual supervisors and granted summary judgment to MWAA on both the Title VII and §1983 claims. Accordingly, the judgment of the district court is *AFFIRMED*.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUSAN H. ABELES

Plaintiff- Appellant

v.

METROPOLITAN WASHINGTON
AIRPORTS AUTHORITY, JULIA HODGE
and VALERIE O'HARA

Defendants-Appellees

APPELLANT'S PETITION FOR (1) PANEL REHEARING AND (2) REHEARING EN BANC

INTRODUCTION - In undersigned counsel's judgment the panel decision in this case (i) overlooked material factual and legal matters, (ii) made findings on factual issues that were controverted in the record, (iii) conflicted with Section 701(j) of the Civil Rights Act (42 U.S.C. § 2000e(j)) and with judicial decisions applying that provision, (iv) conflicted with the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), and (v) determined questions of exceptional importance to minority-faith employees in the enforcement of Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e - 2000e-16).

QUESTIONS PRESENTED

1. Whether an employer has made the statutorily prescribed "reasonable accommodation" to the religious observance of an Orthodox Jewish employee by suspending the employee without pay for being away from work on Passover after the employee has (a) followed her 26-year practice of being absent on religious holidays with no prior formal approval process beyond listing for her supervisors the dates of all Jewish holidays on which she would take annual leave, (b) placed the dates of Jewish holidays, as requested by her current supervisors, on their "Outlook" calendars, (c) sent an e-mail on the last workday before the religious holiday, when her immediate supervisor was absent on leave, to both her supervisor and her supervisor's supervisor noting that she would be absent on the following Monday and Tuesday to observe Passover and receiving a return e-mail saying "Thanks. Please see my note about providing us a status update before you leave today."

2. Whether the Metropolitan Washington Airports Authority ("MWAA") is subject to the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*) so that the above-described suspension of the appellant was an unlawful substantial burden on appellant's exercise of Orthodox Jewish observance in violation of the Act.

3. Whether factual findings recited by the District Court and by this Court improperly resolved contested issues of fact that appellant was legally entitled to present to a jury.

ARGUMENT I. MS. ABELES WAS PUNISHED BY MWAA FOR TAKING ANNUAL LEAVE ON PASSOVER AFTER REPEATEDLY NOTIFYING HER SUPERVISORS OF THE HOLIDAY AND REASONABLY BELIEVING THAT ANNUAL LEAVE WAS APPROVED IN ADVANCE FOR HER ABSENCE

Some facts recited by the District Court and by the Panel are vigorously contested by the appellant. But the undisputed facts establish that Ms. Abeles did everything an employee could possibly do to satisfy any reasonable requirement that she notify her supervisors in advance of her absence to observe a well –recognized Jewish holiday. Indeed, she even satisfied the language of MWAA's "Annual Leave Policy" – language that the Panel opinion does not quote or construe.

(1) Ms. Abeles Satisfied MWAA's Published "Policy" for "Granting Annual Leave." The Panel Opinion fails to quote or construe the text of the "Annual Leave Policy" that MWAA claims Ms. Abeles ignored in taking annual leave for the concluding days of Passover. That text appears at page 239 of the Joint Appendix. It provides that "use of annual leave will be requested and approved in advance of the absence . . . by an exchange of e-mails between the employee and supervisor." MWAA's "Policy" does not say that the exchange of e-mails must be between the employee and his or her immediate supervisor. The language of the "Policy" includes an "exchange of e-mails" with anyone who qualifies as a "supervisor."

Ms. Abeles sent an e-mail to her two supervisors at 11:59 am on Friday, March 29, 2013, advising them again that she would be on annual leave on Monday, April 1, 2013, and on Tuesday, April 2, 2013. Although her immediate supervisor (Valerie O'Hara) was away on leave, that supervisor's supervisor (Julia Hodge) responded with an e-mail at 12:05 pm asking, "What is the nature of this leave request?" (Emphasis added.) A reasonable understanding of this e-mail is that Ms. Hodge viewed it as a "request" for leave. Ms. Abeles replied promptly at 12:11 pm to her supervisor, "This is a reminder of my schedule leave for Passover." Ms. Hodge, who was also Ms. Abeles' "supervisor," then responded at 12:16 pm, "Thanks. Please see my note about providing us a status update before you leave today."

The "exchange of e-mails between the employee and supervisor" – the condition specified in MWAA's "Leave Policy" – was completed in advance of the absence. Indeed, Ms. Hodge's request for a "status update before you leave today" plainly manifests consent to Ms. Abeles' absence at the beginning of the following week. Consequently, the Panel Opinion is wrong when it says (p. 4) that "[t]he instant dispute arises from Plaintiff's failure to follow MWAA's formal procedure for requesting leave" and finds (p. 14) that Ms. Abeles "failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013." The record establishes that Ms. Abeles did not fail to follow the "formal procedure for requesting leave" and did obtain advance approval for her absence for religious observance from Ms. Hodge, her "supervisor."

(2) Ms. Abeles Properly Relied on Her 26 Years' Experience With Various Supervisors at MWAA. Ms. Abeles' affidavit in response to MWAA's motion for summary judgment declared under oath with respect to her experience of taking annual leave for Jewish holidays while employed at MWAA under different supervisors (JA 448): "I routinely and invariably advised my supervisors well in advance in each calendar year of the dates when Jewish holidays were to be celebrated. My supervisors uniformly accepted this notification as the equivalent of a request for annual leave, and I was absent from work on these specified dates. I would frequently remind supervisors of these dates as they approached, but I was never told that annual leave would be denied if I did not make a formal 'request' for such leave in advance. Before April 2013, my advance notification of the Jewish holidays was always accepted by my supervisors as the equivalent of a request." The Panel Opinion erroneously found (p. 15), contrary to Ms. Abeles' sworn statement, that Ms. Abeles' failure to "comply" with the published "Leave Policy" was "the sole differentiating factor from every occasion on which leave was granted." In fact, "leave was granted" on every occasion for 26 years when Ms. Abeles followed the same procedure she followed in 2013.

Ms. Abeles was never told by her supervisors that they would condition approval of annual leave for observance of Passover or any other Jewish holiday in 2013 on a formal request for leave and an oral or e-mailed advance consent by Ms. O'Hara or by any supervisor. The Panel Opinion contains a finding (p. 4) that Ms. Abeles was told by O'Hara, Hodge, and

Labor Relations Specialist Ramos that she had to "[u]se leave according to the Airports' Authority's Absence and Leave Policy." This is a disputed fact that could not lawfully be decided on summary judgment. In response to MWAA's motion for summary judgment and Paragraph 20 of MWAA's Statement of Undisputed Material Facts (JA 127-128), Ms. Abeles responded that her meetings with O'Hara, Hodge, and Ramos "were designed to discuss the 2013 Work Goals and Performance Factors. The discussion was about the 9 a.m. arrival time and early departure on Friday. There was no discussion of MWAA's leave policy." (JA 428; emphasis added.)

It is a well-established proposition of law that "[p]ast practices rise to the level of an implied agreement when they have 'ripened into an established custom between the parties.'" *Brotherhood Railway Carmen of the United States and Canada v. Missouri Pacific Railroad Co.*, 944 F.2d 1422, 1429 (8th Cir. 1991), cited by *Bonnell/Tredegar Industries, Inc. v. National Labor Relations Board*, 46 F.3d 339, 344 (4th Cir. 1995) ("any well established practices that constitute a 'course of dealing' between the carrier and employees"). In the present circumstances, the consistent 26-year practice under which Ms. Abeles took annual leave on the Jewish holidays that she listed at the beginning of each calendar year was "established custom" and a "course of dealing" that effectively became part of her employment contract.

II. THE PANEL'S HIGHLY RESTRICTIVE APPLICATION OF THE PROTECTION FOR RELIGIOUS OBSERVANCE IN TITLE VII OF THE CIVIL RIGHTS ACT AND IN THE RELIGIOUS FREEDOM RESTORATION ACT WARRANT REVIEW AND CORRECTION BY THE FULL COURT

(1) The Panel's Ruling Facilitates Evasion of an Employer's Title VII Obligation To Make a Reasonable Accommodation for an Employee's Religious Observance. The Panel Opinion acknowledges (p. 3) that "MWAA knew Plaintiff's religious beliefs prohibited her from working on Jewish holidays." Her Orthodox Jewish faith was so well-known at MWAA that, as the Opinion notes (pp. 3-4), she was permitted to leave early on Fridays and she was provided kosher food at staff events. MWAA has never claimed that her absence on such holidays created any hardship whatever, much less the "undue hardship" that Section 701(j) of the Civil Rights Act, as amended, contemplates as a permissible exception to the statutorily mandated obligation of reasonable accommodation. Nor is there any claim that Ms. Abeles' absence on April 1 and 2, 2013, was a surprise to anyone at MWAA or caught personnel of MWAA unaware.

If the steps Ms. Abeles took before her absence on the last two days of Passover had not, in MWAA's view, fallen short of the letter of its "Leave Policy," MWAA would have been obliged by Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e-2000e-16) (and, in our understanding of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), by that law as well) to allow Ms. Abeles to be absent on April 1 and 2, 2013, to observe Passover. MWAA's legal claim – sustained by the Panel – is that Ms. Abeles alleged omission of the technicality of receiving an "OK" from Ms. O'Hara (an "OK" that Ms. O'Hara could not lawfully withhold) justified imposing an unpaid suspension on Ms. Abeles.

This reasoning effectively makes vindication of a federally guaranteed right dependent on miniscule technicalities with which an employer may ambush a religiously observant employee. A hypothetical growing out of *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), may illustrate this point. If Abercrombie & Fitch hired Ms. Elauf, the practicing Muslim who wears a headscarf for religious observance, as a salesgirl, could it suddenly impose a requirement that, before she goes on the sales floor each day, Ms. Elauf must request and obtain the oral consent of the chief salesperson – even though the chief salesperson could not lawfully deny her request? In the unlikely event that such daily prior oral consent could be required, could Abercrombie & Fitch suddenly penalize Ms. Elauf by suspending her without pay for failure to make the required request, if it had never, in the preceding year, imposed a rule requiring such a request?

These hypothetical facts parallel the situation in this case. Ms. Abeles was penalized by MWAA for failing to have her supervisor approve a request that her supervisor could not lawfully refuse.

In an *amicus curiae* brief (whose filing was opposed by the MWAA) the National Jewish Commission on Law and Public Affairs ("COLPA"), an organization of volunteer attorneys that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States, enumerated reasons why employers frequently try to avoid the "reasonable accommodation to religious observance" requirement of Title VII. COLPA noted that the ruling of the District Court "will significantly hamper the ability of many religious Jews to find and maintain gainful employment." COLPA Br. 2. The full Court should rehear and review the Panel's decision and weigh these consequences.

(2) Whether MWAA Is Exempt from the Religious Freedom Restoration Act and From Virginia's Comparable Law Is an Important Federal Question That This Court Should Decide. In footnote 4 of its Opinion (p. 8), the Panel declined to consider an important question of federal law – *i.e.*, whether MWAA may claim that it is exempt from the federal Religious Freedom Restoration Act (42 U.S.C. § 2000bb, *et seq.*) and Virginia's equivalent – Va. Code Ann. § 57-2.02(B). MWAA is recognized in 49 U.S.C. § 49106(a)(1) as "a public body corporate and politic." It was assigned authority over two airports by the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500. Its 17-member Board of Directors is appointed by the President of the United States, the Governors of Virginia and Maryland, and the Mayor of the District of Columbia.

No reported decision has exempted MWAA from either RFRA or its Virginia counterpart. The broad remedial policy of RFRA and its language bring within the law's scope discriminatory conduct by any "person acting under color of law." Following the Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress amended RFRA to withdraw "a State, or a subdivision of a State" from RFRA's reach. It did not, however, remove a "public body corporate and politic" over which Congress had exercised its legislative authority in enacting the Metropolitan Washington Airports Act of 1986. This Court should hold that this archetype of a federal quasi-governmental body is subject to RFRA (and/or its Virginia equivalent) and may be sued under that law when its conduct substantially burdens an employee's exercise of religion and does not further a compelling governmental interest.

In addition to supporting Ms. Abeles' position regarding MWAA's failure to provide reasonable accommodation, the Becket Fund for Religious Liberty and the American Jewish Committee, in a 27-page *amicus curiae* brief, argued persuasively that the MWAA "is a federal instrumentality under *Lebron* [*v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995)]." The legal position urged by the Becket Fund and the American Jewish Committee deserve consideration by the full Court.

III. THE PANEL'S AFFIRMANCE OF SUMMARY JUDGMENT RESTED ON IMPERMISSIBLE RESOLUTION OF DISPUTED FACTS

Disputed factual issues may not be resolved at the summary judgment stage by either a District Court or this Court. *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015); see *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014); *Fountain v. Filson*, 336 U.S. 681, 683 (1948). The Panel Opinion, however, adopted Judge Hilton's findings on contested factual issues and erroneously characterized other findings as undisputed.

(1) The Panel Opinion Erroneously Sustained Judge Hilton's Finding That Ms. Abeles Had Been "Insubordinate." Ms. Abeles has consistently denied the allegations made against her by Mss. O'Hara and Hodge that she was "insubordinate." The Statement of Undisputed Material Facts submitted in opposition to MWAA's motion for summary judgment stated: "Beginning in late 2012, Ms. O'Hara and Ms. Hodge began making unjustified criticisms of plaintiff's performance." JA 342 (emphasis added). In her deposition testimony Ms. Abeles disputed the allegation that her performance had "deteriorated." JA 292-294. She also disputed MWAA's Statement of Undisputed Material Facts in which MWAA had alleged that her performance had "deteriorated." JA 127, 427 (para. 17). The contested nature of this pejorative allegation was made clear in the District Court. See JA 425-426 ("A chain of e-mails that began even before December 2012 demonstrates the supervisors' and HR staffs' pettiness and hostility to Susan, and the e-mails of

April 2 through April 4, 2013, prove how expeditiously they pounced on her absence for religious observance to discipline her in a most ignominious and unlawful manner. We deny that Susan's performance 'deteriorated' suddenly 'at the end of 2012,' as MWAA alleges in paragraph 17 of its 'Statement of Undisputed Material Facts.' Susan defended herself in e-mails and orally against unjustified attacks by Julia Hodge and Valerie O'Hara.")

If this case had proceeded to trial and MWAA had sought to justify its suspension without pay of Ms. Abeles on the ground that she had been insubordinate, MWAA would have had the burden of satisfying a jury that this allegation by her superiors was valid. How does an employee rebut a claim of "insubordination" other than by denying the allegation and asking the individual who has made the allegation to prove it? In this case Judge Hilton and the Panel convicted Ms. Abeles of "insubordination" not because of affirmative proof that she had been "insubordinate," but because she had failed to prove herself innocent. This cast the burden of proof on the wrong party.

Exhibits From MWAA's Files That Were Marked As Trial Exhibits Were Disregarded by the Panel. Ms. Abeles asserted that she had contested the allegation of "insubordination" with a letter from an attorney that MWAA refused to accept because her lawyer was one hour late in requesting an extension of one day in which to respond to the allegation. The Panel Opinion refused to credit this assertion because "the letter is not included in the record on appeal." Panel Opinion, p. 12, n. 7.

The attorney's letter was marked as Plaintiff's Exhibit 166 in preparation for trial. Paragraphs 36-39 of Ms. Abeles' Statement of Undisputed Material Facts state: "The plaintiff retained counsel to respond to Ms. Hodges' suspension letter. Plaintiff's retained counsel requested an extension of time to respond to the suspension letter. Because the request for an extension of time arrived after close of business on the last day of a 7-day period to respond, the extension was denied. Plaintiff's counsel delivered a letter on the following business day responding to the allegations in Ms. Hodges' suspension letter." JA 434.

MWAA responded to each of these four Statements of Undisputed Material Facts with the same response: "Not in dispute." JA 469. By this response MWAA conceded that Ms. Abeles had retained a lawyer and had responded to the "insubordination" charges in Ms. Hodge's notice of suspension. The Panel Opinion could not, therefore, truthfully state that Ms. Abeles did not contest the allegation of insubordination made by her superiors. The letter from her lawyer – even if not in the appellate record or the Joint Appendix – is admissible at a trial.

Another document produced by MWAA in discovery and marked as Trial Exhibit 97 is a memorandum from Mr. Ramos to Ms. O'Hara dated April 1, 2013 (which was the first of the two days on which Ms. Abeles was observing the end of Passover). Mr. Ramos provided a proposed "reprimand" letter to be signed by Ms. O'Hara and to be served on Ms. Abeles because of her alleged "insubordination." This memorandum was the subject of testimony during the depositions of Ms. Hodge and Mr. Ramos. Plaintiff can introduce it at trial to prove the proposition that the Panel Opinion refused to credit – *i.e.*, that "absent Plaintiff's failure to request leave properly, MWAA would only have 'reprimanded' Plaintiff for insubordination." (Panel Opinion, p. 11) The Panel Opinion narrowly construes the portion of Ms. Hodge's deposition that appears in the appellate record as not "conceding" this assertion of fact. But the exhibit marked for trial proves that until Ms. Abeles was absent to observe Passover, MWAA's HR Department (*i.e.*, Mr. Ramos) and Ms. Abeles' supervisors were not going to suspend Ms. Abeles but were only intending to "reprimand" her. The five-day suspension without pay was added only after Ms. Abeles was out of the office observing Passover.

CONCLUSION

For the foregoing reasons, the Panel should grant rehearing in this case or the appeal should be reheard en banc.

Respectfully submitted,

s/Nathan Lewin

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Supreme Court, U.S.
FILED
JUN - 9 2017
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Nos. 16-1436, 16A1190

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, *ET AL.*, Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE
PROJECT, *ET AL.*, Respondents.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

UNOPPOSED MOTION FOR LEAVE AND BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS' STAY APPLICATION AND CERTIORARI PETITION

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF STAY APPLICATION AND CERTIORARI PETITION

Amicus American Center for Law and Justice respectfully moves for leave of Court to file the accompanying brief in support of Petitioners' application for a stay and petition for a writ of certiorari concerning a preliminary injunction barring enforcement of Section 2(c) of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO"). Counsel for all parties have been notified of this brief and consent to its filing.

STATEMENT OF INTEREST[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before this Court and other courts around the country in cases involving the Establishment Clause and immigration law. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016); *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Washington v.*

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Trump, 847 F.3d 1151 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 2017 U.S. App. LEXIS 9109 (4th Cir. 2017).

The ACLJ has actively defended, through advocacy and litigation, immigration-related policies that protect American citizens. This brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 230,000 Americans who support the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

ARGUMENT

This brief addresses the challenged Executive Order's constitutionality under the Establishment Clause of the First Amendment, which is an issue that has a direct bearing on the various factors considered when a stay application or certiorari petition is filed.

I. The Fourth Circuit's decision conflicts with this Court's precedent because it failed to review the Executive Order under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Order satisfies.

The United States Court of Appeals for the Fourth Circuit accepted Respondents' invitation to treat this case as if it were a run-of-the-mill Establishment Clause case. It is not. The cases that the court of appeals primarily relied upon, which green-lighted a detailed inquiry into the primary purpose of the government's actions, involved factual contexts such as the public display of the Ten Commandments. *See, e.g.*, App. to Pet. Cert. 47a-48a (S.Ct. No. 16-1436).

In stark contrast, the case at hand involves the special context of an EO concerning the entry into the United States of refugees and nationals of six countries of particular concern, enacted pursuant to the President's constitutional and statutory authority. When this Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny applied to non-immigration-related actions, choosing instead to take a considerably more deferential approach. The EO is valid under this standard.

A. Judicial review of the immigration-related actions of the political branches is deferential.

This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459

U.S. 21, 32 (1982). Moreover, the Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and the President has broad national security powers that may be exercised through immigration restrictions. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

Not only does the Fourth Circuit's decision undercut the President's national security powers, it also undermines the considered judgment of Congress that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (2012). Where, as here, a President's action is authorized by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Frankfurter, J., concurring)). The EO falls squarely within the President's constitutional and statutory authority.

B. The Executive Order is constitutional under this Court's deferential standards applicable to constitutional challenges to the political branches' immigration-related actions.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court rejected a First Amendment challenge to the Attorney General's decision to decline to grant a waiver that would have allowed a Belgian scholar to enter the country on a visa in order to speak to American professors and students. The Court held that "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government.'" *Id.* at 765 (citations omitted). The Court concluded by stating that

> plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 769-70; *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (the government's statement that a visa application was denied due to suspected involvement with terrorist activities "satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard").

Similarly, in *Fiallo*, the Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are the children or parents of United States citizens or lawful permanent residents, except for illegitimate children seeking that status by virtue of their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

Id. at 792 (citations omitted). The Court noted that it had previously "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794. Additionally, the Court stated, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. The Court emphasized that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Id.* at 799.

Although this Court's precedent establishes that courts should not second-guess the wisdom of, or evidentiary support for, the political branches' decision-making concerning immigration, the Fourth Circuit did exactly that. Contrary to what that court held, the legality of executive orders related to immigration does *not* turn on a judicial guessing game of what the President's subjective motives were at the time; rather, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the face of such orders. *See Washington v. Trump*, 853 F.3d 933, 939 n.6 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc) (the panel's "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world"). The EO is valid under this standard. It is closely tethered to well-established discretionary powers vested in the Executive Branch by the Constitution and statute. Respondents' objection to the EO is a policy dispute that should be resolved by the political branches.

II. The Executive Order is constitutional even under a traditional Establishment Clause analysis.

Consideration of the EO must take into account the deferential nature of judicial review of immigration-related actions (as noted previously). Nevertheless, the EO is constitutional even under non-immigration-related Establishment Clause jurisprudence.

The EO satisfies the "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which asks whether the challenged government action has "a secular legislative purpose." *Id.* at 612-13. Here, the EO's predominant purpose is its stated purpose, namely, protecting national security.

The EO is similar in principle to the National Security Entry Exit Registration System ("NSEERS"), implemented after the terrorist attacks of September 11, 2001, which was upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (citing cases). Under this system, the Attorney General imposed special requirements upon foreign nationals present in the United States who were from specified countries. The first group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria, and a total of twenty-four Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3.

In one illustrative NSEERS case, the United States Court of Appeals for the Second Circuit rejected arguments that are strikingly similar to the arguments accepted by the Fourth Circuit here:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 *were facilitated by the lax enforcement of immigration laws.* The Program was [rationally] designed to monitor

> more closely aliens from *certain countries selected on the basis of national security criteria*. . . .
>
> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts. . . . The program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioners' claim.

Id. at 438-49 (emphasis added) (citation omitted).

Similarly, the EO at issue here is constitutional. There is ample justification for the determination of multiple administrations that the six designated countries pose a particular risk to American national security. The EO does *not* single out Muslims for disfavored treatment. Rather, the countless millions of non-American Muslims who live outside the six countries of particular concern are not restricted by the EO. Neither does the EO limit its application to Muslims in the six designated countries; instead, it applies to all citizens of the six enumerated countries irrespective of their faith.

Furthermore, the fact that enforcement of a previous order—which was substantively different from the present EO in numerous ways—was preliminarily enjoined on an expedited basis does not support the Fourth Circuit's decision here. Under the Fourth Circuit's analysis, any hypothetical future immigration-related orders issued by the current President will be irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates, which runs contrary to this Court's admonition that the government's "past actions" do not "forever taint any effort . . . to deal with the subject matter." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 874 (2005).[2]

The many substantive differences between the prior executive order and the existing EO constitute "genuine changes in constitutionally significant conditions" that cured any actual or perceived Establishment Clause deficiencies. *See id.*; *Sarsour v. Trump*, 2017 U.S. Dist. LEXIS 43596, at *33 (E.D. Va. 2017) ("[T]he substantive revisions reflected in [the EO at issue here] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominant purpose of [the EO] is to discriminate against Muslims based on their religion and that [the EO] is a pretext or a sham for that purpose.").

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[2] *See also ACLU of N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'") (citations omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009) ("Another reason we reject the district court's *Lemon* analysis is that . . . [it] would preclude the District from *ever* creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner.").

The EO was narrowly crafted to address concerns raised during litigation over the prior order, with the secular goal of protecting national security in mind. Addressing actual or perceived flaws in previous iterations of a law or policy, in order to bolster the likelihood that it will be upheld in litigation, is itself a valid secular purpose. *See, e.g., ACLU of Ky. v. Rowan Cnty.*, 513 F. Supp. 2d 889, 904 (E.D. Ky. 2007) (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Moreover, the Fourth Circuit's decision to sidestep the EO's obvious secular purposes by focusing on comments made by then-candidate Trump, or one of his advisors, is flawed for at least three reasons.

First, this Court has stated that the primary purpose inquiry concerning statutes may include consideration of the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage." *McCreary Cnty.*, 545 U.S. at 862; *see also id.* (noting that the inquiry is limited to consideration of "the 'text, legislative history, and implementation of the statute,' or comparable official act") (citation omitted). Although the Fourth Circuit relied upon quotes made by then-candidate Trump and individuals holding some non-governmental position within his political campaign, comments made by a private citizen while a candidate for public office (or his or her advisors) *while on the campaign trail* are not "official" *government* acts, and do not constitute "*contemporaneous* legislative history." *Id.*; *cf. Clinton v. Jones*, 520 U.S. 681, 686 (1997) (alleged misconduct occurring before Bill Clinton became President was not an "official" act). Indeed, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

Second, the Fourth Circuit's reliance upon purported evidence of a subjective, personal anti-Muslim bias of the President and some of his advisors is improper because "what is relevant is the legislative purpose of *the statute*, not the possibly religious motives of *the legislators* who enacted the law." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (emphasis added). The Fourth Circuit engaged in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by this Court's precedent. *McCreary Cnty.*, 545 U.S. at 862. The EO, on its face, serves secular purposes, and no amount of rehashing of miscellaneous campaign trail commentary can change that. A foray into the malleable arena of legislative history is not a *requirement* in all Establishment Clause cases. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (noting the Court's "reluctance to attribute unconstitutional motives to the [government], particularly when a plausible secular purpose . . . may be discerned from the face of the statute"); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (inquiry into the government's purpose should be "deferential and limited").

As Judge Niemeyer explained in his dissenting opinion in the instant action, the majority's use of campaign statements to convert the facially neutral EO into an Establishment Clause violation was improper. The "Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs." App. 173a (Niemeyer, J., dissenting). In the few cases in which the Court invalidated government actions based on a religious purpose, for example, *Edwards v. Aguillard*, 482 U.S. 578 (1987), "the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins." App. 173a-174a (Niemeyer, J., dissenting). Those cases are manifestly distinguishable from the EO, which "is framed and enforced without reference to religion, and the government's proffered national security justifications . . . are consistent with the stated purposes of the [EO]." *Id.* 175a. "Conflicting extrinsic statements made prior to the [EO]'s enactment surely cannot supplant its facially legitimate national security purpose." *Id.*[3]

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[3] Further evidence to dispel the notion that the EO is a cover for anti-Muslim discrimination is found in the May 3, 2017, testimony by then-FBI Director James Comey before the Senate Judiciary Committee on FBI Oversight. Comey testified that

(Text of footnote continues on following page.)

Finally, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters, and intermixed with various secular purposes, is not enough to doom government action (along with all subsequent attempts to address the same subject matter). "[A]ll that *Lemon* requires" is that government action have "*a* secular purpose," not that its purpose be "*exclusively* secular," and a policy is invalid under this test only if it "was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *see also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose . . . ."). The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test.

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the FBI has over 2000 "violent extremist investigations" and "about 300 of them [roughly 15%] are people who came to the United States as refugees." Transcript of Testimony of James Comey, www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/; *see also* Mark Krikorian, *Comey: 15 Percent of Terror Cases Came as Refugees*, www.nationalreview.com/corner/447423/comey-terror-cases-refugees.

CONCLUSION

The stay application and certiorari petition should be granted.

Respectfully submitted,

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June 9, 2017

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JUN 12 2017

No. 16A-1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP ET AL.

Applicants,

v.

STATE OF HAWAI'I ET AL.

Respondents.

On Application for a Stay Pending Disposition of a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

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On Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

The American Professional Society on the Abuse of Children seeks to submit an *amicus curiae* brief in this matter, to inform the Court about the effect a stay would have on vulnerable children both inside and outside the United States. On June 7, 2017, *Amicus* notified counsel of record for all parties of its intent to file a brief; all parties consented to this filing. However, *amicus* recognizes that this Court's Rule 37(2)(a) required it to provide notice to the parties at least 10 days before today. *Amicus* respectfully requests leave to file a brief (which it has submitted separately) notwithstanding its providing notice only on June 7.

Amicus has a substantial interest in the outcome of this case. The American Professional Society on the Abuse of Children ("APSAC") is the leading national organization for professionals serving children and families affected by child maltreatment, including abuse and neglect. APSAC members have extensive historical and scientific experience with juvenile brain development, especially where child maltreatment is involved. Because of this experience, APSAC is qualified to inform the Court about the harmful effects of the additional months of trauma and stress that myriad children will suffer if the Court grants the Government's application for a stay in this case.

However, the Government submitted its application on June 1, 2017, just 11 days ago. The Court ordered a response, with a deadline of today at 3 p.m., on June 2, 2017. While it was possible in principle to notify the parties about an *amicus* brief on June 2, in practice notice on that date was not feasible. *Amicus* and its counsel made diligent efforts to review the Government's application swiftly, assess whether a brief from *amicus* regarding the application would be a helpful contribution to the record, and contact the parties as soon as possible. As noted above, *amicus* provided the requisite notice on June 7, and all parties consented to the filing.

For the foregoing reasons and for good cause, counsel for *amicus* respectfully moves for leave to file a brief as *amicus curiae*.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Professional Society on the Abuse of Children ("APSAC") is the leading national organization for professionals serving children and families affected by child maltreatment, including abuse and neglect. A multidisciplinary group, APSAC achieves its mission through expert training and educational activities, policy leadership and collaboration, and consultation emphasizing principles that are both theoretically sound and evidence-based.

For 30 years, APSAC has played a central role in developing guidelines that address child maltreatment. It is qualified to inform the Court about the damage maltreatment can inflict on children's brain development and cognitive ability. APSAC submits this brief to assist the Court in understanding the impact of Executive Order 13,780 on the physical, emotional, and mental development of children, both those receiving its message of religious discrimination in the United States and those abroad suffering the consequences of exclusion from this country.

APSAC members have a direct and substantial interest in these issues because of their historical and scientific experience with juvenile brain development, especially where child maltreatment is involved. APSAC is therefore qualified to advise the Court on the impact of maltreatment on child health, wellbeing, and ability to survive.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus and its counsel, make a monetary contribution to the preparation or submission of this brief. *Amicus* affirms that it notified counsel of record for all parties of its intent to file this brief on June 7, 2017, and all parties consented to this filing.

SUMMARY OF ARGUMENT

Child health experts have found that exposure to early adversity and traumatic experiences can affect mental and physical health and well-being for a lifetime. A clear dose-response relationship between trauma and its health impacts means that the longer children stay in crisis-torn areas, the greater the ultimate harm to their brains and bodies.

The Government has asked this Court to stay the District Court's preliminary injunction, and thus to allow the Government to implement Executive Order 13,780 pending the Court's disposition of the case. Refugee children from the six nations targeted by the Order face acute risk of harm from trauma caused by violence, malnutrition, displacement, and the constant fear and uncertainty that accompany them. Thousands of children from these countries who would otherwise seek refuge in the United States will instead stay in refugee camps, experiencing additional months of trauma. That time is significant in the lives of these children and will cause additional harm to their long-term health and well-being.

Meanwhile, the millions of Muslim children in the United States, including citizens, face acute risk of harm from the poisonous atmosphere created by the religious animus that drips from Executive Order 13,780. It is foreseeable that this stressful experience will itself do damage to the long-term health and well-being of these children, just as childhood experiences of racial discrimination have been demonstrated to relate to long-term health problems.

For these reasons, APSAC urges this Court to reject the Government's application for a stay of the District Court's injunction.

ARGUMENT

I. STRESS AND TRAUMA EXPERIENCED DURING CHILDHOOD CAUSE LONG-LASTING PHYSIOLOGICAL AND PSYCHOLOGICAL HARM UNLESS TREATED.

Children undergo constant physical, mental, and emotional development. Their experiences help shape their personalities and health, both now and into their futures as adults. Traumatic and stressful experiences produce genuine physiological changes, which ultimately cause physical and mental problems that can persist throughout the life of a person exposed to adverse experiences during childhood.

Research has begun to reveal physiological pathways for this connection between childhood stress and trauma and adulthood disorders and diseases. Stress is a physical condition, involving changes in hormones and other physiological signals. These changes cause further metabolic shifts as part of an adaptive mechanism by which humans, like other organisms, manage difficult conditions.

Repeated stress, and especially persistent stress, can be toxic, especially in children. Physiological stress response mechanisms become dysregulated, resulting in long-term shifts in metabolism that affect every bodily system, including the brain. The brain continues to develop throughout childhood and early adulthood, and a persistent stress metabolism harms the developing brain.

As a whole, "a maladaptive response to stress during childhood, referred to as a toxic stress response, plays an important role in the pathway from early adversity to disease."[2] As the American Academy of Pediatrics recently noted, "fear and stress, particularly prolonged exposure to serious stress—known as toxic stress—can harm the developing brain and negatively impact short- and long-term health."[3] The damage to physical and mental health and well-being can be severe.

II. REFUGEE CHILDREN IN COUNTRIES AFFECTED BY THE EXECUTIVE ORDER FACE CONTINUING STRESS AND TRAUMA.

Executive Order 13,780 would prohibit entry into the United States by refugees from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The District Court preliminarily enjoined the implementation of § 2(c) of the Order, which would generally prohibit entry by nationals of these six countries; and of § 6, which would suspend the entry of refugees under the U.S. Refugee Admissions Program. A stay of the District Court's preliminary injunction would expose thousands of children in these countries to continued trauma, causing additional long-term physical, mental, and emotional harm.

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[2] Monica Bucci et al., Toxic Stress in Children and Adolescents, 63 Advances in Pediatrics 403, 404 (2016).

[3] Fernando Stein, AAP Statement on Revised Immigrant and Refugee Travel Ban Executive Order, American Academy of Pediatrics (Mar. 6, 2017).

A. Children in the six affected countries are exposed to harsh and dangerous conditions.

The countries affected by the Order include some of the most disordered areas in the world, areas where it is particularly dangerous to be a child.

Syria, the world's largest producer of refugees, is now in the sixth year of continuous conflict. According to the United Nations Children's Fund, more than 6 million Syrian children are in "immediate" need of humanitarian aid.[4] Millions of children witness unrelenting and brutal violence. 1.75 million children in Syria are no longer in school.[5] At least 652 children were killed last year (a 20% increase from the prior year); 255 died in or near a school.[6] As families get more desperate, more children are being pushed into child marriage and child labor.[7]

In Yemen, 7 million people are short of food, and 2.2 million children are malnourished.[8] Half a million children are severely malnourished and at risk of imminent death unless they receive specialized medical care.[9] Many children suffer and die from preventable diseases. Yemen is also suffering a cholera outbreak—the second in six months—and children are the population most vulnerable to the disease.[10] Seven million children have no access to health care. Two million children are not in school.[11]

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[4] United Nations Children's Fund, "Humanitarian Action for Children: Syrian Arab Republic," p.1 (2017), at https://www.unicef.org/appeals/files/2017_Syria_HAC(2).pdf.

[5] United Nations Office for the Coordination of Humanitarian Affairs, "Humanitarian Needs Overview: Syrian Arab Republic," p.37 (Dec. 2016), at https://docs.unocha.org/sites/dms/Syria/2017_Syria_hno.pdf ("*OCHA Overview*").

[6] United Nations Children's Fund, "Hitting Rock Bottom," pp. 4-5 (Mar. 2017), at https://www.unicef.org/media/files/UN055709.pdf.

[7] *OCHA Overview*, at 6.

[8] United Nations Children's Fund, Press Release, "Race Against Time to Save Millions of Lives in Yemen" (Apr. 25, 2017), at https://www.unicef.org/yemen/media_11858.html.

In Somalia, the number of severely malnourished children was up 50% in May 2017 compared to May 2016, to 1.4 million. There is a "triple threat" of disease, drought, and displacement. Outbreaks of malaria and cholera are imminent. The situation has pushed 40,000 children out of school. Some are working, others have fallen prey to military recruiters.[12]

B. Implementation of Executive Order 13,780 would lead to continued stress and trauma for a significant number of children.

In fiscal year 2015, the United States admitted over 15,000 refugees from the six Muslim-majority countries that the Order affects.[13] The United States does not report on the ages of refugees, but globally over half of refugees were children at the end of 2015.[14] So it seems reasonable to expect that thousands of children have come to the United States from the six countries each year as refugees, and each year thousands more would come so long unless § 2(c) or § 6 of the Order is implemented.

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[9] *Id.*

[10] United Nations Children's Fund, Press Release, "Children of Yemen Are In the Grip of the Second Cholera Outbreak in Six Months" (May 22, 2017), at https://www.unicef.org/yemen/reallives_11968.html.

[11] United Nations Children's Fund, "Falling Through the Cracks: The Children of Yemen," p.2 (Mar. 2017), at https://www.unicef.org/yemen/Yemen2Years-children_falling_through_the_cracks.pdf.

[12] United Nations Children's Fund, Press Release, "Projected Number of Severely Malnourished Somali Children Up 50 Percent" (May 2, 2017), at https://www.unicef.org/somalia/media_19882.html.

To be sure, if the United States ceases to be available as a haven for these refugees, in principle they could go elsewhere. But the dire situations in Syria and other countries have produced the largest population of refugees that the world has seen for decades.[15] Eliminating one potential destination will, as a realistic matter, mean fewer children will find homes in countries of refuge. More will remain in refugee camps in their home or in neighboring countries.

Even a temporary ban on entries from the six countries would have that result. The international refugee system does not switch destination countries quickly. If the United States refuses to admit refugees from the affected countries for, say, six months pending this Court's review,[16] thousands more refugee children will simply sit in the traumatic conditions of refugee camps for another six months. Where severe food shortages exist, six months can mean the difference between severe malnutrition and death. And in the overall burden of trauma and stress borne by children in these countries, another six months is significant because longer exposure leads to further health problems.

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[13] U.S. Refugee Processing Center, "Refugee Admissions Report" (May 31, 2017), at http://www.wrapsnet.org/s/Refugee-Admissions-Report-2017_05_31.xls.

[14] United Nations High Comm'r for Refugees, Global Trends: Forced Displacement in 2015, p.8 (2015) ("UNHCR 2015 Report"), at http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends- 2015.html.

[15] *Id.* at 5. *See also* Ida Kaplan et al., Cognitive Assessment of Refugee Children: Effects of Trauma and New Language Acquisition, 53.1 Transcultural Psychiatry 81, 82 n.50(2016) (noting that half of refugees in 2013 were children).

C. Refugee camps expose children to violence, trauma, and stress.

Life in a refugee camp is unstable; refugees often struggle to find food, water, and shelter.

Moreover, children are adversely affected by the "collapse of social networks and daily routines."[17] The psychological trauma involved can "wield a severe blow to a child's sense of security and self, including central organising fantasies and meaning structures."[18] Children are developing, both neurologically and psychologically, the ability to understand who they are and how they relate to the world. The uncertainties of life of a refugee can "effect great damage

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[16] *Amicus* notes that while the pauses in §§ 2(c) and 6 purport to be temporary—90 days and 120 days respectively—the Order offers no reason to think the United States would resume general admissions from the six countries after that period.

[17] Richard Williams, The Psychosocial Consequences for Children of Mass Violence, Terrorism and Disasters, 19.3 Int'l Rev. Psychiatry 263, 264 (2007).

[18] *Id.*

. . . because of the lingering need to re-evaluate one's view of oneself and the world."[19]

Refugee camps are also violent.[20] This violence exacerbates the developmental harms from the violence that a refugee child fled in the first place. "Negative developmental effects appear more likely if children experience repeated or repetitive 'process' trauma or live in unpredictable climates of fear."[21]

Separation from parents is most likely to lead to depression, and enforced separation from parents increases the likelihood of poor health in old age by a factor of 3.6.[22]

Amicus stresses that children waiting six additional months in a refugee camp during the imposition of a stay by this Court would suffer materially more harm. There is a dose-response relationship between the experience of trauma and stress and the occurrence of long-term health problems. This effect causes multiple forms and instances of abuse to amplify the negative impact that each has on a child's mental and physical health.[23] A child's spending more time under stress increases the probability of the individual's suffering diseases and mental health problems as an adult.

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[19] *Id.* at 268.

[20] *See, e.g.*, Audrey Sheehey, Sexual Assault in the Refugee Camp, Harvard Political Rev. (Oct. 17, 2016), at http://harvardpolitics.com/hprgument-posts/sexual-assault-in-refugee-camps/; Tim Gaynor, "UNHCR concerned at reports of sexual violence against refugee women and children" (Oct. 23, 2015), at http://www.unhcr.org/ news/latest/2015/10/ 562a3bb16/unhcr-concerned-reports-sexual-violence-against-refugee-women-children.html.

[21] Williams, *supra* n.17, at 274.

[22] Emmy Werner, Children and War: Risk, Resilience, and Recovery, 24.02 Dev. & Psychopathology 553, 554-55 (2012).

III. CHILDREN IN THE UNITED STATES RECEIVING A MESSAGE OF RELIGIOUS INTOLERANCE WILL LIKELY SUFFER ADVERSE HEALTH EFFECTS.

Every court that has contemplated Executive Order 13,780 or its predecessor has concluded that these orders were motivated by and give expression to a discriminatory animus against Islam and against Muslims. The United States is home to 3.3 million Muslims, approximately half of them children. If the Government implements § 2(c) or § 6 of Executive Order 13,780, those children will witness this religious discrimination and suffer from it. Reports have already described the fear and stress that American Muslim children have experienced from the anti-Muslim prejudice articulated in the Order.[24]

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[23] Robert F. Anda et al., The Enduring Effects of Abuse and Related Adverse Experiences in Childhood, 256 Eur. Arch. of Psychiatry & Clinical Neurosci. 174, 176 (2006). Scientists use the term "dose-response relationship" to mean that the impact of a deleterious substance or experience grows as the extent of exposure increases. *See, e.g.*, Amer. Acad. Pediatrics, Adverse Childhood Experiences and the Lifelong Consequences of Trauma 3 (2014) (stating that the effects of trauma and stress "multiply when the trauma continues, whether by repetition of similar stresses . . . or accumulation of disparate ones . . . The effect may be particularly severe when trauma involves the child's primary caregiving system.").

[24] *See, e.g.*, Jenée Desmond-Harris, "Crying is an everyday thing": life after Trump's "Muslim ban" at a majority-immigrant

Statements of animus are not a matter of words alone. Recent research on traumatic stress and early adversity suggests that experience of discrimination during childhood exacts a physical and psychic toll and ultimately increases an individual's risk of negative health outcomes.[25] Repeated encounters with negative portrayals of their race can cause children to experience toxic and chronic stress, particularly where such encounters make them feel less safe at school or in the outside world. Over time, toxic stress exerts a pernicious influence over mental and physical health, leading to greater risk of depression, suicide attempts, substance abuse, and a host of other ills.

These studies involve racial discrimination, rather than religious discrimination; widespread governmental discrimination on the basis of religion has of course been uncommon in the United States. But *amicus* considers it likely that that religious discrimi-

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school, Vox (Feb. 16, 2017), https://www.vox.com/identities/2017/2/16/14584228/muslim-ban-trump-immigration-ban-children-kids-schools-anxiety.

[25] *See, e.g.*, M. Jernigan and J. H. Daniel, Racial Trauma in the Lives of Black Children and Adolescents: Challenges and Clinical Implications, 4 J Child & Adolescent Trauma 123, 130 (2011) ("The implications of perceived racial and ethnic discrimination . . . are overwhelmingly associated with negative mental health outcomes such as depression, stress, anxiety, and psychological distress."); P. Cronholm *et al.*, Adverse Childhood Experiences: Expanding the Concept of Adversity, 49(3) Am. J. Preventive Medicine 354, 358 (2015) ("[S]tudies from different contexts have shown that witnessing or experiencing . . . discrimination is associated with concurrent negative health effects and increased participation in risk behaviors.").

nation will have comparable effects, because the underlying mechanism probably involves, in part, the physiological response to stress discussed above.

In short, it is not simply un-American to expect American Muslim children to put up with such vitriol from their own country; it is physically, mentally, and emotionally harmful.

CONCLUSION

A stay of the District Court's judgment would directly cause or increase harm to myriad children, including citizens of the United States. For the reasons set forth above and those discussed in the brief of the respondents opposing the application, the Court should deny the application.

Respectfully submitted.

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Nos. 16-1436, 16A1190, and 16A1191

In the Supreme Court of the United States

Donald J. Trump et al.,
Petitioners/Applicants,
v.
International Refugee Assistance Project et al.,
Respondents.

Donald J. Trump et al.,
Applicants,
v.
State of Hawaii et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Applications for Stays

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND OTHERS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN CONNECTION WITH STAY APPLICATIONS

The federal government has asked the Court for three things related to Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017): (1) a writ of certiorari to review the Fourth Circuit's en banc affirmance of the District of Maryland's preliminary injunction of section 2 of the Executive Order (No. 16-1436), (2) a stay of the District of Maryland's injunction pending this Court's review of the injunction (No. 16A1190), and (3) a stay of the District of Hawaii's preliminary injunction of sections 2 and 6 of the Executive Order during the review of the injunction by the Ninth Circuit and this Court (No. 16A1911). The Association of American Medical Colleges and twenty-one other healthcare-related organizations (*see infra* pp. 1a–4a) respectfully move the Court to allow them to file their accompanying *amicus curiae* brief in connection with the stay applications as well as the petition for a writ of certiorari. All parties consent to the filing of *amici*'s brief.

This Court allows *amici* to file a brief "before the Court's consideration of a petition for a writ of certiorari . . . if accompanied by the written consent of all parties, or if the Court grants leave to file." S. Ct. R. 37.2(a). On June 2, 2017, *amici* notified all parties of their intent to file a brief in connection with the federal government's petition and stay applications and requested consent. The following day, Respondents provided their consent. On June 5, the federal government provided its consent.

Nevertheless, and in an abundance of caution, because *amicus curiae* briefs in connection with stay applications are rare, *amici* are moving for leave. As explained in their brief, *amici* are uniquely qualified to explain the impact of the Executive Order on America's healthcare network, and they underscore the importance of maintaining the status quo while the Court reviews this matter. In short, *amici* present "relevant matter" that will "be of considerable help to the Court" as it considers the stay applications. *Id.* R. 37.1.

Accordingly, and consistent with the parties' consent, the Court should accept *amici*'s brief in connection with the stay applications as well as the petition. *See, e.g.*, *Garcia v. Texas (In re Garcia)*, 564 U.S. 940, 943 n.* (2011) (granting government's motion for leave to file *amicus curiae* brief on application for stay of execution).

Dated: June 9, 2017

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2016 Physician Specialty Data Report: Number of People per Active Physician by Specialty, 2015, Assoc. of Am. Med. Colls. (last visited June 9, 2017) 21

Why Teaching Hospitals Are Important to All Americans, Assoc. of Am. Med. Colls. (Mar. 14, 2017) 12, 13

Amy Yurkanin, *In Alabama, Doctors from Countries on Trump's Banned List Fill Medical Gaps*, AL.com (Feb. 4, 2017, 7:02 am) 8

INTEREST OF *AMICI CURIAE*[1]

The Association of American Medical Colleges is a not-for-profit educational association dedicated to transforming healthcare through innovative medical education, cutting-edge patient care, and groundbreaking medical research. Its members comprise all 147 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, and more than 80 academic societies. Through these institutions and organizations, the AAMC serves the leaders of America's medical schools and teaching hospitals and their nearly 160,000 faculty members, 83,000 medical students, and 115,000 resident physicians. AAMC's member teaching hospitals rely heavily on non-U.S. health professionals and, therefore, face acute and widespread workforce and patient-care risks attributable to the abrupt and destabilizing changes announced in Executive Order 13,780,[2] which courts enjoined before it became effective.[3]

AAMC is joined in this brief by the **American Academy of Family Physicians**; the **American Academy of Pediatrics**; the **American Associa-**

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[1] All parties have consented to the filing of *amici*'s brief. *See* S. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, or their counsel made such a monetary contribution. *See id.* R. 37.6.

[2] 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[3] *Amici* use the adjective "non-U.S." to refer to individuals born in a country other than the United States.

tion of Colleges of Nursing; the **American Association of Colleges of Pharmacy**; the **American College of Healthcare Executives**; the **American College of Obstetricians and Gynecologists**; the **American College of Physicians**; the **American Dental Education Association**; the **American Nurses Association**; the **American Psychiatric Association**; the **American Public Health Association**; the **Association of Academic Health Centers**; the **Association of Schools and Programs of Public Health**; the **Association of Schools of Allied Health Professions**; the **Association of University Programs in Health Administration**; the **Greater New York Hospital Association**; **Hispanic-Serving Health Professions Schools, Inc.**; the **National Medical Association**; the **National Resident Matching Program**; the **Physician Assistant Education Association**; and the **Society of General Internal Medicine**. Additional information regarding these organizations is provided in the Addendum to this brief.

SUMMARY OF THE ARGUMENT

A fair and efficient immigration system strengthens the American healthcare system and advances the nation's health security.[4] Executive Order 13,780 jeopardizes those goals, but two district-court orders have thus far preserved the status quo.[5] *Amici* take no position on whether the Court should issue a writ of certiorari to the Fourth Circuit. Regardless of how the Court resolves the petition, however, the federal government's applications to stay enforcement of the injunctions entered by the Districts of Maryland and Hawaii should be denied.

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[4] *Amici* use the term "immigration system" to refer to laws and policies governing foreign-born individuals who wish to live permanently or work or study temporarily in the United States.

The United States relies upon a significant number of health professionals and scientists who have entered this country through our immigration system. Health professionals who do not hold U.S. citizenship have contributed to the health of our citizens, improved the quality of healthcare, and addressed our nation's health-professional shortages. In addition, global collaboration among scientists and other biomedical researchers contributes to breakthroughs that benefit the United States.

Congress has recognized the importance of non-U.S. professionals to the nation's healthcare system by establishing programs to attract physicians from other countries. Executive Order 13,780 threatens the balance struck by Congress by (1) exacerbating our nation's health-professional workforce shortages, (2) jeopardizing progress in medical innovation and the advancement of consistent standards of care, and (3) inhibiting global research and public-health collaboration opportunities. All of these consequences will, in the judgment of *amici*, undermine the health security of our nation and weaken our ability to avert and respond to health-related national-security threats.

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[5] *Int'l Refugee Assistance Project v. Trump*, Civ. Action No. TDC-17-0361, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017) (Pet. App. 261a), *aff'd in relevant part en banc*, No. 17-1351, 2017 WL 2273306 (4th Cir. May 31, 2017) (Pet. App. 1a); *Hawai'i v. Trump*, CV. NO. 17-00050 DKW-KSC, 2017 WL 1167383, at *8 (D. Haw. Mar. 29, 2017) (16A1911 Appl. Add. 23), *appeal submitted*, No. 17-15589 (9th Cir. May 15, 2017).

ARGUMENT

I. Non-U.S. Professionals Are Important to America's Healthcare System.

A. Non-U.S. Professionals Fill Critical Shortages in the Nation's Healthcare Community.

1. The United States—Especially in Underserved Communities—Is Experiencing Healthcare Shortages.

The United States faces a growing shortage of health professionals.[6] The AAMC estimates that the United States currently faces a shortage of between 13,900 and 25,900 physicians.[7] The Henry J. Kaiser Family Foundation estimates a nationwide shortage of more than 3,000 mental-health professionals and more than 8,000 dental-health professionals.[8]

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[6] Charlotte Oslund, *Which Industries Need Workers? Exploring Differences in Labor Market Activity*, Monthly Lab. Rev., Jan. 2016, at 5–6, https://www.bls.gov/opub/mlr/2016/article/pdf/which-industries-need-workers-exploring-differences-in-labor-market-activity.pdf.

[7] IHS Markit, The Complexities of Physician Supply and Demand 2017 Update: Projections from 2015 to 2030, at 50 (Feb. 28, 2017), https://aamc-black.global.ssl.fastly.net/production/media/filer_public/a5/c3/a5c3d565-14ec-48fb-974b-99fafaeecb00/aamc_projections_update_2017.pdf.

Most states have hundreds of health-professional shortage areas (or "HPSAs"). Texas, for example, has more than a thousand.[9] Nationwide, the Health Resources and Services Administration has identified 4,741 areas with a shortage of mental-health professionals,[10] and the National Center for Health Workforce Analysis projects that 37 states will have a shortage of primary-care and many other specialty physicians in 2025.[11] The NCHWA also projects an-

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[8] *Mental Health Care Health Professional Shortage Areas (HPSAs)*, Henry J. Kaiser Fam. Found. (last visited June 9, 2017), http://kff.org/other/state-indicator/mental-health-care-health-professional-shortage-areas-hpsas/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D; *Dental Care Health Professional Shortage Areas (HPSAs)*, Henry J. Kaiser Fam. Found. (last visited June 9, 2017), http://www.kff.org/other/state-indicator/dental-care-health-professional-shortage-areas-hpsas/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[9] *Shortage Areas*, Health Res. & Servs. Admin. Data Warehouse (last visited June 9, 2017), https://datawarehouse.hrsa.gov/topics/shortageAreas.aspx. HPSAs are but one category of health-professional shortage areas designated by the U.S. Department of Health and Human Services.

[10] *Id.*

[11] Nat'l Ctr. for Health Workforce Analysis, U.S. Dep't of Health & Human Servs., State-Level Projections of Supply and Demand for Primary Care Practitioners: 2013-2025, at 5 (Nov. 2016), https://bhw.hrsa.gov/sites/default/files/bhw/health-workforce-analysis/research/projections/primary-care-state-projections2013-2025.pdf; Nat'l Ctr. for Health Workforce

(footnote continues on following page)

nual nursing shortages through 2025 in sixteen states.[12]

Medically underserved communities, many of which are in rural areas, will suffer the consequences of the health-professional shortage most severely. Those communities are already experiencing a shortage,[13] and restricting the entry of non-U.S. healthcare professionals will only exacerbate it.

There is a direct connection between health-professional shortages and our nation's health security. The National Health Security Strategy and Implementation Plan for 2015 through 2018, prepared by the Assistant Secretary of Health and Human Services for Preparedness and Response, calls for a workforce "large enough to meet both routine and surge demands" but finds that "the public health, healthcare, and emergency management workforces are all currently operating under significant con-

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Analysis, U.S. Dep't of Health & Human Servs., National and Regional Projections of Supply and Demand for Internal Medicine Subspecialty Practitioners: 2013-2025, at 4 (Dec. 2016), https://bhw.hrsa.gov/sites/default/files/bhw/health-workforce-analysis/research/projections/internal-medicine-subspecialty-report.pdf.

[12] Nat'l Ctr. for Health Workforce Analysis, U.S. Dep't of Health & Human Servs., The Future of the Nursing Workforce: National- and State-Level Projections, 2012–2025, at 8–9 (Dec. 2014), https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/projections/nursingprojections.pdf.

[13] *See, e.g.*, Darrell G. Kirch & Kate Petelle, Viewpoint, *Addressing the Physician Shortage: The Peril of Ignoring Demography*, 317 JAMA 1947, 1947 (2017).

straints, with gaps in coverage in many communities."[14]

2. Non-U.S. Professionals Comprise a Significant Part of the Nation's Healthcare Workforce, Especially in Underserved Areas.

Individuals from outside the United States play a critical role in the delivery of healthcare in America. As of 2010, more than one in four physicians practicing in the United States was born in another country.[15] Non-U.S. health professionals hail from around the world, including from the six countries subject to the Executive Order's suspension of entry. Economists estimate that more than seven thousand physicians currently working in the United States received training in the six countries,[16] and that those doctors collectively provide fourteen million patient visits each year.[17]

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[14] Nicole Lurie, U.S. Dep't of Health & Human Servs., National Health Security Strategy and Implementation Plan: 2015–2018, at 26–27 (n.d.), https://www.phe.gov/Preparedness/planning/authority/nhss/Documents/nhss-ip.pdf.

[15] Kristen McCabe, *Foreign-Born Health Care Workers in the United States*, Migration Info. Source (June 27, 2012), http://www.migrationpolicy.org/article/foreign-born-health-care-workers-united-states; *see also* Anthony P. Carnevale et al., Geo. Univ. Ctr. on Educ. & the Workforce, Healthcare 102 (June 2012), https://cew.georgetown.edu/wp-content/uploads/2014/11/Healthcare.FullReport.090712.pdf (as of 2010, 27.56% of physicians and surgeons were foreign born). Individuals from other countries fill a similar number of positions in other healthcare occupations. *Id.* (reporting that, as of 2010, 21.36% of dentists, 20.44% of pharmacists, 15.18% of registered nurses, and 13.74% of physician assistants were foreign born).

Physicians from outside the United States "situate [themselves] on the front lines of medical need," including rural and other underserved communities, Native American communities, and U.S. Department of Veterans Affairs hospitals.[18] In Alabama, for example, "Syria ranks fourth as a source of doctors for medically-needy areas . . . behind India, Pakistan and the Philippines."[19] The Executive Order has a

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[16] Matthew Basilico & Michael Stepner, *The Immigration Ban and the Physician Workforce*, Health Aff. Blog (Mar. 6, 2017), http://healthaffairs.org/blog/2017/03/06/the-immigration-ban-and-the-physician-workforce/.

[17] *Id.*

[18] *Id.* (reporting on professionals trained in the countries subject to the Executive Order); *see also* Padmini D. Ranasinghe, *International Medical Graduates in the U.S. Physician Workforce*, 115 J. Am. Osteopathic Ass n 236, 238 (2015) (reporting that "a higher proportion of [international medical graduates] than other graduates serve socioeconomically disadvantaged populations across the United States" and that they "tend to fill the gaps in workforce demands in rural areas"); Katrina Armstrong et al., Perspective, *International Exchange and American Medicine*, 376 New Eng. J. Med. e40(1), e40(2) (2017); Akash Goel, *What Americans Will Lose When They Push Immigrants Away*, Time (Apr. 13, 2017, 12:45 pm), http://time.com/4733567/immigration-doctors-rust-belt/; Lauren Silverman, *Trump Travel Ban Spotlights U.S. Dependence on Foreign-Born Doctors*, NPR (Feb. 11, 2017, 5:47 am), http://www.npr.org/sections/health-shots/2017/02/11/514399475/trump-travel-ban-spotlights-u-s-dependence-on-foreign-born-doctors.

[19] Amy Yurkanin, *In Alabama, Doctors from Countries on Trump's Banned List Fill Medical Gaps*, AL.com (Feb. 4, 2017,

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direct impact on professionals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, but it could also chill interest in professionals from other nations in practicing in the United States, "exacerbat[ing] already strained areas of health care."[20]

B. Beyond Filling Shortages, Non-U.S. Professionals Play Important Roles in the American Healthcare System.

Health professionals from other countries make significant contributions to the nation's healthcare system. They facilitate America's participation in the global enterprise of researching health problems and devising solutions for patients. They enhance America's ability to respond to large-scale public-health threats.

1. Collaboration Between American Health Professionals and Non-U.S. Professionals Maximizes Research Efforts.

"Collaborative international efforts, especially strengthening the capacity of national health systems, are essential to prevent and prepare for an array of threats, from infectious disease pandemics to the silent killers of chronic noncommunicable diseas-

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7:02 am), http://www.al.com/news/index.ssf/2017/02/in_alabama_doctors_from_countr.html.

[20] Aaron Carroll, *Immigration Reform's Potential Effects on US Health Care*, JAMA Forum (Mar. 8, 2017), https://newsatjama.jama.com/2017/03/08/jama-forum-immigration-reforms-potential-effects-on-us-health-care/.

es."[21] Any constraint on the participation of recognized experts in the free exchange of scientific research and collaboration impairs the collective knowledge of our healthcare community and jeopardizes American lives.[22]

Medical research in the United States benefits greatly from the contributions of non-U.S. professionals. A recent study found that more than forty percent of the cancer researchers at America's top cancer institutes are immigrants.[23] Federal agencies have provided financial support to U.S.-based institutions engaged in international-healthcare-research collaboration. The National Institutes of Health awarded grants in 2016 to Duke, Tulane, Vanderbilt, and Yale to "partner with West African academic centers to design training programs for their scientists and health researchers" who study "Ebola, Lassa fever, yellow fever and other emerging viral diseases."[24] Although these grants fund work by American professionals abroad, they complement programs hosting non-U.S. professionals here,[25] and they demonstrate the importance of the cross-border exchange of ideas in healthcare.[26] The government has similarly invested one billion dollars in the Global Health Security Agenda, an international "partnership . . . designed to measurably address global vulnerability to . . . public health threats, strengthen systems, and ensure that a trained workforce has the tools needed to prevent, detect, and respond rapidly and effectively to infectious disease threats."[27]

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[21] Comm. on Global Health and the Future of the U.S., Nat'l Acads. of Scis., Eng'g & Med., *Global Health and the Future Role of the United States*, at ix (prepubl. copy 2017).

[22] *See* M. Ihsan Kaadan, *I'm a Syrian Doctor Who Treated Patients in Aleppo. I'm in the US To Give Back*, STAT (Feb. 6, 2017), https://www.statnews.com/2017/02/06/syria-aleppo-doctor-us/ (describing Syrian doctor's development of "novel ways to respond to the Zika epidemic"); *see also* Crystal Maynard, *Experts Delve into Issue of Wound Infections After Blast Injuries*, U.S. Army (Dec. 7, 2016), https://www.army.mil/article/179290/experts_delve_into_issue_of_wound_infections_after_blast_injuries (discussing program developed by the U.S. Department of Defense that gathers international expertise in battlefield injuries and infections and develops health solutions).

[23] Stuart Anderson, Nat'l Found. for Am. Policy, The Contributions of Immigrants to Cancer Research in America 1 (Feb. 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226420.

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[24] *Ebola-Affected Countries Receive NIH Support to Strengthen Research Capacity*, Nat'l Insts. of Health (Oct. 26, 2016), https://www.nih.gov/news-events/news-releases/ebola-affected-countries-receive-nih-support-strengthen-research-capacity; *see also Joint West Africa Research Group To Foster Biopreparedness Collaborative Initiative To Focus on Expanding Research Capabilities in Region*, U.S. Army Med. Res. & Materiel Command (last updated July 20, 2016), http://mrmc.amedd.army.mil/index.cfm?pageid=media_resources.articles.biopreparedness_collaborative_initiative_in_west_africa ("The West African Ebola outbreak in 2014–15 highlighted gaps in global public health response and a lack of countermeasures.").

[25] *E.g.*, Lisa Morris, *Engineers, Scientists Participate in International Exchange Program*, U.S. Army (Oct. 22, 2014), https://www.army.mil/article/136728 ("Currently, seven foreign engineers and scientists work at the USAMRMC through the [Engineer and Scientist Exchange Program] and one U.S. scientist works abroad.").

[26] *See, e.g.*, *Emerging Pandemic Threats Program: EPT-2*, U.S. Agency for Int'l Dev. (last updated Nov. 25, 2014), https://www.usaid.gov/ept2 (recognizing the importance of global networks to prevent and control pandemic threats).

Global collaboration among health professionals provides opportunities to share medical knowledge and cross-train the clinical skills necessary to address global medical challenges. The Executive Order's impact on other nations' abilities to collaborate with the United States will likely make such collaboration less robust.

2. Inclusion of Non-U.S. Professionals in the American Healthcare Community Enhances America's Health Security.

The integration of health professionals from outside the United States into the nation's healthcare network improves more than global health security. It strengthens our domestic health security, advancing the express purpose of the Executive Order to protect Americans.

Teaching hospitals are critical to the health-security infrastructure of the United States.[28] They are often on the front lines when America experiences terrorist attacks and large-scale health threats, as evidenced by the roles they played in the response to the 2013 Boston Marathon bombing,[29] the treatment of Ebola in teaching hospitals in Nebraska and Atlanta,[30] and the locations of the members of the Global Virus Network's Zika Task Force.[31]

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[27] Global Health Security Agenda, Advancing the Global Health Security Agenda: Progress and Early Impact from U.S. Investment 1, 2 (n.d.), https://www.ghsagenda.org/docs/default-source/default-document-library/ghsa-legacy-report.pdf?sfvrsn=12.

[28] *Why Teaching Hospitals Are Important to All Americans*, Assoc. of Am. Med. Colls. (Mar. 14, 2017), https://news.aamc.org/for-the-media/article/teaching-hospitals-important-americans/; *Teaching Hospitals: Bringing Together Patient Care, Research, and Education*, Assoc. of Am. Med. Colls. (Mar. 14, 2017), https://news.aamc.org/for-the-media/article/teaching-hospitals/.

For decades, teaching hospitals have benefitted from the diverse training and skills of health professionals from other nations.[32] The reliance of teaching hospitals on health professionals from outside the

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[29] *See, e.g.*, Atul Gawande, *Why Boston's Hospitals Were Ready*, New Yorker (Apr. 17, 2013), http://www.newyorker.com/news/news-desk/why-bostons-hospitals-were-ready.

[30] *See* Michael J. Connor, Jr., et al., *Successful Delivery of RRT in Ebola Virus Disease*, 26 J. Am. Soc'y Nephrology 31, 31 (2015) (describing treatment of Ebola patient in Atlanta); Scott Neuman, *Why Ebola Patients Are Getting Treatment in Nebraska*, NPR (Oct. 6, 2014, 12:40 pm), http://www.npr.org/sections/thetwo-way/2014/10/06/354083214/why-ebola-patients-aregetting-treatment-in-nebraska (reporting treatment of a Liberian man in Nebraska because of a government-commissioned biocontainment facility at a teaching hospital there); *see also Why Teaching Hospitals Are Important to All Americans*, *supra* note 28.

[31] Global Virus Network, Zika Task Force Members 1–19 (n.d.), http://gvn.org/wp-content/uploads/2016/03/GVN-ZTF-Bios.pdf.

[32] *E.g.*, Declaration of Eric Scherzer ¶ 12, *Hawai'i v. Trump*, CV. NO. 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) (ECF No. 154 Ex. 1 Ex. I) (detailing that of a New York hospital's 91 internal-medicine residents, 43 are on H-1B visas, 12 are on J-1 visas, and 20 have green cards).

United States makes such hospitals acutely vulnerable to disruptions in the immigration system.

II. Congress Has Recognized the Importance of Non-U.S. Professionals to the American Healthcare System.

A. Congress Established Programs To Attract Non-U.S. Professionals To Serve Medically Underserved Communities.

"[R]ural areas often experience difficulties in the recruitment and retention of physicians" and, "[d]ue to these difficulties, many communities turn to the recruitment of non-U.S. citizen international medical graduates . . . who trained on a J-1 visa to fill their physician vacancies."[33] Congress responds to this in part through the Conrad 30 waiver program, which enjoys broad bipartisan support.[34]

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[33] *Rural J-1 Visa Waiver*, Rural Health Info. Hub (last updated Feb. 24, 2017), https://www.ruralhealthinfo.org/topics/j-1-visa-waiver; *see also* Fred D. Baldwin, *Access to Care: Overcoming the Rural Physician Shortage*, Appalachian Reg'l Comm'n (last visited June 9, 2017), https://www.arc.gov/magazine/articles.asp?ARTICLE_ID=98; Declaration of Marc Overbeck ¶¶ 3, 5, *Hawai'i*, 2017 WL 1011673 (ECF No. 154 Ex. 1 Ex. G) (describing J-1 visa program and its role in ensuring an adequate supply of healthcare providers in rural and other underserved areas).

[34] Press Release, Darrell Issa & Brad Schneider, Reps. Issa and Schneider Introduce Bipartisan Legislation to Help Address Physician Shortages (Apr. 25, 2017), https://issa.house.gov/news-room/press-releases/reps-schneider-and-issa-introduce-bipartisan-legislation-help-address. The most recent reauthorization of the Conrad 30 waiver program (that was not included within an appropriations measure) passed on

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The majority of physicians from other countries who serve their medical residency[35] in the United States do so as "exchange visitors" under a J-1 visa.[36] Through the Conrad 30 program, up to thirty physicians per state per year can obtain a service-based waiver of the J-1 visa's requirement that the holders return to their home countries if they agree to be employed full-time for at least three years serving patients in medically underserved communities.[37] More than fifteen thousand physicians from other countries have participated in the Conrad 30 program since it was first authorized in 1994.[38]

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unanimous consent in the Senate, 158 Cong. Rec. S6007 (daily ed. Aug. 2, 2012), and a 412–3 vote in the House, *id.* at H5972 (daily ed. Sept. 13, 2012).

[35] Medical residencies are a "vital component of American medical education," *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 525 (3d Cir. 1994), that provide new physicians "a supervised transition between the pure academics of medical school and the realities of practice," *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 549 (3d Cir. 2017).

[36] *See* Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2015–2016*, 316 JAMA 2291, 2302 (2016).

[37] *See* Immigration and Nationality Act § 214(*l*), 8 U.S.C § 1184(*l*) (2012); *Conrad 30 Waiver Program*, U.S. Citizenship & Immigration Servs. (last updated May 5, 2014), https://www.uscis.gov/working-united-states/students-and-exchange-visitors/conrad-30-waiver-program.

[38] *Conrad 30 Reauthorization Bill Earns Bipartisan Support*, Am. Med. Ass'n (May 18, 2017), https://wire.ama-assn.org/ama-news/conrad-30-reauthorization-bill-earns-bipartisan-support.

Although the Conrad 30 waiver program is decentralized, many of the program's oversight and approval responsibilities remain with the federal government.[39] For example, the U.S. Department of State Waiver Review Division must review and recommend each Conrad 30 waiver forwarded by a state health department before the waiver may be considered by the U.S. Citizenship and Immigration Services, an agency within the Department of Homeland Security. In turn, USCIS has exclusive jurisdiction to approve or deny each such waiver. USCIS is also the sole agency responsible for approving petitions for H-1B status, a precondition for employment authorization to fulfill the three-year-service commitment under the Conrad 30 waiver program.[40]

Some physicians from other countries continue to serve beyond the required three years in a medically underserved area, often in connection with the Physician National Interest Waiver Program. This program provides a path for physicians to obtain lawful-permanent-resident status. Under the program, a physician agrees to work full-time for five years in an area designated by HHS as having a physician shortage or at a healthcare facility under the jurisdiction of the Secretary of the Veterans Administration. This increases patient access to care by retaining physicians from other countries in medically underserved U.S. communities and in VA hospitals.[41]

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[39] Davis G. Patterson et al., *Conrad 30 Waivers for Physicians on J-1 Visas: State Policies, Practices, and Perspectives* 2 (WWAMI Rural Health Ctr. Final Rep. No. 157, Mar. 2016), http://depts.washington.edu/fammed/rhrc/wp-content/uploads/sites/4/2016/03/RHRC_FR157_Patterson.pdf.

[40] *About ECMFG*, Educ. Comm'n for Foreign Med. Graduates (last updated Apr. 2, 2013), http://www.ecfmg.org/about/.

B. Congress Established Programs for Non-U.S. Specialists and Others with Extraordinary Abilities.

Physicians from other countries are also eligible for USCIS-issued H-1B visas for specialty occupations under the sponsorship of a U.S. employer. In general, a physician from another country may obtain H-1B status for up to six years.[42] In 2016, the federal government approved certifications for more than ten thousand physicians to work under an H-1B visa.[43]

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[41] *Green Card Through a Physician National Interest Waiver (NIW)*, U.S. Citizenship and Immigration Servs. (last updated Feb. 17, 2016), https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-through-physician-national-interest-waiver-niw.

[42] Immigration and Nationality Act § 212(n)(1)(E)–(n)(1)(G), (n)(3), 8 U.S.C. § 1182(n)(1)(E)–(n)(1)(G), (n)(3) (2012); 20 C.F.R. §§ 655.736–.739 (2016).

[43] Peter A. Kahn & Tova M. Gardin, *Distribution of Physicians with H-1B Visas by State and Sponsoring Employer*, 317 JAMA 2235, 2235 (2017); *see also* Michael Ollove, *Changes to Visa Program Put Foreign-Born Doctors in Limbo*, PBS NewsHour: The Rundown (May 23, 2017, 3:46 pm), http://www.pbs.org/newshour/rundown/changes-visa-program-put-foreign-born-doctors-limbo/ (reporting that University of Arkansas for Medical Sciences "had 86 slots for H-1B visa holders in 2016" and "used the visa program to recruit pioneering researchers from around the world").

In addition, physicians and other health professionals from other countries may submit an immigrant petition on the basis of extraordinary ability reflected in national or international acclaim, or recognition as an outstanding professor or researcher with an offer of tenure or a tenure-track position at a U.S. institution of higher education.[44]

III. The Executive Order Threatens To Upset the Carefully Balanced and Highly Regulated Immigration Processes Essential to Maintaining an Adequate Healthcare Workforce and Promoting Biomedical Research in the United States.

The Executive Order threatens to upset the carefully balanced and highly regulated immigration processes essential to the delivery of healthcare in the United States and the conduct of vital biomedical research. The changes contemplated by the Executive Order—nationality-based suspension of entry with an undefined waiver process and projected system backlogs—put patient care at risk. For example, a consular cable transmitted by the Secretary of State shortly after the Executive Order was issued recognizes that limiting visa interviews in connection with heightened scrutiny and vetting "may cause interview backlogs to rise."[45] While the government's attorneys have stated that the Executive Order "includes a comprehensive waiver process to mitigate any undue hardship,"[46] no guidance has been issued. Key questions relating to the waiver process remain unanswered:

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[44] *Employment-Based Immigration: First Preference EB-1*, U.S. Citizenship & Immigration Servs. (last updated Oct. 29, 2015), https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1.

> (1) Will signed, mutually binding contractual obligations between physicians and their graduate-medical-education programs and related participation in those programs be considered presumptive grounds for a waiver?
>
> (2) May a physician leave the United States temporarily to visit family members or otherwise tend to personal or professional matters such as conferences or charity work without jeopardizing reentry?
>
> (3) Will deadlines associated with the U.S. graduate-medical-education postgraduate year (July 1 through June 30), such as residency-position start dates, which are outside the control of the physician, be accommodated through the waiver process?

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[45] Cable from Rex W. Tillerson, U.S. Sec'y of State, to all diplomatic and consular posts ¶ 13 (Mar. 17, 2017), *reprinted in* Posting of Cassandra Garrison to live.reuters.com (Mar. 23, 2017, 9:12 am), http://live.reuters.com/Event/Live_US_Politics/791255396.

[46] Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order at 1–2, *Hawai'i*, 2017 WL 1011673 (ECF No. 145).

> (4) Will the cognizant agencies confirm the specific documentation from host graduate-medical-education programs, sponsoring employers, and host research organizations that they will deem probative in connection with a waiver application?[47]

In the absence of transparent criteria and timely decision making, *amici* believe there is a risk that U.S. healthcare institutions will be passed over by highly qualified health professionals from other countries, to the detriment of our nation's patients.

Sudden changes in immigration processes and widespread backlogs present a significant complication for the "Match," the annual process that matches the preferences of individuals seeking a slot in a graduate-medical-education program to the preferences of the training program, resulting in assignments of residents and fellows. The 2017 Match included more than 43,000 applicants for graduate-medical-education training programs, including more than 10,000 non-U.S. citizens.[48]

According to Congress, the Match "ha[s] been an integral part of an educational system that has produced the finest physicians and medical researchers in the world."[49] Congress also acknowledged the country's teaching hospitals and medical schools' "crucial missions of patient care, physician training, and medical research."[50]

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[47] *See* Declaration of Dierdre Heatwole ¶ 12, *Hawai'i*, 2017 WL 1011673 (ECF No. 154 Ex. 1 Ex. C) (stating that Executive Order's waiver process does not meaningfully diminish uncertainty related to approvals needed for entry and continued stay); Declaration of Eric Scherzer, *supra* note 32, ¶ 12 (same).

[48] Nat'l Resident Matching Prog., Results and Data: 2017 Main Residency Match 1 (Apr. 2017), http://www.nrmp.org/wp-content/uploads/2017/04/Main-Match-Results-and-Data-2017.pdf.

In 2017, medical-school graduates from countries other than the United States and Canada matched to more than 2,000 of the internal-medicine residencies in the United States.[51] Graduates from other countries matched to 337 first-year family-medicine-residency positions and 253 first-year pediatrics-residency positions, providing much needed care in the types of practices where physician shortages are growing.[52]

Medical residents comprise roughly twelve percent of all active physicians in the United States.[53] Of the 120,000 residents and fellows who served in graduate-medical-education programs in 2015, more than 18,000 were neither U.S. citizens nor lawful permanent residents.[54] In each year from 2011 through 2015, eight to nine percent of resident physicians held temporary visas.[55] This demonstrates that, despite the recent opening of several new medical schools, there are insufficient graduates of U.S. medical schools to meet the needs of U.S. medical-residency programs and the nation's overall need for physicians. Professionals from other countries fill these gaps serving as physician-trainees in accredited programs.

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[49] 15 U.S.C. § 37b(a)(1)(A) (2012).

[50] *Id.* § 37b(a)(1)(E).

[51] Nat'l Resident Matching Prog., *supra* note 48, at 8.

[52] *Id.* at 7.

[53] Brotherton & Etzel, *supra* note 36, at 2302; *2016 Physician Specialty Data Report: Number of People per Active Physician by Specialty, 2015*, Assoc. of Am. Med. Colls. (last visited June 9, 2017), https://www.aamc.org/data/workforce/reports/458490/1-2-chart.html.

[54] *See* Brotherton & Etzel, *supra* note 36, at 2302.

Medical residents, which include a significant percentage of non-U.S. physicians, are essential to the delivery by the VA of healthcare to our nation's veterans. In 2014, more than 40,000 medical residents, including those holding temporary visas, completed some or all of their clinical training in VA hospitals and other medical centers.[56] Given the VA's reliance on non-U.S. physicians, *amici* are concerned that any reduction in their numbers will likely result in longer waits for veterans seeking healthcare.

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[55] *Id.* J-1 or J-2 exchange-visitor visas were held by 6,568 residents; 3,167 residents held H-1, H-1B, H-2, or H-3 temporary-worker visas; and 403 residents held F-1 student visas, and approximately 60 residents held B-1 or B-2 temporary-visitor visas. *Id.*; *see also* Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2014–2015*, 314 JAMA 2436, 2446 (2015); Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2013–2014*, 312 JAMA 2427, 2437 (2014); Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2012–2013*, 310 JAMA 2328, 2338 (2013); Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education 2011–2012*, 308 JAMA 2264, 2273 (2012).

[56] *Medical and Dental Education Program*, U.S. Dep't of Vets. Affairs (last updated Feb. 28, 2017), https://www.va.gov/oaa/gme_default.asp.

The State Department has designated the Educational Commission for Foreign Medical Graduates as the visa sponsor for all J-1 exchange-visitor physicians who participate in clinical-training programs in the United States. To participate in graduate-medical-education programs, graduates from medical schools in countries other than the United States and Canada must achieve certification through the ECFMG. Certification involves verification of identity, verification of graduation from a recognized medical school, successful performance on professional knowledge and skills examinations, and screening against the U.S. Department of Treasury Office of Foreign Assets Control Specially Designated Nationals List.[57]

A destabilized and further backlogged immigration system will interfere with the ability of medical-residency programs to select the applicants deemed best qualified for their programs, patients, and communities, and it will disrupt the staffing of training programs. This harms both the hospitals and the patients they serve by reducing the number of qualified physicians available to provide necessary care to patients throughout the United States. Further, a reduction in the number of qualified medical-school graduates who participate in medical-residency programs will exacerbate the already growing physician-workforce shortage—a shortage felt most acutely in rural and urban underserved communities.[58]

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[57] John R. Boulet, et al., *The International Medical Graduate Pipeline: Recent Trends in Certification and Residency Training*, 25 Health Aff. 469, 473–74 (2006); Educ. Comm'n for Foreign Med. Graduates, ECFMG Fact Sheet for Consular Officials 1–2 (Mar. 30, 2017), http://www.ecfmg.org/annc/fact-sheet-consular-officials.pdf.

Backlogged immigration processes will disrupt the orderly transition between medical residency program years, which occur on or about July 1. If visa-related processing delays prevent a physician from reporting on July 1, even if the delays are short term, the adverse effect on patients will be immediate and potentially irreparable, beginning with strains on coverage in critical care, surgical, and outpatient settings. Delays also threaten the viability of the Conrad 30 waiver program and other widely used pathways that rely on timely decisions on petitions for initial approval or changes in immigration status. As a result, highly skilled medical graduates from other countries are likely to pursue residencies outside the United States.[59]

The absence of even one physician can have a significant impact.[60] This harm is more than hypothet-

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[58] *See* Declaration of Marc Overbeck, *supra* note 33, ¶¶ 4, 6 (discussing hardship to state and harm to patients if J-1 visas are not available to doctors from affected countries); Declaration of Eric Scherzer, *supra* note 32, ¶¶ 12–13 ("As a result of the . . . Executive Order, physicians from the affected countries may not pursue entry to the U.S. in J-1 status and will thereby deprive underserved rural communities of the benefit of their service under a J-1 waiver after their training.").

[59] Declaration of Eric Scherzer, *supra* note 32, ¶ 10.

[60] *Id.* ¶ 14; *see also* Mike Hixenbaugh, *New Travel Ban Could Keep Needed Foreign Docs out of Rural Texas*, Hou. Chron. (Mar. 6. 2017, 1:49 pm), http://www.houstonchronicle.com/local/prognosis/article/Rural-Texans-rely-on-foreign-doctors-Trump-s-new-10980251.php (discussing importance of foreign physicians to rural and urban healthcare);

(footnote continues on following page)

ical. Although the predecessor Executive Order was in effect for only a short period of time, it prevented licensed physicians from entering the United States, where they had responsibilities for patient care.[61]

The Executive Order also has the potential to adversely affect patient care by constraining medical research and innovation.[62] In 2016, all six American winners of the Nobel Prize in economics and scientific fields were immigrants. Moreover, since 2000, immigrants have been awarded 40%—or 31 of 78—of the Nobel Prizes won by Americans in chemistry, medicine, and physics.[63] An analysis of the U.S. Pa-

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Esther Hing & Susan M. Schappert, *Generalist and Specialty Physicians: Supply and Access, 2009–2010*, at 2 (NCHS Data Brief No. 105, Sept. 2012), https://www.cdc.gov/nchs/data/databriefs/db105.pdf (on average, a specialty physician provides 2,704 patient visits annually and a generalist physician provides 3,521 patient visits annually).

[61] *See, e.g.*, Fares Alahdab et al., *Syrian Doctors and the American Dream: Practicing Medicine in a New Immigration Landscape*, Health Aff. Blog (Feb. 24, 2017), http://healthaffairs.org/blog/2017/02/24/syrian-doctors-and-the-american-dream-practicing-medicine-in-a-new-immigration-landscape/.

[62] *See* Susan Sauer Sloan & Tom Arrison, Nat'l Acad. of Sci., Nat'l Acad. of Med. & Inst. of Med. of the Nat'l Acads., *Examining Core Elements of International Research Collaboration: Summary of a Workshop* 1 (2011) (noting that "[t]he globalization of science, engineering, and medical research is proceeding rapidly" as governments recognize that "research and development . . . leads to economic growth, employment, and overall social well-being of their citizens").

[63] Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016, 10:48 am), https://

(footnote continues on following page)

tent and Trademark Office's online database shows that 76% of patents awarded to the top ten patent-producing U.S. universities in 2011 listed at least one inventor who had been born in another country.[64] During that same period, 56% of all patents were awarded to inventors who were students, postdoctoral fellows, or staff researchers from another country.[65] Because non-U.S. postdoctorate students are increasingly relied upon to counter a decrease in U.S. students pursuing biomedical research in this nation, chilling their participation could adversely affect biomedical research and our health security.[66]

Finally, it is widely recognized in scientific fields that travel and global collaboration are essential incubators of research and innovation. Indeed, Congress has specifically recognized the importance of international collaboration in fields such as biomedical research.[67] The Executive Order inhibits such in-

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www.forbes.com/sites/stuartanderson/2016/10/16/immigrants-flooding-america-with-nobel-prizes/#57237ef06cb6.

[64] P'ship for a New Am. Econ., Patent Pending: How Immigrants Are Reinventing the American Economy 1 (June 2012), http://www.newamericaneconomy.org/wp-content/uploads/2013/07/patent-pending.pdf.

[65] *Id.*

[66] Howard H. Garrison et al., *Biomedical Science Postdocs: An End to the Era of Expansion*, 30 FASEB J. 41, 41, 43 (2016).

[67] *E.g.*, 21st Century Cures Act, Pub. L. No. 114-255, § 2072, 130 Stat. 1033, 1083 (2016) (expressing sense of Congress that it should "encourage a global pediatric clinical study network by providing grants, contracts, or cooperative agreements to support new and early stage investigators who participate in the global pediatric clinical study network" and that the

(footnote continues on following page)

novation. For example, the probability that some non-U.S. physicians currently working inside the United States will not be able to return if they travel to a conference abroad could have a chilling effect on this type of collaboration.[68]

CONCLUSION

The organizations submitting this brief have a long history of collaborating with a diverse and highly skilled workforce of U.S. and non-U.S. health professionals to treat hundreds of millions of patients annually and to conduct groundbreaking research leading to medical breakthroughs. Health professionals and scientific experts from other countries are rigorously screened, must satisfy strict standards of qualification set by our government, and are addressing compelling needs in our communities.

Secretary of Health and Human Services "should engage with clinical investigators and appropriate authorities outside of the United States, including authorities in the European Union, during the formation of the global pediatric clinical study network to encourage the participation of such investigator and authorities").

[68] Declaration of Michael F. Collins ¶¶ 5, 10, 13, 15, *Louhghalam v. Trump*, Civ. Action No. 17-10154-NMG, 2017 WL 479779 (D. Mass. Feb. 3, 2017) (ECF No. 52-2); *see also* Declaration of Dierdre Heatwole, *supra* note 47, ¶ 12 (describing adverse effects on faculty, researchers, post-docs, graduate teaching assistants, and medical residents, including disruption of recruitment schedule; interference with plans to attend conferences, exchange programs, seminars, and symposia in other countries; with prospect of losing prospective students and faculties to other countries).

Amici believe that their work to ensure our nation's health security—through critically needed patient care and cutting-edge biomedical research—contributes to our national security. In doing so, *amici* rely upon immigration processes to operate fairly and efficiently. *Amici* are deeply concerned that the Executive Order, and similar actions barring or discouraging health professionals and scientists from coming to the United States, will reduce patient access to care, inhibit medical innovation and biomedical research, and set back efforts to prevent pandemics and other public-health threats to Americans.

For the reasons provided above, whether it decides to review the Fourth Circuit's judgment or not, this Court should deny the federal government's applications to stay enforcement of the injunctions against Executive Order 13,780.

Dated: June 9, 2017

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ADDENDUM

AMICI CURIAE

Association of American Medical Colleges—represents all 147 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, and more than 80 academic and scientific societies.

American Academy of Family Physicians—represents more than 129,000 family physicians, family-medicine residents, and medical students from all fifty states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Uniformed Services of the United States.

American Academy of Pediatrics—a not-for-profit professional organization of 66,000 primary-care pediatricians, pediatric-medical subspecialists, and pediatric-surgical specialists dedicated to the attainment of optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults.

American Association of Colleges of Nursing—represents 810 member schools offering baccalaureate and graduate programs in nursing at public and private universities nationwide.

American Association of Colleges of Pharmacy—represents pharmacy education in the United States, advancing pharmacy education, research, scholarship, practice, and service to improve societal health.

American College of Healthcare Executives—an international professional society of 40,000 healthcare executives who lead hospitals, healthcare systems, and other healthcare organizations.

American College of Obstetricians and Gynecologists—is a not-for-profit educational and professional organization with more than 58,000 members dedicated to the healthcare of women.

American College of Physicians—represents 148,000 internal-medicine physicians (internists), related subspecialists, and medical students.

American Dental Education Association—the "Voice of Dental Education," with members that include all 66 U.S. dental schools, over 800 allied and advanced dental-education programs, 66 corporations, and more than 20,000 individuals.

American Nurses Association—represents the interests of 3.6 million registered nurses, has more than 179,000 members through both state associations and individual membership, and has 35 national organizational affiliates that collectively represent approximately 420,000 registered nurses in specialty areas.

American Psychiatric Association—represents more than 37,000 members involved in psychiatric practice, research, and academia representing the diversity of the patients for whom they care. As the leading psychiatric organization in the world, APA now encompasses members practicing in more than 100 countries.

American Public Health Association—champions the health of all people and all communities, strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public-health issues and policies grounded in research.

Association of Academic Health Centers—a not-for-profit association dedicated to advancing the nation's health and well-being through the vigorous leadership of academic health centers.

Association of Schools and Programs of Public Health—represents more than 100 schools and programs accredited by the Council on Education for Public Health.

Association of Schools of Allied Health Professions—a national association comprised of 115 not-for-profit universities focused on issues impacting allied-health education.

Association of University Programs in Health Administration—a global network of colleges, universities, faculty, individuals, and organizations dedicated to the improvement of health and healthcare delivery through excellence in healthcare management and policy education and scholarship, by promoting the value of university-based management education for leadership roles in the health sector.

Greater New York Hospital Association—represents more than 160 hospitals and health systems located throughout New York, New Jersey, Connecticut, Pennsylvania, and Rhode Island. All of GNYHA's members are either not-for-profit entities, charitable organizations, or publicly sponsored institutions that provide services that range from state-of-the-art, acute tertiary services to basic primary care, and, with their related medical schools, provide medical education and training and undertake cutting-edge medical research.

Hispanic-Serving Health Professions Schools, Inc.—represents 44 schools of medicine, public health, nursing, pharmacy, and dentistry that strive to strengthen the nation's capacity to increase the Hispanic health workforce and advance the health of Hispanics.

National Medical Association—represents and promotes the interests of physicians and patients of African descent.

National Resident Matching Program—a private, not-for-profit organization established in 1952 to provide an orderly and fair mechanism for matching the preferences of applicants for U.S. residency positions with the preferences of residency-program directors.

Physician Assistant Education Association—represents over 200 physician-assistant programs across the nation.

Society of General Internal Medicine—represents more than 3,600 of the world's leading academic general internists, who are dedicated to improving access to care for vulnerable populations, eliminating healthcare disparities, and enhancing medical education.

RECORD AND BRIEFS

Supreme Court, U.S.
MOTION FILED

JUN 12 2017

Nos. 16-1436, 16A1190, & 16A1191

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND APPLICATIONS FOR STAYS

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE

The Becket Fund for Religious Liberty respectfully moves for leave to file a brief as *Amicus Curiae* in support of certiorari and in support of neither party without 10 days' advance notice to the parties of *Amicus*' intent to file. See Sup. Ct. R. 37.2(a).

Petitioners' consent to the filing of the enclosed amicus brief is on file with the Clerk of this Court. Counsel for Hawai'i in *Trump* v. *Hawaii*, No. 16A1191, consented to the filing of the enclosed amicus brief. Counsel for respondents in *Trump* v. *International Refugee Assistance Project*, No. 16-1436, states that in light of the timing of our filing, they take no position on this motion.

Amicus also respectfully requests that the Court consider the arguments herein and in the enclosed amicus brief, which we file in support of certiorari, but in support of neither party.

1. *Statement of Movants' Interest.*

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket is particularly interested in protecting minority groups from religious targeting by the government. The lower courts enjoined in part an Executive Order on the basis that it targeted a particularly religious group for disfavor and violated the Establishment Clause. This Court's resolution of such an important conflict will have high stakes for religious liberty in this case and for future litigants. *Amicus* therefore has a substantial interest in the constitutional interpretation this Court employs in deciding this conflict, and offers its view in hopes that it "may be of considerable help to the Court." Sup. Ct. R. 37.1.

2. *Statement Regarding Brief Form and Timing.*

Given the expedited consideration of this matter of significant national interest, *Amicus* respectfully requests leave to file the enclosed brief without 10 days' advance notice to the parties of their intent to file. The district court heard oral argument on March 15, 2017, and entered its injunction that day. The *en banc* court of appeals heard oral argument on May 8. On May 25, the court of appeals affirmed in part and vacated in part the injunction, and denied petitioners' motion for a stay pending appeal as moot. The petition for a writ of certiorari and application for stay and for expedited briefing and consideration in this Court were filed on June 1. On June 2, this Court ordered a response to these filings by June 12. An amicus in support of certiorari would thus normally be due 30 days after this court's request for a response, on July 12, and consent would be required by July 2, but due to the expedited consideration of this matter, *Amicus* requests leave to file this brief before the usual deadline and before consent has been granted.

CONCLUSION

The Court should grant *Amicus Curiae* leave to file the enclosed brief.

Respectfully submitted.

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QUESTION PRESENTED

Section 2(c) of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) suspends for 90 days the entry of foreign nationals from six Muslim-majority countries. Respondents allege, and both lower courts found, that the Executive Order impermissibly targets Muslims. The question presented is:

Whether Section 2(c)'s alleged religious targeting should be evaluated under the Establishment Clause or the Free Exercise Clause.

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Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of a Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) .... *passim*

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992) 7

Eric Rassbach, Town of Greece *v.* Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71 (2014) 8

INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket has long sought to protect minority groups from religious targeting by the government. Accordingly, Becket has appeared as counsel or amicus in many cases in which the government has singled out a particular religious group or practice for worse treatment than its secular analogues. See, *e.g.*, *Holt*, 135 S. Ct. 853 (counsel for Muslim petitioner seeking to grow a short religious beard where prison system allowed beards for non-religious reasons); *Singh* v. *Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (counsel for Sikh plaintiffs successfully challenging refusal to let Sikhs serve in the military while observing religious requirement to wear beard and turban); *Merced*

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* contributed money intended to fund the preparation or submission of this brief. Counsel for petitioners and counsel for respondents in No. 16A1191 have consented to the filing of this brief; counsel for respondents in Nos. 16-1436 and 16A1190 take no position on the motion for leave to file.

v. *Kasson*, 577 F.3d 578 (5th Cir. 2009) (counsel for Santería priest challenging municipal ban on religious animal sacrifice that allowed killings for secular reasons); Petition for Writ of Certiorari, *Stormans, Inc.* v. *Wiesman*, No. 15-862 (U.S. Jan. 4, 2016) (counsel for Christian pharmacists challenging state law prohibiting conscientious refusals to provide certain drugs but allowing refusals for business and other secular reasons); *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, 709 F.3d 487 (5th Cir. 2013) (counsel for observant Jewish prisoner seeking kosher diet).

Becket has also long argued that the Establishment Clause should not be used to pit church and state against one another, and has in particular opposed application of the *Lemon* test. See, *e.g.*, *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (challenge to Pledge of Allegiance); *Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) (challenge to exhibition of "Ground Zero Cross" in museum); *New Doe Child #1* v. *United States*, No. 16-4440 (8th Cir. filed Dec. 13, 2016) (challenge to "In God We Trust" on currency).

Based on its expertise in this area, and in keeping with understandings of the Free Exercise and Establishment Clauses it has long advocated for in a variety of contexts, Becket files this brief in support of *certiorari*, but in favor of neither party on the merits. Rather, as a friend of the Court and of the First Amendment, Becket offers something that has been missing in the litigation thus far: a proper understanding of the complementary roles of the Establishment and Free Exercise Clauses and how they should apply in a case of alleged religious targeting.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The stakes in this case could not be much higher. On one side, there are claims that the government has targeted a particular religious group for disfavor, something repugnant to our constitutional traditions. Singling out a particular religious group for punishment or mistreatment is always constitutionally suspect and, in fact, presumptively unconstitutional. Only in rare circumstances can the government hope to survive strict scrutiny and justify religious targeting.

On the other side, the government offers weighty national security interests and the preservation of American lives, in the context of a slew of terrorist incidents around the world that are claimed to be religiously motivated. These are, by any measure, interests of the highest order.

But the stakes here are higher still because of those Americans who are *not* before the Court. That is because this litigation will set the standard for how to balance these different interests for the hundreds or thousands of religious liberty cases that will arise in the future. What law this Court applies, how this Court applies that law, and how it balances the various interests at stake are questions that transcend the particular personalities and issues in this case and go instead to the very heart of the constitutional order.

The lower courts and the plaintiffs did not address these questions. Instead, the lower courts used the wrong Religion Clause and the wrong legal test to root out claimed religious targeting. They used the Establishment Clause (which aims to prevent government involvement in religion) rather than the Free Exercise Clause (which protects religious individuals and groups from burdens on their religious beliefs and exercise). As this Court indicated more than two decades ago in *Lukumi*, it is typically only efforts to control or "benefit religion or particular religions" that can establish religion in violation of the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). By contrast, laws that "discriminate[] against some or all religious beliefs or * * * conduct" should be analyzed under the Free Exercise Clause. *Ibid.*

The litigants and courts then compounded their error of choosing the wrong Clause by applying the wrong test, using *Lemon*'s ahistorical "purpose" analysis rather than the historically grounded *Town of Greece* approach. To date, none of the lower courts has analyzed the question of religious targeting under the clause that most naturally prevents it: the Free Exercise Clause. Put differently, it is Free Exercise doctrine, not Establishment Clause doctrine, that gives courts the tools needed to determine whether the Executive Order is a benign national security measure or an invidious "Muslim ban."

The Court should grant *certiorari* because these errors, if left uncorrected, would come at terrible cost to the Republic. The lower courts' use of the wrong Clause and the wrong test led them to decide important questions of First Amendment rights and national security by relying on inferences about the state of mind of a single government official. Worse still, because the lower courts used the Establishment Clause, they invalidated the Executive Order without weighing the government's claimed interest in protecting national security.

That is a bad outcome both for considering the government's interests and for considering religious interests. The national security interests weren't considered at all. And avoiding a formal balancing test ultimately harms religious liberty interests because it puts too much pressure on courts to balance by other, surreptitious means. The danger of informal balancing is all the greater here because the *Lemon* test depends so heavily on the state of mind of individual officials who will eventually no longer be in office. By contrast, under the Free Exercise Clause, courts can balance enduring interests through the time-tested affirmative defense of strict scrutiny.

Under a Free Exercise analysis, this Court's unanimous decision in *Lukumi* provides a roadmap for this case. There, the Court analyzed a law that was deliberately crafted to target one particular religious minority while allowing similar conduct for non-religious purposes. That is the gravamen of the complaint here. Under *Lukumi*, there are many ways in which Plaintiffs might show that the Executive Order is either not neutral or not generally applicable, and therefore merits strict scrutiny review.

But instead of looking to *Lukumi*, the courts and plaintiffs below chose to follow the *Lemon* will-o'-the-wisp, much to the detriment of both the resolution of this litigation and the constitutional order. Because the Free Exercise claims have not yet been litigated below, the cases should be remanded.

ARGUMENT

I. The courts below incorrectly applied the Establishment Clause.

The courts below relied solely on the purpose prong of the *Lemon* test to enter a nationwide injunction against the Executive Order. But *Lemon* is a poor test for determining whether an act of government establishes religion. Under the appropriate historical analysis, the Executive Order does not establish religion.

A. *Lemon* provides a poor foundation for deciding Establishment Clause claims.

To put it mildly, *Lemon*'s three-pronged test has a troubled past. In recent cases, the Court has treated the *Lemon* factors, at best, as "no more than helpful signposts." *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality). More often—and without exception in the last decade—it has not applied *Lemon* at all. See *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

The lower courts, however, continue to feel obligated—even empowered—to apply *Lemon* in the absence of clear doctrinal guidance on the Establishment Clause.

Lower court judges have criticized, and scholars have expressed frustration at, the inconsistent application invited by the subjective factors in *Lemon*. See, *e.g.*, *Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbrook, J. & Posner, J., dissenting from *en banc* decision) (calling *Lemon* "hopelessly open-ended"); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Calif. L. Rev. 5 (1987) ("conceptual disaster"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 117-20 (1992) (frees courts "to reach almost any result in almost any case").

One of *Lemon*'s many problems, as highlighted by this case, is that it wrongly places the focus on the subjective intent of lawmakers to determine whether an action is an establishment of religion. Whether a lawmaker had a religious or secular intent can be famously difficult to discern, and the focus on this question as the first prong of analysis leads to an overemphasis on extra-statutory evidence of what a lawmaker's actions may mean, despite the Court's admonition to avoid "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cnty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). Here, an application of the *Lemon* test resulted in an issue of national security and constitutional law turning in part on judicial interpretation of tweets and television interviews, Pet. App. 11a, 49a, and an assessment of how long the "taint" of those statements might last. *Id.* at 61a n.21. Absent from the analysis was any serious consideration of the historical elements of an establishment.

B. Both the majority and principal dissent in *Town of Greece* adopted a new history-based approach to Establishment Clause claims.

This Court's most recent Establishment Clause precedent, *Town of Greece*, sets forth a far better mode of analysis—one that supersedes *Lemon* and provides the objective criteria lower courts need for evaluating whether a challenged government practice establishes a religion. *Town of Greece* rejected the idea that the allowance of legislative prayer in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), "carv[es] out an exception" to general Establishment Clause jurisprudence. *Town of Greece*, 134 S. Ct. at 1818. Instead, the Establishment Clause "must" be interpreted "by reference to historical practices and understandings." *Id.* at 1819. Importantly, this focus on history was the approach also adopted by the principal dissent in *Town of Greece*. See *id.* at 1845-51 (Kagan, J., dissenting) (citing historical practice).

Town of Greece starts from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting what that means to courts today. Historical analysis has long played an important role in Establishment Clause analysis. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 181-87 (summarizing historical view of Establishment Clause); *Van Orden*, 545 U.S. at 686 (citing history); *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-16 (1947) (same). But before *Town of Greece*, courts often failed to begin with the all-important question: what is an establishment of religion? See *Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring) (considering "what constituted an establishment" at the time of the founding); see also Eric Rassbach, Town of Greece *v.* Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71 (2014). When courts objectively assess whether modern government actions mirror the establishments the Founders rejected, Establishment Clause jurisprudence will be clearer and more predictable.

Six features characterized founding-era establishments. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of a Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). Judge Kelly and Chief Judge Tymkovich employed those features in *Felix* v. *City of Bloomfield*, 847 F.3d 1214 (10th Cir. 2017). They are: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Id.* at 1216 (Kelly, J., dissenting) (quoting McConnell, 44 Wm. & Mary L. Rev. at 2131). These categories should have been applied in this case and would have led to the conclusion that the Executive Order does not constitute an establishment of religion.

C. Executive Order No. 13,780 does not violate the Establishment Clause.

The Executive Order displays none of the six characteristics of a historical establishment.

1. The Executive Order does not create state control over doctrine, governance, and personnel of a church.

At the time of the founding, state control over the institutional church manifested itself in the control of religious doctrine and the appointment and removal of religious officials. McConnell, 44 Wm. & Mary L.

Rev. at 2132; see also Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). Thus, colonial establishments typically included government appointment and removal of ministers, rendering religious groups "subservient" to their state masters. McConnell, 44 Wm. & Mary L. Rev. at 2140-41; see also *Hosanna-Tabor*, 565 U.S at 182-83 (describing government control over ministerial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Hosanna-Tabor*, 565 U.S. at 183 (citing 1 Annals of Congress 730-31 (1789)).

The Executive Order does not seek to control religious doctrine. No church is compelled by the Executive Order to adopt or reject religious doctrine, clergy, or governance.

2. The Executive Order does not compel church attendance.

Anglican colonies like Virginia followed England's example by fining those who failed to attend Church of England worship services. McConnell, 44 Wm. & Mary L. Rev. at 2144; George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 513 (Burt Franklin 1970) (1902); Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion").

The Executive Order has nothing to do with church attendance, compulsory or otherwise.

3. The Executive Order provides no financial support to any church.

At the time of the founding, public financial support took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147. Land grants, the most significant form of public support, provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148.

The Executive Order does not financially support any church.

4. The Executive Order does not prohibit worship.

As part of their efforts to prop up the state churches, colonies sometimes prohibited worship by adherents of non-state religions. Some colonial establishments were more tolerant than others, and those that were less tolerant singled out particular groups to banish.[2] McConnell, 44 Wm. & Mary L. Rev. at

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[2] The Church of England is an example of a modern "tolerant" establishment, where the church is given official status as the state religion, but dissenting worship is not prohibited. Saudi Arabia is an example of an "intolerant" establishment.

2131. Some establishments tolerated "orthodox" dissents from the official state religion, some singled out particularly vexatious individual denominations (like Quakers) for persecution, and some outlawed any form of worship outside the strict doctrine of the state church. Virginia, for example, imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2118, 2166. Several states banned Catholic churches altogether. *Id.* at 2166. This element of an establishment took the form of control of religious belief and worship by the established church.

The Executive Order does not encourage or discourage worship of any kind.

5. The Executive Order does not cede important public functions to church institutions.

A fifth element of establishment is government assignment of important civil functions to church authorities. At the founding, states used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. McConnell, 44 Wm. & Mary L. Rev. at 2169-76. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Virginia ministers were tasked with keeping vital statistics; and South Carolina recognized only marriages performed in an Anglican church. *Id.* at 2173, 2175, 2177.

The Executive Order gives no important civil functions to any church. No religious group has the authority to determine immigration policy or entry criteria.

6. The Executive Order does not restrict political participation to members of any church.

The final feature of an establishment is the restriction of political participation based on church affiliation or the lack thereof. At the time of the founding, England allowed only Anglicans to hold public office and vote; many states took comparable measures. McConnell, 44 Wm. & Mary L. Rev. at 2177. Although religious tests were prohibited at the federal level by the Religious Test Clause of Article IV, *id.* at 2178, Maryland's version of religious disqualification lasted until 1961, when the Supreme Court struck it down. See *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

The Executive Order does not impose any religious test for political participation. Respondents present no claim that the Executive Order violates the ban on religious tests for office, limits voting rights or interferes with other aspects of political participation.

II. Respondents' religious-targeting claim should be evaluated under the Free Exercise Clause instead.

That Respondents' Establishment Clause claim fails does not mean that the religious targeting they allege is without a First Amendment remedy; it means only that they have relied on the wrong Religion Clause. To the extent that *Lemon* sweeps religious-targeting cases into the Establishment Clause, it is inconsistent with this Court's modern Free Exercise jurisprudence.

A. Targeting of a particular religious group has historically been viewed as a Free Exercise, not an Establishment Clause, problem.

The core of Respondents' theory is that the Executive Order is unconstitutional because it "singl[es] out" members of one particular religion—Muslims—"for disfavored treatment." First Am. Compl. ¶¶ 5, 63, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-361, ECF No. 93 (D. Md. Mar. 10, 2017). That argument sounds in Free Exercise, not Establishment, both historically and today.[3]

To be sure, the historical establishments prohibited by the Establishment Clause sometimes included efforts to suppress minority faiths. Virginia, for instance, banned Quakers from immigrating and prosecuted and imprisoned Baptist preachers. McConnell, 44 Wm. & Mary L. Rev. at 2163, 2165-66. And Massachusetts Bay adopted an Act Against Heresy, which banished from the colony any person who denied the immortality of the soul, resurrection, sin in the regenerate, the need of repentance, redemption or justification through Christ, the morality of the fourth commandment, or infant baptism. *Id.* at 2161.

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[3] Of course intentional discrimination is *sufficient* to trigger strict scrutiny under the Free Exercise Clause, but it is not necessary. "Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Shrum* v. *City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (emphasis added) (internal citation omitted).

But these efforts to exclude and suppress dissent were *in addition to* laws affirmatively promoting or controlling the established church; they were a way to buttress the establishment but they did not constitute the establishment itself. McConnell, 44 Wm. & Mary L. Rev at 2120, 2127-31 (explaining that establishments could be "tolerant or intolerant," with the difference being the extent to which they persecuted dissenters); see also *Torcaso*, 367 U.S. at 490 (discussing state establishments and the "consequent burdens" they "imposed on the free exercise of * * * nonfavored believers"). In other words, Virginia did not have an established church because it persecuted Baptists and excluded Quakers; it had an established church because it erected Anglican "churches * * * in every parish at public expense," selected the Anglican Church's ministers, and resolved theological matters by statute. McConnell, 44 Wm. & Mary L. Rev. at 2118-19.

Thus in both Virginia and Massachusetts it was not disestablishment that ended the regimes of excluding and suppressing dissenters—it was the enactment of free exercise provisions. McConnell, 44 Wm. & Mary L. Rev. at 2119-20 (the free exercise provision of the Virginia Declaration of Rights "effectively ended the persecution of Baptist and other preachers and granted all Virginians the right to practice religion freely" "[b]ut it did not disestablish the Church"); *id.* at 2124-26 (provision of the Massachusetts Charter of 1691 guaranteeing "liberty of Conscience * * * to all Christians" "eased" attempts "to maintain religious homogeneity by banishing or punishing dissenters," although the Massachusetts establishment did not end until 1833).

This history makes clear that restrictions on religious minorities were addressed under free exercise provisions even before or at the founding, when the restrictions were used to prop up the established church. But it is even clearer that when "restrictions on minority faiths are [*not*] part of any effort to establish some other religion, * * * such restrictions are * * * treated as a free exercise issue." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1800 (2006). Put simply, government disfavor toward one religion does not—standing alone—establish another. But it does potentially violate free exercise.

Lukumi proves this point. In *Lukumi*, all nine Justices agreed that the City of Hialeah had singled out a particular religion for disfavored treatment: it passed an ordinance prohibiting the "central element of the * * * worship service" of the Santería religion, and did so in order to "target[]" Santería. 508 U.S. at 534, 541-42. On the theory urged by Respondents and adopted by the courts below, *Lukumi* should have been an Establishment Clause case—the ordinance "established a disfavored religion," Santería. See, *e.g.*, *Hawai'i* v. *Trump*, No. 17-50 DKW-KSC, __ F. Supp. 3d ____, 2017 WL 1011673, at *4 (D. Hawai'i Mar. 15, 2017) (characterizing challengers' claim as being that "the Government has established a disfavored religion," Islam). But this Court rejected reliance on the Establishment Clause in *Lukumi*. Surveying precedent under both Religion Clauses, the *Lukumi* Court noted that Establishment Clause cases "for the most part have addressed governmental efforts to benefit religion or particular religions," rather than the sort of "attempt to disfavor [a] religion" at issue there. 508 U.S. at 532. The Court therefore held that "the Free Exercise Clause [would be] dispositive in [its] analysis." *Ibid.*

Lukumi got the division of labor between the two Religion Clauses right. The historical establishments prohibited by the Establishment Clause were designed to establish—to bring within state protection or control—certain religions or religious ideas, not just to target one of many religions for disfavored treatment. Eliminating claimed religious targeting is the job of the Free Exercise Clause.

B. *Lukumi* provides the proper framework for using the Free Exercise Clause to combat claimed religious targeting.

Not only is the Free Exercise Clause the right Clause for this case historically and doctrinally—it is also the Clause best suited to combat the sort of religious targeting alleged here.

The key question in this case is whether a law that (according to the court below) is facially neutral with respect to religion in fact embodies hostility toward one particular religion, targeting it for disfavored treatment. See Pet. App. 52a-53a. That is a question Free Exercise doctrine is well equipped to answer. Because the Free Exercise Clause prohibits lawmakers from "devis[ing] mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices," the *Lukumi* Court identified "many ways" that a plaintiff can demonstrate that a facially neutral law in fact constitutes "covert suppression of particular religious beliefs" or a "subtle departure[] from" religious neutrality. 508 U.S. at 533-34, 547; see also *id.* at 534 ("The Free Exercise Clause protects against governmental activity which is masked, as well as overt."). These carefully calibrated techniques for uncovering "masked," "covert," or "disguised" hostility toward religion stand in stark contrast to the ineffective *Lemon* test, whose focus on inherently subjective perceptions of the lawmaker's intent consistently leads to chaos. See *Cnty. of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 675-76 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (*Lemon* test requires courts to "[d]ecid[e] cases on the basis of * * * an unguided examination of marginalia" and using "little more than intuition and a tape measure").

In contrast, *Lukumi* illustrates at least seven ways a plaintiff can prove that a law is not "neutral [and] generally applicable" with respect to religion, subjecting it to strict scrutiny under the Free Exercise Clause. See *Lukumi*, 508 U.S. at 531-32 (citing *Emp't Div.* v. *Smith*, 494 U.S. 872 (1990)). This elaboration of neutrality and general applicability, not the *Lemon* test, should determine the constitutionality of the Executive Order here. The Court should remand so that the parties can litigate the Free Exercise claim in the first instance, and the lower courts can consider whether any of the following paths to strict scrutiny is satisfied.

1. Does the law facially target religion?

First, a plaintiff can show that a law is not neutral and generally applicable by showing that the law facially targets religion. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. Thus if a law's benefits or burdens are determined by "refer[ence] to a religious practice without a secular meaning discernable from the language or context," the law is not neutral and generally applicable under the Free Exercise Clause, and strict scrutiny applies. *Id.* at 533-34.

2. Does the law, in its real operation, result in a religious gerrymander?

Facial neutrality is the "minimum," but strict scrutiny applies even to facially neutral laws if "the effect of [the] law in its real operation" is to accomplish "a religious gerrymander." *Lukumi*, 508 U.S. at 535 (citation omitted). A gerrymander exists when a law—evaluated in light of its stated, nondiscriminatory purpose—is so underinclusive with respect to secular conduct, and so overinclusive with respect to religious conduct, that its "burden * * *, in practical terms, falls on adherents [of a particular religion] but almost no others." *Id.* at 534-37.

3. Does the law fail to apply to analogous secular conduct?

Short of a gerrymander, another way a plaintiff can prove a Free Exercise violation is to show that the law's "prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). Thus, in *Lukumi*, the law at issue was not neutral and generally applicable because it exempted animal killing for certain secular reasons, but not religious reasons, even though secular killings would endanger the government's purported interests in protecting public health and preventing animal cruelty just as much as or more than religious sacrifices. *Id.* at 533-34. The categorical-exemption inquiry is designed to prevent the government from making "a value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

4. Does the law give the government open-ended discretion to make individualized exemptions?

Another way to show that a law is not neutral and generally applicable is to show that it gives the government open-ended discretion to make "individualized exemptions." *Lukumi*, 508 U.S. at 537. Individualized exemptions trigger strict scrutiny if they are capable of being "applied in practice in a way that discriminates against religiously motivated conduct," relative to secular conduct equally undermining the government's stated interests. See *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Smith*, 494 U.S. at 884).

5. Has the law been selectively enforced?

Even a law that is neutral and generally applicable on its face can violate the Free Exercise Clause if the plaintiff shows that it has "been enforced in a discriminatory manner." *Blackhawk*, 381 F.3d at 208. This is because "selective * * * application" of a facially neutral and generally applicable law "devalues" religious reasons for engaging in conduct just as much as a law that facially exempts analogous secular conduct. *Tenafly Eruv Ass'n, Inc.* v. *The Borough of Tenafly*, 309 F.3d 144, 151-53 (3d Cir. 2002).

6. Does the law's historical background show that the lawmaker's purpose was to discriminate based on religion?

If a law by its terms is neutral and generally applicable and there is no evidence of selective enforcement, it could still trigger strict scrutiny if its "historical background"—including "statements made by members of the decisionmaking body"—indicates a purpose to discriminate based on religion. *Lukumi*, 508 U.S. at 540-42 (opinion of Kennedy, J., joined by Stevens, J.). The contours of this inquiry, however, are contested. Only two Justices agreed in *Lukumi* that this type of evidence could be significant, and two other Justices disagreed, arguing that the "evil motive[] of [a law's] authors" is irrelevant. Compare *ibid.* (plurality opinion) with *id.* at 558-59 (Scalia, J., joined by Rehnquist, C.J., concurring).

7. Does the law discriminate between religions?

Finally, laws that discriminate *between* religions, rather than just between religion and nonreligion, also violate the Free Exercise Clause. *Lukumi*, 508 U.S. at 536 (citing *Larson* v. *Valente*, 456 U.S. 228, 244-46 (1982)); *Smith*, 494 U.S. at 877 (same). Thus, in applying the other six categories of the *Lukumi* analysis, if a law's text, "object," exemptions, or (possibly) motive demonstrate a preference for conduct by members of some religions over others, rather than for secular conduct over religious conduct, the law nonetheless triggers strict scrutiny. *Larson*, 456 U.S. at 245-47 (describing this as a rule against "denominational preferences").[4]

C. Because Free Exercise claims are subject to strict scrutiny, the choice of Clause is particularly important.

The courts below erred because they applied *Lemon* and failed to appreciate (or, at least at this stage, did not explore) the many ways in which alleged religious targeting may violate the Free Exercise Clause. These errors are reason enough to grant the petition, vacate, and remand with instructions to consider the Free Exercise claim. But this Court's intervention to steer lower courts to the appropriate Religion Clause is important for an additional reason: by relying solely on the Establishment Clause, the courts below decided an important issue with potentially serious implications for national security without ever balancing the government's claimed interests.

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[4] Although *Larson* invokes both the Establishment Clause and the Free Exercise Clause, this Court's decisions in *Smith* and *Lukumi* essentially treat *Larson* as Free Exercise precedent. See *Lukumi*, 508 U.S. at 536; *Smith*, 494 U.S. at 877; accord *Larson*, 456 U.S. at 245 ("Th[e] prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause"); see also *id.* at 255 (characterizing the law at issue as "religious gerrymandering"). That treatment is consistent with *Larson*'s application of strict scrutiny, 456 U.S. at 246-51—an analysis that typically occurs under the Free Exercise Clause, not the Establishment Clause. See *infra* section II.C.

This error derives from another key difference between the Establishment and Free Exercise Clauses: the extent to which each Clause accounts for the strength of the government's interest in enacting the challenged law. The Establishment Clause is a structural limitation on government power, so "Establishment Clause violations * * * are usually flatly forbidden without reference to the strength of governmental purposes." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.) (collecting cases). But Free Exercise claims are subject to a means-ends analysis—strict scrutiny. Under the Free Exercise Clause, once a law burdening religious exercise is determined not to be neutral or generally applicable, it still passes constitutional muster if it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal quotation marks and citations omitted).

Strict scrutiny plays an important role in the Free Exercise analysis. To be sure, it is a demanding test; when applied correctly, it is the "rare" law that survives it. *Lukumi*, 508 U.S. at 546. But strict scrutiny at least leaves open the possibility for courts to strike "appropriate[] balance[s]" between free exercise and serious government needs—balances that can account for "context" and "sensitivity to security concerns" when necessary. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-23 (2005).

The court below failed to analyze the Executive Order under strict (or any other level of) scrutiny. Instead, the court held the Executive Order likely unconstitutional immediately upon concluding that it violated *Lemon*'s purpose prong. Pet. App. 64a-65a; see also *Hawai'i*, 2017 WL 1011673, at *15 (means-ends analysis not "necessary to the Court's Establishment Clause determination"); *Aziz* v. *Trump*, No. 1:17–cv–116 (LMB/TCB), 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) (Establishment Clause concerns "do not involve an assessment of the merits of the president's national security judgment."). That was error. As explained above, the Executive Order does not violate the Establishment Clause, and under the more appropriate Free Exercise Clause analysis, courts should analyze whether the order is neutral and generally applicable and then, if appropriate, apply strict scrutiny to determine its constitutionality.

The failure to apply strict scrutiny provides yet another illustration of how *Lemon* is problematic. With no means-ends balancing, *Lemon*'s purpose prong renders any law that targets religion unconstitutional. Pet. App. 47a-65a; see also *Hawai'i*, 2017 WL 1011673, at *12; *Aziz*, 2017 WL 580855, at *7. But that is flatly inconsistent with *Lukumi*, which holds that a showing of religious discrimination is not the end of the analysis, but just one way among many to trigger strict scrutiny. *Lukumi*, 508 U.S. at 533 (a non-neutral law is "invalid *unless it is justified by a compelling interest and is narrowly tailored to advance that interest*") (emphasis added)). So *Lemon*, "[l]ike some ghoul in a late-night horror movie," continues to sow confusion in the lower courts, despite "being repeatedly killed and buried" by this Court. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment). The Court should resolve the confusion, and make clear that *Lukumi*, rather than *Lemon*, controls religious-targeting claims like this one.

* * *

It is said that bad facts make bad law. But bad law can make bad law too. Taking the *Lemon* path rather than the *Lukumi* path in these cases guarantees the further proliferation of bad law. The Court can set this extremely important litigation on the right footing at the outset by asking the lower courts to use the Free Exercise Clause to balance the societal interests at stake.

CONCLUSION

The petition and stay applications should be granted.

Respectfully submitted.

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JUNE 2017

No. 16-1436

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle ("Amicus"),[1] once wrote the Court about the Mideast, in *Zivotofsky v. Kerry*, 576 U.S. ___ (2015). So, he now advises re present Mideastern/African issues.

SUMMARY OF ARGUMENT

Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("The Order") may or may not be arbitrary, unrealistic, or rife with forbidden animus.

ARGUMENT

"There is no compulsion in religion." *The Koran*, Sura 2:256. The Order thus may be *even less liberal than the Koran*, in that the Order—like its earlier version—exerts a "TRAVEL BAN", says the President, https://twitter.com/realDonaldTrump/status/871899511525961728 (June 5, 2017, 6:20 p.m.), on some largely-Islamic nations and risks illegal religious animus, per the court below.

Why is Saudi Arabia, donor of 15 9/11 hijackers, not travel-banned? Or, after Turkish President Erdoğan's bodyguards *physically attacked Americans* on May 16 in Washington, D.C., why was Turkey not banned? So, the Order may be but a Baudrillard-style "hyperreality", a mere simulacrum of rational foreign policy, "extend[ing] the absence at the heart of politics", Jean Baudrillard, *The Spirit of Terrorism*, Le Monde, Nov. 2, 2001 (tr. Rachel Bloul), *available at* https://cryptome.org/baud-terr.htm. The Order almost resembles a type of "performance art" designed to make (some) Americans feel safer from "Islam", without actually producing safety. Indeed, such measures may create the kind of animus that led Jeremy Christian—an ironic cognomen—to murder two defenders of women against Christian's Islamophobic abuse in Portland, Oregon on May 26.

---

[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission by Petitioners to write briefs is filed with the Court, and Respondents have written Amicus a letter of permission. Amicus contacted parties at least 10 days before June 12.

But the Court could try (?) using other "evidence" to support the Order: e.g., the President's claiming Iran may be evil enough to *deserve* a terrorist attack, *see* Claire Shaffer, *Trump White House Blames ISIS Attack on Tehran and the 'Evil They Promote'*, Newsweek, June 7, 2017, 5:24 p.m., http://www.newsweek.com/donald-trump-islamic-state-terrorist-iran-evil-622727—considering such claims' judgment and veracity at their genuine worth, of course.

CONCLUSION

The Court may ponder its options, e.g., summary affirmance, with explanation; and Amicus humbly thanks the Court for its time and consideration.

June 10, 2017 Respectfully submitted,

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RECORD
AND
BRIEFS

MOTION FILED
JUN 1 2 2017

Nos. 16-1436 and 16A1190

IN THE
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *ET AL.*,
Petitioners-Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, English First, English First Foundation, Policy Analysis Center, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund in Support of Application for Stay and Petition for Certiorari

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June 12, 2017

Nos. 16-1436 and 16A1190

IN THE
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *ET AL.*,
Petitioners-Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File Brief *Amicus Curiae*

Amici curiae Citizens United, Citizens United Foundation, U.S. Justice Foundation, English First, English First Foundation, Policy Analysis Center, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund respectfully move for leave to file the attached *amicus* brief in support of Petitioners-Applicants' application for stay pending disposition of the petition for certiorari and in support of their petition for writ of certiorari. This motion and brief are being filed before court ordered deadline of 3:00 pm, June 12, 2017, to respond to the application and petition.

Petitioners have filed a blanket consent to the filing of *amicus* briefs in support of the petition for certiorari, and have consented to the filing of the *amicus* brief in support of the application. Counsel for respondents state that "in light of the timing of your anticipated filing, we take no position on your request."

Although this Court's Rules do not expressly provide for *amicus* briefs in support of or in opposition to an application for stay, this Court previously has allowed them. *See, e.g.*, Leal Garcia v. Texas, 564 U.S. 940, 943, n.* (2011).

Amici have a deep interest in protecting our nation's borders and enforcing our nation's immigration laws. Furthermore, *amici* believe they have special insight into the laws surrounding the President's Executive Order at issue, and they have filed an *amicus* brief in this case before the Fourth Circuit, as well as three *amicus* briefs in the Ninth Circuit in Washington v. Trump and Hawaii v. Trump.

Therefore, *amici* respectfully request leave to file an *amicus* brief in support of the application for stay of the district court's injunction and in support of the petition for certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, English First, and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, United States Justice Foundation, English First Foundation, Gun Owners Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* filed an *amicus* brief in this case in the Fourth Circuit as well as three *amicus* briefs in the Ninth Circuit in Washington v. Trump and in Hawaii v. Trump.

STATEMENT

The courts below freely admitted that the President has given "'facially neutral'" reasons for his Second Executive Order ("SEO") of March 6, 2017. *See*

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Due to the Court's June 2 order to file a response by June 12, *amici* did not have time to provide the 10-day notice required of Rule 37.2, but notified counsel for the parties shortly thereafter.

IRAP v. Trump, 2017 U.S. App. LEXIS 9109, *60 ("IRAP"). In fact, the President explained in great detail the basis for his order. He identified the threat to national security posed by the unrestricted immigration of certain foreign nationals, linking that threat to his chosen course of action, and explaining precisely how his actions are designed to respond to that threat. *See* SEO Section 1; *see also* Petition for Certiorari ("Pet. Cert.") at 8-9. Not only has the President explained the need for the SEO, but so too have executive branch officials such as Secretary of Homeland Security Kelly[2] and Secretary of State Tillerson.[3] The SEO is not only facially neutral, but demonstratively required to minimize a very real threat to Americans.

SUMMARY OF ARGUMENT

The district and circuit courts dismiss all stated reasoning supporting the SEO. Instead, they reach behind President Trump's statements made as the nation's Chief Executive, to statements made by candidate Trump on the campaign trail while a private citizen. Then, with the interpretive flexibility of pagan bone throwers, the judges tease out from among numerous ambiguous and conflicting statements the

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[2] "Statement by Secretary of Homeland Security John Kelly on President's Executive Order Signed Today," Department of Homeland Security (Mar. 6, 2017).

[3] "Remarks on the President's Executive Order Signed Today." U.S. Department of State (Mar. 6, 2017).

"evidence" that fits the "bad faith" predicate they believe necessary to enjoin the SEO.

Judicial second guessing was made possible only because the court misapplied the Establishment Clause to an alleged disfavoring of a religion, and then seized upon a repudiated Establishment Clause test which allegedly authorizes the court to search for impermissible motives applicable only in cases in which the government has favored a religion. Acting as if they were jurors determining *mens rea* in a criminal case — but without the benefit of a trial, sworn testimony, and rules of evidence — the judges pronounced the President of the United States guilty of "intolerance, animus, and discrimination."

In reaching their conclusion, the courts below rejected what President Trump said in his Executive Order and during his presidency, relying instead upon what candidate Trump said in the past. Additionally, these courts reject (i) what this country's highest ranking national security officials have recommended; (ii) what Congress has done (Pet. Cert. at 2); (iii) what past administrations have concluded (IRAP at *182); and (iv) the policies that the People themselves voted for.[4] The injunction entered here is not based on any established constitutional rule; it is an act of judicial lawlessness.

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[4] A. Giaritelli, "Poll: 49 percent support Trump's immigration ban, 41 percent oppose," *Washington Examiner* (Jan. 31, 2017).

ARGUMENT

I. THE INJUNCTION REQUIRES ADMISSION OF POTENTIAL RADICAL ISLAMIC TERRORISTS INTO THE UNITED STATES.

The district court's injunction, as modified by the Fourth Circuit sitting *en banc*, orders that President Trump and the executive branch employees who work for him **may not** enforce SEO Section 2(c).[5] Section 2(c) of the SEO bans nationals from six terror-prone countries from entering into the United States for a period of 90 days. The practical effect of the district court's order is to direct that the nationals of countries that Congress has found to be state sponsors of terrorism **must be admitted** into this country in an **unsafe manner, without proper vetting**. Also, the injunction undermines the stated purpose of SEO Section 2(c) to permit the Secretary of Homeland Security to have the time and resources to develop **vetting procedures** with which to **safely admit** persons from the six named countries into the United States. *See* SEO Section 2(a).

It is highly likely that this injunction will result in the entry into the country of persons from countries unable or unwilling to provide sufficient information for proper screening. Syria, for example, is known for its porous border with Turkey through which ISIS fighters enter at will to fight in the country's civil war.[6] With a severe lack of infrastructure (and even functioning government) in many areas of the country, it would seem impossible to obtain any assurances that a "refugee" from Syria is not instead a member of ISIS who entered from another country. Thus, the national serious threat is real. Yet the courts below would choose to keep the borders open, disregarding of "[t]he Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence" — primarily because of statements by candidate Trump on the campaign trail.

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[5] IRAP v. Trump, 17-361, U.S.D.C. Md., ECF #150, Mar. 16, 2017, p. 2.

In Judge Kozinski's dissent from a denial of stay of the Washington injunction in the Ninth Circuit, he stated, "[e]ven if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result — namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate." Washington v. Trump, 2017 U.S. App. LEXIS 4838, *21 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from the denial of reconsideration *en banc*). He makes an excellent point as to the sweeping and dangerous rationale underlying the injunction. Consider President Trump's authorization of a missile strike against a Syrian military airbase in April 2017.[7] Applying the logic of the courts below, could not the same or other plaintiffs bring suit based on the Establishment Clause and obtain a nationwide (or worldwide) injunction against further military action against Syria? No doubt, someone would be found to have hurt feelings, because their family members living in Syria could be harmed by U.S. military action. Could plaintiffs not claim that President Trump's motives were tainted when he ordered a cruise missile strike on the pretext of the use of chemical weapons on civilians, when his true motive was that he just hates Muslims? Could not the district and circuit court opinions, taken to their logical conclusion, be used to prohibit the President from acting as Commander in Chief of the nation's armed forces? Indeed, the SEO establishes a foundation for a comprehensive review of federal immigration policy with respect to foreign nations and foreign persons. For that reason, it constitutes every bit as much an act in pursuit of national security as a strike on military targets abroad.

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[6] *See* N. Bertrand, "'Relax, they are our friends': One quote shows why Turkey's ISIS problem is only going to get worse" (Apr. 14, 2016), Business Insider, http://www.businessinsider.com/turkey-isis-syria-border-problem-2016-4.

What the courts below have done is nothing less than a judicial takeover of a large portion of the constitutional powers of the Executive Branch, wresting away control of foreign and domestic policymaking from the People's elected officials. The injunction binds President Trump's senior officials to the status quo. Allegedly tainted by discrimination, many of the President's powers to implement his own policies have been put into the receivership of federal judges, much like some government school districts were in the 1970s and 80s.[8] There is no natural termination point to this type of judicial interference.[9]

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[7] B. Starr and J. Diamond, "Trump launches military strike against Syria" CNN News, Apr. 7, 2017, http://www.cnn.com/2017/04/06/politics/donald-trump-syria-military/index.html.

Indeed, Judge Traxler (concurring below) would rule that, so long as Donald Trump is president, every policy change affecting Muslims will require judicial approval:

> [t]he answer to the rhetorical question of whether the President will be able to 'free himself from the stigma' of his own self-inflicted statements ... lies in determining whether the Executive Order complies with the rule of law. **That requires us to consider, in each instance**, how the character, temporality, and nature of the President's repeated, public embrace of an **invidiously discriminatory** policy offensive to the Constitution bear on a challenged policy. [IRAP at *116 n.1 (emphasis added).]

Under the Traxler rule, he and his *en banc* colleagues have unleashed district courts to exercise power without responsibility, and viewing the world through rose-colored glasses, ignore the potential danger of radical Islamic extremists, like here, on the ground that "no terrorist acts have been committed on U.S. soil by nationalists of the banned countries since September 11, 2001." Such judicial naivete would thus be substituted for the expertise and knowledge of officers of the executive department — including access to the latest intelligence — such as would be denied them by the Hawaii district court's broad order enjoining the Trump administration's efforts even to develop an effective vetting process for foreign nationals from the six countries. *See* Hawaii v. Trump, 2017 U.S. Dist. LEXIS 47042, *23 (D. Haw. Mar. 29, 2017).

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[8] *See* J.A. Rabkin, "Captive of the Court: A Federal Agency in Receivership," *The American* (May 26, 1984) http://www.aei.org/publication/captive-of-the-court-a-federal-agency-in-receivership/.

[9] *See* Pet. Cert. at 21-22.

II. THE COURTS BELOW ENGAGED IN AN ACT OF JUDICIAL WILL, DISREGARDING THE CONSTITUTIONAL AND STATUTORY BASIS OF THE PRESIDENT'S SEO.

A. The President Has Inherent As Well As Statutory Power to Protect the Nation's Borders.

Neither the opinion of the district court nor the court of appeals demonstrated any real understanding of the President's solemn responsibility, and robust authority, to control the nation's borders. Rather, both opinions reflect hostility to border controls, giving no deference whatsoever to the judgment of the President on this vital matter of national security. The courts below showed no willingness to honor the promise made by Alexander Hamilton to ratifying conventions that the judiciary would be the "least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them." Federalist No. 78, G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001) at 402. Defying that prediction, the judges below have undermined and usurped the constitutional powers of the President, while giving the erroneous impression that they are mandated to do so by that same Constitution.

The district court began its analysis by stating: "The formulation of immigration policies is entrusted exclusively to Congress...." 2017 U.S. Dist. LEXIS 37645 at *28. Although it may be true that Article 1, Section 8 of the U.S. Constitution gives Congress the power to establish a "uniform rule of naturalization," there is no similar enumerated power granting Congress authority to regulate immigration. Neither does Article 2 of the Constitution confer upon the President any express authority over immigration. Thus, the source of the power to control the nation's borders is not textual, but rather inherent in any nation's sovereignty. *See* E. de Vattel, The Law of Nations, bk. II, ch. VII, § 94, p. 309 (B. Kapossy & R. Whatmore, eds. 2008). The "power to exclude from the sovereign's territory people who have no right to be there" is, as Justice Scalia observed, "the defining characteristic of sovereignty." Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J. dissenting). That inherent power to exclude aliens is shared by the President and the Congress.

The district court below stated that "Congress delegated **some** of its power [over immigration] to the President in ... 8 U.S.C. § 1182(f)...." 2017 U.S. Dist.

LEXIS 37645 at *28 (emphasis added). Unlike the district court in Washington,[10] at least the district court below quoted the central statute on which the SEO relies:

> **Whenever** the President finds that the entry of any aliens or of any class of aliens into the United States would be **detrimental** to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, **suspend the entry of all aliens or any class of aliens** as immigrants or nonimmigrants, or impose on the entry of aliens **any restrictions** he may deem to be appropriate. [Emphasis added.]

Although both courts below found ways to undermine section 1182(f) through allegations of animus and "bad faith," the statute could not be more clear. Congress conveyed to the President of the United States all of its power to ban the admission of aliens. Thus, the President's constitutional authority is at its zenith.[11]

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[10] The district court's embarrassing "oversight," in wholly ignoring the operative statute, led to that court being roundly criticized by even liberal legal commentators for its rush to an anti-Trump judgment. *See, e.g.*, J. Toobin, "The Vulnerabilities in the Ninth Circuit's Executive-Order Decision," *The New Yorker* (Feb. 10, 2017).

[11] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these

B. The Courts Below Have Demonstrated Both Political Hostility and Animus Toward the President.

In one of the most important challenges to presidential authority ever brought, Chief Justice Burger explained:

> the Judiciary always must be hesitant to **probe** into the elements of **Presidential decisionmaking**, just as other branches should be hesitant to **probe into judicial decisionmaking**. [Nixon v. Fitzgerald, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring) (emphasis added).]

Yet the Fourth Circuit did exactly what the Chief Justice warned against, belittling the SEO's use of "vague words of national security," and melodramatically characterizing the President's action as one that "drips with religious intolerance, animus, and discrimination."[12] IRAP at *20.

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circumstances ... may he be said ... to personify the federal sovereignty.").

[12] Islam is not only a religion — it also is a political system. *See* J. Tayler, "Ayaan Hirsi Ali Explains How To Combat Political Islam," *Quillette* (Mar. 31, 2017). Consider how the Fourth Circuit opinion would constrain President Trump from responding to the threat of immigration from a Muslim country where the 109 verses of the Quran which call Muslims to war against nonbelievers to achieve Islamic rule are generally believed. *See* "What Does Islam Teach about Violence," http://www.thereligionofpeace.com/pages/quran/violence.aspx.

The correct approach to a case such as this is to evaluate the Executive Order for what it does, rather than what one district court judge and even a majority of judges on a court of appeals thought motivated it. As Justice Powell more specifically amplified in Nixon, "Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive...." The consequences of this Court sanctioning the approach taken here by the Fourth Circuit, indeed, would "subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose." *Id.* at 756. If the Fourth Circuit's approach here is sanctioned, there would be no stopping point: not only would motives be put on trial, but litigants would also be enticed to find some "forbidden purpose" to challenge the legality of any official act. The search for motive transforms the judicial process from an objective legal search for legal principles to a psychological search to determine the state of the mind.

The 2016 presidential election was waged in part, as a battle between open-border internationalists aligned with Secretary Hillary Clinton who embrace even illegal immigration, and nationalists who aligned with President Donald Trump, who promised to enforce our borders. It is not the role of judges to operate "behind enemy lines" as a left-behind army tasked with impugning the President and impeding his agenda. Yet, for example, in a concurrence, one of the circuit court judges, Judge James A. Wynn, remarkably concluded that the President's statutory authority to ban entry to "'all aliens or any class of aliens'" conferred no authority "to deny entry on the basis of nationality and religion." IRAP at *107, 117. Judge Wynn then demonstrated his personal animus to the President through intemperate language, such as "religious animus" and "invidiously discriminatory." *Id.* at *116.

C. The Decisions of the Courts Below Open the Judiciary to What Chief Justice Burger Termed a "Probe into Judicial Decisionmaking."

There is an old saying that "what is good for the goose is good for the gander." If the Fourth Circuit is correct — that evidence of animus voids a decision of the political branches — then, as Justice Burger warned, would that not invite a "probe into judicial decisionmaking" by the political branches? Nixon at 761. Indeed, the President of the United States, as a coordinate branch of the federal government, would seem to have the same duty as to the court to examine the motives of the judges ruling on cases involving his authority before determining whether to give deference to a judicial ruling. Indeed, when judges twist the Constitution and statutes of the nation so as to give effect to their political will, the judicial branch acts like a political branch of government, and ceases to have any legitimacy to order another co-equal branch of government to do anything.[13]

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[13] Should the Court believe that the central issue in the case is the credibility of President Trump, that is a matter on which Justice Ginsburg has already publicly expressed her views, rendering her ineligible to participate in this Court's review. *See*

For example, if the President were to determine that District Judge Chuang enjoining the SEO in Maryland was agitated by the undoing of the work of a prior administration in which he served in a senior capacity, could he conclude that the judge was motivated by his "animus" toward the current President and his policies? Should his prior statements and acts be evaluated to determine if his service as Deputy General Counsel of the Department of Homeland Security from 2009 to 2014 colored his decision about an EO undoing the immigration policies of the last administration?[14] Can the judge's motives be discerned from the fact that, in his previous position, he reportedly "pursued policies that are diametrically opposed to those of President Trump [and] that many legal scholars and political commentators ... suggest that the impartiality of Judge Chuang's ... ruling 'might reasonably be questioned'"? *Id.* Should the President then treat this novel and constitutionally unsupportable injunction as being invalid and unenforceable?[15]

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28 U.S.C. § 455 and J. Biskupic, CNN, "Justice Ruth Bader Ginsburg calls Trump a 'faker,' he says she should resign" (July 13, 2016).

[14] M. Leahy, "Impartiality of Federal Judge Who Blocked Trump EO May Be In Question," Breitbart (Mar. 21, 2017).

[15] No challenges to similar Executive Orders issued by prior presidents have been successful. *See* "A Legal Analysis of New Proposals to Limit Immigration from Muslim Countries into the United States," USJF Legal Policy Paper at 2-4 (Feb. 12, 2016).

Indeed, counsel for respondents conceded his challenge was grounded in "never-Trumpism" in oral argument before the Fourth Circuit:

> Judge Niemeyer: "If a different candidate had won the election and then issued this order, I gather you wouldn't have any problem with that?"
>
> * * *
>
> Counsel for Respondents Omar Jadwat: "Yes, your honor, I think in that case, it could be constitutional."[16]

III. THE FOURTH CIRCUIT ERRONEOUSLY FOUND THAT PRESIDENT TRUMP'S SEO VIOLATED THE ESTABLISHMENT CLAUSE.

The Fourth Circuit clearly explained the narrow scope of its decision, stating:

> the preliminary injunction issued by the district court may be justified **if and only if** Plaintiffs can satisfy the requirements for a preliminary injunction based on their **Establishment Clause claim**. [IRAP at *44 (emphasis added).]

Indeed, the Fourth Circuit ruled that it was the invocation of the Establishment Clause which allowed the court to avoid the application of Kleindienst v.

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[16] "ACLU Lawyer Says Travel Ban 'Could Be Constitutional' if Enacted by Hillary Clinton," NTK Network (May 8, 2017).

Mandel, 408 U.S. 753 (1972), explaining that case as "contemplat[ing] the application of **settled** Establishment Clause doctrine in this case." IRAP at *60 (emphasis added). In truth, there is nothing whatsoever "settled" about the application of the Establishment Clause to this case.

To its credit, the Fourth Circuit carefully sorted through the standing claims before determining that only one had the legal standing to trigger the court's constitutional authority to an Establishment Clause claim — John Doe #1. *Id.* at *55-56. However, not once did the circuit court, or the district court before it, pause to address whether the complaint was properly grounded in the Establishment Clause. The Fourth Circuit's conclusion that constitutional text, which prohibits the "Establishment of religion," applies to an act supposedly disfavoring some adherents of a particular religion, results in a constitutional error of enormous significance, at variance with innumerable decisions of this Court, requiring review. *See* Supreme Court Rule 10(c). Through this misapplication of the constitutional text, the courts below have contrived a constitutional conflict designed to empower unelected federal judges to overturn a decision of the President and open the nation's borders to foreigners who cannot be properly vetted before admission. In reality, the Fourth Circuit decision is a judicial hijacking of the election of the President who was doing exactly what the People elected him to do.

A. The Establishment Clause Does Not Apply to This Case.

Neither the litigants nor the courts below made the threshold inquiry whether the Establishment Clause even applies to this case — simply assuming that the plaintiffs' claims that the President's allegedly "anti-Muslim" views and attitudes violated the constitutional ban on laws with respect to the establishment of religion. However, in Church of Lukumi Babalu Aye v. City of Hialeah, this Court ruled that in cases involving claims of a government "attempt to **disfavor** [one's] religion[,] the **Free Exercise Clause** is **dispositive.**" *Id.*, 508 U.S. 520, 532 (1993) (emphasis added).[17] In contrast, this Court observed, "**Establishment Clause** cases ... for the most part[18] have addressed governmental efforts to **benefit** religion or particular religions." *Id.* (emphasis added).

Free Exercise cases require proof that the government action "prohibits" one's "exercise" of one's religious faith. *See id.* at 532. It would not be enough for a Free Exercise claimant to allege and prove "only economic injury"; one must allege and prove "infringement of their own religious freedoms." *See* McGowan v. Maryland, 366 U.S. 420, 429 (1961). Thus, as applied to the Lukumi Babalu plaintiffs, they were able to sustain a Free Exercise claim because the law targeted the church's "religious exercises" of animal sacrifices. *Id.* at 542. Here John Doe #1 failed completely to allege that the EO prohibits him from exercising his religious faith, such as traveling to Mecca or fasting during Ramadan, only alleging a litany of burdens on his lifestyle and feelings:

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[17] The Lukumi Babalu Court also stated that "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." However, of the six Supreme Court cases cited in support, none involved a challenge like that brought here, based on the disfavoring of religion. *See id.* at 532.

[18] Even if this Court has occasionally employed loose language implying that the Establishment Clause might be invoked in a case involving government action disparaging a religion, the Court's "for the most part" qualifier does not allow courts to disregard the presumptive rule that government attempts to disfavor religion or religious practice are not governed by the Establishment Clause, but rather by the Free Exercise Clause.

- SEO bars his wife's entry, forcing him to choose between his career and his wife
- SEO has created significant fear, anxiety, and insecurity for him and his wife
- SEO has caused him to fear for his personal safety in this country, wondering whether he should return to Iran. [IRAP at *48.]

In a Free Exercise case, such allegations about how the SEO sent a message that foreign-born Muslims like he are second-class citizens — political outsiders — would be of no avail.

Knowing that any Free Exercise claim would almost certainly fail, John Doe #1 and his co-plaintiffs seized the Establishment Clause as a weapon of convenience. And the court of appeals adopted the plaintiff's constitutional premise that the "Establishment Clause's command [is] not to disfavor a particular religion." *Id.* at *53. Indeed, the court of appeals asserted that "one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Id.* at *47. In reaching this conclusion, the court relied upon two cases, neither of which involved challenges to government action that allegedly **disfavored** one religion over another. Nor did either involve facts from which a "reasonable observer" could infer that the government action conferring a benefit upon a preferred religion denigrates the citizenship status of one who is not in the preferred class. *Id.* at *53 n.9. In Moss v. Spartanburg Sch. Dist. Seven, 683 F.3d 599 (4th Cir. 2012), a Jewish daughter and father who received a letter describing public school policy of awarding academic credit for private, Christian religious instruction suffered injury in part because they were made to "feel like 'outsiders' in their own community." *Id.* at 607. The court of appeals acknowledged that the quotation was taken from this Court's very different decision in McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (emphasis added), where the Ten Commandments display "show[ed] a purpose to **favor** religion," and, hence, sent a message to non-adherents of a religious doctrine that they were not full members of the political community.[19]

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[19] Although the court of appeals cited two appellate Establishment Clause cases in which plaintiffs prevailed on allegations of "disfavored" treatment, they were not cited to support the proposition that the Establishment Clause provided a remedy for such treatment. *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012), and Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1041 (9th Cir. 2010). IRAP at *54 n.10. Apparently the question here was not raised.

The distinction between a government act favoring religion, as contrasted with disfavoring religion, is not a semantic one, but stems from the fact that the two religion clauses in the First Amendment are designed to protect two different rights. As Joseph Story explained, the Establishment Clause addresses the "limits to which the government may rightfully go in **fostering and encouraging** religion." *Id.*, 2 J. Story, Commentaries on the Constitution, Section 1872, at 628 (Little, Brown: 5th ed. 1891) (emphasis added). On the other hand, the Free Exercise Clause addresses the limits to which the government may rightfully go in "**excluding**" individual religious beliefs and practices. *Id.* at 629 (emphasis added). Although the two rights are interrelated, Story opined that "the duty of supporting religion, especially the Christian religion, is **very different** from the right to force the consciences of other men or to punish them for worshiping God in the manner which they believe their accountability to him requires." *Id.* Section 1876, at 631 (emphasis added).

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much less answered, and those cases should not govern the Establishment Clause challenge to the President's SEO. Similarly, in its discussion of standing, IRAP at *53, the court of appeals referenced Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003) to support the notion that a violation could be based on the "endorsement or disapproval" of religion, but that was pure *dicta*, as the case involved daily supper prayer at a government school. In it, the Fourth Circuit cited further *dicta* from Wallace v. Jaffree, 374 U.S. 38 (1985) which involved only the claim of support for religion from a moment of silence in government schools. *Dicta* built upon *dicta* is a weak foundation for the expansion of a constitutional principle.

As demonstrated above, despite the protestations of the court of appeals below that the SEO "in context drips with religious intolerance, animus, and discrimination," John Doe #1 could never have asserted a colorable Free Exercise claim. As for his Establishment claim, he has not even attempted to show how the President's actions allegedly "disfavoring" Islam amount to an Establishment Clause claim, such as preferring one religion over another. Further, the court of appeals engaged in no discussion on why this case constitutes an exception to the general rule that the Establishment Clause is triggered by government action benefitting, not disfavoring, religion. Not only is the answer to that question important in principle but, as a practical matter, it shifts the focus away from the lack of impairment of personal religious faith and practices of the individual plaintiffs, and opens the door to a judicial inquiry into motive and purpose under the Lemon v. Kurtzman 403 U.S. 602, 612 (1971), test which was never designed to test the constitutionality of a government action that disfavors a particular religion.

B. The Fourth Circuit Erroneously Assumed that the Lemon Test Applies.

The court of appeals nonchalantly presumed that "the test outlined in *Lemon v. Kurtzman* ..., governs the constitutional inquiry" (IRAP at *59), applying the three-part Lemon test, as if it is settled doctrine, and concluding that the SEO does not have a "secular purpose." The court of appeals creates the distinct impression that since 1971, when Lemon was first decided, the three-part test generated by the Supreme Court has been smooth sailing. However, for decades, justices on both sides of the aisle have expressed dismay over the state of Establishment Clause jurisprudence. In 2002, Justice Souter, dissenting in Zelman v. Simmons-Harris, lamented that this Court's Establishment Clause jurisprudence had reached "doctrinal bankruptcy." *Id.*, 536 U.S. 639, 688 (2002) (Souter, J., dissenting). Seven years earlier, concurring Justice Thomas found it in "hopeless disarray." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Two years before that, Justice Scalia, joining a chorus of academic critics colorfully describing the High Court's Establishment Clause precedents as a "geometry of crooked lines and wavering shapes." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring). Long before retiring from this Court, Justice Stevens bemoaned the fact that its Establishment Clause precedents have imposed "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in Lemon ....'" Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). Indeed, as Justice Sandra Day O'Connor observed, "this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in Lemon." Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring). And, as Justice Rehnquist, before he became Chief Justice, lamented: "the Lemon test has caused this Court to fracture into unworkable plurality opinions [] ...

depending upon how each of the three factors applies to a certain state action." Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). Lastly, in Van Orden v. Perry, 545 U.S. 677 (2005), Chief Justice Rehnquist writing for a plurality of four justices found the Lemon test "not useful" in assessing the constitutionality of a Ten Commandments display on the Texas State Capitol grounds and explaining that "[m]any of our recent cases simply have not applied the Lemon test." *Id.* at 685-86 (citations omitted).

In contrast with these cautionary words, the court of appeals automatically subjected the SOE to analysis under the Lemon test, notwithstanding "the nature of Lemon's application varies so severely from context to context that ... it can hardly be considered a uniform test." *See* K. Ravishankar, "The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts," 41 UNIV. DAYTON L. REV. 261, 263 (2016). Indeed, the Establishment Clause cases run the gambit from legislative prayer to school prayer, to religious symbols, and to State funding of Religion in Schools. *Id.* at 264-273. Of special note is the status of legislative prayer after Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

In 1983, this Court ruled that the opening of legislative sessions of Congress with prayer was not forbidden by the Establishment Clause. Marsh v. Chambers, 463 U.S. 783 (1983). Long considered to be an exception "to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to 'any of the formal "tests" that have traditionally structured' this inquiry," Town of Greece ruled that:

> *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." [*Id.* at 845-46.]

Under Town of Greece's restatement of Marsh, then the Establishment Clause text as historically understood would govern, not conformity to some judicially-devised test. As Justice Alito put it, if there was an inconsistency between any Establishment Clause test in any court opinion "and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice." *Id.* at 862 (Alito, J., concurring). Apparently all nine justices in Town of Greece agreed that "Marsh – not the Lemon test – controlled in legislative prayer cases." *See* Ravishankar at 266. In contrast, so confident of his analysis and so committed to the Lemon formula, Justice Brennan wrote that he had "no doubt that, if any group of law students were asked to apply the principles of Lemon to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." Marsh at 800-01 (Brennan, J., dissenting).

Today's judges should know that — after Town of Greece, and before pronouncing judgment in an Establishment Clause case — they must first address the threshold question of whether the Lemon test governs. This is especially true in cases like this one in which there is no Establishment Clause precedent involving the exercise of the highly deferential powers of the President and Congress in matters involving the nation's foreign affairs, beginning with the original role that religion played in America's relationship with the various Indian tribes. *See* R. Cord, Separation of Church and State at 57-79 (Lambeth Press, N.Y. 1982). The Lemon test has never been applied to a case involving entry into the United States from foreign countries. It was error for the court of appeals below to presume the applicability of that much-maligned test.

CONCLUSION

For the foregoing reasons, the Application for Stay should be granted and the Petition for a Writ of Certiorari should be granted.

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IN THE

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DONALD J. TRUMP, *et al.*,
Petitioners-Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Applicants,
v.
STATE OF HAWAII, *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit and Applications for a Stay
to the U.S. Courts of Appeals for the
Fourth and Ninth Circuits

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF IN THREE RELATED PROCEEDINGS AND BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE** OPPOSING THE GOVERNMENT'S APPLICATION FOR STAY

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* See Appendix for a complete list of *Amici*.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to this Court's Rule 21.2(b) and 37.2(b), *Amici*, constitutional law scholars, respectfully move this Court for leave to file the accompanying brief *amicus curiae* in opposition to the Government's application for a stay.[1] A full list of *Amici* is attached as an appendix to the accompanying brief.

As set forth in the accompanying brief, the *Amici* identify a distinct legal principle compelling the conclusion that the revised executive order is unconstitutional: the long-settled prohibition on governmental acts based on animus toward a particular religious group.

This distinct legal principal is relevant to whether this Court will grant the Government's stay applications. Accordingly, the Court should grant *amici curiae* leave to file the attached brief in opposition to the stay applications.

For the above reasons, *Amici* constitutional law scholars respectfully request that the Court grant this motion for leave to file the accompanying *amicus* brief in each of these matters.

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[1] Counsel for Respondents in 16-1436, 16A1190, and 16A1191 have consented to the filing of this brief *amicus curiae* in writing. In No. 16-1436, petitioners lodged their blanket consent to *amicus* briefs with the Clerk; and in Nos. 16A1190 and 16A1191, counsel for Applicants has directed *Amici* to seek leave to file from the Court.

Dated: June 13, 2017

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars. They submit this brief to identify a distinct legal principle compelling the conclusion that the revised executive order is unconstitutional: the long-settled prohibition on governmental acts based on animus toward a particular religious group.

A full list of *Amici* is attached as an appendix to this brief.[1]

SUMMARY OF ARGUMENT

The court of appeals safeguarded the religious liberty guaranteed by the Constitution by finding Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "Order") unconstitutional and affirming the preliminary injunction granted by the district court. That liberty should not be imperiled by granting the Government's motion for a stay. The Fourth Circuit relied on *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), to find that the Order lacked a secular purpose—that, instead, its "primary purpose is religious," namely effectuating President Trump's stated intent to "ban Muslims from the United

---

[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief.

States." App. 48a-49a.[2] Under settled precedent, that conclusion was correct and should be affirmed.

But the Fourth Circuit's conclusion is also supported by an independent line of Establishment Clause precedent—repeatedly confirmed in Religion Clause cases—that forbids the government from acting on the basis of animus toward any particular religion. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1822 (2014); *id.* at 1831 (Alito, J., concurring); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 722, 728 (1994) (Kennedy, J., concurring in the judgment); *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *Romer* v. *Evans*, 517 U.S. 620, 632-35 (1996). This longstanding, fundamental principle has been adopted by judges of many different persuasions in cases arising under the Establishment Clause. And it is directly applicable here. This Court should vindicate this core principle by denying the Government's request for a stay of the preliminary injunction.

While the courts below focused on whether the Order lacked a secular purpose under *Lemon*, the same facts even more clearly demonstrate anti-Islamic animus under familiar means of discerning improper motive. *See, e.g.*, *Town of Greece*, 134 S. Ct. at 1824-26; *Locke* v. *Davey*, 540 U.S. 712, 724-25 (2004); *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2693-94 (2013); *City of Cleburne* v. *Cleburne Living Ctr.*, 473

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[2] References to the Petition ("Pet.") and the Appendix thereto ("App.") are to those filed in *Donald J. Trump, et al.* v. *International Refugee Assistance Project, et al.*, No. 16-1436.

U.S. 432, 447 (1985). That conclusion is compelling even without consideration of President Trump's admissions of animus prior to his inauguration. But it is even more forcefully confirmed by a careful review of those remarks, which, as a matter of precedent, *must* be considered as part of the constitutional analysis, and which are reiterated in the President's most recent statements.

The extraordinary record in this case demonstrates that President Trump's principal motive in issuing the Order was anti-Islamic animus. After repeatedly promising voters during the campaign that he would ban Muslims from entering the United States, upon taking office, President Trump promptly issued a sweeping, unprecedented, and bizarrely-structured Order with no discernible connection to an actual national security threat. While not explicitly denominated a "Muslim Ban," that order (even as subsequently revised) came close enough to realizing that goal to satisfy his campaign promise. And in case the point somehow remained unclear, President Trump has since made numerous statements—as recently as a series of tweets on June 5, 2017—to the effect that excluding Muslims was the Order's true purpose. The extensive public record thus establishes that in issuing the Order, President Trump was following through on his animus-laden campaign promise, rather than acting for any constitutionally legitimate reason.

Even if national security concerns played some role, that would still not save the Order. Animus may co-exist with legitimate motives. As this Court has explained, where the government acts on the basis of mixed motives, courts do not hesitate to invalidate official acts when animus was a *primary* or *essential* motive, as it plainly was here. *See Windsor*, 133 S. Ct. at 2693; *Lukumi*, 508 U.S. at 535; *Larson*, 456 U.S. at 248.

The animus presented in this case does not require the Court to peer into the "veiled psyche of government officers[.]" *McCreary*, 545 U.S. at 863. "[T]his wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). President Trump has repeatedly and ostentatiously expressed the animus that motivated his promises, and subsequent acts, to ban persons of a single faith from entering the United States. For religious liberty to endure, the Order must never go into effect.

ARGUMENT

I. THE CONSTITUTION PROHIBITS GOVERNMENTAL ACTION BASED ON ANIMUS TOWARD DISFAVORED RELIGIONS

"In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532. This prohibition against governmental action motivated by animus toward a religious group is so fundamental that it has been expressed not only in Establishment Clause doctrine, but also in cases arising under the Free Exercise and Equal Protection Clauses. Together, these precedents teach that the anti-animus rule rests upon an abiding national commitment to equal treatment and religious freedom. Indeed, "the Free Exercise Clause, the Establishment Clause, the

Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion [] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

A. The Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. This rule is "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Religious freedom "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* As Justice Goldberg explained, the Religion Clauses recognize that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

This Court has thus held time and again that the Establishment Clause forbids official acts based on animus toward any particular religious group. This principle transcends many of the familiar divisions in Establishment Clause jurisprudence, and has been embraced by strict separationists, devotees of the endorsement test, those who believe that the Clause targets coercion, and jurists who see a very broad role for religion in public life. *See, e.g.*, *Locke*, 540 U.S. at 725 (Rehnquist, C.J.) (upholding a scholarship program against Establishment Clause attack because "we find neither in the history or text of [the state law], nor in the operation of the [program], anything that suggests animus toward religion"); *Kiryas Joel*, 512 U.S. at 703 (holding courts must safeguard "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion"); *id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (holding the Establishment Clause "forbids hostility toward any [religion]"); *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968) (holding that "[t]he State may not adopt programs or practices . . . which 'aid or oppose' any religion"). There is a jurisprudential consensus that government may not act on the basis of animus toward disfavored religious groups.

This Court recently reaffirmed the rule against governmental animus toward religion in *Town of Greece*, which upheld a town's practice of holding a prayer program at the start of monthly board meetings. 134 S. Ct. 1811 (2014). A crucial issue in *Town of Greece* was whether the town had established Christianity by adopting a rotational policy that led to mostly Christian prayers. The Court upheld the town's policy, concluding that some sectarian prayer is consistent with the nation's historical traditions, and that the town's prayer program did not result in religious coercion. *See id.* at 1819-25.

However, the Court's opinion contained a critical limitation:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Id. at 1823. The Court explained that the town could not "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished," *id.* at 1826, because practices serving to "denigrate, proselytize, or betray an impermissible government purpose" would violate the Constitution. *Id.* at 1824; *accord Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) (stating religious accommodations would violate the Establishment Clause if they "discriminate against other religions").

In a concurrence in *Town of Greece*, Justice Alito echoed the majority's warning against official acts based on animus toward a disfavored religion. He noted that the town's lack of non-Christian prayer leaders "was at worst careless,"—adding, "I would view this case very differently if the omission of these synagogues were intentional." *Town of Greece*, 134 S. Ct. at 1831. Similarly, Justice Breyer made clear that he would have viewed the case differently had there been proof of discriminatory intent. *See id.* at 1840 (Breyer, J., dissenting) ("The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite[.]").

As *Town of Greece* showed, and as many other precedents confirm, the Establishment Clause's longstanding prohibition against animus enjoys wide support among jurists of all methodological persuasions. The rule is also supported by historical evidence concerning the original understanding of the First Amendment. "A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). By the time the Bill of Rights was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990). The Framers thus understood that their task was to design a "government for a pluralistic nation—a country in which people of different faiths had to live together." Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* 101 (2006).

Governmental acts based on animus toward a disfavored religious group are thus at war with the Establishment Clause, as a matter of history, principle, and precedent. This anti-animus rule follows directly from the Clause's purpose of protecting religious freedom for those sects not favored by the political majority: just as the government cannot coerce (or endorse) religious belief or practice, neither can it take action based on a desire to harm or suppress any faith.

This does not mean that government is unable to recognize the importance of religion—including majority religions—in our nation. Far from it: this rule is perfectly consistent with broad views of religion's permissible role in public life. Rather, the Establishment Clause forbids officials from exercising governmental power on the basis of a desire to suppress, harm, or denigrate any particular religious sect or denomination. This limit, though narrow, is essential to religious liberty in America.

B. The Free Exercise Clause

The Free Exercise and Establishment Clauses speak as one against laws designed to oppress disfavored faiths. This reflects "the common purpose of the Religion Clauses," which is "'to secure religious liberty.'" *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

This principle received its fullest elaboration in *Lukumi*, where the Court struck down a local ordinance on the ground that it was based on animosity toward Santeria religious practices. *See* 508 U.S. at 542. The Court explained that "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547. Thus, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.*

Governmental acts based on religious animosity are accordingly forbidden by the Free Exercise Clause. *Id.* That is true even if officials "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Id.* at 524.

Furthermore, in discerning animus, "[f]acial neutrality is not determinative" because the "Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534. Rather, when government classifies on religious lines, courts guard against "impermissible attempt[s] to target [religious people] and their religious practices." *Id.* at 535.

Under *Lukumi*, evidence of improper purpose may come from the text and structure of an order, the order's real-world effect, or the degree to which the order is tailored to achieve legitimate ends. *See id.* at 533-38. Courts must also consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540 (opinion of Kennedy, J.).

Thus, if the full circumstances of an official act disclose that it was based on animus toward a religious group, that act must be invalidated.

C. The Equal Protection Clause

Precisely because the Religion Clause rule against animus is grounded in equal treatment for all religions, Justice Kennedy has explained that it should be informed by insights from equal protection doctrine. *See Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

The Equal Protection Clause is instructive in the Establishment Clause context in at least three respects. First, on many occasions, this Court has equated race with religion as reasons for discrimination inimical to our constitutional order. *See, e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976). This principle has been invoked in a wide array of circumstances: "Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); *see also Shaw* v. *Reno*, 509 U.S. 630, 648 (1993).

Second, equal protection jurisprudence offers a nuanced account of animus. In many cases, the Court has invalidated acts on animus grounds, without any finding that particular individuals were subjectively motivated by bigotry. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634. Rather, as Justice Kennedy has explained: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *accord Lukumi*, 508 U.S. at 524 (recognizing the possibility that officials "did not understand" or "failed to perceive" their animus toward Santeria).

Thus, the Court has remained sensitive to the subtle dangers posed by "unconscious prejudices and disguised animus," as well as the social harms of "covert and illicit stereotyping." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Finally, equal protection cases shed additional light on how to recognize animus. Several objective factors are often considered relevant here: the text of an act; its novelty in our constitutional tradition; the full context leading up to and following enactment; the act's real-world effects; and the degree of fit between an act's stated purpose and its actual structure. *See Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448; *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-67 (1977); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 536-38 (1973). The Religion Clause precedents consider the same factors, including those addressing official acts based on animus toward specific religious denominations. *See Kiryas Joel*, 512 U.S. at 698-705; *Lukumi*, 508 U.S. at 534-36; *Edwards* v. *Aguillard*, 482 U.S. 578, 594-95 (1987); *see also Town of Greece*, 134 S. Ct. at 1824-26 (describing when a pattern of prayers would be unconstitutional because it functioned to "denigrate" or "betray an impermissible government purpose"). The link between the Religion Clauses and the Equal Protection Clause thus promotes a more refined application of the Establishment Clause's ban on official animus toward religion.

II. THE ORDER VIOLATES THE CONSTITUTION BECAUSE IT IS BASED ON ANIMUS AGAINST ISLAM

"For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). Yet the President has issued an Order targeting six Muslim-majority nations—while maintaining a campaign website that, for months following his inauguration, included his statement supporting "a total and complete shutdown of Muslims entering the United States." App. 10a. Even acknowledging the deference due to the President in matters of immigration and national security, it is hard to imagine a clearer case of governmental action motived by animus toward a single religion.

A. Evidence of Animus—Including But Not Limited to Campaign Statements—Is Overwhelming

In upholding the preliminary injunction, the Fourth Circuit relied on myriad statements by Mr. Trump expressing "anti-Muslim sentiments that animated his desire to ban Muslims from the United States." App. 49a. Among the evidence it considered was a "Statement on Preventing Muslim Immigration" posted by then-candidate Trump on his campaign website—and maintained there until shortly before oral argument in the Fourth Circuit on May 8—calling for a "total and complete shutdown of Muslims entering the United States." App. 10a-11a. The Fourth Circuit also considered statements by President Trump coinciding with entry of the Order, including: "Islam hates us"; "[w]e can't allow people coming into this country who have this hatred"; and "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." App. 49a. Such voluminous evidence, standing on its own, overwhelmingly supports the Fourth Circuit's finding that the Order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it[.]" App. 64a.

And while the Fourth Circuit relied on this evidence of animus primarily to determine that the Order did not satisfy the *Lemon* test, the same facts illustrate anti-Islamic animus even more clearly: President Trump's Order and the oft-repeated campaign promise it fulfilled are based on a desire to exclude Muslims from the United States. Indeed, as explained above, this kind of evidence—the text of an order, its novelty, its real-world effects, the full context of its enactment, statements made by decisionmakers, and the degree of fit between an order's stated purpose and actual structure—is the standard fare of courts engaged in animus analysis. *See Town of Greece*, 134 S. Ct. 1824-26; *Locke*, 540 U.S. at 725; *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448. And as the Fourth Circuit and many others have concluded, the immigration and national security context of this litigation does not alter that bottom line. *See* App. 64a-65a. While the Court in *Kleindienst* v. *Mandel* deferred to a decision to exclude aliens based on "a facially legitimate and bona fide reason," 408 U.S. 753, 770 (1972), here the improper anti-Muslim animus means that the Order was not bona fide and was not issued in good faith.

While the Government repeatedly asserts that the Fourth Circuit's decision was "based on speculation about officials' subjective motivations drawn from campaign-trail statements by a political candidate," which should not be considered, Pet. 13, 28-30, that is not correct.

First, setting aside the campaign, a review of *only* post-election and post-inauguration statements by the President and his senior advisors demonstrates that the Order is based on anti-Islamic animus. Some of the more notable statements from this period include:

> (1) More than a month after the election, President Trump was asked whether he would reevaluate his intention to ban

Muslims. He responded: "You know my plans all along, and I've been proven to be right."[3]

(2) Upon signing the initial Executive Order, President Trump read its oblique title "Protecting The Nation From Foreign Terrorist Entry Into The United States" and said, "We all know what that means."[4]

(3) On January 28, 2017, Rudy Giuliani stated, "When [President Trump] first announced it, he said 'Muslim ban.' He called me up, he said, 'Put a commission together, show me the right way to do it legally.'"[5]

(4) When President Trump's second Order was enjoined, he said he would rather "go all the way, which is what I wanted to do in the first place."[6]

(5) On June 5, 2017, five days after the Government filed this Petition, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a

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[3] *Trump: "You've Known My Plans" On Proposed Muslim Ban*, WASH. POST (Dec. 21, 2016).

[4] *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017).

[5] Amy B. Wang, *Trump Asked for a "Muslim Ban,' Giuliani Says*, WASH. POST (Jan. 29, 2017).

[6] Bob Van Voris & Erik Larson, *Trump on Travel Ban Ruling: "Go Back To the First One,"* BLOOMBERG (Mar. 15, 2016).

> TRAVEL BAN!"[7] He continued: "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to the S.C."[8]

These statements alone reveal the President's motives. Neither the adjudication of the Government's request for a stay nor the ultimate resolution of this case turns on whether the Court considers pre-election expressions of animus.

Second, as a matter of law, this Court has never suggested that campaign statements are uniquely irrelevant to motive analysis. To the contrary, courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (citing *Arlington Heights*,

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[7] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. President Trump's tweets are properly among the "'readily discoverable fact[s]'" in which the "'official objective' of a government order may be discerned." App. 48a (citing *McCreary*, 545 U.S. at 862.). As Deputy White House Press Secretary Sarah Sanders explained, Twitter "gives [President Trump] the ability to speak directly to the people without the bias of the media filtering those types of communications." Callum Borchers, *Kellyanne Conway had a lousy Monday. Sean Spicer's wasn't much better.* WASH. POST (Jun. 5, 2017).

[8] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871675245043888128.

429 U.S. at 268).[9] These considerations reflect simple common sense: "[T]he world is not made brand new every morning." *McCreary*, 545 U.S. at 866.

Here, where President Trump issued this policy almost immediately upon taking office, the "series of events leading to the . . . official policy," and the "contemporaneous statements made by members of the decisionmaking body," necessarily include statements made by President Trump *while he was crafting the policy*—a process that unquestionably began *during* the campaign and pre-inauguration period. *Cf. Romer*, 517 U.S. at 623 (emphasizing "the contentious campaign that preceded" the adoption of a state constitutional amendment). Indeed, the connection in time, subject matter, scope, and substance between the President's campaign statements and the Order under review is extraordinarily tight.

The Government's attempt to disassociate the second Order from the first by asserting that the Order was revised to "address the Ninth Circuit's concerns" and that these revisions "demonstrate good faith" (Pet. 6, 25) is futile. Any material distinction in the motivation behind the orders is belied by the President's own words, including a tweet in which he stated that the Order is merely "the watered down, politically correct version" of the original order.[10]

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[9] Unlike in *Lukumi*, where the Court determined a multi-member body's purpose, here the only question is why one man (President Trump) undertook one official act (issuing the Order).

[10] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. The continuity of the orders has been reaffirmed by President Trump's top advisors. *See* App. 14a; *see also Chris*

The President's own prior statements—which often explicitly tied his refusal to be "politically correct" with his pledge to ban Muslim immigration[11]—leave no doubt that the "political correct[ness]" of the Order lies in its use of nationality as a pretext for religion.

Third, excluding President Trump's pre-inauguration statements would render unintelligible many of his post-inauguration statements which explicitly reference his earlier remarks. For example, on the morning of June 5, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[12] Thus, contrary to the Government's characterization of the second Order as a facially neutral executive action distinct from the prior order or campaign promises (*see* Pet. 2, 29), the President's statements make clear the continuity between his call for a "total and complete shutdown of Muslims entering the United States" and the Order he enacted. App. 10a.

Cuomo, Trump aide tangle over 'travel ban' tweets, CNN: POLITICS (Jun. 5, 2017), http://www.cnn.com/2017/06/05/politics/cuomo-and-gorka-spar-cnntv/. (Sebastian Gorka, Deputy Assistant to the President, stating: "The fact is, it's been the same since the beginning—from the first EO to the second EO, it's one thing.").

[11] Donald Trump, Remarks at Saint Anselm College in Manchester, NH (Jun. 13, 2016), *in* Gerhard Peters & John Woolley, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=117775; Donald Trump, Address at a Rally in Manchester, NH (Aug. 25, 2016), video available, http://www.dailymotion.com/video/x4qli4h.

[12] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

Fourth, protected speech would not be chilled by consideration of the President's campaign statements. *Washington* v. *Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), Slip. Op. at 9-14 (Kozinski, J., dissenting from denial of reconsideration en banc). Could a candidate run an explicitly racist campaign, win an election, enact facially neutral measures that distinctively injure the racial minority he had attacked for months, and then prevail against an equal protection challenge? Surely not. The First Amendment protects speech, but it does not allow politicians to evade all accountability if their words reveal that an unconstitutional purpose motivated their actions.

That is true *throughout* a politician's career. The Government's bizarre insistence that Donald J. Trump was a mere private citizen on January 19, 2017—one whose promises to the electorate meant nothing at all—"taxes the credulity of the credulous." *Maryland* v. *King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

Finally, the Government's analysis is unworkable. If an incumbent were running for office, how would campaign statements be distinguished from others? The Government's proposed rule is at odds with precedent and arbitrary in application.

B. Invalidating the Second Order Is Not Novel

The Government's assertion that the decision below is "novel" because it is "based on speculation about its drafters' supposedly implicit purpose," Pet. 27, is mistaken. The purpose of the Order is not "implicit"; it is clear from its express terms and operation. The Order makes express reference to honor killings—an anti-Islamic dog whistle that, as the Fourth Circuit found, underscores its lack of a secular purpose. (*See* App. 53a n.17.) The Order also by its terms applies to six majority-Muslim nations. Put simply, the Order has a recognized meaning that "denigrate[s]" Islam. *See Town of Greece*, 134 S. Ct. at 1823-26.

Nor would it be novel for the Order to be struck down based on a finding of animus. After all, if this were the rule, a similar objection could have been raised each time the Court has identified animus in an Establishment Clause challenge. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 722, 728 (Kennedy, J., concurring in the judgment); *Larson*, 456 U.S. at 246. And the prohibition on animus is familiar in Free Exercise or Equal Protection challenges, where the Court has repeatedly invalidated state action based on a finding of animus. *See, e.g.*, *Lukumi*, 508 U.S. at 542; *Cleburne*, 473 U.S. at 450; *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634.

C. The Order Is Unlawful Even if Animus Was Not Its Sole Motive

Given the exceptional record in this case—and, in particular, the utter lack of any serious national security justification for a travel ban structured like the Order—there is compelling reason to believe that the Order was motivated solely by anti-Islamic animus or, at the very least, by a decision to follow through on avowedly and explicitly anti-Islamic campaign promises. From that perspective, the Order—whose scope and structure do not match even its own professed purposes—is analogous to the constitutional amendment invalidated in *Romer*: "Its sheer breadth is so discontinuous with the reasons offered for it that the [Order] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

In this regard, it is important to recognize that animus can co-exist with other motives. Thus, in *Lukumi*, the Court recognized that the subject did implicate "multiple concerns unrelated to religious animosity." 508 U.S. at 535. But those concerns were so "remote" from the ordinance under review that they could not save it. *Id.* So, too, in *Windsor*, where the Court acknowledged other legislative purposes, but nevertheless concluded that the Defense of Marriage Act's "principal effect" and "principal purpose" were to "impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694; *see also Larson*, 456 U.S. at 248 (Minnesota's interest in "protecting its citizens from abusive practices in the solicitation of funds for charity" could not explain its *de facto* denominational line-drawing).

The mere façade of a national security justification, even if actually in the mix of presidential motives, should not have saved an Order that rested ultimately on prejudice and stereotype. When otherwise valid motives are mixed with forbidden animus, inevitably the legitimate justification is itself corrupted and distorted. *See Powers* v. *Ohio*, 499 U.S. 400, 416 (1991) (warning that "race prejudice stems from various causes and may manifest itself in different forms."). In short, where the government acts on the basis of mixed motives—as it often does—courts do not hesitate to invalidate governmental action when animus was a *primary* or *essential* motive. *Cf. McCreary*, 535 U.S. at 865. And here, for reasons well stated by the Fourth Circuit, that conclusion is inevitable.

Ultimately, perhaps the most instructive precedent is *Korematsu* v. *United States*, 323 U.S. 214 (1944). There, too, an executive order built on animus was presented to courts as justified by national security concerns, which courts were forcefully urged to take at face value. There, too, the President acted on the basis of various motives, some legitimate and others (the decisive ones) emphatically not so. And there, too, internal executive branch evidence undercut much of the Government's factual argument to the Judiciary—but, unlike in this case, that evidence was not available to the Court in 1944. *See* Peter Irons, *Justice At War: The Story of the Japanese-Internment Cases* (1993); Leah Litman & Ian Samuel, *No Peeking?: Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017).

Of course, in *Korematsu*, the Court went along with a presidential demand for boundless deference over a courageous and strongly-worded dissent from Justice Murphy. *See* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."). For good reason, *Korematsu* is now taught as one of the most painful cases in our nation's history. *See Hassan* v. *City of N.Y.*, 804 F.3d 277, 307 (3d Cir. 2015) ("Given that unconditional deference to [the] government['s] . . . invocation of 'emergency' . . . has a lamentable place in our history, the past should not preface yet again bending our constitutional principles merely because an interest in national security is invoked." (citing *Korematsu*, 323 U.S. at 223)).

This Petition tests the lesson of *Korematsu* in our own time. One of the very reasons this country was founded was to welcome people of all faiths and to reject religious intolerance. Issuing an Order to keep Muslims out is inconsistent with that principle as expressed through the First and Fourteenth Amendments. Nor can the President's Order be saved by a pretextual, after-the-fact appeal to national security. Respectfully, this Court should not abide an Order widely—and correctly—understood to flow from anti-Islamic animus.

III. A FINDING OF ANIMUS WOULD ONLY HEIGHTEN THE NEED FOR THE PRELIMINARY INJUNCTION TO REMAIN IN FORCE

The Order's grounding in religious animus deepens both the irreparable injury that Plaintiffs would suffer in the absence of the preliminary injunction and the public's interest in keeping the stay in force. As the Fourth Circuit explained, "the risk of [irreparable] harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group." App. 71a. The President's continued underscoring of the animus motivating the Order through tweets and other public statements, even as contrary arguments are being made to this Court, only reaffirms the need for a stay to remain in place to preserve the essential rights guaranteed by the Constitution. Given the extraordinary risk of irreparable harm and the fact that "upholding the Constitution undeniably promotes the public interest[,]" the preliminary injunction should remain in effect. App. 70a.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should deny the Government's motion to stay the preliminary injunction.

Dated: June 13, 2017

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APPENDIX

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RECORD
AND
BRIEFS

Nos. 16–1436 & 16–1540

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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
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PROGRAM, *et al.*,
Respondents.

DONALD J. TRUMP,
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vs.
STATE OF HAWAI'I, *et al.*,
Respondents.

On Writs of Certiorari to the United States
Courts of Appeals for the Fourth and Ninth Circuits

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

These cases involve the validity of Executive Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Section 2(c) of that order suspends for 90 days the entry of foreign nationals from 6 countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, subject to case-by-case waivers. Section 6(a) suspends refugee admissions for 120 days. Section 6(b) reduces the number of refugees to be admitted in Fiscal Year 2017.

The questions presented are:

1. Whether respondents' challenge to the temporary suspension of entry of aliens abroad is justiciable.

2. Whether section 2(c)'s temporary suspension of entry violates the Establishment Clause.

3. Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad.

4. Whether the order complies with the Immigration and Nationality Act.

5. Whether the challenges to section 2(c) became moot on June 14, 2017.

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STATE OF HAWAI'I, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, two courts of appeals have upheld injunctions against a temporary section of an executive order issued by the President "to protect the Nation from terrorist activities by foreign nationals admitted to the United States . . . ." Although the enjoined section will have expired by the time this case is argued, the precedents of judicial interference set in these cases may hamstring the current President's and future Presidents' abilities to protect the people from foreign dangers. The continued precedential effect of these decisions is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Only a brief summary is needed here to frame the issues discussed in this brief.

On January 27, 2017, President Donald J. Trump issued Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 ("EO-1"). Section 3(c) of this order suspended entry of aliens from seven countries for 90 days. "Two States challenged the Executive Order as unconstitutional and violative of federal law, and a federal district court preliminarily ruled in their favor and temporarily enjoined enforcement of the Executive Order." *Washington* v. *Trump*, 847 F. 3d 1151, 1156 (CA9 2017) (*per curiam*). The Ninth Circuit found that EO-1 violated the due process rights of lawful permanent residents and potentially others, see *id.*, at 1165-1166, and denied a motion for a stay pending appeal. *Id.*, at 1169. "Rather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal after the President signed EO2." *Hawai'i* v. *Trump*, 859 F. 3d 741, 757 (CA9 2017) (*per curiam*). "EO-2" is Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 13209 (Mar. 6, 2017).

EO-2 also had a 90-day suspension provision, § 2(c), but it was more limited. Iraq was no longer included because of improvements in that country. See § 1(g). The order exempted persons with due process rights to entry by limiting its scope to persons who were outside the country and did not have a valid visa on the date of issuance of EO-1, and by specifically exempting lawful permanent residents and several other categories of persons. See EO-2, § 3(a) and (b). The duration of the suspension was "90 days from the effective date of this order," § 2(c), and the effective date was specified as March 16, 2017. § 14.

The Fourth Circuit, with three judges dissenting, affirmed a nationwide injunction against § 2(c), lifting it only as applied against the President himself. *International Refugee Assistance Project* v. *Trump*, 857 F. 3d 554, 604-606 (CA4 2017). In a separate suit, the Ninth Circuit affirmed a broader injunction against Sections 2 and 6 of the Executive Order on nonconstitutional grounds, finding that "the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress." *Hawai'i* v. *Trump*, 859 F. 3d, at 755.

On June 14, 2017, the day that § 2(c) would have expired under EO-2 as written and if it had not been enjoined, the President issued a memorandum resetting the effective dates of the enjoined provisions as the dates the injunctions are lifted. See *infra*, at 6.

On June 26, 2017, this Court granted certiorari, stayed the injunctions in part, and directed briefing on mootness.

SUMMARY OF ARGUMENT

Whether the date for mootness of § 2(c) is the original June 14 date or September 24 (90 days from this Court's partial stay of the injunctions) is a question that will itself be moot by the time this case is argued on October 10. Assuming there are no further extensions, § 2(c) will have expired, it will not operate to inhibit any person from entering this country, and no person will have a legally cognizable interest in enjoining it. That is the very essence of mootness.

No exception to the mootness rule applies. The issue is not "capable of repetition" within the meaning of this Court's cases. There is not a "reasonable likelihood" that the circumstances which brought about this extraordinary order will recur, and mere speculation is not sufficient.

The expiration of an order that was planned to be temporary from the beginning and not as a response to this litigation is not a "voluntary cessation" within the meaning of that exception to the mootness rule. Although this Court has not directly addressed this point, there is a consensus among the courts of appeals on it.

When a federal civil case becomes moot pending review, the normal practice is to vacate the lower court decision under the rule of *United States* v. *Munsingwear*. Vacatur is particularly appropriate in this case, involving sensitive matters of separation of powers that should be addressed by this Court but cannot be because of mootness.

The *U. S. Bancorp* exception to vacatur, forfeiture of that remedy by a party who settles the case, does not apply in this case. Under *Alvarez* v. *Smith*, that exception does not apply when mootness is caused by an action of a party that is "basically unrelated" to the litigation. In this case, the 90-day duration of the suspension was part of the plan from the beginning, before any litigation was commenced.

These cases are moot as to § 2(c), and the decisions of the courts of appeals should be vacated to the extent they affirm injunctions against enforcement of that section.

ARGUMENT

I. The challenges to § 2(c) will be moot before argument.

A. *Effective Date and Expiration Date.*

In its *per curiam* opinion granting certiorari and granting a stay in part, this Court directed the parties "to address the following question: 'Whether the challenges to § 2(c) became moot on June 14, 2017.' " *Trump* v. *International Refugee Assistance Project*, 582 U. S. __ (No. 16-1436, June 26, 2017) (slip op., at 9) ("*Trump* v. *IRAP*"). Section 2(c), by its terms, expires 90 days from its effective date. The original effective date was March 16, so the original expiration date was June 14. See *ibid.* If the effective date is the date of this Court's order partially staying the injunction, June 26, the expiration date is Sunday, September 24, or arguably the following business day, Monday, September 25. Because oral argument in this case has been set for October 10, the question of which of these dates is the date the challenge becomes moot will itself be moot before oral argument in this case.

On the original expiration date of June 14, the President issued a memorandum regarding the effective date. See Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence (June 14, 2017), https://www.whitehouse.gov/the-press-office/2017/06/14/presidential-memorandum-secretary-state-attorney-general-secretary, with the subject line "Effective Date in Executive Order 13780." That memorandum "declare[d] the effective date of each enjoined provision to be the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." The memorandum further provided that it was to be construed "to amend the Executive Order" "[t]o the extent it is necessary."

The memorandum did not specify whether the effective date reboot was based on a complete or partial stay, but the executive branch has treated the partial stay issued by this Court as making the order effective, and no party has objected to this treatment. In an announcement on its website, the State Department said: "As of June 29, 2017, we began implementing the executive order at our embassies and consulates abroad in compliance with the Supreme Court's decision and in accordance with the Presidential Memorandum issued on June 14, 2017. Our implementation is in full compliance with the Supreme Court's decision." U. S. Dept. of State, Important Announcement: Executive Order on Visas, https://travel.state.gov/content/travel/en/news/important-announcement.html (viewed Aug. 2, 2017).

If this Court's partial stay were not sufficient to trigger the "effective date" under the June 14 memorandum, the executive order would not yet be in effect. If the memorandum was not effective to reset the effective date, then § 2(c) of the order would have expired by its terms, and again it would not be in effect. Yet the Government treated the order as being in effect, and the plaintiffs did not challenge its implementation on the basis that it was not. They challenged the Government's interpretation of the scope of this Court's stay and obtained relief from some applications of the order on that basis, part of which was quickly stayed by this Court. See Order of July 19, 2017, in No. 16-1540, *Trump* v. *Hawaii*; Hawaii Response to Motion for Clarification 6-9 (describing proceedings and contentions in District Court). Thus it appears to be undisputed that the President's memorandum effectively reset the effective date for the enjoined portions of the order to June 26, 2017, but § 2(c) will still expire before this case is argued.

B. The Mootness Rule.

The doctrine of mootness forms part of the boundary of the judiciary's constitutional grant of power. A moot case lies outside the boundary. See *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90-91 (2013). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Id.*, at 91 (quoting *Murphy* v. *Hunt*, 455 U. S. 478, 481 (1982) (*per curiam*)).

Absent a further extension, by the time this case is argued none of the plaintiffs in either action will have a legally cognizable interest in enjoining the enforcement of an expired order or in having it declared invalid. This is all the relief that plaintiffs have asked, see First Amended Complaint in *International Refugee Assistance Project* v. *Trump*, U. S. D. C. Md., No. 8:17-cv-00361-TDC, at 52-53; Second Amended Complaint in

State of Hawaii v. *Trump*, U. S. D. C. Hawaii, No. 1:17-cv-00050-DKW-KJM, at 37, except for costs and attorneys' fees, and these collateral demands are insufficient to maintain jurisdiction. See *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 480 (1990). Plaintiffs have not asked for damages in either case, and given this Court' recent decision in *Ziglar* v. *Abbasi*, 582 U. S. __ (No. 15-1358, June 19, 2017), no such demand could credibly be made regardless of the merits of the case.

This case meets the basic definition of mootness. It is moot unless it comes within one of "the long-recognized exceptions to mootness." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U. S. 167, 190 (2000).

II. No "exception" to mootness applies.

A. Exceptions v. Scope of Rules.

This Court's decisions over many years have established that the mootness doctrine is an aspect of the Constitution's limitation of the judicial power to cases and controversies, *Laidlaw*, 528 U. S., at 180, and also that there are a number of exceptions. See *id.*, at 190. The inconsistency of these two propositions has occasionally been noticed. If a case is not within the judicial power, then the judiciary has no authority to assert jurisdiction by creating a policy-based exception. See *United States Parole Commission* v. *Geraghty*, 445 U. S. 388, 411-413 (1980) (Powell, J., dissenting); Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562, 563-564 (2009).

Professor Hall suggests bifurcating mootness into constitutional and prudential branches, 77 Geo. Wash. L. Rev., at 565, while other commentators suggest abandoning the constitutional basis of mootness altogether. See *id.*, at 564-565, nn. 11 and 12. *Amicus* believes that a better approach is to recast the "exceptions" as more nuanced definitions of the contours of the rule. This is similar to what the Court has done with habeas corpus retroactivity. The so-called "first exception" to the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), is now recognized as a part of the definition of the rule itself, not an exception to it. See *Schriro* v. *Summerlin*, 542 U. S. 348, 352, n. 4 (2004). This was essentially Justice Powell's approach in *Geraghty*, 445 U. S., at 412. Collateral consequences and defense against a credible threat of recurrence *supply* the needed continuing personal stake rather than furnish a policy-based exception to this constitutional prerequisite to judicial power. This point may be academic for the present case because none of the "exceptions" apply regardless of how they are characterized, but the matter should be clarified either in this case or in another case in the near future.

B. Capable of Repetition Yet Evading Review.

In some cases, a court may proceed to decision despite facial mootness if the underlying issue is "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The rule is narrower than this shorthand description, though. "A dispute falls into that category, and a case based on that dispute remains live, if '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.' " *Turner* v. *Rogers*, 564 U. S. 431, 439-440 (2011) (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) (*per curiam*)).

The "capable-of-repetition doctrine" is not as broad as its capsule description sounds but instead "applies only in exceptional situations . . . ." *City of Los Angeles* v. *Lyons*, 461 U. S. 95, 109 (1983). The short duration, by itself, is not sufficient, and "capable of repetition" does not capture the full meaning of the second prong. Repetition must not be a mere possibility, there must be a reasonable expectation of it.

Turner v. *Rogers* illustrates the kind of case that qualifies. Turner had been found in contempt and sent to jail for not paying support without a finding that he was able to pay, and he was neither able to retain counsel nor appointed counsel. See 564 U. S., at 436-438. His 12-month contempt sentence was far too short for full review up the appellate chain, but Turner's chronic arrears created "a more than 'reasonable' likelihood that [he] will again be 'subjected to the same action,' " and in fact he already had. See *id.*, at 440. Similarly, in *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), Jane Roe's 1970 pregnancy was long past by the time of this Court's decision, but another was entirely possible.

On the other hand, in *Spencer* v. *Kemna*, 523 U. S. 1, 3 (1998), a challenge to parole revocation became moot when the prisoner's term was completed. The possibility that the former prisoner might once again be paroled and have his parole revoked did not rise to the "reasonable likelihood" level. See *id.*, at 18; see also *DeFunis* v. *Odegaard*, 416 U. S. 312, 320, n. 5 (1974) (speculative possibility that last-term law student might not graduate and need to reapply was insufficient).

Similarly, in *City News & Novelty, Inc.* v. *Waukesha*, 531 U. S. 278 (2001), a business challenging the procedural adequacy of a city's licensing requirement withdrew its application after petitioning for certiorari in this Court because it could not compete with a

" 'larger and more modern' " purveyor of pornography. See *id.*, at 282-283. The remote possibility that the company might re-enter the business was insufficient for " 'a legally cognizable interest in the outcome.' " *Id.*, at 283 (quoting *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979)).

City News distinguished *Erie* v. *Pap's A. M.*, 529 U. S. 277 (2000), another case involving a failed "adult business," on the basis of which party was seeking review and which one was seeking dismissal for mootness. *Erie* came up on review from a state court, so *Munsingwear* vacatur was not an option. See 529 U. S., at 305 (Scalia, J., concurring in the judgment); see also Part III, *infra* (discussing *Munsingwear*). "Thus, had we declared *Erie* moot, the defendant municipality would have been saddled with an 'ongoing injury,' *i. e.*, the judgment striking its law." *City News*, 531 U. S., at 284 (citing *Erie*, *supra*, at 288). The "speculation" that Pap's A. M. might reenter the business, "standing alone," would not have been sufficient to "shield the case from a mootness determination." *Id.*, at 283. Because the City of Waukesha had prevailed in state court, that problem was not present in *City News*. *Id.*, at 284.

City News and *Erie* indicate that the key element is the tangible interest of a party in preserving, reversing, or vacating a decision on a question of law that the party has a real possibility of needing to litigate in the future. Had the City of Erie been "saddled" with an adverse decision, any effort to enforce its law would have been quickly enjoined at the behest of a plaintiff who could cite that decision as collateral estoppel or res judicata. In these "exceptional situations" that interest is sufficient to maintain a live controversy, even when the specific dispute that brought the decision about is moot.

This same interest was noted in a different but related context in *Camreta* v. *Greene*, 563 U. S. 692 (2011). Officials with child protection responsibilities had received a decision that they had violated the Fourth Amendment but prevailed on qualified immunity. If the decision stood, they would not have immunity if they repeated the same conduct that they believed to be legal performance of their duties, and this was a sufficient personal stake for them to seek review in this Court despite being prevailing parties in the court of appeals. See *id.*, at 702-703.

In most cases, avoiding mootness requires that both parties retain a stake in the outcome. In *Camreta*, even though the officials were able to seek review, the case was nonetheless moot because the child had moved across the country and would shortly no longer be a child, so there was "not the slightest possibility" of repetition. See 563 U. S., at 711. This was sufficient for a finding of mootness and a partial *Munsingwear* vacatur. See *id.*, at 714, and n. 11. Similarly, *Turner* v. *Rogers*, 564 U. S., at 440, distinguished *DeFunis* on this basis. The contours of the *Erie* exception to the "both parties" rule need not be considered in this case, though, because repetition is not likely and neither party has engaged in the kind of "gamesmanship" that was of concern there. See *Bunting* v. *Mellen*, 541 U. S. 1019, 1021 (2004) (Stevens, J., respecting the denial of certiorari).

The 90-day suspension in § 2(c) surely qualifies as "too short to be fully litigated" for the first prong of the test, see *Turner* v. *Rogers*, 564 U. S., at 439-440, so the key inquiry is whether repetition is "reasonably likely." Once § 2(c) has lapsed, it is highly unlikely that a new suspension will be imposed any time in the foreseeable future, and that is sufficient to end this case.

The events of the last year have been unprecedented in many ways. The 90-day suspension of admissions from 6 particularly problematic countries, see EO-2, § 1(e), was a short-term measure by an incoming administration that determined that a new policy considerably more restrictive than the existing policy was needed. The suspension has been reissued once and extended once, largely because of the current litigation, but if the Government allows it to lapse without further extension it would likely be on the basis that more permanent and targeted measures are ready.[2] If that point has been reached by the time this case is argued, it is extremely unlikely that the circumstances that brought about the need for the suspension will recur at any time in the foreseeable future. The current administration and future ones will review the restrictiveness of alien admission policies, to be sure, but a shift of the same magnitude and direction as we have seen this year is highly unlikely. The possibility is much more speculative than the ones deemed insufficient in *Spencer* and *City News*. The "reasonably likely" prong of the test is not met. The question is not even close.

C. Voluntary Cessation.

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *SEIU, Local 1000*, 567 U. S. 298, 307 (2012). "Challenged" is a better term than "unlawful" for the statement of this rule, cf. *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 91 (2013), because the lawfulness of the conduct is necessarily disputed and undetermined at the time the court addresses the threshold question of mootness.

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[2] This brief is written two months before argument of this case with regard to what action should be taken in light of the situation at that time. The discussion must necessarily refer to what we expect the situation to be as we cannot be certain.

However it is stated, though, the central concern of the rule is manipulation by the party whose conduct is challenged. "Otherwise, a defendant could engage in unlawful conduct, *stop when sued to have the case declared moot,* then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Ibid.* (emphasis added). The purpose of the rule suggests a limitation on its scope. "Voluntary cessation" refers to cessation motivated by the litigation with the purpose of having it declared moot. "The voluntary cessation doctrine does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation." 15 J. Moore et al., Moore's Federal Practice § 101.99[2] (3d ed. 2017).

This Court has not had occasion to squarely address whether the doctrine applies to a voluntary cessation motivated by factors external to the litigation, but the courts of appeals have. "[I]n order for this exception to apply, the defendant's voluntary cessation must have arisen *because* of the litigation." *Public Utilities Commn.* v. *FERC*, 100 F. 3d 1451, 1460 (CA9 1996) (emphasis in original); accord, *O'Connor* v. *Washburn Univ.*, 416 F. 3d 1216, 1221-1222 (CA10 2005); *E. I. Du Pont de Nemours & Co.* v. *Invista B. V.*, 473 F. 3d 44, 47 (CA2 2006).

"Circuit courts have routinely held that the voluntary cessation exception is not invoked when the challenged conduct ends because of an event that was scheduled before the initiation of the litigation, and is not brought about or hastened by any action of the defendant." *ACLU of Massachusetts* v. *U. S. Conference* *of Catholic Bishops*, 705 F. 3d 44, 55 (CA1 2013). In that case, the challenged contract had been completed and expired, and the tax dollars at issue had already been spent. The government's new grants to different grantees did not involve the underlying issue. See *id.*, at 53-54. "This, in our view, is not a case of voluntary cessation so as to invoke the exception." *Id.*, at 55. Similarly, in *O'Connor*, the challenged art exhibition ended on schedule "through the normal course of events," not because of the litigation, and the voluntary cessation doctrine did not apply. See 416 F. 3d, at 1221-1222.

In the present case, the Government has intended from the beginning that the suspension of entries from the named countries be a temporary 90-day measure. The government action in response to the litigation has been to extend the termination date, the opposite of the concern behind the "voluntary cessation" doctrine. The doctrine does not apply, so the Court need not ask if its test is met. Even if the test did apply, though, the test would be met. For the reasons stated in the previous section, it "could not reasonably be expected" that a new restriction of this type will be imposed in the foreseeable future, and speculation to that effect is not sufficient to avoid mootness. See *Already, LLC*, 568 U. S., at 92.

III. The decisions of the courts of appeals should be vacated under *Munsingwear*.

"When a [federal] civil suit becomes moot pending appeal," this Court's " 'established' (though not exceptionless) practice . . . is to vacate the judgment below." *Camreta* v. *Greene*, 563 U. S. 692, 712 (2011) (citing *United States* v. *Munsingwear*, 340 U. S. 36, 39 (1950)). Indeed, this was already "established practice" in 1950. *Munsingwear* cited a long string of cases going back to the nineteenth century. See *United States* v. *Munsingwear*, 340 U. S. 36, 39, and n. 2 (1950); *New Orleans Flour Inspectors* v. *Glover*, 161 U. S. 101, 103 (1896).

This Court "normally . . . vacate[s] the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.' " *Alvarez* v. *Smith*, 558 U. S. 87, 94 (2009) (quoting *Munsingwear*, 340 U. S., at 40). That is, vacatur is the rule, and letting the lower court decision stand is the exception. There is no ground for making an exception in this case.

There is much to be said for clearing the path in this case. Foreign affairs have long been recognized as a particularly sensitive area where courts must tread carefully. See *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112 (1948); see also *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 33-36 (2010). "Energy in the executive" was recognized as essential from the beginning. See The Federalist No. 70, p. 423 (C. Rossiter ed. 1961) (A. Hamilton). The sensitive separation of powers implications make a compelling case for decision by this Court. See Pet. for Cert. 33-34. Yet the merits cannot be decided by this Court because the case is moot. If the Government was entitled to free itself from the binding effect of an unreviewable decision of a lower court regarding price control formulas on underwear, see *Munsingwear*, 340 U. S., at 40-41, then it surely is entitled to do so regarding the authority of the President to take steps he deems necessary for protection of the nation and its people from terrorism.

Vacatur must be granted when mootness results from circumstances that are not attributable to either party ("happenstance") or are attributable to the unilateral action of the party who prevailed in the lower court. See *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 23 (1994). A nonprevailing party who agreed to settle the litigation, however, "voluntarily forfeited his legal remedy . . . thereby surrendering his claim to the equitable remedy of vacatur." *Id.*, at 25.

This emphasis on voluntariness bears a strong resemblance to the "voluntary cessation" doctrine described in Part II C, *supra*. Not surprisingly, *Alvarez* v. *Smith*, 558 U. S. 87 (2009), comes to a position very similar to the consensus of the court of appeals decisions on that doctrine. The voluntary action needed to forfeit the remedy of vacatur must have a causal link to the present case. In *U. S. Bancorp*, the bank settled the case in which the decision had been rendered, while in *Alvarez* the local officials were sued in federal court while forfeiture actions proceeded in state court. See *id.*, at 95-96. The "federal case played no significant role in the termination of the separate state-court proceedings" and return of the property. See *id.*, at 96-97. From this determination, *Alvarez* concluded, the "ordinary practice" should be followed, vacating the decision and " 'clear[ing] the path' " under *Munsingwear*.

Alvarez notes *Munsingwear* itself as an example of mootness being caused by an act of the nonprevailing party without forfeiting the vacatur remedy. See *id.*, at 96. Injunctive relief became moot when the company's products were decontrolled on November 12, 1946. See *Fleming* v. *Munsingwear, Inc.*, 162 F. 2d 125, 127 (CA8 1947). The obvious reason is that the war was over along with the inflationary pressures that justified price controls. The reason was "basically unrelated" to the litigation. *Alvarez*, 558 U. S., at 96.

This case is essentially the same as *Munsingwear* in this regard. The 90-day expiration of § 2(c) was predetermined for reasons that have nothing to do with this litigation. The section is an extraordinary measure that can and should expire when it is no longer needed, and its expiration was scheduled at the outset.

This case resembles the "happenstance" cases more than the "settlement" cases. See *Alvarez*, 558 U. S., at 94. The court of appeals decisions regarding § 2(c) must be vacated under *Munsingwear*. Where other issues remain "live," a *Munsingwear* vacatur may be limited to the moot issues. See *Arave* v. *Hoffman*, 552 U. S. 117, 118-119 (2008) (*per curiam*).

CONCLUSION

The judgment of the courts of appeals in these cases should be vacated as moot to the extent they address the validity of § 2(c) of Executive Order 13780.

August, 2017

Respectfully submitted,

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AND
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Nos. 16-1436, 16A1190 & 16A1191

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners-Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Applicants,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit and Applications for a Stay to the U.S. Courts of Appeals for Fourth and Ninth Circuits

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF IN THREE RELATED PROCEEDINGS AND BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS-APPLICANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 21.2(b) and 37.2(b), Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the federal petitioners and applicants in three related proceedings: the two stay applications in *Trump v. Int'l Refugee Assistance Project*, No. 16A1190, and *Trump v. Hawaii*, No. 16A1191, and the petition for a writ of *certiorari* in *Trump v. Int'l Refugee Assistance Project*, No. 16-1436. The parties have consented to this motion, and in the petition (No. 16-1436) have consented to the filing of the *amicus* brief with 10 days written notice.*

EFELDF is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has defended American sovereignty, a strong national defense, and adherence to the separation of powers under the U.S. Constitution, including judicial restraint under both Article III and separation-of-powers principles. For the foregoing reasons, EFELDF has direct and vital interests in the issues before this Court.

Movant EFELDF respectfully submits that a joint brief would aid the Court because the two rulings under review – *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. May 25, 2017) ("*IRAP*") and *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 29, 2017) ("*Hawaii*") – both enjoin the same executive order and involve common legal issues. Moreover, because both courts issued a nationwide injunction, lifting the injunction in *IRAP* would not redress the Government's injuries: *Hawaii* would continue to enjoin the challenged order.

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* In No. 16-1436, petitioners lodged their blanket consent to *amicus* briefs with the Clerk, and movant has lodged the respondents' written consent with the Clerk.

At its core, the accompanying *amicus* brief is a petition-stage *amicus* brief in support of petitioners filed with the consent of all parties, more than 10 days prior to the deadline. *See* S.Ct. Rule 37.2(a) (deadline is 30 days from the docketing of the petition, or July 1, 2017). Consistent with that context, the *amicus* brief has no more than 6,000 words. If that were the only filing at issue, EFELDF could proceed without a motion. *Id.*

Here, however, EFELDF respectfully submits that the same brief is also applicable in the two stay applications, which requires this motion. Although the Court has not consolidated the three proceedings, nothing precludes the Count's considering the same brief in the other two matters. Mara Silver in the Office of the Clerk advised the undersigned counsel that the Court would not need more than its usual 40 copies, notwithstanding that the same brief would be filed in three distinct proceedings.

Movant EFELDF respectfully submits that its proffered brief *amicus curiae* will bring several relevant matters to the Court's attention:

- Although the lower courts evaluated plaintiffs' claims under the Establishment Clause, the EFELDF brief demonstrates that the claims arise under the Free Exercise Clause, EFELDF Br. at

15-17, which has implications for plaintiffs' standing. *See id.* at 7.

- Jurisdictionally under sovereign immunity, the EFELDF brief analyzes not only the doctrine of consular nonreviewability, *id.* at 8-10, but also the extent to which the statute leaves a reviewing court with no law to apply and thus commits the challenged action to agency discretion. *See id.* at 10-11.
- The EFELDF brief analyzes the inapplicability of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA"), which would affect the standard of review if it applied. *See* EFELDF Br. at 14-15.
- The EFELDF discusses *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84-86 (1961), in which this Court acknowledged that courts cannot hold initial proposals against the government when the proposals are amended subsequently to address constitutional concerns. *See* EFELDF Br. at 21-22.
- The EFELDF explains why the President's extra-record statements do not evince impermissible discrimination against Muslims. *See id.* at 23-24.
- The EFELDF brief demonstrates why courts should not countenance indirect class actions or facial challenges via nationwide injunctions in as-applied challenges with atypical, cherry-picked facts, thereby sidestepping procedural protections that defendants have in actual class actions and facial challenges, such as dismissing facial challenges under *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). *See* EFELDF Br. at 25-26.

These issues all are relevant to whether this Court grants the writ and the stay applications and to how the Court resolves them.

For the above reasons, EFELDF respectfully requests that the Court grant this motion for leave to file the accompanying *amicus* brief in each of these three matters.

Dated: June 12, 2017 Respectfully submitted,

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of foreign nationals from six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, subject to case-by-case waivers. The district court issued, and the court of appeals upheld, a preliminary injunction barring enforcement of Section 2(c) against any person worldwide, because both courts concluded that the suspension violates the Establishment Clause.

The questions presented in No. 16-1436 are:

1. Whether respondents' challenge to the temporary suspension of entry of aliens abroad is justiciable.
2. Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.
3. Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad.

These questions also predominate in the related stay applications – Nos. 16A1190 & 16A1191 – in addition to the stay factors.

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Nos. 16-1436, 16A1190 & 16A1191

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners-Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
et al.,
Respondents.

DONALD J. TRUMP, *et al.*,
Applicants,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit and Applications for a Stay to the U.S. Courts of Appeals for Fourth and Ninth Circuits

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri.[1] For more than thirty-five years, EFELDF has defended American sovereignty, a strong national defense, and adherence to the separation of powers under the U.S. Constitution. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

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[1] *Amicus* files this brief with the accompanying motion for leave to file and with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the respondents' written consent with the Clerk, and petitioners have lodged their blanket consent to all

STATEMENT OF THE CASE

These related matters concern the lawfulness of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (2017) (the "Order")[2]. Section 2 of the Order paused and directed study of immigration from six state, sponsors or shelters of terrorism; Section 6 of the Order similarly paused and directed study of refugee admissions and caps the number of refugees for 2017. Both sections implement authority delegated to the President by the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). *See* 8 U.S.C. §§1182(f), 1157(a)(2)-(3). The plaintiffs are the State of Hawaii, various individuals, and various organizations who claim that the Order violates due process and discriminates against Islam because the six covered nations all are Muslim-majority countries.

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amicus briefs. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

[2] The Order is reprinted at Pet. App. 289a-312a. The Order followed on – and superseded – an earlier executive order, 82 Fed. Reg. 8977 (2017), which was also preliminarily enjoined. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

In this Court, the federal defendants filed two stay application and petitioned for a writ of *certiorari*. In No. 16-1436 and No. 16A1190, the Government seeks review and a stay of the preliminary injunction upheld by the U.S. Court of Appeals for the Fourth Circuit in *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. May 25, 2017) ("*IRAP*"). In No. 16A1191, the Government seeks to stay the preliminary injunction granted by the U.S. District Court for the District of Hawaii in *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 29, 2017) ("*Hawaii*"). Although the Order is facially neutral with respect to religion, *IRAP* and *Hawaii* perceive violations of the Establishment Clause from the animus allegedly demonstrated in extra-record statements, primarily from the election campaign.

SUMMARY OF ARGUMENT

At the outset, no party has standing to press the alleged religious-freedom issues found below because the Order does not affect *the plaintiffs'* religious rights and aliens abroad have no constitutional rights here (Sections I.B.2-I.B.3); similarly, plaintiffs would lack third-party standing to assert aliens' rights, if aliens abroad had any rights (Section I.B.1). The plaintiffs' claim that the Order stigmatizes them as Muslims fails because the Order does not target these plaintiffs and subjective, third-party stigma is insufficiently concrete for Article III (Section I.B.4); the plaintiffs' other injuries are insufficiently concrete or speculative (Section I.B.5). Similarly, with respect to jurisdiction, the Order falls under the consular nonreviewability doctrine (Section I.C) and outside the waiver of sovereign immunity in the

Administrative Procedure Act ("APA") as committed to agency discretion by law (Section I.D).

On the immigration merits, the Order implements plenary authority that INA delegates to the President with no law for a reviewing court to apply in checking the President's power (Section II.A). On religion, the Order is facially neutral, lacking the selective persecution necessary for facially neutral laws to violate the Free Exercise Clause (Sections II.B.2, II.B.3). Significantly, because the Order does not disparately regulate religiosity or any religion (or atheism) but merely allegedly persecutes Muslims, the Establishment Clause is not applicable (Section II.B.2). The Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA") does not apply because an alien abroad is not a protected RFRA "person" and plaintiffs here suffer no RFRA injuries (Section II.B.1). Finally, the plaintiffs have not made the strong showing needed to go beyond the administrative record to demonstrate impropriety (Section II.C.1) and – indeed – would exceed this Court's powers to fault the government for allegedly unconstitutional policy proposals (from the election campaign, no less) that both the campaign and subsequently the President amended to address constitutional concerns raised against the initial proposal (Section II.C.2), as recognized in *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84-86 (1961).

Even if it finds jurisdiction and an entitlement to a preliminary injunction, this Court should narrow the injunctions' overbroad scope. For a court to issue a nationwide injunction on slender and atypical bases for standing violates not only Article III (Pet. at 31) but also the limitations on facial challenges and class action put in place to protect defendants: put simply, rather than a nationwide injunction based on cherry-picked and atypical facts, the plaintiffs deserved dismissal for failing to show the Order facially invalid under all circumstances (Section III.B). In any event, this type of overbroad injunction effectively denies the Court the opportunity for multiple circuits to address an issue and should thus be rejected (Section III.A).

ARGUMENT

I. THIS COURT HAS JURISDICTION, BUT THE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

Although this Court has jurisdiction over these matters, the plaintiffs lack jurisdiction to press their claims:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[. ...] And if the record discloses that the lower court was without jurisdiction[, ... and] we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 95 (1998) (quotations and citations omitted). Because plaintiffs' claims are not justiciable, this Court must remand these cases with orders to dismiss them.

A. These actions are not moot.

Although the travel restrictions enjoined in *IRAP* are time-limited, the Executive functions enjoined in *Hawaii* are not. *Compare, e.g.*, Order §2(c) *with id.* §2(e). As such, these cases would still require this Court's intervention, even if the time-limited provisions were not tolled during the pendency of the injunctions. The issues here are not moot.

B. The plaintiffs lack standing.

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear,* 520 U.S. 154, 162 (1997) (interior quotations and citations omitted).

Plaintiffs must – and cannot – establish standing for each form of relief they seek: "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). The following five subsections emphasis how plaintiffs have failed to establish standing.[3]

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[3] Two related concepts also bear mention. First, the Order allows for case-by-case waivers for instances of undue hardship, and entries in the national interest and not posing national-security threats. Pet. App.

1. Plaintiffs lack standing to raise the rights of aliens abroad.

Even if aliens abroad had constitutional rights, the plaintiffs here would lack third-party standing to assert those rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). While plaintiffs may assert their own rights, if any, they must do so under the standards applicable to those rights, without any heightened scrutiny applicable to the third parties' rights. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977).

2. Plaintiffs do not – themselves – suffer cognizable religious injury.

To the extent that they seek to assert free-exercise claims against the Order, plaintiffs must show how the Order coerces *their* religion, not the rights of third parties. *Harris v. McRae*, 448 U.S. 297, 320 (1980). As in *McRae*, however, the challenged action has no effect whatsoever on plaintiffs' religious exercise. *Id.* By the same token, membership groups cannot press these claims. *Id.* at 321 (*citing Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963)). Consequently, plaintiffs cannot assert religious rights of their own.

301a-303a. The Government suggests that this renders this action unripe because entry may not be denied. Appl. No. 16A1191, at 22. Similarly, injuries can satisfy Article III's immediacy test but not the higher bar of irreparable harm. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149-50, 162 (2010). Either issue would independently justify reversal.

3. Aliens abroad lack cognizable rights under the Constitution.

The only people whom the Order affects directly – aliens abroad – simply do not have rights under our Constitution relevant to this litigation. *Boumediene v. Bush*, 553 U.S. 723, 755-62 (2008). Particularly, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Even an order banning Muslims on the basis of religion would not violate constitutional rights of would-be immigrants. Without a right, aliens abroad cannot suffer cognizable Article III injury.

4. Plaintiffs' claimed stigmatic injury is insufficiently concrete.

The claimed stigma injuries from the Order are insufficient because, as the petition explains, "only … 'those … personally denied equal treatment' by the challenged discriminatory conduct" can assert stigma injuries. Pet. at 17 (*quoting Allen v. Wright*, 468 U.S. 737, 755 (1984)). With religious rights, a contrary holding effectively would eliminate the restrictions that this Court has placed on such litigation under *Abington Township*, *McRae*, and their progeny. If subjectively hurt feelings could satisfy Article III, anyone could sue about anything.

5. Plaintiffs' economic and other non-religious injuries are speculative.

The plaintiffs' other asserted injuries also fail. For example, Hawaii claims economic loss from tourists and lost student and faculty interactions with state universities. Without concrete particulars, this type of future injury is insufficient: "'some day' intentions –

without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Conversely, where sufficiently imminent injury is involved, the injury could be ameliorated under the Order's hardship provisions.

C. The "consular nonreviewability" doctrine precludes judicial review.

In a doctrine related to aliens abroad lacking any cognizable right to enter the United States, courts also have found consular decisions to exclude aliens not open to judicial review. This doctrine of consular nonreviewability also precludes plaintiffs' suits to the extent that the suits rely on the rights or injuries of aliens abroad.

By way of analogy, for most of our history, aliens detained *at our border* could challenge the detention only by *habeas corpus*, *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892), although *Brownell v. We Shung*, 352 U.S. 180, 184-85 (1956), *abrogated by* PUB. L. NO. 87-301, §5(b), 75 Stat. 650, 653 (1961) ("[n]otwithstanding the provisions of- any other law, any alien against whom a final order of exclusion has been made ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise"[4]), allowed such aliens also to proceed via an APA suit. Even there, however, this Court expressly did "not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. Thus, even there, aliens abroad had no right to litigate the bases for their admission into the United States.

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[4] The post-1996 version of this provision is codified at 8 U.S.C. §1252(g).

Other than that inapposite short window – which Congress slammed shut in 1961 – the federal courts have uniformly held consular immigration decisions regarding aliens abroad immune from judicial review. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999) (collecting cases). As this Court recently reiterated, such history provides "convincing support for the conclusion that Congress accepted and ratified the unanimous" judicial interpretations of a statute. *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). In APA parlance, the "agency action [here] is committed to agency discretion by law" under 5. U.S.C. §701(a)(2), and thus falls under one of the "limitations on judicial review" recognized in 5 U.S.C. §702(1), notwithstanding APA's otherwise generous judicial review.[5]

D. Sovereign immunity bars the *Hawaii* injunction.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).[6] Moreover, such waivers are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). In the 1976 amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has restrictions, 5. U.S.C. §§701(a)(2), 702(1); Section I.C, *supra* (discussing doctrine of consular nonreviewability), which preclude the *Hawaii* relief.

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[5] The lack of APA-INA review would not necessarily preclude *constitutional* review, *Webster v. Doe,* 486 U.S. 592, 603-04 (1988); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893), but plaintiffs here cannot establish any constitutional violations.

Specifically, review is limited to agency action either made reviewable by statute or final but not otherwise reviewable. 5. U.S.C. §704; *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980). By enjoining not only §2(c)'s visa suspension but also intra-Executive deliberations, analysis, and reporting under §2(a)-(b), (d)-(g), the *Hawaii* injunction improperly and without jurisdiction enjoined agency action not reviewable by statute and not final. Indeed, the *Hawaii* court also enjoined the President himself, where the waiver of sovereign immunity does not extend to the President. *See* Appl. No. 16A1191, at 22. By not immediately staying that overbroad injunction in response to the Government's stay application, the Ninth Circuit has sanctioned a lower court's egregious departure from the accepted course of judicial proceedings (namely, the separation of powers), which should compel this Court to exercise its supervisory power over the lower federal courts. *See* S.Ct. Rule 10(a).

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[6] The officer-suit exception in *Ex parte Young*, 209 U.S. 123 (1908), offers a limited exception to sovereign immunity, but only with *ongoing violations* of federal law. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985). Here, there is no ongoing violation of law.

II. THE EXECUTIVE ORDER IS ENTIRELY LAWFUL.

To the extent that jurisdiction exists for plaintiffs' claims, the claims lack merit under both INA and the Constitution. Accordingly, this Court should grant review and summarily vacate the injunctions on the merits.

A. Plaintiffs lack an INA cause of action, and the Order is lawful under INA.

The Constitution gives Congress, and thus its enforcement and rulemaking delegates in the Executive, plenary authority over immigration. U.S. CONST. art. I, §8, cl. 4; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

INA delegates exceedingly broad power to the President to regulate immigration in this context:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all

> aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. §1182(f). In doing so, Congress neither gave plaintiffs nor the judiciary a basis for second-guessing (or even reviewing) the President's actions.

At the outset, as indicated, aliens abroad have "no constitutional rights" regarding admission into the United States. *Plasencia*, 459 U.S. at 32. Moreover and more generally under INA, "[j]udicial power over immigration and naturalization is extremely limited," *Miller v. Albright*, 523 U.S. 420, 455 (1998) (Scalia, J., concurring in judgment), because of the relative interests and powers of the three branches:

> "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"

Id. (*quoting Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Accordingly, *amicus* EFELDF respectfully submits that the lower courts' reliance on Justice Kennedy's concurrence – with Justice Alito – in *Kerry v. Din*, 135 S.Ct. 2128 (2015), is misplaced.

The concurrence posits that the wife of a denied applicant could "look behind" exclusion of an alien abroad, notwithstanding *Mandel*, upon making "an affirmative showing of bad faith on the part of the consular officer" who denied the alien's visa. *Id.* at 2141 (Kennedy, J., concurring). In making that claim, however, the concurrence expressly distinguished the statute at is issue in *Din* from the one in *Mandel*:

> [U]nlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, §1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa.

Id. at 2140-41. To say one consular officer of hundreds may be called upon for more specificity in that context does not authorize a reviewing court to compel *the President* to do so under §1182(f).

The consular officer is not entitled to policy-based deference, *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001), and must make a factual finding. 8 U.S.C. §1182(a)(3)(B). By contrast, Congress did not require the same specificity from the President, 8 U.S.C. §1182(f), and a reviewing court would have "no law to apply" in reviewing the President's action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In the President's case, judicial review is not available. 5 U.S.C. §701(a)(2).

B. The Order does not violate the religious freedoms of anyone.

The lower courts enjoined the Order to halt the purportedly ongoing violation of religious rights. As explained in this section, no such rights have been violated.

1. Plaintiffs lack a RFRA cause of action.

Significantly, RFRA does not protect the religious interests of aliens abroad, and the plaintiffs here do not suffer RFRA injuries.[7] RFRA applies to "persons," and the scope of that term is not defined, but can be inferred from the pre-RFRA usage that Congress intended to restore. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2773-74 (2014); *cf. Pfizer, Inc. v. Gov't of India,* 434 U.S. 308, 315-16, 318-19 (1978). Our courts have never entertained the free-exercise rights of aliens abroad, and the plaintiffs are not burdened in the exercise of *the plaintiffs'* religion. *See* Section I.B.2, *supra*. Accordingly, RFRA does not apply.

2. Plaintiffs' religious claims fall under the Free-Exercise Clause, not the Establishment Clause.

Our Constitution both prohibits establishment of religion and protects the free exercise of religion. U.S. CONST. amend. I, cl. 1-2. "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *see generally* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311 (2000). Although the lower courts analyzed these cases as Establishment-Clause cases, the gravamen of plaintiffs' claims is that the Order singles Muslims out for ill treatment, which – if true – would violate the Free Exercise Clause.

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[7] RFRA concerns laws that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §2000bb-1(a), which Congress enacted to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner,* 374 U.S. 398 (1963), in response to *Employment Division v. Smith,* 494 U.S. 872, 890 (1990) (allowing as-applied infringement of religious freedom by facially neutral government actions). *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424 (2006).

Even as plaintiffs misread it, the Order does not "demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)" under the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989). Instead, they see the Order as pitting Muslims against every other conceivable form of religiosity or non-religiosity (*e.g.*, atheists, Buddhists, Christians, Druids, Hindus, Jews, pagans). That would constitute persecution, not establishment:

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs... Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause. These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty*, for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it

> imposed special disabilities on the basis of religious status. On the same principle, in *Fowler v. Rhode Island*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993) (internal quotations, citations, and Court's alterations omitted). Of course, a secondary "purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel*, 370 U.S. at 432. But the Order advances neither atheism nor any one religion, even if it did punish Islam.

While the Establishment Clause applies to both "the advancement or inhibition of religion," *Sch. Dist. of Abington Twp.*, 374 U.S. at 222, the inhibition prong has always required some form of affirmative disparate regulation. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents").[8] The Order is religiously neutral, but even as plaintiffs misread it, the Order is simply an attack on Muslims, with no preference for any other religion or atheism. This

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[8] In more typical Establishment-Clause cases, the government *advances* religion, such as school prayers. *See, e.g.*, *Engel*, 370 U.S. at 430.

Court should not extend the Establishment Clause to cover subjectively perceived targeting of one religion, with no governmental attempt to regulate religion.

3. The Order does not violate religious freedom.

Under *Smith*, 494 U.S. at 879 (interior quotation omitted), "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Because the Order is such as "valid and neutral law," plaintiffs fail to state a claim under the religious clauses, *unless* the Court not only allows the entry of information outside the Order's administrative record but also credits the information as establishing an impermissible motive. Section II.C, *infra*, rebuts the non-record information, and this section demonstrates the appropriateness of the Order under the religious clauses.

On its face, the Order is neutral with respect to religion, applying not only to the Muslim majorities in the affected countries but also to religious minorities who seek to emigrate. Similarly, the Order does not affect the vast majority of Muslims worldwide, further belying the suggestion of disparate treatment *because of religion*. While the Order disparately impacts Muslims, that correlation is not surprising, given the current historical correlation between Islam and both failed states and sponsors of terrorism.

A famous statistical study showed that birthrates in seventeen countries correlate heavily with those countries' stork populations. Robert Matthews, *Storks Deliver Babies ($\rho = 0.008$)*, 22:2 TEACHING STATISTICS: AN INT'L JOURNAL FOR TEACHERS, at 36 (2000). The statistical inference that storks deliver babies clearly "mistakes correlation for causation." *Woodford v. Ngo*, 548 U.S. 81, 94 n.4 (2006); Matthews, *Storks Deliver Babies*, 22:2 TEACHING STATISTICS, at 36-37. The same type of mistake underlies the lower court's reasoning from disparate impacts to intentional discrimination. Mere correlation *with religion* is not discrimination *because of religion*. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *Larson*, 456 U.S. at 246 n.23; *McGowan v. Maryland*, 366 U.S. 420, 564 (1961). On its face, at least, the Order is entirely neutral with respect to religion.

Even religion is not sacrosanct under the Constitution. Thus, while "for temporal purposes, murder is illegal, ... the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation." *McGowan*, 366 U.S. at 442. Sadly, recent history and the record here suggest that significant segments of worldwide Islam support harming Americans. Pet. App. 10a n.5. While most Muslims are not murderous jihadis, significant numbers are, and our enemies actively use immigration to gain access. Pet. App. 293a-297a. Under the circumstances, pausing immigration from countries associated with terrorism is not irrational: "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). In any event, aliens abroad have no religious rights here, Section I.B.3, *supra*, so the Court need not decide whether the Order violates religious-freedom rights.

C. Non-record statements – especially ones predating the President's oath of office – do not control here.

Recognizing that no one protested when the prior administration acted against the same countries, *see* Pet. at 4 & n.2; *see also* Kate M. Manuel, Acting Section Research Manager. Congressional Review Service, *Executive Authority to Exclude Aliens: In Brief*, at 6-10 (2017) (listing prior presidents' exclusions), plaintiffs seek to find discriminatory intent by the current administration officials based on non-record statements, primarily ones predating the defendants' oaths of office. As explained, however, the extra-record statements are simply not relevant here.

To some extent, courts' willingness to look behind executive or legislative action depends on the context. With regard to immigration decisions regarding aliens abroad and the First Amendment, it is enough that Congress or its delegates in the Executive Branch provide a "facially legitimate and bona fide" basis for exclusion, *Mandel*, 408 U.S. at 769, which equates to rational-basis review. Pet. App. 40a n.14 (collecting cases); *accord Fiallo*, 430 U.S. at 794. Under that deferential review, legislative choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Deference is particularly appropriate here, given the "extremely limited" review available in this context. *See* Section II.A, *supra*. This Court should follow *Mandel* and *Fiallo* by declining to second-guess the Executive on issues of national security.

By contrast, with regard to the religious rights of those already within the U.S., the inquiry can be more searching: "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi Babalu*, 508 U.S. at 547. Because no one in this litigation has standing to assert religious rights, *see* Sections I.B.1-I.B.3, *supra*, the Court need not consider this line of inquiry. To the extent that the Court pursues this line of inquiry, the plaintiffs cannot make the selective-enforcement showing that the *Lukumi Babalu* plaintiffs made, see Section II.B.3, *supra*; Sections II.C.2-II.C.3, *infra*, so the plaintiffs cannot prevail.

1. **The plaintiffs have not made an *Overton Park* showing for going beyond the administrative record.**

Courts typically base judicial review of executive action on the administrative record before the agency when it acted, *Overton Park*, 401 U.S. at 420. Assuming *arguendo* it were otherwise permissible and relevant to go outside the record to review statements during the election campaign, on Twitter, and the like, the plaintiffs would need "a strong showing of bad faith or improper behavior" before expanding review to include materials in addition to the governmental findings that accompanied the Order. *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]"). "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and are "therefore 'usually to be avoided.'" *Arlington Heights*, 429 U.S. at 268 n.18 (*quoting Overton Park*, 401 U.S. at 420). As explained below, the plaintiffs have not produced anything near the "clearest proof" or even made a "strong showing" of anything improper.

2. Statements about prior policy iterations are irrelevant.

The lower courts erred by reaching back into pre-election campaign statements, including original statements that the candidate subsequently revised to accommodate constitutional concerns. The courts' error lies not only in practical import and equity but also in the institutional competences of the respective branches of government.

As a matter of simple fairness and equity, a court should not hold an officer to initial plans when that officer changes plans based on input from stakeholder groups and affected agencies. Particularly for political outsiders, learning on the job is necessary.

More importantly, however, the lower courts' approach is outside the judicial power. Specifically, "treat[ing an amended] Act as merely a ruse by Congress to evade constitutional safeguards" "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Subversive Activities Control Bd.*, 367 U.S. at 85. There, like here, when presented with the argument that regulating one way would violate the Constitution, the Government changed the focus of the legislation to achieve a desired end lawfully. The Court did not inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly here, the Court must evaluate what the Government did, once the new administration was fully installed, not what they thought about doing before they took office.

3. The President's recent tweets in defense of the first order and against "political correctness" are neither relevant nor anti-Muslim.

As this Court has said of Twitter, "[p]rejudice can come through a whisper or a byte." *Dietz v. Bouldin*, 136 S.Ct. 1885, 1895 (2016). After the Government's petition and applications were filed, the President went online to lament courts as "slow and political," to characterize the Order as a "watered down" and "politically correct version" of the first order, and to identify the need for a "much tougher version." Glenn Thrush, *National Desk: Online Defiance Starts Early at the Oval Office*, N.Y. TIMES, June 7, 2017, at A18. These tweets are irrelevant because they do not constitute anti-Muslim prejudice and cannot elevate review of the second Order into review of the superseded first order. In effect, the tweets are inadmissible because they are irrelevant.

At the outset, however much the President or the plaintiffs want this Court to evaluate the first order, this Court lacks jurisdiction for an advisory opinion on that topic. Federal courts cannot render advisory opinions because their Article III jurisdiction extends only to cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). If the President wants to do another order, courts will have to wait for that eventuality; whatever was in the first order is now moot.

Similarly, as explained in Sections II.B.3 (no anti-Muslim prejudice) and II.C.2 (prior versions do not impugn amended policies), *supra*, these tweets do not express any unconstitutional or otherwise improper motive. If the tweets portend any future action, courts will have to assess the legality of those actions when that future action occurs.

On the question of political correctness, however, the President's tweet did not reflect prejudice against peaceful and lawful Muslims. Instead, the President campaigned on frustration with political correctness, including official classifying Islamic terrorist action with euphemisms such as "workplace violence." Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 653 (2013). Calling Islamic terrorism by its name and trying to understand its roots should not offend anyone – Muslim or not – who opposes terrorism.

III. THE NATIONWIDE INJUNCTIONS WOULD BE OVERBROAD, EVEN ASSUMING THAT ANY ONE PLAINTIFF HAD STANDING AND A VALID CLAIM.

For practical, jurisprudential, and jurisdictional reasons, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v.*

Yamasaki, 442 U.S. 682, 702 (1979). Thus, even if this Court finds that some aspect of the injunction should remain in place, the Court nonetheless should narrow the injunction.

A. Overbroad nationwide injunctions deprive this Court to the percolating effect of multiple circuits reaching an issue.

Nationwide injunctions effectively preclude other circuits from ruling on the constitutionality of the enjoined agency action. In addition to conflicting with the principle that federal appellate decisions are binding only within the court's circuit, *see, e.g.*, *U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994), nationwide injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives the Court of the benefit of decisions from several courts of appeals. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to trim the nationwide injunctions.

B. Providing facial relief in as-applied challenges frustrates this Court's precedents on facial challenges and can exceed lower courts' Article III jurisdiction.

Overbroad injunctions can convert an as-applied challenge into a facial challenge or class action, without the procedural safeguards that protect defendants. Where relief would reach beyond the particular parties' circumstances, the party seeking that relief "must ... satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561

U.S. 186, 194 (2010). Indeed, where "claims are better read as facial objections" to a law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Of course, a "facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.*, prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011). Especially where the Order allowed case-by-case waivers for instances of undue hardship, this Court should not allow hijacking national policy based on atypical, cherry-picked facts.

CONCLUSION

For the foregoing reasons and those argued by the Government, this Court should reverse the Fourth Circuit's decision and enter the requested stays in both cases.

Dated: June 12, 2017

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RECORD
AND
BRIEFS

JUN 1 2 2017

Nos. 16-1436, 16A1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

DONALD J. TRUMP, ET AL.,

Applicants,

v.

STATE OF HAWAII, ET AL.

Applications for a Stay Pending Disposition of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and an Appeal to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN OPPOSITION TO THE APPLICATIONS FOR A STAY

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FORMER NATIONAL SECURITY OFFICIALS IN OPPOSITION TO THE APPLICATIONS FOR A STAY

The applications filed by Applicants Donald J. Trump, et al., for a stay pending disposition of: (i) a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit (in Trump v. International Refugee Assistance Project, No. 16-1436) and (ii) an appeal to the United States Court of Appeals for the United States Court of Appeals for the Ninth Circuit (in Trump v. State of Hawaii, No. 16A1191) raises issues of critical importance. Were this Court to grant the application for a stay, the March 6, 2017, Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Order") at issue in the dispute would go into immediate effect while the Court considered the petition. Because that Order prohibits the entry into the United States of nationals from six countries for 90 days and bans refugee admissions for 120 days, allowing the Order to take effect would result in immediate chaos in the nation's airports and worldwide, akin to that seen on January 27 following the issuance of a nearly identical executive order. But just as importantly, permitting the Order to go into effect would cause lasting damage to U.S. national security and foreign policy interests.

Amici, a group of former national security officials identified in the Appendix to the attached brief, are in a unique position to provide guidance to the Court regarding the consequences to U.S. security and foreign policy that would result from granting the petitioners' application for a stay. As a result, amici can explain to the Court that denial of the petitioners' application for a stay would not cause any irreparable harm to the national security or foreign policy of the United States. Finally, amici's substantial experience with the procedures the Executive Branch has long used to promulgate new security policies based on credible intelligence allows amici to demonstrate that the government's inaction over the last few months while the Order has been stayed fatally undermines the petitioners' present claims of urgency. For these reasons, amici can provide useful information to the Court regarding the petitioners' requested relief.

On June 5, 2017, amici requested and received consent to file the proposed amicus brief from counsel for all parties. Due to the expedited nature of these proceedings, amici requested the consent less than 10 days prior to the due date of respondents' papers as set out in Rule 37.2(a). Also, Supreme Court Rule 37.2 does not expressly address the procedure by which an amicus may submit a brief regarding an application for a stay. Accordingly, and on the advice of the Clerk's Office, amici respectfully moves this Court for leave to file the accompany brief in support of respondents' opposition to petitioners' application for a stay.

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STATEMENT OF INTEREST[1]

Amici curiae are former national security, foreign policy, intelligence, and other public officials who have worked on security matters at the most senior levels of the United States government.[2]

Amici have collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. A number of amici have worked at senior levels in the administrations of Presidents from both major political parties. Amici have held the highest security clearances. A significant number were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the original January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("January 27 Order"), and one was current as recently as the start of March 2017, shortly before the issuance of the identically titled March 6, 2017 Executive Order ("March 6 Order").

Amici agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. Amici nevertheless do not believe that the risk merits the blanket and counterproductive ban on entry established by the revised Order at issue in this case. They submit that the costs of any stay by this Court that would put that ban into immediate effect would far exceed any conceivable benefit.

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[1] No party or counsel for a party to this appeal authored this brief in whole or in part, or contributed monetarily to the preparation or submission of any portion of this brief. On June 5, 2017, amici requested and received consent from the parties to file this brief. Due to the expedited nature of these proceedings, amici requested their consent fewer than 10 days prior to the due date of the responsive papers. Amici have submitted a motion for leave to file this brief.

[2] A complete list of signatories may be found in the Appendix.

SUMMARY OF ARGUMENT

Amici agree that to keep our country safe from terrorist threats, the U.S. government must gather all credible evidence about growing threat streams—including through the best available intelligence—to thwart those threats before they ripen. Through the years, national security-based immigration restrictions have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency legal and policy review. Neither the March 6 Order at issue in this application for a stay nor its predecessor rest on such tailored grounds, but rather, (1) are generalized entry bans, (2) are not supported by any new intelligence that the Government has cited or of which amici are aware, and (3) were not vetted through the kind of careful interagency legal and policy review that would compel judicial deference.

The Government is unable to point to any national security or foreign policy harm that would result from the denial of a stay. In reality, a stay allowing the Order to go into effect would cause serious harm to those interests. A stay would endanger U.S. troops in the field, by barring many foreigners who have assisted our troops at great risk to their own lives. A stay would disrupt essential counterterrorism, intelligence, and other security partnerships with countries that are critical to our country's efforts to address the threat posed by terrorist groups such as the so-called "Islamic State" ("IS" or Daesh).

Letting the Order take effect, even temporarily, would feed IS's propaganda narrative, and hinder law enforcement efforts to fight homegrown terrorism by alienating Muslim-American communities. Over the longer term, the Order would cause devastating humanitarian impact and economic damage to the United States, including in ways that affect strategic economic sectors such as defense, technology and medicine. Finally, a stay at this point would lead to confusion and disruption that would itself undermine our national security interests.

Rebranding the proposal first advertised as a "Muslim Ban", as "Protecting the Nation from Foreign Terrorist Entry into the United States", did not convert the overbroad travel ban into an effective vetting mechanism against genuine terrorist threats. Nor did that rebranding disguise the January 27 Order's discriminatory origins or make it a necessary or effective national security tool. The few changes that were introduced by the March 6 Order at issue in this application did not cure this discriminatory intent, or suddenly provide a legitimate foreign policy or national security basis for this Order.

ARGUMENT

An applicant for a stay pending the disposition of a petition for a writ of certiorari "bears a heavy burden" of showing that there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm will result from the denial of a stay.'"[3]

In opposing a stay, amici confine their submission to three points peculiarly within their collective expertise.[4] First, the Government has manifestly failed to establish any irreparable harm to foreign or national security justifying a stay. Second, by allowing the March 6 Order temporarily to take effect, a stay would in fact cause serious damage to U.S. national security and foreign policy interests. Third, the defective and aberrant process that led to the Order buttresses the Fourth Circuit's finding that the Order was both overbroad and discriminatory.

I. No National Security or Foreign Policy Harm Will Result from the Denial of a Stay

The Government offers no evidence of any national security or foreign policy harm that would result from the denial of a stay. Instead, in claiming "irreparable harm," the Government gestures to abstract concepts of executive prerogative and generalized injury that results "whenever elected representatives . . . are enjoined in their official conduct."[5]

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[3] *Maryland v. King*, 133 S. Ct. 1, 2 (2012); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010).

[4] In opposing a stay, amici affirm their conviction that no grant of certiorari is warranted at this time, and that there is no "fair probability" that this Court will reverse the decision below. Amici believe that the decisions of the Fourth Circuit and the District of Hawaii are more faithful to America's Constitution, laws, and values than the Administration's overbroad and counterproductive travel ban. A number of cases challenging the Order are winding their way through the judicial system, but there is presently no division among the Courts of Appeal. Because there is no split in the circuits, and because others will detail why the Fourth Circuit's ruling is fundamentally correct, amici focus here on why there is no national security or foreign policy imperative to stay the Fourth Circuit decision at this time.

Amici know of no national security or foreign policy imperative for staying the injunctions of the Fourth Circuit and the District of Hawaii against the March 6 Order. A number of amici were current on active intelligence concerning all credible terrorist threat streams directed against the United States as recently as January 20, 2017, and one was current as recently as the start of March 2017. They know of no specific threat that justified either the January 27 Order suspending travel from a number of listed countries ("the country ban") or refugee admissions ("the refugee ban"), or any intervening security threat after that date that required the similar bans in the slightly revised March 6 Order.

Amici submit that the country and refugee bans bear no rational relation to the President's stated aim of protecting the nation from foreign terrorism. Indeed, the Government's own conduct since January 27 casts doubt on its claim that a sudden urgency now warrants a judicial stay.

A. The Country Ban. The current Order targets six countries whose nationals have committed no lethal terrorist attacks on U.S. soil in the last forty years.[6] Although the administration initially invoked the September 11, 2001 attacks as a rationale for the ban,[7] none of the September 11 hijackers were citizens of the six targeted countries. In fact, the overwhelming majority of individuals who were charged with—or who died in the course of committing—terrorist-related crimes inside the United States after September 11 have been U.S. citizens or legal permanent residents.[8]

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[5] App. for Stay in *Trump v. International Refugee Assistance Project*, No. 16-1436, at 34 (S. Ct.)

[6] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, CATO at Liberty, Jan. 25, 2017.

Against this history, the Government offers no persuasive evidence that the threat from the banned areas has so increased recently as to warrant the renewed country-based ban in the March 6 Order, or an interim judicial stay of the rulings below. The Government pointed to no such evidence at all in the January 27 Order. In the March 6 Order, the Government cited general excerpts from the 2015 Department of State Country Reports on Terrorism describing how these nations are home to violent extremist groups, and do not cooperate in U.S. counterterrorism efforts.[9] On examination, those Country Reports only confirm the gross imprecision of the Order's country bans. The reports show that over 55 percent of 2015 terrorist attacks took place in five countries, *none of which are subject to the travel ban.*[10]

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[7] Exec. Order: Protecting the Nation From Foreign Terrorist Entry Into the United States, Jan. 27, 2017, §1 [hereinafter "Jan. 27 Order"].

[8] *See* Peter Bergen et al., *Terrorism in America After 9/11*, New America Foundation, www.newamerica.org/in-depth/terrorism-in-america/; George Washington University Program on Extremism, *ISIS in America: From Retweets to Raqqa* 6 (Dec. 2015), https://cchs.gwu.edu/isis-in-america; Nora Ellingsten, *It's Not Foreigners Who Are Plotting Here: What the Data Really Show*, Lawfare (Feb. 7, 2017); *see also* Felicia Schwartz & Ben Kesling, *Countries Under U.S. Entry Ban Aren't Main Sources of Terror Attacks*, Wall St. J. (Jan. 29, 2017); Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016) [hereinafter "Nowrasteh Sept. 2016"]. The March 6 Order asserts that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States." Exec. Order Protecting The Nation From Foreign Terrorist Entry Into The United States §1(h) (March 6, 2017) [hereinafter "March 6 Order"]. The Order does not cite any support for this statement, but a similar set of data has been widely criticized for its definition of terrorism-related offenses, among other issues. *See* Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here"*, Lawfare (Apr. 11, 2017); Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2007); Alex Nowrasteh, *42 Percent of 'Terrorism-Related' Convictions Aren't for Terrorism*, Cato Institute, Mar. 6, 2017.

The only other evidence cited by the March 6 Order to support a sweeping ban on travel from the six listed countries were two anecdotal cases in which refugees from those countries were later sentenced for terrorism-related crimes.[11] But the current refugee procedures had already been fully reviewed and revised to address the issues raised by one of those cases, which involved no acts on U.S. soil, only terror activities undertaken *before* the individual came to the United States. The other individual never executed on his plans, and was in any event admitted as a baby and radicalized in America, so any suspension of travel to improve the vetting process would not have affected his entry. Even now, months after the supposed emergency conditions necessitating issuance of the Executive Orders, the government can point to no genuine security threat, or any flaw in our existing security screening of travelers that would warrant either the March 6 Order, or a stay of the lower court orders.

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[9] March 6 Order §1(e). A March 6 letter from the Attorney General and the Secretary of Homeland Security to the President principally relies on similar information. *See* Letter from Jeffrey B. Sessions, Att'y Gen. and John Francis Kelly, Sec'y of Homeland Sec. to President Donald J. Trump, Mar. 6, 2017.

[10] Annex of Statistical Information, Country Reports on Terrorism 2015 (June 2016) (addressing Iraq, Afghanistan, Pakistan, India and Nigeria).

[11] March 6 Order §1(h).

Since the September 11, 2001 attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law enforcement and intelligence communities. The current individualized vetting system is applied to travelers not once, but multiple times, and it is continually re-evaluated to ensure its effectiveness.

Successive administrations have strengthened the vetting process through robust information-sharing and data integration. This approach allows the government to identify potential terrorists without resorting to blanket bans.[12] The government offers no national security justification for abruptly moving to a country-based travel ban, particularly when the United States already has in place a tested system of individualized vetting. In contrast to the irregular process that produced the two Orders, see Part III *infra*, the existing vetting system was carefully developed and implemented by national security professionals across the government and across several presidential administrations in response to particular threats identified by U.S. intelligence.

B. The Refugee Ban. For similar reasons, the March 6 Order's 120-day ban on refugee admissions serves no legitimate national security or foreign policy purpose. From 1975 to the end of 2015, over three million refugees have been admitted to the United States. Of that number, no refugee has killed an American in a terrorist attack in the United States since the modern refugee vetting system began in 1980. Over that same period, only twenty refugees were convicted of any terrorism-related crimes on U.S. soil at all.[13]

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[12] *See The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016) (written statements of David Donahue and Sarah R. Saldaña).

Refugees already receive the most thorough vetting of any travelers to the United States.[14] Refugee candidates are vetted recurrently throughout the resettlement process, as "pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light."[15] By the time refugees referred by the United Nations High Commissioner for Refugees ("UNHCR") are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State and the U.S. intelligence community.[16]

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[13] *See* Nowrasteh Sept. 2016, *supra* note 8.

[14] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs*, https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm.

[15] Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states.

[16] U.S. Dep't of State, *supra* note 14.

The refugee vetting process is also reviewed and enhanced on an ongoing basis in response to particular threats.[17] For Syrian applicants, the Department of Homeland Security recently added a layer of enhanced review that involves collaboration between the Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews.[18]

Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States; fewer than one percent were settled in any single country in 2015.[19] Because refugees do not decide where they will be resettled, the odds that any terrorist posing as a refugee will be resettled in the United States are vanishingly small. Ultimately, the Government alleges no specific information about any vetting step omitted by these current procedures that demand a stay in this case.

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[17] U.S. Dep't of Homeland Security, *U.S. Citizenship and Immigration Services* (Dec. 3, 2015), https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20.

Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[18] U.S. Dep't of State, *The Refugee Processing and Screening System*, https://www.state.gov/documents/organization/266671.pdf; Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief*, Cong. Research Serv., 4-5 (Sept. 16, 2016).

[19] U.N. High Commissioner for Refugees, *Resettlement*, http://www.unhcr.org/en-us/resettlement.html.

C. *No Sudden Urgency.* The Government's own conduct belies the notion that a judicial stay is needed to prevent urgent national security or foreign policy harm. When the initial Executive Order suspended travel from the listed countries for 90 days, it cited as its rationale the need to establish a period to review existing screening and vetting protocols. Specifically, Section 3 of the Order: (i) instructed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "*immediately conduct* a review" to identify what additional information will be needed from any country to ensure that an application by a national of those countries for a visa or other benefit is not a security or public safety threat, §3(a); (ii) instructed the same officials to submit to the President a report on the results of the review *within 30 days of the effective date of the Order,* §2(b), (iii) ordered the Secretary of State, *upon submission of the report*, to request that all foreign governments that do not supply the necessary information begin providing it within 60 days of notification, §2(c), and (iv) instructed the Secretary of Homeland Security after the 50-day period expires, in consultation with the Secretary of State, to submit to the President a list of countries recommended for inclusion in a subsequent Presidential proclamation to prohibit the entry of foreign nationals until compliance is achieved, §2(d).

The Order instructed that within the first 20 days, the named officials would complete the review, submit to the President the relevant report, and then start making the necessary requests to the foreign governments. But a full 47 days then passed between January 27, 2017 (when the first Executive Order went into effect) and March 15, 2017 (when the U.S.

District Court for the District of Hawaii blocked similar provisions set out in the revised March 6 Executive Order). During those 47 days, the Government only managed to start to do "some work" on the required review.[20] The Government's leisurely approach toward implementing its own Order refutes the urgency it now suddenly asserts in support of a judicial stay.[21]

II. A Stay Would Cause Serious Damage to National Security and Foreign Policy Interests.

A stay pending review by this Court is not only unnecessary to protect the national security or foreign policy interests of the United States; it would do actual damage to those interests.

At this juncture, imposing a stay would be massively disruptive. The few days between when the January 27 Order took effect and when it was halted were a time of well-documented chaos.[22] Since then, the administrative apparatus has functioned relatively smoothly, largely because career officials have been applying well-understood procedures. Allowing the March 6 Order to similarly take effect during the pendency of Supreme Court review would again massively disrupt this status quo, with the likelihood that the administrative process would be disrupted again should the Court ultimately find the Order unlawful.

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[20] Oral arg. in *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 at 8:02 (4th Cir. May 8, 2017) (en banc), http://www.ca4.uscourts.gov/opinions/en-banc-cases.

[21] There are other reasons to doubt the Administration's sudden claims of urgency. For instance, the revised Order exempts people who were previously approved to enter the U.S., making clear the President does not think that irreparable harm would occur when admitting individuals vetted under the current system. March 6 Order § 3(a).

[22] Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017); Patrick Hatch et al., *Trump Travel Ban Causes Business Chaos*, Sydney Morning Herald (Jan. 30, 2017).

The Order that the Government would have this Court impose by stay is of unprecedented scope. We know of no case where a President has invoked authority under the Immigration and Nationality Act to suspend admission of such a sweeping class of people. Even after the September 11 attacks, the U.S. government did not invoke the provisions of law cited by the Administration to broadly bar entrants based on nationality, national origin or religious affiliation. Across the decades, executive orders under the Immigration and Nationality Act usually have targeted specific government officials,[23] undocumented immigrants,[24] or individuals whose personalized screenings indicated that they posed a national security risk.[25] No example in the modern era approaches the breadth of this Order, which with one stroke of the pen bans more than 180 million people in six separate countries from traveling to the United States based solely on their national origin.

The Order's sweep would cause multiple harms to the nation's security interests. First, the Order would affect interpreters and others who have assisted our troops at great risk to their own lives. While Iraq has been removed from the list of banned countries, the Order would halt the entire U.S. Refugee Assistance Program for 120 days for all countries. This pause would affect the thousands of individuals who, because they assisted the United States, are waiting for admission under the already backlogged "Priority 2" program.[26] By discouraging future assistance and cooperation from these and other affected military allies and partners, the Order would jeopardize the safety and effectiveness of our troops.

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[23] *See, e.g.*, Proclamation No. 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

[24] *See, e.g.*, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

[25] *See, e.g.*, Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016); Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

Second, the Order would disrupt key counterterrorism, foreign policy, and national security partnerships. These partnerships are critical to our country's efforts to address the threat posed by terrorist groups such as IS. The Order would also endanger U.S. intelligence sources in the field. For up-to-date information, our intelligence officers often rely on human sources in some of the countries listed. The Order breaches faith with those very sources, who have risked much or all to keep Americans safe—and whom our officers had promised to protect.[27] Finally, by suspending visas, this Order halts the collection of important intelligence that occurs during visa screening processes, information that can be used to recruit agents and identify regional trends of instability.

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[26] *See* U.S. Dep't of State, et al., *Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016*, at 57 (2016); Urban Justice Center, International Refugee Assistance Project, *IRAP Stands With Iraqi Allies of the United States Affected by Executive Order* (Feb. 1, 2017).

[27] Michael V. Hayden, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash. Post (Feb. 5, 2017).

Third, the Order's disparate impact on Muslim travelers and immigrants feeds IS's propaganda narrative and sends the wrong message to the Muslim community at home and abroad – that the U.S. government is at war with Muslims based on their religion. The day after President Trump signed the January 27 Order, jihadist groups began citing its contents in recruiting messages online.[28] Likewise, domestic law enforcement relies heavily on partnerships with American Muslim communities to fight homegrown terrorism.[29] By alienating Muslim-American communities in the United States, the Order will harm our efforts to enlist their aid in identifying radicalized individuals who might launch attacks of the kind recently seen in San Bernardino and Orlando.

Fourth, the Order would have a devastating humanitarian impact. The travel ban would disrupt the travel of men, women and children who have been victimized by actual terrorists. Countless other travelers would face deep uncertainty about whether they would be able to travel to or from the United States for reasons including medical treatment, study or scholarly exchange, funerals or other pressing family reasons. While the Order allows the Secretaries of State and Homeland Security to admit travelers from targeted countries on a case-by-case basis, in our experience it would be unrealistic for these overburdened agencies to apply such procedures to every one of the affected individuals with urgent and compelling needs to travel.

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[28] Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, Wash. Post (Jan. 29, 2017).

[29] Kristina Cooke & Joseph Ax, *U.S. Officials Say American Muslims Do Report Extremist Threats*, Reuters (Jun. 16, 2016).

Finally, the Order would affect many foreign travelers, who annually inject hundreds of billions of dollars into the U.S. economy, supporting well over a million U.S. jobs.[30] The travel ban also could be expected to have a negative economic impact on strategic economic sectors including defense, technology, and medicine. About a third of U.S. innovators were born outside the United States, and their scientific and technological innovations have contributed to making our nation and the world safe.[31] The harm caused by the ban to the economic dynamism of our country would carry long-term negative and serious consequences for our national security.

III. The Aberrant Procedure that Produced the Travel Ban Supports the Fourth Circuit's Conclusion that the Ban was Motivated by Discriminatory Intent, Not a National Security Threat

The Fourth Circuit concluded that the "Executive Order . . . in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination."[32] The Fourth Circuit points to statements that, "taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States."[33] Judge Thacker's concurrence adds that the country-based ban in the January 27 order identified only Muslim-majority nations, banning about 10 percent of the world's Muslim population from entering the United States.[34] She notes: "if the conditions in the six countries subject to EO-2 truly motivated the Government's travel ban, the Government would have based its ban on contact with the listed countries, not *nationality*" per se.[35] Finally, the concurrence notes that on its face, the revised Order "seeks information on honor killings—a stereotype affiliated with Muslims—even though honor killings have no connection whatsoever to the stated purpose of the Order."[36]

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[30] U.S. Dep't of Commerce, *Department of Commerce Releases October Travel and Tourism Expenditures* (Dec. 15, 2016), http://trade.gov/press/press-releases/2016/department-of-commerce-releases-october-travel-tourism-expenditures-121516.asp.

[31] Adams Nager, et al., *The Demographics of Innovation in the United States*, Information Technology & Innovation Foundation 29 (Feb. 2016), http://www2.itif.org/2016-demographics-of-innovation.pdf; Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*, Cyberscoop (Jan. 30, 2017), https://www.cyberscoop.com/trump-immigration-ban-cybersecurity-iran-protests/.

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[32] *Int'l Refugee Assistance Project v. Trump*, No. 17-1351, slip op. at 12 (4th Cir. May 25, 2017) (en banc) [hereinafter "Fourth Circuit Opinion"].

[33] *Id.* at 58.

[34] *Id.* at 139 (Thacker, J., concurring).

[35] *Id.* at 138; *see id.* at 139 ("[A] person who is a citizen of Syria would not be allowed to enter the United States even if they had never set foot in Syria," while "a person who lived his or her whole life in Syria but never obtained Syrian citizenship, and had even recently lived near terrorist-controlled regions of Syria, would be unaffected and freely allowed to enter the United States.").

[36] *Id.* at 139; *see* Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, Just Security (June 9, 2017).

The aberrant process that produced the Executive Orders supports the finding below that the Order was driven by invidious intent. This Court has held that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role" in government action.[37] Moreover, this Court has observed that evidence of an improper motivation cannot be cured by a later-in-time order that perpetuates the essential policies and practices of the first.[38] In this case, the process that produced the original January 27 Order departed dramatically from the traditional national security policy-making process, with little to no consultation or scrutiny across the Departments of State, Justice, Homeland Security or the Intelligence Community. And while further consideration no doubt went into the March 6 Order, on its face that order plainly was structured to track the old ban as closely as possible.

In every recent administration, Presidents considering an important change to immigration policy have followed an interagency review process that allows national security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential risks are effectively identified and mitigated. Before recommendations are submitted to the President, the National Security Council oversees a legal and policy process that typically includes the following important components: a review by the career professionals in those institutions of the U.S. government charged with implementing an order; a review by the career lawyers in those institutions to ensure legality and consistency in interpretation; and a policy review among senior leadership across all relevant agencies, including Deputies and Principals at the cabinet level.[39]

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[37] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

[38] *See McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 851 (2005) (finding that a third version of a display of the Ten Commandments surrounded by religious references did not cure evidence of improper intent that animated earlier exhibits, as "the development of the presentation should be considered when determining its purpose"); *U.S. v. Fordice*, 505 U.S. 717, 741-42 (1992) (holding that Mississippi's re-classification of its state colleges and universities in ways that were facially neutral but perpetuated racial segregation continued to violate *Brown v. Board of Education*).

This practice of interagency deliberation has been followed even—and especially—in times of national emergency to set temporary exclusions or establish criteria for admission to the United States. For example, in the immediate aftermath of the September 11, 2001 attacks, the Bush Administration considered whether the President should invoke 8 U.S.C. § 1182(f) to bar certain immigrants or take other actions to secure the border. Officials engaged in consultations across the national security agencies to arrive at a decision.[40]

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[39] This is no less true of executive orders issued at the very start of a new presidency. *See, e.g.*, Henry B. Hogue, Cong. Research Serv., *Presidential Transition Act: Provisions and Funding* (2016).

[40] *See, e.g.*, Edward Alden, *The Closing of the American Border* 104-06 (2008); Thomas R. Eldridge, et al., *9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks Upon the United States* 151-54 (2004). That same statute—8 U.S.C. § 1182(f)—authorizes the President to act only if he "finds" the entry of the individuals "would be detrimental to the interests of the United States." As Judge Keenan observed

The process that produced the January 27 Order departed sharply from this standard practice. We know of no process in the Government that was underway before January 20, 2017 to change current immigration vetting procedures. According to extensive reporting, the Government followed no such interagency review in producing the January 27 Order. Nor, apparently, did the White House consult officials from any of the seven agencies tasked with enforcing immigration laws, much less the congressional committees and subcommittees that oversee them. There is every indication that that Order received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security or the intelligence community.[41]

As telling, the January 27 Order was apparently issued without the ordinary interagency legal process for review of Executive Orders. In recent history, administrations of both political parties have followed a protocol of submitting proposed Orders to the Attorney General, the Justice Department's Office of Legal Counsel ("OLC") and all other agency legal offices involved with enforcing the law.[42] Legal review by multiple agencies helps to identify potentially unforeseen

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in her concurrence below, the Order in this case fails to articulate any basis at all for the suggestion that entry by "any of the approximately 180 million individuals subject to the ban" would be so detrimental. Fourth Circuit Opinion at 87 (Keenan, J., concurring).

[41] Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017); Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017); Allen & O'Brien, *supra* note 22.

[42] *See* Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (Jun. 19, 1962).

legal implications of an order, determines the lawfulness of the proposed action, and analyzes whether the proposed language has established legal meaning that can be interpreted consistently with other laws and regulations. Here, the White House reportedly never asked the Department of Homeland Security for legal review in advance of the Order being promulgated, so "[t]he Department . . . was left making a legal analysis on the order after [President] Trump signed it."[43]

Although the White House apparently brought more agencies into the fold in the days leading up to the March 6 Order, whatever process took place after January 27, 2017 plainly was meant to preserve the same structure, substance and purpose of the original flawed executive order. Indeed, White House political advisor Stephen Miller admitted that the March 6 Order would reflect "mostly minor technical differences," and achieve "the same basic policy outcome for the country," statements that were echoed by other senior officials.[44]

Even months later, there is scant evidence that the country-based approach that is maintained in the executive orders emerged from the considered judgment of national security experts from across multiple affected agencies. In fact, internal governments documents have shown just the opposite. When DHS officials were asked by the new administration to identify the terrorist threat from the countries listed in that Order, an internal document shows that they reached two critical conclusions that were directly at odds with the Order: that citizenship is likely an unreliable indicator of terrorist threat, and that, as noted above, few of the listed countries are home to terrorist groups that threaten the United States.[45]

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[43] Shear & Nixon, *supra* note 41; Perez et al., *supra* note 41.

[44] Matthew Nussbaum et al., *White House Creates Confusion About Future of Trump's Travel Ban*, Politico (Feb. 21, 2017).

As Justice Thomas explained in *U.S. v. Fordice*, "if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent."[46] The hasty and plainly defective process here supports the Fourth Circuit's conclusion that the Order here was based on unlawful discriminatory intent, and not an actual national security need.

* * * * *

In sum, a stay pending review by this Court would be extremely disruptive to the security of the nation. By contrast, maintaining the status quo while the case is under submission would preserve settled expectations. The injunctions below have not barred the Government from adopting a range of new security measures to strengthen the status quo.[47] The President himself acknowledged as much when he recently noted that the injunctions had not prevented his administration from adopting "extreme vetting" of those coming into the United States.[48]

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[45] *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf.

[46] *Fordice*, 505 U.S. at 747 (Thomas, J., concurring).

[47] *See, e.g.*, Yeganeh Torbati et al., *U.S. Embassies Ordered to Identify Population Groups for Tougher Visa Screening*, Reuters (Mar. 23, 2017).

While this matter was under submission, the President publicly criticized the Justice Department for defending a "watered-down" revised Order, signaling that if this Court does honor his request for a stay and expedited review of the current Order, his administration might then "seek [a] much tougher version" of the Order in any event.[49] It is unclear why this Court should now jump into this fray on an expedited basis, to overturn judicial decisions invalidating an Executive Order that the President himself dismisses. The Administration's continuing inability to identify precisely what pressing national security threat allegedly requires the current Order, what changes are purportedly needed to vetting procedures to strengthen our security, or even which version of the Order they want to defend, all counsel this Court against rushing to stay the judgment below.

CONCLUSION

For the foregoing reasons, the Court should deny the applications for a stay.

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[48] Maya Rhodan, *President Trump Blasts Justice Department Over 'Watered Down' Travel Ban*, Time (June 5, 2017).

[49] *Id.*

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June 12, 2017

Counsel for Amici Curiae

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. General (ret.) John R. Allen, USMC, served as Special Presidential Envoy for the Global Coalition to Counter ISIL from 2014 to 2015. Previously, he served as Commander of the International Security Assistance Force and U.S. Forces Afghanistan.

3. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

4. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. State Department from 2009 to 2012.

5. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He also served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

6. R. Nicholas Burns served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

7. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

8. James Clapper served as U.S. Director of National Intelligence from 2010 to January 20, 2017.

9. David S. Cohen served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

10. Eliot A. Cohen served as Counselor of the U.S. Department of State from 2007 to 2009.

11. Ryan Crocker served as U.S. Ambassador to Afghanistan from 2011 to 2012, U.S. Ambassador to Iraq from 2007 to 2009, U.S. Ambassador to Pakistan from 2004 to 2007, U.S. Ambassador to Syria from 1998 to 2001, U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

12. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

13. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. State Department from 2016 until January 20, 2017.

14. Michèle Flournoy served as Under Secretary of Defense for Policy from 2009 to 2013.

15. Robert S. Ford served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

16. Josh Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

17. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

18. Phil Gordon served as Special Assistant to the President and White House Coordinator for

the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

19. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

20. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

21. Christopher R. Hill served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

22. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

23. Prem Kumar served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

24. Sen. Richard Lugar served as U.S. Senator for Indiana from 1977 to 2013, and as Chairman of the Senate Committee on Foreign Relations from 1985 to 1987 and 2003 to 2007, and as ranking member of the Senate Committee on Foreign Relations from 2007 to 2013.

25. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

26. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

27. Janet A. Napolitano served as Secretary of Homeland Security from 2009 to 2013.

28. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the State Department from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

29. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

30. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

31. Jeffrey Prescott served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

32. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights on the National Security Council.

33. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor from 2013 to January 20, 2017.

34. Anne C. Richard served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

35. Kori Schake served as the Deputy Director for Policy Planning at the U.S. State Department from December 2007 to May 2008. Previously, she was the director for Defense Strategy and Requirements on the National Security Council in President George W. Bush's first term.

36. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

37. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

38. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

39. Jeffrey H. Smith served as General Counsel of the Central Intelligence Agency from 1995 to 1996. Previously, he served as General Counsel of the Senate Armed Services Committee.

40. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

41. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

42. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.

Supreme Court, U.S.
MOTION FILED
JUN 12 2017

No. 16-1436

In The
Supreme Court of the United States

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DONALD J. TRUMP, et al.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, et al.,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

MOTION BY IMMIGRATION REFORM LAW INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

◆

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Pursuant to Rule 37(2)(b) of this Court, the Immigration Reform Law Institute ("IRLI") makes this unopposed motion to file an *amicus curiae* brief on behalf of petitioners.

IRLI is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). In addition, IRLI has filed *amicus curiae* briefs in the instant case, both in the U.S. District Court for the District of Maryland and in the U.S. Court of Appeals for the Fourth Circuit, both times with the written consent of the parties who are now respondents.

Petitioners have given blanket consent to file *amicus curiae* briefs in this case. Respondents, when asked in writing on June 7, 2017, for their consent to IRLI's filing an *amicus curiae* brief on June 12, responded in writing that in light of the anticipated timing of the filing, they took no position on IRLI's request.[1]

IRLI submits this brief to urge this Court to review this case in light of numerous disastrous legal consequences of the holding of the court below. The arguments in the following brief have not been made by the parties below, or by petitioners in their petition. Thus, they may be helpful to this Court. *See* Rule 37(1) ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.").

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[1] As the accompanying correspondence shows, on June 6, counsel for IRLI asked respondents for consent to IRLI's filing a brief on or before June 9. Not receiving a response, on June 7, counsel for IRLI asked respondents for consent to its filing a brief on June 12. In an abundance of caution, IRLI makes this motion on the assumption that respondents' statement that they have no position on IRLI's request for consent constitutes a withholding of consent.

CONCLUSION

For the foregoing reasons, the instant motion should be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this brief to set forth a train of striking legal absurdities that follow from the holding of the

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[1] Timely notice was given to all parties. Petitioners have given blanket consent to the filing of *amicus curiae* briefs in this case. Respondents have stated in writing that they take no position on IRLI's request for consent to file this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

U.S. Court of Appeals for the Fourth Circuit, and show the faultiness of that holding.

◆

SUMMARY OF THE ARGUMENT

In finding that President Trump's executive order issued on March 6, 2017 ("March 6 Order") probably violated the Establishment Clause, the Fourth Circuit defied a large body of Supreme Court precedents establishing that, in First Amendment challenges, courts should give no more than limited scrutiny to presidential directives in the area of war, foreign relations, and the admission of aliens. The Fourth Circuit's reasoning, moreover, entails a train of striking absurdities that unmistakably shows the wisdom of these same precedents.

Specifically, under the Fourth Circuit's reasoning, private litigants could enjoin President Trump's war on the religious group known as the Islamic State. The reasoning of the Fourth Circuit also pits different clauses of the First Amendment (to wit, the Establishment Clause and the Free Speech Clause) against each other, and it implies (absurdly) that what is constitutional for one president is unconstitutional for another. Lastly, the Fourth Circuit's reasoning, if applied broadly, would make this country vulnerable to long-term foreign threats.

To restore the right of the people of the United States, acting through the political process, to protect themselves and their interests by controlling the admission of aliens, this Court must reject the Fourth Circuit's holding and its rationale.

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ARGUMENT

I. The Fourth Circuit Flouted Clearly-Applicable Precedent In Reaching Its Establishment Clause Holding.

The Constitution should not be interpreted to imperil the safety of the United States, or its people, from foreign threats. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."). Also, the United States has a right inherent in its sovereignty to defend itself from foreign dangers by controlling the admission of aliens. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . inherent in [both Congress and] the executive department of the sovereign"). Accordingly, the ability of private litigants to challenge presidential exercises of alien-admission powers on grounds of individual rights protected in the Constitution is sharply limited. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Thus, even if exercises of these powers were not non-justiciable political acts, they could receive no higher level of scrutiny from a court than a form of rational-basis review. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) ("We hold that when the Executive exercises th[e] power [to exclude aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."). In applying (indeed, misapplying) a much higher level of scrutiny to the March 6 Order, the Fourth Circuit erred egregiously.

The Fourth Circuit did not even attempt to distinguish *Mandel* on the (unconvincing) ground that it concerned only the Free Speech Clause, as opposed to the Establishment Clause, of the First Amendment. (Had it done so, it would have been hard-pressed to explain why the claimed loss of rights under the latter clause triggers a higher level of scrutiny than the claimed loss of rights under the former, despite the equal prominence given to the two provisions textually.) Instead, taking *Mandel*'s holding that this Court will not look behind "a facially legitimate and bona fide reason" as authorizing judicial inquiry into whether a proffered reason for an exclusion was given in bad faith, the Fourth Circuit looked behind the proffered reason for the March 6 Order at statements President Trump had made as a candidate. App. 10a-12a, 38a-44a. Based on these statements, the court held that the proffered reason was a pretext for the president's actual motivation: to exclude Muslims from this country. App. 44a-45a. Then the court looked behind the proffered reason again, at those same campaign statements, and concluded that the March 6 Order was primarily motivated by a desire to exclude Muslims, and therefore probably violated the Establishment Clause. App. 48a-52a.

It is hard to imagine a more thorough evisceration of *Mandel*'s bar on looking behind proffered reasons for exclusion orders, at least when they are challenged under the Establishment Clause. In any given case where there is insufficient evidence of pretext, there also will be insufficient evidence that religion was the primary motive for a challenged decision. Thus, under the rubric pioneered by the Fourth Circuit, courts will obey *Mandel*'s injunction not to look behind the proffered reason only when their so refraining will make no difference to the outcome of the case.

If, instead of seizing on the above means of gutting *Mandel*, the Fourth Circuit had adequately considered the inherent right to sovereignty of the United States, and the separation of powers found in the structure of the Constitution, it would have found every reason to apply the *Mandel* line of cases straightforwardly – and so (as will be seen) avoid many unfortunate results.

II. The Fourth Circuit's Reasoning Leads To Many Absurd Consequences.

The Fourth Circuit's reasoning has innumerable absurd consequences that show, without question, both how faulty that reasoning is and the wisdom of the contrary case law that the Fourth Circuit brushed aside. A few of the more notable absurdities that court committed itself to are drawn out as follows:

A. Private Litigants Could Enjoin President Trump's War Against The Islamic State.

If its own statements are any indication, the Islamic State, also known as ISIS ("the Islamic State of Iraq and Syria") or ISIL ("the Islamic State of Iraq and the Levant"), is as much a religious group as a military force or aspiring state. It has declared its leader a caliph, that is, "a successor of Muhammad as . . . spiritual head of Islam," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/caliph, and is dedicated to the forcible conversion of nonbelievers to its distinctive religious faith. *E.g.*, Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State with "Restoration of Caliphate" in Middle East*, Independent (June 30, 2014), http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html (reporting on this declaration); *The Islamic State of Iraq and the Levant*, Wikipedia (June 8, 2017), https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant ("As caliph, [the leader of ISIL] demands the allegiance of all devout Muslims worldwide ... ISIL has detailed its goals in its *Dabiq* magazine, saying it will continue to seize land and take over the entire Earth until its: '[b]lessed flag . . . covers all eastern and western extents of the Earth, filling the world with the truth and justice of Islam'").

Many authorities within mainstream Islam have rejected the religious teachings of the Islamic State. *Id.* But even if this group is, properly speaking, not Islamic, and its distinctive beliefs are (at best) a heretical deviation from true Islam, plainly it still is a religious group with a religious leader, and easily qualifies as a religion under the broad definition used for First Amendment purposes. *See, e.g.*, *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (refusing to find that a sermon by the pope was less "religious" than a mass; "[s]uch a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity[,] an impossible task in an age where many and various beliefs meet the constitutional definition of religion.") (footnote omitted); *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (listing "religions in this country," including Secular Humanism, "which do not teach what would generally be considered a belief in the existence of God"); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir. 1994) (defining religion as "any set of beliefs addressing matters of ultimate concern occupying a place parallel to that filled by God in traditionally religious persons") (citing *Welsh v. United States*, 398

U.S. 333, 340 (1970)) (internal quotation marks and ellipsis omitted); Black's Law Dictionary 1293-94 (7th ed. 1999) ("In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have construed the term *religion* quite broadly to include a wide variety of theistic and nontheistic beliefs.").

Nevertheless, President Trump has vowed not only to attack the Islamic State, but to eradicate it. President Donald Trump, Remarks in Joint Address to Congress (Feb. 28, 2017) ("As promised, I directed the Department of Defense to develop a plan to demolish and destroy ISIS. . . . We will work . . . to extinguish this vile enemy from our planet.").

Islamic (in the true sense) or not, persons who bear allegiance to the caliph of the Islamic State may be residing in this country as citizens or lawful permanent residents. Once President Trump's order to the Department of Defense is complied with, and the president further orders the Department to implement its plan to destroy the Islamic State, these U.S. coreligionists of the Islamic State might have close family members placed in immediate peril by the latter order. They also might feel excluded by its message of condemnation of their religion. If the Fourth Circuit's reasoning were correct, these circumstances would be more than enough for them to have standing to challenge that order in court, under the Establishment Clause. *See* App. 29a-30a, 32a. Worse, if the Fourth Circuit were correct, they would probably win their case. If the March 6 Order probably violated the Establishment

Clause because Donald Trump, during the election campaign, called for a temporary pause in entry to the country by Muslims, as the Fourth Circuit held, App. 10a-12a, 48a-52a, what would a like-minded court make of President Trump's vow, before a joint session of Congress, to "extinguish" the Islamic State "from our planet"? If calling for a temporary pause in Muslim entry reveals impermissible animus, surely announcing a war of extermination on a particular religious body does so even more. Yet no one believes that a federal court has the power to enjoin our nation's military campaign against the Islamic State.

There is no helpful distinction for the Fourth Circuit here between the president's war-making power and his power to regulate the admission of aliens. Both involve the safety of the nation and its people, and the power to fight our enemies abroad would mean little without the power to prevent them from entering the country. *See Harisiades*, 342 U.S. at 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power. . . .").[2] But even if the distinction could be made, it would not help the Fourth Circuit; the proposition that the president could not block the admission of members of the Islamic State into the country without violating the Establishment Clause, in light of the animus revealed by his avowed intention to destroy that religious group, is an equally-absurd result of the Fourth Circuit's reasoning.

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[2] Another seeming defense against this *reductio ad absurdum* – namely, that a court would never enjoin a war, because to do so would be giving aid and comfort to the enemy in time of war, and thus, by definition, be treason, U.S. Const. art. III, § 3, cl. 1 – begs the question. A court as averse as the Fourth Circuit to accepting that presidential determinations in this area are close to unreviewable could easily conclude that treason cannot lie if the underlying war is unconstitutional, as, of course, it would be if it violated the Establishment Clause.

Also, that no one (most likely) would bring a lawsuit challenging President Trump's war on the Islamic State does not avert this absurdity. The logic of the Fourth Circuit's holding remains, like a fatal gas. The correct rule of law in this case cannot be one that implies that all of the members of the armed forces who are fighting the war on the Islamic State, and also their civilian superiors, are violating their oaths to uphold the Constitution by prosecuting that war. Yet the Fourth Circuit's reasoning implies just that.

B. The Fourth Circuit's Reasoning Pits The First Amendment Against Itself.

Free discussion of governmental affairs and the free exchange of ideas during a political campaign are the heart of America's democracy. *Brown v. Hartlage*, 456 U.S. 48, 52-53 (1985). "Freedom of speech reaches its high-water mark in the context of political expression." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 863 (8th Cir. 2001), *rev'd on other grounds*, 536 U.S. 765 (2002). The Free Speech Clause protects not just political speech by private citizens but such speech by political candidates running for public office. *Id.* at 53.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (concurring opinion), applies with special force to candidates for public office.

Buckley v. Valeo, 424 U.S. 1, 52-53 (1976). *See also Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal citations and quotation marks omitted).

In relying on the campaign statements of President Trump while a candidate, the Fourth Circuit thus set the Establishment Clause against the Free Speech Clause in the latter's most vital application. Yet both provisions are at the same level in the text of the First Amendment, and, accordingly, the Supreme Court has been at least as solicitous of free speech rights as of rights under the Establishment Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that a public university's refusal to permit the funding of a student religious group on equal terms with other groups was viewpoint discrimination that violated the Free Speech Clause and was not required by the Establishment Clause; "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 397 (1993) (holding that a school district violated the Free Speech Clause by denying a group permission to show a film with a religious purpose on school premises); *see also, e.g., Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986) (recognizing that both clauses stand on equal ground).

The chilling effect of such judicial inquiry into campaign statements can easily be imagined; for example, candidates who oppose abortion, or support the State of Israel, might shrink from saying that their religion motivates their position, thus depriving the voters of potentially important information. Given the equal primacy of the Free Speech Clause (and also the Free Exercise Clause), it is absurdly contrary to democratic freedom that candidates for president (or other offices) must tread carefully from now on when commenting on a wide range of policy issues, including national security, for fear that courts will enjoin their actions if they are elected. Yet this chilling effect on core political speech is a clear result of the Fourth Circuit's holding.

C. The Fourth Circuit's Reasoning Implies That What Is Constitutional For One President Is Unconstitutional For Another.

The Fourth Circuit held that the March 6 Order probably violated the Establishment Clause because statements by President Trump when a candidate revealed an impermissible anti-Muslim motivation. It follows that had the exact same order, with exactly the same stated purpose, been issued by President Obama, it would not have violated the Establishment Clause (assuming that President Obama had made no statements the court could construe as revealing animus toward the Muslim religion). This is an absurd result, if only because a president might have a clear duty to protect the country against a pressing foreign threat, and whether that duty could be performed should not depend on whether the nation had, or did not have, a president who might feel illicit racial or religious animus against that threat, and enjoy his duty too much. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982) ("'In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.' ") (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)); *cf. Spalding*, *supra* ("[P]ersonal motives cannot be imputed to duly authorized official conduct."); *see also Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (refusing to examine the president's motives for declaring a national emergency during the Libyan crisis); *but see Korematsu v. United States*, 323 U.S. 214, 223 (1944) (stating in dicta that the internment of an American citizen of Japanese descent during World War II would have been unconstitutional if motivated by racial prejudice).

This result of the Fourth Circuit's holding is dangerous in another way, for it gives the impression, at least, that courts are taking political sides. Diminishing the power of a particular president, as opposed to others, because of his statements in the political arena seems perilously close to diminishing his power because of his politics – of which an onlooker could easily assume the court disapproves. It goes without saying that even the appearance of such political partisanship in judging should be avoided in our democracy, since the Constitution gives the federal courts the power to decide "Cases" and "Controversies," and no other power, U.S. Const., art. III, § 2 – certainly not political power. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81

Cornell L. Rev. 393, 455 (1996) (surveying cases and commenting that, for the modern Supreme Court, "[j]udicial restraint preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters.") (footnotes omitted); *In re V.V.*, 349 S.W.3d 548, 576 (Tex. App. 2010) (Jennings, J., dissenting) ("Judges should decide the cases that come before them based upon the facts in evidence and the governing law, not upon their moral preferences, desires, or the dictates of their emotions. The obvious problem with results-oriented judging is that it . . . guts the rule of law . . . [and] produces bad consequences on a system-wide basis.") (internal quotation marks and footnotes omitted); *cf.* Code of Conduct for United States Judges, Canon 5, 28 U.S.C.S. app. (stating that federal judges should refrain from political activity).

D. The Fourth Circuit's Reasoning Would Put The United States At The Mercy Of Foreign Threats.

The following absurdity is wholly hypothetical, but nonetheless devastating to the Fourth Circuit's reasoning. Imagine a religion that, as a fundamental tenet, demanded the sacrifice of children to "the gods" on a regular basis. Suppose this religion, called Molochism,[3] had followers around the world numbering in the billions, but as yet few in the United States. Even though the members of this religion in the U.S. would be (constitutionally) hampered in its exercise by neutral, generally-applicable laws against murder, *see Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), they could still advance their religion, and eventually all of its practices, through the courts and through our immigration system – that is, if the tenor of the Fourth Circuit's reasoning became generally accepted, and domestic civil rights law applied to all immigration restrictions challenged by suitably-affected U.S. plaintiffs. Specifically, if Congress passed a law barring immigration by, say, those who believe they have an obligation to take innocent human life, it is likely that some members of Congress who voted for this ban would have made clear, if only in campaign statements, that it was aimed at Molochians. If U.S.-citizen Molochians felt excluded by this law, and were separated from their close relatives because of it, they would have standing to sue, under the Fourth Circuit's reasoning. And under that same reasoning, the ban on such immigration would violate the Establishment Clause because it was improperly motivated by anti-Molochian animus.

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[3] After the ancient fire god to whom children were sacrificed. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/Moloch.

After the ban on immigration by those who believe they have an obligation to take innocent human life was, accordingly, permanently enjoined, let us suppose that the pace of continued Molochian immigration was very rapid, so rapid that a political uproar resulted, complete with anti-Molochian statements by leading politicians promising to stem the tide. At that point, a court of the Fourth Circuit's stripe might well conclude that *any* step with the predictable result of lowering Molochian immigration – even bringing *all* immigration to a near-standstill – would only be a transparent pretext for a measure that really pertained to an anti-Molochian establishment of religion. Thus, by court order, actual or merely threatened, the door to heavy overall immigration would remain open, and Molochians could continue to come in. Over time, let us suppose, American Molochians would become so numerous that any ban on their immigration would become politically difficult, even if the courts would uphold one. Still later, suppose that Molochians became politically dominant, in part through sheer force of numbers, and were able to adjust U.S. laws to allow their full religious practices, including the long-deferred one of the sacrifice of children to the gods.

Of course, it is to be hoped that no series of events as horrific as this – the transformation of the United States into a country of legalized child sacrifice – would ever take place. Still, that the United States and its people would be without power to defend themselves against that disaster because of the Establishment Clause is absurd in the highest degree. As a matter of pure logic, such gross absurdity is fatal to the Fourth Circuit's reasoning.

◆

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for certiorari.

Respectfully submitted,

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JUN 12 2017

Nos. 16A1190 and 16A1191

In The
Supreme Court of the United States

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DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., APPLICANTS

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.

◆

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., APPLICANTS

v.

HAWAII, ET AL.

◆

*ON APPLICATIONS FOR STAYS
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS*

◆

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS' OPPOSITIONS TO THE STAY APPLICATIONS

◆

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MOTION OF INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS TO FILE A BRIEF AS AMICI CURIAE SUPPORTING RESPONDENTS' OPPOSITIONS TO THE STAY APPLICATIONS

An interfaith group of religious and interreligious organizations—consisting of the Alliance of Baptists; the American Jewish World Service; the Anti-Defamation League; Church World Service; Disciples Home Missions; Franciscans for Justice; the Friends Committee on National Legislation; Interfaith Alliance; Islamic Relief USA; the Leadership Conference of Women Religious; the Missionary Servants of the Most Holy Trinity; Muslim Advocates; the National Council of Jewish Women; the Reconstructionist Rabbinical Association; the School Sisters of Saint Francis, United States Province; Sojourners; the Southwest Conference of the United Church of Christ; T'ruah: The Rabbinic Call for Human Rights; the Union for Reform Judaism; the Central Conference of American Rabbis; Women of Reform Judaism; and the Unitarian Universalist Association—respectfully move this Court for leave to file the accompanying brief, as amici curiae in support of respondents' oppositions to the stay applications.

Letters from counsel for all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

The prospective amici here would be affected if the stay applications were granted. As faith-based organizations, the prospective amici depend heavily on the guarantee of the Establishment Clause that the government cannot single out one faith as favored or disfavored. Yet, as the lower courts found, although Executive Order 13,780 does not expressly mention Islam, it is targeted at Islam. The prospective amici seek to participate here to express how permitting the Order to become effective would harm not only Muslims living in the United States but also members of all faiths. In addition, as explained in the accompanying brief, issuing the requested stays would directly affect the prospective amici's ability to fulfill their moral and religious obligations to provide aid to refugees in need.

Accordingly, the prospective amici respectfully request leave to file the accompanying brief.

Respectfully submitted,

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BRIEF FOR INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS' OPPOSITIONS TO THE STAY APPLICATIONS

Amici curiae, an interfaith group of religious and interreligious organizations, respectfully submit this brief in support of respondents' oppositions to the stay applications.[1]

INTEREST OF AMICI CURIAE

Amici are a diverse group of twenty-two faith-based and interfaith religious associations, congregations, and organizations, pursuing their respective faiths alongside each other and standing for the right of all believers to practice their religions, as guaranteed by the First Amendment. Amici have a wide array of beliefs and come from different faith traditions, yet they unite here to speak with one voice in urging the Court not to grant relief that would result in the reinstatement of Executive Order 13,780.

The Order harms amici. Although the Order is ostensibly a nationality-based ban and a ban on the admission of refugees, it is focused on citizens of majority-Muslim nations. Amici therefore see it for what it is: anti-Muslim discrimination. Such government-imposed discrimination has real harms.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

By targeting members of a particular faith, it promotes dangerous stereotypes and fosters baseless fear. Discrimination against members of one faith harms people of other faiths as well. All religious people in this Nation depend on the right to practice their faiths free from discrimination. When religious-based discrimination is permitted—especially when propagated at the highest levels of government—the free-exercise right of members of all faiths is affected. Additionally, because amici's various faiths commit them to helping others who have been victims of war, hunger, and persecution—and, in particular, to helping refugees—this case directly implicates amici's ability to practice their religions and to carry out their missions.

Amici curiae are as follows:

The **Alliance of Baptists** is a faith community comprised of 140 congregations across the United States and over 3,000 individual members—Christians knit together by love for God, committed to religious liberty for all, whatever their faith tradition, including those of no faith. Its response to the call of God in Jesus Christ to be disciples and servants includes a commitment to prophetic action to bring about justice and healing in our world. The Alliance, whose congregations work with and support refugees and immigrants, joins this amicus brief in response to a Covenant of commitment to side with those who are poor and pursue justice with and for those who are oppressed.

American Jewish World Service is the first and only Jewish organization dedicated solely to ending poverty and promoting human rights in the developing world. AJWS joins this amicus brief because welcoming refugees and immigrants is central to American identity, and because as a Jewish American organization, AJWS cannot stand idly by while ethnic and religious minorities are under attach for simply being who they are.

Founded in 1913, the **Anti-Defamation League** is a civil-rights and human-relations organization that works to combat intolerance and hatred, seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all people. Rooted in Jewish values that command offering welcome to the stranger, and understanding that the Jewish community has experienced the plight of living as refugees throughout history, ADL opposes efforts to turn away those desperately seeking safety. Through its twenty-six regional offices throughout the United States, ADL provides materials, programs and services to combat anti-Semitism and all forms of bigotry.

Church World Service, a humanitarian agency that brings together thirty-seven Protestant, Anglican, and Orthodox member communions, is one of the nine refugee resettlement agencies in the United States, and, through a center in Nairobi, also assists with the processing of all refugees resettled to the United States from Africa. CWS, the National Council of Churches, and their constituencies, representing 30 million people in the United States, issued the "Ecumenical Declaration to Protect Welcome and Restore Hope," declaring to the President, members of Congress, and their own constituencies their strong opposition to the Executive Order and their "moral responsibility to speak out and advocate alongside all immigrants and refugees to stop these unjust and immoral executive orders."

Disciples Home Missions is the enabling and coordinating expression of the **Christian Church (Disciples of Christ)** in the United States and Canada in the areas of congregational programming and mission in North America. With over 750,000 members in more than 3,800 congregations, DHM and its Refugee and Immigration Ministries engage congregations and members in advocacy to support refugee and immigrant rights, and to ensure ongoing and vigorous resettlement and partnerships with refugees within the United States. It has, since 1949, resettled more than 38,000 refugees and assisted countless people facing immigration problems.

Franciscans for Justice is a joint project of the Franciscan Friars of the St. Barbara Province and the Our Lady of Guadalupe Province that includes more than 200 friars throughout the western United States. For over 800 years, Franciscans have upheld the fact that twice St. Francis of Assisi went to the Muslim sultan, not to convert him, but to befriend him; Franciscans hold Muslim believers dear to our hearts.

Franciscans for Justice challenges the U.S. government to reach out to all Muslim refugees—not to ban them, but to befriend them.

The **Friends Committee on National Legislation** is the oldest religious lobby in Washington, D.C., lobbying Congress and the Administration to advance peace, justice, opportunity, and environmental stewardship. FCNL opposes the Executive Order because it goes against our core values of welcome, religious freedom, and assistance to those most in need. The Muslim and refugee ban is discriminatory, unconstitutional, and immoral.

Interfaith Alliance advocates from a faith perspective for the guarantees of the independence of conscience from government and of government from religion, including special attention to the rights of minorities. It rejects any religious test in this country, not just for elected office but also for securing the blessings of life, liberty, and the pursuit of happiness. It believes the attempt to exclude immigrants and refugees because they are part of a particular religion or subset of that religion violates the nation's basic values and constitutional guarantees.

Islamic Relief USA is a nonprofit humanitarian organization that provides the necessities of life in refugee camps outside the United States and resettlement aid to refugees here. Its work to protect the most vulnerable in the human family, particularly those who have fled poverty, violence, and oppression, is guided by the timeless values and teachings provided by the revelations contained within the Qur'an and prophetic example. Despite the fear and anguish created by this Executive Order, which has profoundly affected its staff, donors, and beneficiaries, Islamic Relief USA continues to reach out to its neighbors in love and serve them with dignity believing that what unites us is stronger than the fears that divide us.

The **Leadership Conference of Women Religious**, founded in 1956, is an association of leaders of congregations of Catholic women religious. LCWR has nearly 1,300 members, who represent approximately 38,800 women religious. LCWR has joined this amicus brief because Catholic sisters began coming to these shores 288 years ago as immigrants to serve the immigrant and refugee communities and continue to this day to minister to refugees and new immigrants in schools, hospitals, and social service agencies.

The **Missionary Servants of the Most Holy Trinity**, founded in 1929, is a congregation of Catholic priests and Brothers who work in the United States and Latin America with the poor and abandoned, including recent immigrants.

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life.

The **National Council of Jewish Women** is a grassroots organization of 90,000 volunteers and advocates who are inspired by Jewish values to strive for social justice. NCJW joins this brief in keeping with its formal resolve to work for "[c]omprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals."

The **Reconstructionist Rabbinical Association**, established in 1974, represents 350 rabbis across North America and serves as a voice of Reconstructionist Jewish values in partnership with more than 100 Reconstructionist Jewish congregations and their members. Its understanding of Jewish tradition and experience compels its support for refugees and immigrants as an act of justice and compassion in the world.

The **School Sisters of Saint Francis, United States Province** are part of an international congregation of religious women. The United States Province was established when immigrant sisters came to the United States from Europe in order to work with immigrants. Its mission is to serve the poor and otherwise needy. As a province, it joins the ranks of others who wish to speak out to challenge the anti-refugee Executive Order.

Founded in the early 1970s, **Sojourners** believes that U.S. citizens, immigrants, and refugees who practice their Islamic faith in this country are brothers and sisters as fellow human beings and children of God. The violation of the religious freedom of Muslim brothers and sisters must not be accepted by any people of faith.

The **Southwest Conference of the United Church of Christ** provides support and services to approximately 6,000 members and clergy in forty-seven local congregations in Arizona, New Mexico, and part of Texas. The United Church of Christ is a mainline Protestant denomination derived in part from Puritan and Pilgrim immigrants in the early 1600s and German immigrants in the 1800s. Its mission statement, "extravagantly welcoming and affirming followers of Christ called to embody God's unconditional justice and love," is manifested in a deep commitment to a ministry of extravagant welcome to migrants, undocumented residents, refugees, and others.

T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism, together with all members of the Jewish community, to act on the Jewish imperative to respect and advance the human rights of all people. It joins this amicus brief to express condemnation of the Executive Order, which effectively closes the nation's borders to Muslims and flagrantly violates America's longstanding, values-driven commitment to serving as a safe haven for refugees.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.5 million Reform Jews, the **Central Conference of American Rabbis**, whose membership includes more than 2,000 Reform rabbis, and **Women of Reform Judaism**, which represents more than 40,000 women in nearly 400 women's groups in North America and around the world, come to this issue out of their longstanding commitment to the principle of religious liberty, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of religious freedom has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history.

The **Unitarian Universalist Association** represents 200,000 members of more than 1,000 Unitarian Universalist congregations nationwide and is dedicated to the principle of freedom of religion for all people and to freedom from oppression. The UUA has joined the amicus brief because it believes that the Executive Order is unconstitutional and undermines the UUA's core principles.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, who represent members of a wide range of faiths and sects, are acutely aware that when the U.S. government carries out official acts that are motivated by religious animus, it harms people of all faiths. Executive Order 13,780 is such an act—the result of the President's long-stated objective to exclude (at least temporarily) Muslims from entering this Nation. The Order offends the very notion of the United States "as a refuge of religious tolerance" for people of all faiths. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153 (10th Cir. 2013) (Gorsuch, J., concurring), *aff'd*, 134 S. Ct. 2751 (2014). The Establishment Clause's central purpose is to protect religious liberty by prohibiting the government from picking and choosing among faiths, or from singling out any one faith for disfavor. The Order contravenes that purpose, harming not only members of Islam but members of all faiths as beneficiaries of this Nation's commitment to religious free exercise. It further harms groups such as amici whose faiths compel them to aid refugees who are fleeing war and persecution.

History teaches that government discrimination against members of one faith must be opposed by people of all faiths. Reinstating the Order, as applicants ask, would do far more than harm the litigants who have challenged it; it would harm people of all faiths whose most central beliefs and actions depend on the First Amendment's protections. The requests for stays should be denied.

ARGUMENT

A. The Executive Order Contravenes Core Constitutional Principles Critical To The Free Exercise Of All Faiths

In contrast with many other countries, where religious conflict has at times led to upheaval and suffering, a defining trait of the United States has been its ability to be open to different religions and encourage their coexistence. "It was in large part to get completely away from * * * religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion." *Engel v. Vitale*, 370 U.S. 421, 433 (1962). As a result of those guarantees, the United States is a country of vibrant religious beliefs, practices, and communities in which faith continues to play an important role in most Americans' lives.

The Nation's commitment to religious freedom and non-discrimination is firmly woven into our national fabric and our constitutional system. The government is prohibited from favoring a particular religion over others and from singling out any religion for opprobrium. The Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

This Court has long recognized that efforts by the government to favor one religion "inevitabl[y] result" in incurring "the hatred, disrespect and even contempt of those who h[o]ld contrary beliefs." *Engel*, 370 U.S. at 431. Such acts send messages to members of minority faiths "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). That is all the more true when the government singles out one religion for *disfavor*, as it has done here.

The harm caused by singling out members of one religious faith is not restricted to the disfavored sect; it extends to all religious groups by eroding core principles that have allowed a multitude of faiths to coexist and thrive. Protections for the free exercise of religion are critical to "vindicat[e] this nation's long-held aspiration to serve as a refuge of religious tolerance." *Hobby Lobby Stores*, 723 F.3d at 1153 (Gorsuch, J., concurring); *see Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (official efforts to "denigrate * * * religious minorities" violate the Establishment Clause). By both protecting the free exercise of religion and prohibiting the government from favoring or disfavoring any one religion, the First Amendment "seek[s] to avoid * * * divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

Permitting the Executive Order to take effect would undermine these fundamental protections on which all religious groups rely.

B. Members Of The Faith Community, Who Themselves Have Been Targets Of Persecution, Recognize That The Order Is Intended To Target Muslims

The Order is clearly intended to do what the Establishment Clause forbids: target members of one faith, Islam.

Amici, both as faith leaders and as members of faiths that have experienced religious persecution, are unfortunately familiar with the history of religious minorities who have faced discrimination and exclusion from the United States based on stereotypes and stigma. One of the most famous examples is from 1939, when a ship carrying more than 900 Jewish men, women, and children who were fleeing Nazi Germany was turned away from U.S. shores. Many in the United States suspected that these Jewish refugees were threats to national security. The ship was forced to return to Europe, and more than a quarter of its passengers perished in the Holocaust. *See* Daniel A. Gross, "The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies," *Smithsonian.com* (Nov. 18, 2015).[2] As another example, the large influx of Catholic immigrants in the mid-nineteenth century led to anti-Catholic riots, burnings of Catholic churches, beatings of Catholic students who refused to use the King James Bible, and the rise of nativist political movements that campaigned to restrict immigration by Catholics. *See* Michael W. McConnell, *Is There Still a "Catholic Question" in America? Reflections on John F. Kennedy's Speech to the Houston Ministerial Association*, 86 Notre Dame L. Rev. 1635, 1639 (2011).

"[F]ormally neutral, generally applicable laws" have been "central to the * * * worst episodes of religious persecution in our history." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 223 (1993). For example, Mormons faced persecution in the nineteenth century as they were driven across the country and faced with oaths that resulted in denial of their right to vote. *Ibid.* And Jehovah's Witnesses in the early- and mid-twentieth century were forced to salute the flag, and children were often beaten in schools when they refused. *Ibid.*; *see also Barnette*, 319 U.S. at 629 (noting that children who refused faced suspension and could be treated as delinquents).

Although the Order here does not expressly mention Islam, amici understand it for what it is: an official act of discrimination on the basis of religion. As the

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[2] http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/.

Fourth Circuit found, the Order's primary purpose is to discriminate against Muslims. No. 16A1190, App. 48a-52a. The Order is consistent with President Trump's call as a candidate for "a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." *Id.* at 49a. This call for a "Muslim ban" was repeated throughout the 2016 presidential campaign, accompanied by further statements from candidate Trump that "Islam hates us" and that "we're having problems with the Muslims." *Ibid.* The proposed "Muslim ban" later morphed into a plan to "call it territories" and impose nationality-based travel restrictions. *See id.* at 49a-50a. The President, upon signing the predecessor version of the Order, stated that it was meant to protect the nation from entry by foreign terrorists—and then explained, "We all know what that means." App. 13a. It is likewise plain to members of the faith community that a desire to exclude Muslims drove the issuance of this Order.

Were the Court to reinstate the Order, despite such clear evidence of animus, it would send a message that religious-based discrimination is tolerable so long as it is framed based on nationality. It would provide an Establishment Clause-evading roadmap for governments at all levels that wish to enact policies disfavoring Muslims or members of any minority faith.

C. The Stay Requests Vastly Underestimate The Public Harms Caused By The Order

In considering whether to grant a stay, the Court considers "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). Applicants attempt to downplay the public harm resulting from the Order, contending that it injures only "a single individual" (in the case that was before the Fourth Circuit), No. 16A1190, App. 2, 40, or that the harms to the public are no more than hurt feelings.

But the Establishment Clause itself is a clear recognition by our founders that when the government picks and chooses among religions, it harms the broader fabric of our society and creates an injury of constitutional dimensions. And "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Consideration of the public-interest factor should therefore include the harm done to all Americans of faith who recognize the Order as an act of official disfavor toward Islam and, thus, as an assault on their own religious liberty.

The Order is also directly harmful to Muslims who are entitled to freely practice their faith in the United States. The Order and its predecessor have disrupted the lives of Muslim Americans who fear that they are being targeted for exclusion and could face separation from their families. *See, e.g.*, Neil Munshi, "Muslim Americans Express Anxiety Over Trump Travel Ban," *Financial Times* (Feb. 2, 2017);[3] *see also* Faiyaz Jaffer, "The Travel Ban Has Been Particularly Harsh on Shiite Muslims," *The Gazette* (May 26, 2017) (describing the story of a college student who feared that, if he went to say his final goodbyes to a dying relative in Iran, he might be unable to return to the United States to study).[4]

The two Orders have separated couples engaged to be married and caused family members to miss weddings of their loved ones, as well as births and deaths—key moments in the personal and religious life of a faith community. *See* Jack Healy & Anemona Hartocollis, "Love, Interrupted: A Travel Ban Separates Couples," *N.Y. Times* (Feb. 8, 2017);[5] Ed Pilkington, "Trump Travel Ban Crackdown Turns Wedding Celebration Into a Family Separation," *The Guardian* (Apr. 14, 2017).[6] The Order's predecessor interfered with religious practice and community by barring prominent Muslims with citizenship or dual citizenship in the affected countries from fulfilling long-planned speaking engagements at conferences, religious services, festivals, and universities in the United

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[3] https://www.ft.com/content/ba9f2d88-e905-11e6-893c-082c54a7f539?mhq5j=e2.

[4] http://gazette.com/the-travel-ban-has-been-particularly-harsh-on-shiite-muslims/article/1603972.

[5] https://www.nytimes.com/2017/02/08/us/love-interrupted-a-travel-ban-separates-couples.html.

[6] https://www.theguardian.com/us-news/2017/apr/14/trump-travel-ban-visa-iran-wedding.

States. *E.g.*, *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *2 (E.D. Va. Feb. 13, 2017).

Even though the current Order has been enjoined, its existence still harms non-citizen Muslims who live in the United States and have planned to travel overseas to visit family members, fulfill work obligations, or participate in faith-based activities. They now fear leaving the country out of concern that—if this Court were to issue the requested stays—they may not be permitted to return.

The Order also has harmed all American Muslims at a profoundly deeper level. It has ostracized those who simply want to practice their faith freely and live peacefully as neighbors, students, colleagues, families, and members of their communities. It has contributed to an environment in which Muslims are increasingly subject to violence, harassment, and discrimination because of their faith. This is borne out by recent hate crimes that have been perpetrated against Muslims[7]—or even people *perceived* to be Muslims.[8]

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[7] *See* Doug Criss, "Mosques Targeted in 2017," *CNN.com*, http://www.cnn.com/2017/03/20/us/mosques-targeted-2017-trnd/index.html. The map, which contains data from January through March 2017, describes thirty-five reported incidents of attacks against mosques, including suspected arson and spray-painting of anti-Muslim epithets. *See also*, *e.g.*, Bill Lindelof, "Two Suspected Hate Crimes in Less Than Two Weeks at Davis, Roseville Mosques," *The Sacramento Bee* (Feb. 1, 2017), http://www.sacbee.com/news/local/crime/article130135154.html.

[8] *See* Daniel Victor, "Three Men Stood Up to Anti-Muslim Attack. Two Paid With Their Lives," *N.Y. Times* (May 28, 2017) (describing stabbing victims' efforts to intervene when a man

That the Order's proffered justification was based on the threat of terrorism makes the Order all the more pernicious.[9] Conflating "Muslims" with "terrorists" obscures the fact that most victims of terrorism are themselves Muslims. Indeed, a vast number of refugees fleeing war, persecution, and human atrocities are Muslim. Attempts to justify the Order based on the threat of terrorism—and to treat populations of entire Muslim-majority countries as potential terrorists—only compound anti-Muslim vilification.

These harms would be revisited if this Court were to issue the requested stays. Muslims living in the United States would be subjected anew to what they and many others rightly view as official condemnation of their faith. This harm is not trivial, and it should receive significant weight in this Court's consideration of the stay factors.

D. The Order Precludes People Of All Faiths From Fulfilling Their Moral Obligation To Aid Refugees

The Order also conflicts with faith-based organizations' ability to carry out their missions by assisting those in need. Amici's faiths teach that one must not forsake people in their time of crisis. The moral and religious imperative to "help the stranger" is especially

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shouted anti-Muslim insults at two women in Portland, Oregon, and noting that one of the women is not Muslim), https://www.nytimes.com/2017/05/28/us/portland-stabbing-victims.html.

[9] The Order also invokes the specter of "honor killings," which is a coded term that reinforces the stigmatization of Muslims as violent and backward. *See* No. 16A1190, App. 53a n.17.

compelling in the case of refugees, who are among the most vulnerable people in the world. By definition, refugees are people who have been forced to flee their homes because of persecution or conflict and need sanctuary because they do not have the protection of their own governments. U.N. General Assembly, *Convention Relating to the Status of Refugees*, art. 1A(2), United Nations, Treaty Series, vol. 189, at pp. 153-54 (July 28, 1951).

Many amici and their members thus actively participate in aiding refugees, assisting them with resettling in the United States and working with congregations to provide them with practical, emotional, and spiritual support as they build new lives. Amicus Church World Service exemplifies the crucial role these agencies play. It alone has assisted more than 850,000 refugees since its founding in 1946. Amicus Disciples Home Missions of the Christian Church (Disciples of Christ) has resettled more than 38,000 refugees since 1949 and provided legal assistance to countless immigrants, and it actively engages its congregations and church members to support immigrants and refugees. Some Roman Catholic religious orders, including ones represented here through the Leadership Conference of Women Religious, trace their very existence in the United States to nuns who immigrated here specifically to work with immigrants.

Allowing the Order to go into effect would prevent amici from fulfilling their missions. Section 6 of the Order suspends further processing of refugees under the U.S. Refugee Admission Program and reduces the total number of refugees who may be admitted to the United States for the 2017 fiscal year by more than half. The countries named in the 90-day entry ban imposed by Section 2(c) of the Order include several, such as Somalia and Syria, that have significant refugee populations.

The Order, even as enjoined, already has devastated faith-based refugee organizations' ability to maintain operations and services moving forward. Episcopal Migration Ministries announced in early April 2017 that cutbacks forced by the Order have resulted in reductions of more than twenty percent in its national staff and in its affiliate network, which will hamper assistance to refugees already resettled as well. Mary Frances Schjonberg, "Trump's Immigration Policies Force Reduction of Episcopal Church's Refugee Resettlement Network," *Episcopal News Service* (Apr. 4, 2017).[10] World Relief announced in February 2017 that, as a direct result of the Order's reduction in future refugee admissions, it is closing five offices and laying off 140 staff members. Press Release, World Relief, World Relief Announces the Layoff of 140+ Staff and Closure of Five Local Offices Due to the Trump Administration's Reduction in Refugee Resettlements in the U.S. (Feb. 15, 2017);[11] *see* Dan Barry, "A

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[10] http://episcopaldigitalnetwork.com/ens/2017/04/04/trumps-immigration-policies-force-reduction-of-episcopal-churchs-refugee-resettlement-network/.

[11] https://www.worldrelief.org/press-releases/world-relief-announces-the-layoff-of-140-staff-and-closure-of-five-local-offices-due-to-the-trump-administrations-reduction-in-refugee-resettlements-in-the-us.

Resettlement Mission Upended by the Sweep of a President's Pen," *N.Y. Times* (Feb. 5, 2017).[12]

Reinstating the Order now, just as the government has begun to ease refugee restrictions,[13] would further harm not only refugees who would be denied entry but also the vitality of the entire refugee-assistance and -resettlement mission of amici and other people of faith going forward.

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[12] https://www.nytimes.com/2017/02/05/us/lancaster-refugees-trump-travel-ban.html.

[13] *See* Gardiner Harris, "U.S. Quietly Lifts Limit on Number of Refugees Allowed In," *N.Y. Times* (May 26, 2017), https://www.nytimes.com/2017/05/26/us/politics/united-states-refugees-trump.html.

CONCLUSION

The applications for a stay should be denied.

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IN THE

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in support of respondents, in opposition to the petition for certiorari, without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a).

In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. All parties have consented in writing to the filing of the brief without such notice.

As set forth in the enclosed brief, the undersigned amici States have a strong interest in opposing the petition for certiorari, which asks this court to review the holding below that § 2(c) of Executive Order No. 13,780 likely violates the Establishment Clause, threatens substantial harms, and was properly enjoined. The Executive Order ("EO-2"), signed on Mar. 6, 2017, appears at 82 Fed. Reg. 13,209 (Mar. 9, 2017), and is reprinted at Pet. App. 289a-312a.

The interest of the amici States arises from the fact that enforcement of § 2(c) of EO-2 threatens substantial harm to the amici states and our hospitals, universities, businesses, communities, and residents. And by imposing a federal policy disfavoring Islam on the amici States, § 2(c) violates our profound commitments to religious pluralism.

Consequently, the amici States have a distinct perspective on the harms threatened by the order—

and thus the justifications for enjoining its enforcement—that may be of considerable assistance to the Court. The States have asserted and documented these harms in numerous other cases challenging EO-2[1] and its predecessor, Executive Order No. 13,769 (Jan. 27, 2017), 82 Fed. Reg. 8,977-79 (Feb. 1, 2017) (Pet. App. 277a-288a) ("EO-1").[2]

Moreover, it appears that § 2(c) will soon cease to have effect, and will likely be followed by other executive actions taken to renew or modify it after its expiration. Amici States have a strong interest in avoiding review of the injunction after § 2(c) ceases to have effect, and instead reserving this Court's review for any subsequent executive actions that may be taken to renew or modify it after its expiration.

Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to demonstrate that the injunction affirmed by the court of appeals was appropriately crafted to restrain the harms threatened by § 2(c), including the harms to amici States, and also to demonstrate that the decision below is ill-suited to this Court's review at this time.

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[1] *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge to EO-2 by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawai'i v. Trump*), ECF No. 152; Br. for Amici Curiae Illinois et al. (16 States and D.C.), *Hawai'i v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Br. for Amici Curiae Virginia, Maryland, et al. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[2] *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans in EO-1); Br. for Amici Curiae Massachusetts, New York, et al. (15 States and D.C.), *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban in EO-1 as applied to Virginia).

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to the petition for certiorari.

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INTEREST OF THE AMICI

Amici States New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief in opposition to the petition for certiorari.[1] The Court of Appeals affirmed a preliminary injunction that restrained, on Establishment Clause grounds, the enforcement of a section of an Executive Order imposing a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries. *See* Executive Order No. 13,780, § 2(c) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Pet. App. 289a-312a) ("EO-2"). That ban affects large numbers of persons seeking entry to work, study, or be with family in the amici States.

Amici have a strong interest in respondents' challenge to EO-2, which threatens substantial harm to our hospitals, universities, businesses, communities, and residents while courts adjudicate the lawfulness of § 2(c). Amici's interest extends not only to the Establishment Clause challenge to § 2(c), but also to the other constitutional and statutory challenges raised by respondents' suit and not presented here—arguments that the amici States have made in other cases challenging EO-2[2] and its predecessor, Executive Order No. 13,769 (Jan. 27, 2017), 82 Fed. Reg. 8,977-79 (Feb. 1, 2017) (Pet. App. 277a-288a) ("EO-1").[3]

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[1] Because of this Court's expedited briefing schedule, it was not feasible to provide 10 days' notice as required by Rule 37.2(a). The parties have consented to the filing of this brief without such notice, and amici States are concurrently filing a motion requesting leave to file this brief.

If allowed to go into effect, EO-2's travel ban will immediately harm the amici States' proprietary, quasi-sovereign, and sovereign interests. It will inhibit the free exchange of information, ideas, and talent between the six designated countries and the amici States, including at the States' many educational institutions; disrupt the provision of medical care at the States' hospitals; harm the life sciences, technology, health care, finance, and tourism industries, as well as innumerable other small and large businesses throughout the States; inflict economic damage on the States themselves through both increased costs and immediately diminished tax revenues; and hinder the States from effectuating the policies of religious tolerance and nondiscrimination enshrined in our laws and our state constitutions.

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[2] *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge to EO-2 by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawai'i v. Trump*), ECF No. 152; Br. for Amici Curiae Illinois et al. (16 States and D.C.), *Hawai'i v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Br. for Amici Curiae Virginia, Maryland, et al. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[3] *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans in EO-1); Br. for Amici Curiae Massachusetts, New York, et al. (15 States and D.C.), *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban in EO-1 as applied to Virginia).

While the amici States differ in many ways, all welcome and benefit from immigration, tourism, and international travel by students, academics, highly skilled professionals, and businesspeople. Moreover, all amici States will face concrete and immediate harms flowing directly from § 2(c) of EO-2 if this Court stays or lifts the preliminary injunctions that have been entered against it.

Amici States file this brief supporting respondents to demonstrate that the injunction affirmed by the court of appeals was appropriately crafted to restrain the harms threatened by § 2(c), including the harms to amici States, and also to demonstrate that the decision below is either moot or otherwise ill-suited to this Court's review at this time.

SUMMARY OF ARGUMENT

The petition should be denied. First, the decision below correctly affirmed the injunction on the grounds that § 2(c) likely violated the Establishment Clause, and that the potential for nationwide harm justified broad nationwide relief. Second, the travel ban that the petition seeks to reinstate is only a few days away from expiring, and its expiration will moot the questions presented by this petition. And even if § 2(c) could be deemed effective past its June 14, 2017, expiration date, certiorari still should not be granted at this juncture for several reasons: (i) the terms of EO-2 make plain that petitioners will in the near future move on to a new policy based on new facts; (ii) consideration of petitioners' issues now would waste judicial resources on piecemeal litigation, because the Establishment Clause challenge to § 2(c) that forms the basis for the injunction entered below is only one of several challenges to EO-2 contained in the complaint, and the other challenges remain pending for resolution below; and (iii) petitioners' legal issues have been considered by only two courts of appeals, there is no conflict between those courts' holdings, and this Court's consideration of the issues would benefit from further percolation. Any one of these factors is an independently sufficient reason for this Court to deny certiorari.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Correct.

The Fourth Circuit correctly found that preliminary relief was justified to restrain a likely violation of the Establishment Clause that threatened substantial harm, and that the nationwide scope of the injunction issued by the district court was justified by the nationwide scope of the threatened harm. The decision to issue a preliminary injunction lies within the authority and discretion of the district court where the plaintiff has shown "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Decisions about the scope of a preliminary injunction are also a matter for the district court's sound discretion. *See, e.g., McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005).

A. Plaintiffs Have Made a Strong Showing That the Order Violates the Establishment Clause and Threatens Irreparable Harm.

Although the Establishment Clause indisputably protects individual rights against both state and federal infringement, one of its original purposes was also to prevent the federal government from interfering with the States on core matters of religion.[4] EO-2 does just that by imposing a federal policy disfavoring Islam on the amici States, in violation of their own profound commitments to religious pluralism.[5]

The Establishment Clause prohibits, among other things, governmental action motivated by a religious primary purpose. *See, e.g., McCreary*, 545 U.S. at 864; *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *see also Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Proffering a facially legitimate motive is not sufficient. The government must show that the identified purpose is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also id.* at 865 n.13; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

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[4] *See, e.g.*, Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1879, at 633-34 (5th ed. 1891); Akhil Reed Amar, *The Bill of Rights* 32-42, 246-57 (1998).

[5] As the Fourth Circuit correctly recognized, despite the executive's broad authority in the immigration arena (Br. for Amici Curiae Texas et al. in Support of Pet. 7-14), "that power is still 'subject to important [and independent] constitutional limitations'" (Pet. App. 40a-41a (quoting *Zadvyas v. Davis*, 533 U.S. 678, 695 (2001))).

In evaluating purpose, courts seek to ascertain the "official objective" of government action from "readily discoverable fact[s]," including "the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *McCreary*, 545 U.S. at 862 (quotation marks omitted). Although courts should refrain from "judicial psychoanalysis of a drafter's heart of hearts," *id.*, they must take into account the action's "historical context" and "the specific sequence of events leading to [its] passage," *Edwards*, 482 U.S. at 595. Like any other objective observer, courts have "reasonable memories" and cannot "turn a blind eye to the context in which [the] policy arose." *McCreary*, 545 U.S. at 862, 866 (quotation marks omitted).

Two days after the President signed EO-1, the predecessor and model for EO-2, presidential advisor Rudolph Giuliani revealed that the President had sought his help to craft a "Muslim ban" that would withstand judicial scrutiny. (J.A. 508.) Shortly before the President issued EO-2—and in the aftermath of the federal court injunctions against the implementation of EO-1—Senior White House Policy Advisor Stephen Miller said that EO-2 would reflect the "same basic policy outcome for the country" as EO-1 and contain "mostly minor technical differences" in order to address the federal courts' constitutional concerns with EO-1. (J.A. 339, 579.) And White House Press Secretary Sean Spicer said that the "principles of [EO-1] remain the same." (J.A. 379.)

It was no abuse of discretion to interpret these comments as tending to show that both EO-1 and EO-2 were driven predominantly by anti-Muslim animus rather than genuine security concerns. *See* Pet. App. 52a-56a; J.A. 383-384, 397, 665-666. And, as the Fourth

Circuit correctly observed, this animus is confirmed by a litany of anti-Muslim statements by then-candidate Trump that were both "closely related in time" and "specific and easily connected to" EO-1 and EO-2. (Pet. App. 60a; *see id.* 48a-50a.) In December 2015, then-candidate Trump announced an immigration policy labeled "Preventing Muslim Immigration" that urged "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on." (J.A. 341; *see also* J.A. 346.) He advocated heavy surveillance of mosques and databases to track all Muslims. (J.A. 473.) And throughout the campaign, he reiterated his belief that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." (J.A. 522.) In July 2016, in response to public criticism, Trump stated that he would reframe his proposed restrictions on Muslim immigration to incorporate a focus on nationality. Trump explained that this was not a "rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." (J.A. 481; *see also* J.A. 798.)

Contrary to the concern raised by petitioners (Pet. 29-30), this case does not present the question of whether statements that are unrelated or too remote in time may be considered in ascertaining purpose. Here, all of the statements relied upon by the courts below were directly related to banning Muslim immigration, and in many cases were virtually contemporaneous with the issuance of EO-1 and EO-2. The campaign statements made by candidate Trump were also fairly considered by the courts below because they were consistent with, and give relevant context to, the statements that he has made since taking office. *See Edwards*, 482 U.S. at 595; *McCreary*, 545 U.S. at 862, 866. Moreover, unlike a statute, which is the act of a collective body, and therefore presents some difficulties in discerning legislative intent from the statements of individual legislators, the Executive Orders at issue here are the acts of a single official, and there is no such barrier to treating his statements as probative of his intent in promulgating those orders. Under this "highly unique set of circumstances" (Pet. App. 61a), the lower courts did not abuse their discretion in considering all of the President's statements of anti-Muslim animus.

Petitioners have never disputed the existence of these statements or their contents. They have instead suggested (Pet. 20-23) that the courts below erred in failing to recognize that an executive action in the immigration context must be sustained so long as there is a "facially legitimate and bona fide reason" for the action. As the Fourth Circuit noted, however, the same statements that convincingly demonstrate § 2(c)'s anti-Muslim purpose also amount to a showing that the proffered reason for this provision is not, in fact, "bona fide." Pet. App. 42a. A reviewing court may therefore "look behind" the challenged action to assess whether the "facially legitimate" reason was in fact the governmental actor's true, primary motive. Pet. App. 42a; *see Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring in the judgment).

The courts below correctly viewed the explicit and consistent statements in the record here as "the exact type of 'readily discoverable fact[s]'" that may be used to determine a government actor's true purpose. Pet. App. 51a (quoting *McCreary*, 545 U.S. at 862). The

Fourth Circuit explained that "EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Muslim ban and EO-2 itself." Pet. App. 52a. Thus, having performed the required inquiry into purpose without "prob[ing] anyone's heart of hearts," the Fourth Circuit correctly held that the statements, "taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States," as well as his "intended means of effectuating the ban[] by targeting majority-Muslim nations instead of Muslims explicitly." Pet. App. 51a.

Accordingly, because the context and historical background of EO-2 demonstrate that it has the primary purpose and effect of conveying the message that Islam is a disfavored religion, respondents established the requisite likelihood of success on the merits here. And when a party colorably "alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *see also American Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986); *cf. American Civil Liberties Union of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005) (presuming irreparable harm where plaintiffs were likely to succeed on merits of Establishment Clause claim); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986) (same).

B. The Preliminary Injunction Was Proper and Was Appropriately Tailored to § 2(c)'s Violations and Threatened Harms.

The Fourth Circuit also correctly found that the district court did not abuse its discretion in entering a preliminary injunction or in concluding that a nationwide injunction was necessary in view of the nature of the constitutional violation and the harms to be avoided. The injuries that enforcement of § 2(c) threatens to the State amici exemplify the public interests affected by the travel ban, support the balance of the equities struck by the district court, and demonstrate the appropriateness of restraining § 2(c)'s application nationwide. *See Winter*, 555 U.S. at 20. See *infra* 12-17.

Petitioners argue (Pet. 31-33) that the injunction is overbroad and should be narrowed to bar application of § 2(c) only as to the wife of respondent John Doe #1, the sole respondent whose standing was adjudicated by the Fourth Circuit. But the nationwide injunction was appropriate and necessary to safeguard not only Doe #1 and all similarly situated U.S. persons seeking entry into the country for their relatives,[6] but also to prevent the immediate, systemic harms that enforcement of § 2(c) would cause. Those harms include injuries to the amici States as well as to our state institutions, businesses, communities, and citizens.

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[6] Contrary to the assertion of the amici States in support of petitioners (Texas Amicus Br. 4-7), neither the courts below nor respondents relied on any extraterritorial injuries for irreparable harm.

This Court has long recognized that where "there has been a systemwide impact [there may] be a systemwide remedy." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937); *see also Porter v. Lee*, 328 U.S. 246, 250-52 (1946) (finding that landlord had "engaged in violations" of federal rent regulations supported "broad injunction" restraining landlord from prosecuting eviction proceedings against *all* tenants, rather than the respondents only). District courts exercising their equity jurisdiction thus enjoy broad and "'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (equity courts "should pay particular regard for the public consequences" when fashioning an injunction). Accordingly, petitioners are simply incorrect to assert that equitable relief should be limited to redressing only a particular plaintiff's "own cognizable injuries." Pet. 31.

Consistent with these principles, the Fourth Circuit found no error in the district court's issuance of a nationwide injunction. Pet. App. 71a-73a (citing *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992)). As the experiences of the amici States show, the Establishment Clause violation at the heart of § 2(c) jeopardizes public interests throughout the country. The district court appropriately considered and addressed those harms in issuing its preliminary injunction.

Harms to Universities, Hospitals, and Businesses. Section 2(c) will block the admission of nationals from the six designated countries who seek entry to be faculty and students at our public universities, doctors at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here for family visits or for tourism. Although some of these people already have visas, EO-2 nonetheless harms them and the States. Single-entry visa holders will be unable to participate in professional obligations or religious observances that require travel outside the United States. Those whose visas expire during the term of the travel ban will face obstacles to renewal that could jeopardize their studies or employment. And those whose visas are still effective during the period of the travel ban will be unable to receive visits from their parents, spouses, children, and other relatives. Others who have planned to come here to study, teach, or provide health care or other services, but who have not yet secured a visa, will not be able to come to our States at all. Many will simply look for alternative placements in other, more welcoming countries.

The loss of such students and workers places the amici States' institutions and businesses at a competitive disadvantage in the global marketplace, particularly where those students and workers possess specialized skills or training.[7] State educational and medical institutions that have relied on accepted offers of employment from individuals and scholars in the designated countries—who now may be unable or unwilling to come—will face unexpected and critical staffing shortages, and additional costs and administrative burdens. These disruptions will translate to uncertainty in academic programs and threats to the provision and quality of health care services that will put our communities at risk.[8]

The States will also suffer direct economic harms from the travel ban, including the elimination of significant sources of taxes and other revenues. For example, a recent survey by the Institute of International Education found that "[m]ore than 15,000 students enrolled at U.S. universities during 2015-16 were from the 6 countries named in [EO-2]," and nationwide, "these students contributed $496 million to the U.S. economy, including tuition, room and board and other spending."[9] Because only single-entry visas are permitted for two of the countries, and because the required visas are valid only for relatively short periods, most students have to apply for a new visa during the course of their academic studies. In particular:

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[7] *See, e.g.*, New Amer. Econ., *The Contributions of New Americans in Illinois* 13 (Aug. 2016) (internet). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[8] *See Immigrant Doctors Project*, https://immigrantdoctors.org/; *see also* Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017) (internet).

[9] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

- students from Somalia are issued single-entry visas that are valid for 3 months;
- students from Libya are issued single-entry visas that are valid for 12 months; and
- students from Iran, Sudan, Syria, and Yemen are issued multiple-entry visas, but visas for Iran and Syria have a validity period of only two years, while the validity period is only 12 months for Yemeni students and 6 months for Sudanese students.[10]

In other words, foreign students on single-entry visas who have relied on the existing preliminary injunctions—whether to return home for the summer, conduct research in other countries, or travel abroad for other reasons—face the prospect of being denied a visa to reenter the United States. Although EO-2 gives consular officers discretion to waive the travel ban for students from the six countries, the discretionary nature of the review process means students have no assurance of readmission. EO-2 does not describe the process for applying for a waiver, does not specify the timeframe for receiving one, and does not set any concrete guidelines beyond providing a list of circumstances in which waivers "could be appropriate," EO-2 § 3. The ultimate decision whether to issue a waiver is committed entirely to "the consular officer's or the [Customs and Border Protection] official's discretion." *Id.*

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[10] U.S. Dep't of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country* (search by country and visa types F and M) (internet).

That uncertainty alone will likely induce students from the six countries designated in EO-2—and many other countries—not to apply to colleges and universities in the United States,[11] or not to accept offers of admission from those educational institutions. Indeed, the climate of uncertainty and discrimination created by the travel ban already appears to be deterring applications and acceptances from international students more broadly. Forty percent of colleges surveyed report a drop in applications from foreign students in the wake of EO-1 and EO-2.[12] And 80% of college registrars and admissions officers surveyed have serious concerns about their application yields from international students.[13] Not surprisingly, countries that are perceived as more welcoming—such as Canada, the United Kingdom, Australia, and New Zealand—have already seen a jump in applications following issuance of EO-1 and EO-2.[14]

Likewise, as a result of the travel ban, an estimated 4.3 million fewer tourists are expected to visit the United States this year, resulting in $7.4 billion in lost revenue, and in 2018, those numbers will increase to 6.3 million fewer tourists and $10.8 billion in lost revenue.[15] Such revenues will never be recovered, even if the pending legal challenges ultimately prevail.[16]

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[11] The University of Washington, for instance, received various communications from prospective students from the affected countries expressing anxiety about applying in light of the travel ban. Decl. of David L. Eaton ¶ 5 & Ex. 2, *Hawai'i v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125.

[12] Kirk Carapezza, *Travel Ban's "Chilling Effect" Could Cost Universities Hundreds of Millions*, Nat'l Pub. Radio (Apr. 7, 2017) (internet).

[13] Carapezza, *supra*.

[14] Carapezza, *supra*.

Harms to Our Residents and Communities. EO-2 also harms the amici States' ability to protect "the well-being of [our] populace" through our own constitutional and statutory commitments to tolerance and diversity, including through enforcement of our antidiscrimination laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). Our residents and businesses—and, indeed, many of the amici States ourselves—are prohibited by those state enactments from taking national origin and religion into account in determining to whom they can extend employment and other opportunities.[17] EO-2 stands in stark opposition to these core expressions of the States' sovereignty.

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[15] *See* Abha Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet).

[16] *See* Br. for Amici Curiae Virginia, Maryland, et al. in Opp'n to Stay Applications 6-21; *see also* Br. for Amici Curiae Illinois 5-27, *Hawai'i v. Trump*, *supra* (both discussing in detail amici States' injuries).

[17] *See, e.g.*, Cal. Const. art. I, §§ 4, 7-8, 31; Cal. Civ. Code § 51(b); Cal. Gov't Code §§ 11135-11137, 12900 et seq.; Conn. Gen. Stat. § 46a-60; Ill. Const. art. I, §§ 3, 17; Ill. Comp. Stat. ch. 740, § 23/5(a)(1); *id.* ch. 775, §§ 5/1-102(A), 5/10-104(A)(1); Maine Rev. Stat. tit. 5, §§ 784, 4551-4634; Md. Code, State Gov't § 20-606; Mass. Gen. L. ch. 93, § 102; *id.* ch. 151B, §§ 1, 4; N.M. Const. art. II, § 11; N.M. Stat. § 28-1-7; Or. Rev. Stat. § 659A.006(1); R.I. Gen. Laws § 28-5-7(1)(i); Vt. Stat. Ann. tit. 9, §§ 4500-4507; *id.* tit. 21, § 495; Wash. Rev. Code § 49.60.030(1).

The amici States have a strong interest in ensuring that our "residents are not excluded from the benefits that are to flow from participation in the federal system"—and relatedly, in "securing observance of the terms under which [we] participate in" that system, *id.* at 607-08, including observance of the limits of the Establishment Clause. See *supra* 5. And here the Establishment Clause violations at the heart of § 2(c) and its predecessor provision in EO-1 have contributed to an environment of fear and insecurity among immigrant and minority populations that not only puts additional strain on state and local law enforcement resources, but also runs counter to the amici States' deeply held commitment to inclusiveness and equal treatment.[18]

As the courts below correctly recognized, the public interest in avoiding these harms—which flow directly from the Establishment Clause violation shown by Doe #1—would not be addressed by injunctive relief limited to just Doe #1 himself. Enjoining § 2(c) "only as to [p]laintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications." Pet. App. 73a. Nor would such an injunction address the "feelings of disparagement and exclusion" and "worries about his safety in this country" that § 2(c) has inflicted on Doe #1, like so many others. Pet. App. 16a. For these reasons, the courts below did not err in concluding that the protections of a nationwide preliminary injunction were appropriate to provide "complete relief." *See* Pet. App. 73a.

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[18] In the Chicago area alone, 175 hate-related incidents were reported in the first two months of 2017, as compared to 400 hate crimes reported in all of 2016. *See* Marwa Eltagouri, *Hate Crime Rising, Report Activists at Illinois Attorney General's Summit*, Chicago Tribune (Feb. 24, 2017) (internet); *see also* Azadeh Ansari, *FBI: Hate Crimes Spike, Most Sharply Against Muslims*, CNN (Nov. 15, 2016) (internet).

II. The Petition Presents a Poor Vehicle for This Court's Review.

The travel ban in EO-2 § 2(c) will expire by its own terms on June 14, 2017—two days after the deadline this Court set for responses to the petition—rendering the injunction issued by the district court moot.[19] Section 2(c) provides for the entry of nationals from the six designated countries to be "suspended for 90 days from the effective date of this order." EO-2 § 2(c). This 90-day time period was purportedly designed to avoid erroneous admissions of individuals presenting a national security risk while federal officials conduct a global review of visa "screening and vetting procedures." *Id.* § 1(f); *see id.* § 2(a)-(d) (describing global review process). The effective date of EO-2 was March 16, 2017, making June 14, 2017 the travel ban's expiration date. *See id.* § 14.

Even after the enforcement of the travel ban had been preliminarily enjoined by the district courts in this case and in *Hawai'i v. Trump*,[20] petitioners agreed below that "[s]ection 2(c)'s 90-day suspension *expires in early June*." Mot. of Defs.-Appellants for a Stay Pending Expedited Appeal at 11, *IRAP*, CA4 ECF No.

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[19] *See, e.g, In re T.W.P.*, 388 U.S. 912 (1967) (petition for writ of certiorari denied on mootness grounds); *Spurlock v. Steer*, 324 U.S. 868 (1945) (same).

[20] On June 1, 2017, petitioners filed in this Court a motion for a stay of the pending Ninth Circuit proceedings (No. 16-A1191).

257 (emphasis added). And in their petition for certiorari, petitioners have stated that the 90-day period has been running, noting that alleged harms scheduled to occur in November 2017 are irrelevant because the 90-day suspension will have ended by then. *See* Pet. 15 n.7.

Petitioners have also at times suggested that the injunctions entered in this case and in *Hawai'i v. Trump* have tolled the 90-day period, either by tolling the effective date of EO-2 or by suspending federal officials' review of visa procedure and vetting processes. *See* Defs.-Appellants' Resp. to Pls.-Appellees' Mot. for Leave to Supplement the Record at 2-3, *IRAP*, CA4 ECF No. 291. Nothing in any provision of EO-2 suspends or tolls either the 90-day period or EO-2's effective date in the event that the travel ban is halted through court action or some other intervening event. Moreover, even if EO-2 were for some reason to be deemed effective past its June 14, 2017, expiration date, certiorari should still be denied at this stage of the proceedings because the terms of EO-2 make plain that petitioners will soon move on to a revised plan of action based on new facts that will itself moot this dispute over EO-2.

EO-2 requires the Secretary of Homeland Security to report to the President "within 20 days of the effective date of this order," EO-2 § 2(b), what "additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the [Immigration and Nationality Act] in order to determine that the individual is not a security or public-safety threat," *id.* § 2(a). And it provides that after this initial report and the Secretary's request "that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification," *id.* § 2(d), the Secretary must submit to President a "list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested," *id.* § 2(e).

Whether petitioners have commenced this process already or will commence it in the near future, the record and policies currently before the Court will soon be outdated. There is no justification for granting certiorari now to review a soon-to-be superseded policy, and certainly no reason to review the propriety of a soon-to-be moot preliminary injunction. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 412-13 (1935) (declining to consider issue mooted by subsequent government action).

Additional considerations further weigh against granting certiorari at this stage of the proceedings. This Court generally declines to exercise its certiorari jurisdiction over interlocutory lower court decisions, even in cases presenting significant constitutional questions.[21] That practice stems from the well-established principle that "piece-meal appellate review is not favored," *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), and ensures that the legal issues presented for resolution to the Court can be evaluated on the basis of a complete record with "the benefit of the [lower] courts' full consideration," ***Wrotten v. New York***, 560 U.S. 959, 959 (2010) (Sotomayor, J.). These concerns apply with full force here.

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[21] *See, e.g., Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J.) (Establishment Clause issue); *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.) (Equal Protection Clause issue); *see also Hamilton-Brown Shoe Co. v. Wolf Bros.* , 240 U.S. 251, 258 (1916) (lack of final judgment "alone furnished sufficient ground" for denial of the writ).

The Fourth Circuit's ruling was limited to affirming "the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order" based only on § 2(c)'s likely violation of the Establishment Clause. Pet. App. 3a, 22a. The Fourth Circuit did not address respondents' other constitutional and statutory challenges to § 2(c) and several other sections of EO-2, which remain to be resolved in the lower courts. Indeed, the decisions below were narrowly framed to avoid irreparable harms only (see *supra* Point I) while the litigation proceeds to a final judgment and a full record is created to support an ultimate determination of respondents' various constitutional and statutory claims.

Contrary to petitioners' suggestions (Pet. 13, 20, 24-27), the Fourth Circuit did not propose any sweeping new rules for review of a facially valid determination by the President—such as authorizing a "wide-ranging search for pretext" based purely "on speculation about officials' subjective motivations." Rather, the Fourth Circuit affirmed the district court's evaluation of record evidence concerning the unusually explicit and on-point statements of the President, his senior advisors, and his official representatives. Petitioners do not dispute that the statements were in fact made by those persons or that courts may consider any evidence of official purpose that can be "gleaned from 'readily discoverable fact.'" Pet. 26-27; *see also* Texas Amicus Br. 15-24.

Petitioners' bare assertion that those statements could have other possible meanings (Pet. 27), even if credited, only underscores why review by this Court is premature at this juncture. This Court "has often refused to decide constitutional questions on an inadequate record," *Ellis v. Dixon*, 349 U.S. 458, 464 (1955), and has a long-standing "policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty," *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 576 (1947). To do otherwise risks "the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

"[R]eview of an injunction issued by a lower federal court independently of the 'merits' of the issue involved in the case is [thus] not common," *Heckler v. Lopez*, 463 U.S. 1328, 1331 (1983) (Rehnquist, J.), and certainly should not be granted here, where petitioners have failed to show any "special circumstances" warranting a departure from the Court's long-standing reluctance to grant certiorari in interlocutory cases, *see Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007). As the Fourth Circuit correctly concluded, petitioners' purported national security concerns about the preliminary injunction against § 2(c) (*see* Pet. 33-34) are unsupported by the record (*see* Pet. App. 53a), and indeed have been directly contradicted by the President himself, who has asserted that officials "are EXTREME VETTING people coming into the U.S. in order to help keep our country safe."[22]

In addition, petitioners' legal issues have been considered by only two courts of appeals, there is no conflict between those courts' holdings, and this Court's consideration of the issues would benefit from further percolation.

Accordingly, even if the issues presented by this case involved important, non-moot questions of federal law that might otherwise warrant this Court's review (Pet. 33-34), the current procedural posture of the case makes it a particularly poor vehicle for resolving any such questions at this time. This Court should adhere to its ordinary practice of awaiting a final judgment on the merits, based on a full and complete record, before then determining whether certiorari review is warranted.

---

[22] Donald Trump (@realDonaldTrump), Twitter (June 5, 2017 3:44 a.m. PT) (internet).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Nos. 16-1436 and 16-1540

In the
Supreme Court of the United States

DONALD J. TRUMP, *ET AL.*,
PETITIONERS
V.
INTERNATIONAL REFUGEE ASSISTANCE
PROJECT, *ET AL.*,
RESPONDENTS

DONALD J. TRUMP, *ET AL.*,
PETITIONERS
V.
STATE OF HAWAII, *ET AL.*,
RESPONDENTS

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

Brief of the Public Policy Legal Institute and Center for Competitive Politics As *Amici Curiae* In Support of Neither Party

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QUESTIONS PRESENTED

The Questions Presented in No. 16-1436 include "[w]hether Section 2(c)'s [of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)] temporary suspension of entry violates the Establishment Clause." Pet. I.

The Fourth Circuit Court of Appeals below rested its decision, in substantial part, on statements made by Donald Trump while he was a candidate for president. The majority opinion acknowledged that such review of campaign statements might "chill[] campaign promises," but thought such chill "a welcome restraint" on certain speech. *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, 857 F.3d 554, 600 (4th Cir. 2017), slip op. 68, Pet. App. 62a.

Amici believe that, fairly included within Petitioners' Question 2 in Case No. 16-1436, is the question of whether a court's determinative reliance on candidates' campaign statements poses an unacceptable risk to First Amendment interests.

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STATEMENT OF INTEREST

Amicus curiae Public Policy Legal Institute is a nonprofit educational organization dedicated to protecting the right of Americans to advocate for and against public policies.[1] www.publicpolicylegal.com.

Amicus curiae Center for Competitive Politics is a nonpartisan, nonprofit organization that defends the First Amendment rights of speech, assembly, and petition through litigation, research, and education. www.campaignfreedom.org.

Amici take no position on the propriety of the underlying immigration order in these cases, nor on the Establishment Clause questions addressed below. They write separately to address a portion of the Fourth Circuit's opinion, discussed at pages 28-30 of the Petition in No. 16-1436, that welcomes the chilling of "campaign promises to condemn and exclude entire religious groups." This new "welcome restraint" doctrine – which could be used by other courts to probe candidates' campaign speech and associations in a broad range of cases – presents a significant danger to free speech and association.

---

[1] Pursuant to Rule 37.3(a), *amici* certify that Petitioners have filed a blanket consent with the Clerk, and counsel of record for all Respondents have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

By undertaking a novel review of campaign speech in an Establishment Clause challenge, the Fourth Circuit majority below created a free speech dilemma. It then compounded that dilemma by "welcom[ing]" the "restraint" its analysis might impose.

A judicial review of campaign speech – even speech that sheds light on the reasons for later official action – chills expression and conflicts with numerous long-standing protections for campaign speech. As this Court recently reiterated: "the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"[2]

A religious facet to campaign speech does not lessen its protection under the First Amendment. In the realms of religion and political belief, "exaggeration, ... vilification" and "false statement" are predictable.[3] "But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[4] Importantly, if a candidate's speech on religious topics is "restrain[ed]" by the Fourth Circuit's opinion, the public will not know if a candidate holds such views, and will be unable to act on that knowledge in choosing how to vote.

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[2] *McCutcheon v. Fed. Election Comm'n,* 134 S. Ct. 1434, 1441 (2014) (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971)).

[3] *N. Y. Times v. Sullivan,* 376 U.S. 254, 271 (1964) (citation and quotation marks omitted).

[4] *Id.*

This Court has never given the lower courts direction on how to review campaign speech in an Establishment Clause challenge. Nor have the lower courts, including those cited by the majority below, ever relied on campaign statements to find an Establishment Clause purpose in a facially-neutral official action. But this Court has not suggested that the judicial branch may, in that context, act to discourage particular electoral messages. And in similar areas, such as false statements by elected officials, this Court has rejected a "free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits."[5]

The Fourth Circuit majority below defended its reliance on campaign speech by claiming "highly unique" circumstances, 857 F.3d at 599, Pet. App. 61a, but divisive campaign speech is fairly common. Even in tiny local government units, under the Fourth Circuit's analysis, candidates may make divisive statements that would generate legal challenges to their later official actions. Litigants will likely rely on those statements, including when making discovery demands, and the Fourth Circuit has provided no effective limiting principle that would protect candidates and ensure the electorate's right to hear unvarnished campaign statements.

The Fourth Circuit majority's reliance on campaign speech could lead to numerous difficult and divergent decisions before future courts. And it was unnecessary: as the Ninth Circuit panel decision demonstrates, this case could have been decided without considering campaign speech.

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[5] *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Regardless of this Court's disposition of the merits in this case, and even if this litigation is mooted by events, the Court should take this opportunity to reject the Fourth Circuit's analysis and strongly endorse robust protections for speech about elections and political campaigns.

ARGUMENT

> To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a **welcome restraint**.

Int'l Refugee Assistance Project, et al. v. Trump, et al., 857 F.3d 554, 600 (4th Cir. 2017) ("*IRAP*"), Pet. App. 62a (emphasis added).[6]

This case comes to this Court as, *inter alia*, an Establishment Clause challenge to an executive order. But in reviewing that challenge, the Fourth Circuit unnecessarily relied upon a parsing of campaign speech, and suggested that any chill resulting from that approach would be a "welcome restraint" on certain messages. *Id.*

However distasteful a particular campaign statement may be, the "restraint" the Fourth Circuit majority below would "welcome" is self-censorship.[7]

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[6] All references in this brief to the Petition Appendix are to the Appendix filed in No. 16-1436.

[7] *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("the possibility of mistaken factfinding – inherent in all litigation – will create the danger that legitimate utterance will be

An endorsement of self-censorship conflicts with settled law protecting a variety of speech and speakers, was not necessary to the resolution of this case, and is applicable to many more situations than the Fourth Circuit's "highly unique" prediction would suggest.

Within the second Question Presented in Case No. 16-1436[8] is the substantive question of whether Section 2(c) of the Executive Order[9] may be subjected to Establishment Clause scrutiny based upon campaign "promises" by candidate Donald Trump, or whether the constitutionality of that order should instead rise or fall based upon evidence less likely to chill political speech and association. *See, e.g.*, Pet. 28-30; *IRAP*, 857 F.3d at 631-632, Pet. App. 129a-130a (Thacker, J., concurring in part); *id.*, 857 F.3d at 646-647, Pet. App. 162a-163a (Niemeyer, J. dissenting).

Given the likelihood that lower courts will use the "welcome restraint" analysis in future cases, the Court should take this opportunity to explicitly endorse robust protections for speech about elections and political campaigns.

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penalized. ... It can only result in a deterrence of speech which the Constitution makes free").

[8] Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.

[9] Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

I. The Fourth Circuit's "Welcome Restraint" Analysis Conflicts With Numerous Settled Precedents.

Although this case concerns an Establishment Clause dispute, the Fourth Circuit majority quotation above poses important questions concerning free speech, content, and speakers. Yet, rather than maintain the courts' traditional respect for vigorous campaign speech,[10] the lower court here "welcome[d] restraint" on "campaign promises" of a particular type and by a particular speaker.[11] *IRAP*, 857 F.3d at 600; Pet. App. 62a.

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[10] *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) ("the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head") (emphasis omitted); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign") (internal citation and quotation marks omitted); *Eu v. San Francisco Cnty Dem. Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms") (citations and quotation marks omitted).

[11] The identity of the speaker was important in this case:

> "Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive Order, they would have had no problem with the Order. As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional."

IRAP, 857 F.3d at 649, Pet. App. 167a-168a (Niemeyer, J., dissenting).

Elected officials have to campaign for office, leaving trails of campaign statements, promises, and speeches. Often, the campaign trail is littered with scorching controversies, including those over religion.[12] Absent rare and established exceptions,[13] the government—including its judicial department—may not discriminate among these messages, supporting some and discouraging others.

The Fourth Circuit chose to use the Establishment Clause's "purpose" requirement to impose its view of which campaign speech should be "restrained." That choice ignored this Court's clear statements concerning the level of protection given to campaign speech, and risks further harm to First Amendment interests as courts explore the range of campaign statements they may legitimately deter.

---

[12] For example, the Fourth Circuit below cited *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), a case involving "the Ten Commandments Judge," Alabama Chief Justice Roy Moore. *IRAP*, 857 F.3d at 595, 599, Pet. App. 51a-52a, 60a. Moore is currently running for the Senate from Alabama. Ed Kilgore, "Alabama's 'Ten Commandments Judge' Is Running for Senate," New York, April 27, 2017, http://nymag.com/daily/intelligencer/2017/04/alabamas-ten-commandments-judge-is-running-for-senate.html.

[13] "These historic and traditional categories long familiar to the bar – including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct – are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 559 U.S. at 468 (citations and quotation marks omitted). None of these categories is implicated here.

1. Campaign Speech is Highly-Protected, Even When It is Controversial, Offensive, or False.

When candidates speak, what they say during their campaigns is highly protected: "Indeed, as we have emphasized, the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McCutcheon*, 134 S. Ct. at 1441, (quoting *Monitor Patriot Co.*, 401 U.S. at 272).

Equally important,

> the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470; *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("What the Constitution says is that" value judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

McCutcheon, 134 S. Ct. at 1449-1450.

"Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *Playboy Entertainment Group, Inc.*, 529 U.S. at 827 (striking down content-based restriction).

In this case, the two entwined concerns are speech about religion and speech about politics and candidates. The high degree to which those two areas of speech are protected is settled law:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Conn., 310 U.S. 296, 310 (1940).

In short, "[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *N. Y. Times*, 376 U.S. at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

Further, the First Amendment bars "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United,* 558 U.S. at 340. The danger is not only governmental disfavor of particular speakers, but also the very real danger that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*

In fact, even where the candidates in question are judges, who must maintain the highest degree of impartiality, the candidates' speech is protected at the highest levels. *Republican Party of Minn.*, 536 U.S. at 776-777. Judges who had participated in formulating laws and even spoken out on them are not automatically disqualified. *Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Justice Black participated in deliberations over the Fair Labor Standards Act, even though he was one of its principal authors in the Senate).

On its face, then, the Fourth Circuit's analysis is in substantial tension with this Court's unambiguous protection of campaign speech and speakers, regardless of identity or message. But there is another danger as well: relying upon candidates' speech in adjudicating later official actions risks entangling campaign speech with government speech doctrines. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (government speech not restricted by the First Amendment). "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents." *Id.* at 1758. The same is true of a government seal of disapproval, such as an official statement, like a published judicial opinion, that a particular utterance is anti-religious "hate speech."

Yet, the Fourth Circuit's "welcome restraint" of campaign speech risks *sotto voce* triggering the government speech factors this Court cited in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) and *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Two of the *Walker/Summum* factors are usually present in campaign speech: candidate speech has long been equated with an expectation of government action (especially where the candidate was successful), and candidates are often closely identified in the public's mind with the State, especially since the State often circulates materials, such as voter education and ballot materials, with the candidates listed.

But there is a third *Walker/Summum* requirement for counting speech as government speech: whether the State exercises control over candidates' messages. *Matal*, 137 S. Ct. at 1760. If the "welcome restraint" analysis becomes more widespread, the question of whether candidates' speech is actually some attenuated form of government speech becomes much more confusing.

Candidates' speech is not currently considered government speech, subject to government control and review. Looking at it through that lens would raise a further difficulty: when would campaign speech qualify as official action? This Court has unanimously held that "[s]imply expressing support" for a policy, without more, does not qualify as an official act. *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016). It would be exceedingly strange if a particular type of stated support—that contained in campaign statements, even by sitting government officials—could rise to the level of actionable official actions. *See id. at* 2368 ("[S]etting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an official act"). Yet a too-eager willingness to probe campaign speech in order to prove an Establishment Clause violation risks that result.[14]

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[14] Of course, here the Executive Order, and not any particular statement by candidate Trump, is the "official act" being evaluated. And this case does not raise the specter of criminal sanctions. Nevertheless, the distinction between

The Fourth Circuit's "welcome restraint" analysis sets up a clash between the Free Speech, Association, and Establishment Clauses of the First Amendment. This Court has not set a standard for reviewing candidate campaign statements as part of an Establishment Clause analysis, but in the context of false statements made by elected officials,[15] "this Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Stevens*, 559 U.S. at 470) (brackets and ellipses in original). That cautionary note should be extended to the facts presented here.

2. Protection of Campaign Speech Offers More Information to Voters.

Uninhibited speech is not merely protected in the interest of the speaker. The "right to receive information and ideas, regardless of their social

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campaign speech and official action is necessarily blurred where the principal evidence for an official act's true meaning comes from public campaign statements and not from the act itself. Absent this Court's intervention, future litigation will doubtless further blur that line, especially in cases involving incumbent officeholders.

[15] *See, generally*, Richard Hasen, "A Constitutional Right to Lie in Campaigns and Elections?" 74 MONTANA L.REV. 53 (2013) http://scholarship.law.umt.edu/mlr/vol74/iss1/4; Margaret H. Zhang, "Note: *Susan B. Anthony List v. Driehaus* and the (Bleak) Future of Statutes That Ban False Statements In Political Campaigns," 164 U. PA. L. REV. ONLINE 19 (2015), www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-19.pdf.

worth, is fundamental to our free society." *Stanley v. Ga.,* 394 U.S. 557, 564 (1969) (internal citation omitted).

The Fourth Circuit's invitation to self-censorship, then, is self-defeating: if candidates intend to act contrary to the Constitution, including the Establishment Clause, they must "have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate [their] personal qualities and their positions on vital public issues" before voting. *Brown*, 456 U.S. at 53 (citation and quotation marks omitted). After all, it is not obvious that the cause of religious nondiscrimination is furthered by hiding candidates' views on relevant policies from scrutiny by the electorate.

3. The Use of Campaign Statements Was Not Necessary to the Resolution of This Case.

More than one judge below felt that the majority could have come to the same conclusion – "for more practical reasons" – without using candidate Trump's statements. *IRAP*, 857 F.3d at 631, Pet. App. 129a (Thacker, J., concurring).[16] Judge Thacker noted that candidate Trump's statements: "reveal religious animus that is deeply troubling. Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so." 857 F.3d at 600, Pet. App. 130a (citation omitted).[17]

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[16] Judge Thacker noted that courts "should…hesitate to attach constitutional significance to words a candidate offers on the campaign trail." *IRAP*, 857 F.3d at 631, Pet. App. 129a.

None of the cases relied upon by the Fourth Circuit majority opinion below found it necessary to look at candidates' campaign statements for Establishment Clause reviews. *IRAP*, 857 F.3d at 599, Pet. App. 59a-60a. That court relied on *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) to show that other courts have looked at campaign statements in Establishment Clause cases. *IRAP*, 857 F.3d at 595, 599, Pet. App. 51a, 60a; *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, 2017 U.S. Dist. LEXIS 37645 (D. Md. 2017) at *43, *47, Pet. App. 245a, 248a. But in *Glassroth*, the Eleventh Circuit did not need the campaign statements of Chief Justice Roy Moore to show his religious purpose in unilaterally erecting a Ten Commandments statue in the Alabama Judicial Building. The Eleventh Circuit found Chief Justice Moore's purpose in his statements while in office at the unveiling of the statue, and in his testimony at trial. *Glassroth*, 335 F.3d at 1286-87. The campaign statements were mentioned only in passing.[18]

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[17] The Ninth Circuit panel in No. 16-1540 did not address the Establishment Clause in its review. *Trump v. Hawaii*, 859 F.3d 741, 761 (9th Cir. 2017), slip op. at 15 ("we need not, and do not, reach the Establishment Clause claim to resolve this appeal."). Consequently, that Court did not adopt the Fourth Circuit's approach to proving a violation of that clause.

[18] Similarly, *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998), *IRAP*, 857 F.3d at 599, Pet. App. 59a n.20, did not involve either government officials or candidates for office. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982), was an Equal Protection challenge. *Calif. v. United States*, 438 U.S. 645, 663-64 (1978), was a challenge to the Reclamation Act of 1902, and noted only that both major political

This suggests that the Fourth Circuit majority's "welcome restraint" analysis was not narrowly-tailored or the least-restrictive alternative for dealing with candidate Trump's "troubling" campaign statements. Indeed, there is no indication that campaign statements, as opposed to other statements made after the President took the oath of office and accepted his duties to the Constitution, added anything to the Fourth Circuit's analysis worth the threat of chill to campaign speech and consequent distortion of our national political debates.

The Court should act swiftly and decisively to quash the use of the counter-productive, unnecessary, and unwelcome "welcome restraint" analysis. The Court should again forcefully reject a test where judges must weigh the value of particular campaign speech, and candidates must self-censor their own speech to avoid later review. Otherwise, the "fullest and most urgent application" of the Free Speech Clause will be subordinated to another part of the First Amendment, and individual judges will be left with the inherently subjective task of balancing equally-important rights, a project that, in the absence of this Court's guidance, will inevitably lead to differing and unpredictable results.

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parties supported the Act and, *once he assumed office*, so did the successful Presidential candidate: "In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation." 438 U.S. at 664; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) was another Equal Protection challenge, and addressed only official legislative or administrative histories.

II. The Broad Application of the Fourth Circuit's "Welcome Restraint" Analysis Cannot Be Limited and Its Use Will Expand.

The Fourth Circuit's opinion below opens with a bold declaration that the Executive Order under consideration in this case, "drips with religious intolerance, animus, and discrimination." *IRAP*, 857 F.3d at 572, Pet. App. 2a. Even if that were a legitimate basis for officially discouraging similar campaign speech – which, as shown above, it is not – today's supercharged and contentious political atmosphere almost guarantees that the Fourth Circuit's "welcome restraint" analysis will resurface unless this Court speaks strongly against it.

Having been announced by a federal court of appeals sitting *en banc*, the Fourth Circuit's invitation to self-censorship is certain to be influential.[19] Dicta or not, the concept of "welcome restraint" will be tempting authority for future litigants probing the intentions of elected officials, with "every repetition imbed[ing] that principle more deeply in our law and thinking and expand[ing] it to new purposes." *Korematsu v. United States,* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Free speech is under considerable pressure. Students at public universities demand, and sometimes receive, "safe spaces" where they do not have to listen to speech with which they disagree or which they feel is harassing.[20] Government officials claim that "hate speech" is not protected by the First Amendment.[21] In the private realm, Facebook is hiring thousands of employees to review posts to avoid "hate speech," however defined,[22] and GuideStar, a previously-neutral republisher of annual tax forms submitted by tax-exempt organizations, put banners on its site claiming that dozens of conservative and religious organizations were "hate groups;"[23] GuideStar backed down[24] in the face of lawsuits, threats, and substantial criticism.[25]

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[19] Indeed, a simple Google search already finds about 247,000 results containing the quote "drips with religious intolerance, animus, and discrimination."

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[20] Cal. Educ. Code § 234.1(d)(2)(A) (schools may provide "safe spaces for LGBTQ and other at-risk pupils"); Prof. Alan Levinowitz, "How Trigger Warnings Silence Religious Students," The Atlantic, Aug. 30, 2016, https://www.theatlantic.com/politics/archive/2016/08/silencing-religious-students-on-campus/497951/.

[21] Kristine Phillips, "The Fix: 'Hate speech is not protected by the First Amendment,' Portland mayor says. He's wrong," The Washington Post, May 30, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/05/30/hate-speech-is-not-protected-by-the-first-amendment-oregon-mayor-says-hes-wrong.

[22] Ingrid Lunden, "Facebook to add 3,000 to team reviewing posts with hate speech, crimes, and other harming posts," TechCrunch, May 3, 2017, https://techcrunch.com/2017/05/03/facebook-to-hire-3000-to-review-posts-with-hate-speech-crimes-and-other-harming-posts/ (added to 4,500 employees already conducting such reviews); Mark Zuckerberg, May 3, 2017, https://www.facebook.com/zuck/posts/10103695315624661 (same).

Against this background, the Fourth Circuit majority below contends that its new "welcome restraint" analysis will not be a jurisprudential burden, or further undermine respect for free speech rights, because it is applicable only to a "**highly unique** set of circumstances." *IRAP*, 857 F.3d at 599, Pet. App. 61a (emphasis added). It contends: "The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decision maker, and specific and easily connected to the challenged action." 857 F.3d at 599, Pet. App. 59a-60a. Indeed, as noted *supra*, n. 11,

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[23] "GuideStar, website about charities, flags dozens of nonprofits as hate groups," CBS News, June 8, 2017, http://www.cbsnews.com/news/guidestar-charity-website-flags-nonprofits-hate-groups/.

[24] Michael Kunzelman, "Charity website cites threats in removing hate group labels," The Seattle Times, June 23, 2017, http://www.seattletimes.com/nation-world/charity-website-cites-threats-in-removing-hate-group-labels/.

[25] Andy Segedin, "GuideStar Sued For Using 'Hate Group' Designation," The Nonprofit Times, June 30, 2017, http://www.thenonprofittimes.com/news-articles/guidestar-sued-using-hate-group-designation/; Complaint, *Liberty Counsel v. GuideStar USA, Inc.* (E.D. Va. June 28, 2017) http://lc.org/062817GSComplaint.pdf.

In addition, the Evangelical Council for Financial Accountability sent a letter to GuideStar, available at http://www.ecfa.org/PDF/07-07-17%20GuideStar%20Letter.pdf, complaining about the "hate group label" and quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

Respondents told the court below that the analysis would not have been applied to a candidate other than Trump. 857 F.3d at 649, Pet. App. 167a-168a (Niemeyer, J., dissenting).

Yet there is nothing "highly unique" in the circumstances identified by the majority opinion below that cabins the application of the "welcome restraint" doctrine just to Candidate and President Trump. A wide variety of candidates, from presidential to local specialty districts, make statements that some may find offensive to religious sensitivities.[26]

In tiny, rural San Juan County, Washington, for example, the San Juan County Public Hospital District #1 is a junior taxing district, administering, *inter alia*, a public subsidy to a local rural hospital.[27] The local hospital, Peace Island Medical Center, is a Catholic-affiliated institution.[28] In 2015, a slate of candidates, headed by Monica Harrington, successfully ran for the Hospital District Board.[29]

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[26] *See, e.g.*, the multiple suits including *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), involving the actions of Chief Justice Roy Moore – "the Ten Commandments Judge" case discussed in n. 12 *supra*; *N.Y. Times*, 376 U.S. at 271.

[27] www.sjcphd.org.

[28] PeaceHealth, About PeaceHealth, "Our Mission, Vision and Values," https://www.peacehealth.org/about-peacehealth/mission-values.

[29] "The Journal Endorses Sharp, Williams and Harrington For Hospital District Board," The Journal of the San Juan Islands, Oct. 20, 2015, http://www.sanjuanjournal.com/opinion/the-journal-endorses-sharp-williams-and-harrington-for-hospital-district-board-editorial/ ("We too sense that Harrington has a wider scope of issues with Catholic organizations than PeaceHealth, however

Harrington runs a website and blog called "Catholic Watch, Keeping Watch on Catholic Healthcare."[30] In 2017, Harrington and her colleagues on the Hospital District Board withdrew $50,000 of the public hospital subsidy and contracted with Planned Parenthood to provide services which they claimed were not offered by the Catholic-affiliated hospital.[31]

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her commitment to affordable healthcare and serving islanders comes first and foremost").

[30] www.catholicwatch.org. "CatholicWatch is committed to safeguarding patients, physicians, and taxpayers from the imposition of theocracy-based medicine."

Harrington herself has publicly made statements that could reasonably be considered "vilification of men who have been, or are, prominent in church," *N. Y. Times*, 376 U.S. at 271. Seattle Community Media, "Catholic HealthCare Your Only Choice," June 14, 2013, http://seattlecommunitymedia.org/series/moral-politics/episode/catholic-healthcare-your-only-choice, at 2:54 ("what it's about is increasing the span of control for the Catholic bishops and the health-care policies that they direct. ... It would be paranoid if it weren't for the fact that real women are paying the price with their lives and with their fertility.").

[31] Hayley Day, "Public Hospital District Votes to Contract with Planned Parenthood," The Journal of the San Juan Islands, May 31, 2017, http://www.sanjuanjournal.com/news/public-hospital-district-votes-to-contract-with-planned-parenthood/.

Recently the Hospital Board agreed to give $10,000 of the money removed from the hospital subsidy to other organizations and give Planned Parenthood only $40,000. Hayley Day, "EMS, Prevention Coalition to receive remaining hospital district funds," The Journal of the San Juan Islands, July 9, 2017, http://www.sanjuanjournal.com/news/ems-prevention-coalition-receive-one-time-subsidy-from-public-hospital-district/. Hospital Commissioner Monica Harrington dissented, arguing to use the remaining funds for "death with

These are the same circumstances that the majority below thought were "highly unique," though writ small. Even assuming that the Hospital District's Board votes were based on facially-neutral concerns, and the District's resolutions did not mention Catholic beliefs or Catholicism, under the Fourth Circuit's "welcome restraint" analysis, do the clear and relevant views in 2015 of candidates Harrington and her colleagues on the Board so taint the 2017 vote that the Planned Parenthood contract decision must be reviewed under the Establishment Clause? Given the contention over this small taxing district's actions, would the Washington or federal courts have to judge Harrington's motives based on her blogging and campaign statements? By what standards would those courts decide these cases? [32]

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dignity" services not available at the local Catholic-affiliated hospital. *Id.*

[32] As Judge Kozinski wrote in dissent in *State of Washington v. Trump*, 858 F.3d 1168, 1173-1174 (9th Cir. 2017):

> [Review of candidate statements] will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?
>
> Weighing these imponderables is precisely the kind of "judicial psychoanalysis" that the Supreme Court has told us to avoid. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). ...Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry.

As this Court noted in *Meek v. Pittenger*, 421 U.S. 349 (1975), the possibility of repeated, diverse challenges to such offensive statements may itself generate Establishment Clause problems.[33] It is not difficult to envision similar concerns arising from complex and difficult judicial analyses.

Under a "welcome restraint" analysis, the potential for litigation premised upon campaign speech, and divergent interpretations of various phrases in different courts and before different judges, is enormous. This is not an analysis that can be limited to presidential candidates and executive orders; the Fourth Circuit's treatment of campaign speech will inevitably be applied to Establishment Clause cases arising from the full range of political disputes.

III. The Court Should Strongly Reject the "Welcome Restraint" Analysis Even If the Lower Court Opinion Is Vacated or Reversed On Other Grounds.

It is highly likely that the Court could resolve this matter without addressing the Fourth Circuit's

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> But the panel has approved open season on anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.

[33] "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Pittenger*, 421 U.S. at 372.

"welcome restraint" analysis or its probable effects. For example, Petitioners suggested to the Court by letter on June 25, 2017, that this case was moot because the only individual plaintiff in the underlying case has received her visa.[34] Petitioners argued that this visa should warrant "reversal or vacatur of the ruling below."[35] Media reports also suggest that the review of national security procedures required by the Executive Order may be completed before this case can be heard.[36] Indeed, the Court's June 26th Order granting the Petition and consolidating the cases directed the parties to address "[w]hether the challenges to 2(c) became moot on June 14, 2017." *Trump et al. v. Int'l Refugee Assistance Project, et al*, 582 U.S. ___ (2017), slip op. at 9.

The "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur would "clear[] the path for future relitigation of the issues between the parties and eliminate a judgment, review of which was prevented through happenstance." 340 U.S. at 40.

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[34] Letter to Hon. Scott S. Harris, Clerk, from Jeffrey B. Wall, Acting Solicitor General, June 25, 2017, p. 2.

[35] *Ibid.*

[36] Andy J. Semotiak, "Supreme Court Hands Border Agents Potentially Confusing Task In Partially Lifting Freeze on Travel Ban," Forbes, June 27, 2017, https://www.forbes.com/sites/andyjsemotiuk/2017/06/27/supreme-court-supports-part-of-presidents-travel-ban.

Reversal or vacatur, however, is not always required under *Munsingwear*. The mootness of this case would not be caused by either the "unilateral action of the party who prevailed below" or the "vagaries of circumstance." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Even if the Court addresses the merits of the Fourth Circuit opinion, it may not also reach the "welcome restraint" analysis for a variety of reasons. Given the likelihood of further use of the Fourth Circuit's analysis by future litigants or reviewing courts, as shown *supra*, it is important for the Court to reaffirm its firm commitment to the free speech of candidates, as also shown *supra*.

The Court should use this opportunity to forestall further use of the Fourth Circuit's imposition of a "welcome restraint" on particular speech and speakers by clearly stating that such "restraint" is neither a proper function of the judicial branch, nor an appropriate remedy for speech, regardless of how offensive or false.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that, no matter how else this Court rules on these cases, the Court should expressly reject the "welcome restraint" analysis used by the Fourth Circuit below.

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No. 16-1436

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*,
PETITIONERS
V.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *ET AL.*,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief of the Public Policy Legal Institute and Center for Competitive Politics As *Amici Curiae* Supporting Petitioners

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QUESTIONS PRESENTED

The Questions Presented in the Petition include: "2. Whether Section 2(c)'s [of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)] temporary suspension of entry violates the Establishment Clause." Pet. I.

The Court of Appeals below rested its decision, in substantial part, on statements made by Donald Trump while he was a candidate for president. The majority opinion below acknowledged that such review of campaign statements might "chill[] campaign promises," but thought such chill "a welcome restraint" on certain speech. *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, No. 17-1351 (4th Cir. May 31, 2017), slip op. 68, Pet. App. 62a.

Amici believe that Petitioners' Question 2 fairly includes the question of whether a court's determinative reliance on candidates' campaign statements poses an unacceptable risk to First Amendment interests.

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STATEMENT OF INTEREST

Amicus curiae Public Policy Legal Institute is a national non-profit educational organization dedicated to protecting the right of Americans to advocate for and against public policies.[1] www.publicpolicylegal.com.

Amicus curiae Center for Competitive Politics is a nonpartisan, nonprofit organization that defends the First Amendment rights of speech, assembly, and petition through litigation, research, and education. www.campaignfreedom.org.

Amici take no position on the propriety of the underlying immigration order in this case, nor on the Establishment Clause questions addressed below. They write separately to address a portion of the Fourth Circuit's opinion, discussed at pages 28-30 of the Petition, that creates a new and unprecedented danger by welcoming the chilling of "campaign promises to condemn and exclude entire religious groups." This new "welcome restraint" doctrine – which could be used by other courts to probe candidates' campaign speech and associations, including speech bearing little resemblance to the utterances at issue here – offers significant dangers to free speech and association.

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[1] Pursuant to Rule 37.2, amici certifies that counsel of record for all parties received notice of their intention to file this brief ten days prior to its due date. Petitioners filed a blanket consent with the Clerk, and Counsel of Record for Respondents has consented to the filing of this brief. A copy of the Respondents' consent has been filed with the Clerk.

Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

> To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a **welcome restraint**.

Int'l Refugee Assistance Project, et al. v. Trump, et al., No. 17-1351 (4th Cir. May 31, 2017), slip op. 68, Pet. App. A, 62a (emphasis added).

The parties have not focused on the Fourth Circuit's new assertion that the chilling of certain disfavored speech would be a "welcome restraint." Pet. App. 62a. The "restraint" the majority below would "welcome" is self-censorship.[2]

Within the second Question Presented[3] is the substantive question of whether Section 2(c) of the Executive Order[4] may be subjected to Establishment Clause scrutiny based upon campaign "promises" by candidate Donald Trump, or whether the constitutionality of that order should instead rise or fall based upon evidence less likely to chill political speech and association. See, e.g., Pet. 28-30; Pet. App. 129a-130a (Thacker, J., concurring in part); 162a-163a (Niemeyer, J. dissenting). Indeed, one member of the Fourth Circuit majority wrote separately, in part, to note her view that the court's review of the campaign statements was not necessary and that the Order could be found unconstitutional without considering those statements. Pet. App. 129a-130a (Thacker, J., concurring in part).

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[2] *Speiser v. Randall,* 357 U.S. 513, 526 (1958)("the possibility of mistaken factfinding – inherent in all litigation – will create the danger that legitimate utterance will be penalized. ... It can only result in a deterrence of speech which the Constitution makes free.").

[3] Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.

[4] Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

Although this case concerns an Establishment Clause dispute, the Fourth Circuit majority quotation above poses important questions concerning free speech, content and speakers. Yet, rather than maintain the courts' traditional respect for vigorous campaign speech,[5] the lower court here "welcome[d] restraint" on "campaign promises" of a particular type and by a particular speaker.[6] Pet. App. 62a.

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[5] *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002)("the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head.") (emphasis omitted); *Brown v. Hartlage*, 456 U. S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.")(internal citation and quotation marks omitted); *Eu v. San Francisco County Dem. Central Cmte*, 489 U.S. 214, 223 (1989) ("[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms")(citation and quotation marks omitted).

[6] The identity of the speaker was important in this case:

> "Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter

Whether or not the majority below thought their "welcome restraint" analysis was mere dicta, this Court has never held or suggested that the Establishment Clause can restrain campaign speech. Nor can the "welcome restraint" formulation be limited, as the majority below suggests, to only "highly unique" situations. Once confirmed (or left unrestrained by this Court's review) the number of applications of "welcome restraint" analysis of campaign speech on religious or other grounds will likely multiply.

> entered this same Executive Order, they would have had no problem with the Order. As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional."

Niemeyer, J., dissenting, Pet. App. 167a-168a.

SUMMARY OF ARGUMENT

By undertaking a novel review of campaign speech in an Establishment Clause challenge, the Fourth Circuit majority below created a free speech dilemma. The majority below compounded that dilemma by "welcom[ing]" the "restraint" its analysis might place on campaign speech.

A review of campaign speech – even speech that sheds light on the reasons for later official action – chills expression and conflicts with numerous long-standing protections for campaign speech. As this Court recently held: "the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"[7]

A religious aspect to campaign speech does not lessen its protections. In the realms of religion and political belief, "exaggeration, ... vilification" and "false statement" are predictable.[8] "But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[9] For example, if a candidate's speech on religious topics is "restrain[ed]" by the Fourth Circuit's review analysis, the public will not know if a candidate holds such views, and will be unable to act on that knowledge when casting their ballots.

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[7] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. __, __, 134 S.Ct. 1434, 1441 (2014), *quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

[8] *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (citation and quotation marks omitted).

[9] *Id.*

This Court has never confronted this analysis or given the lower courts direction on how to review such a case. Nor has a lower court, even the ones cited by the majority below, ever relied almost entirely on campaign statements to find an Establishment Clause "purpose." But in similar areas, such as false statements by elected officials, this Court has rejected a "free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits."[10] At least one judge in the majority below felt that the case could have been decided equally well without considering campaign speech.

Finally, the Fourth Circuit majority's reliance on campaign speech could lead to numerous difficult and divergent decisions before future courts. The majority below defended its reliance on campaign speech by claiming "highly unique" circumstances, but divisive campaign speech is fairly common. Even in tiny local government units, candidates may make divisive statements that generate legal challenges to their later official actions. These challenges to offensive campaign statements may themselves generate Establishment Clause problems.

Because the "welcome restraint" analysis used below could conflict with established precedent, and because it is unnecessary and likely counterproductive, this Court should review it. The Petition should be granted.

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[10] *United States v. Stevens*, 559 U.S. 460, 470 (2010).

ARGUMENT

This case comes to this Court as an Establishment Clause challenge to an Executive Order. But in reviewing that challenge, the Fourth Circuit relied heavily upon its parsing of campaign speech, and suggested that any chill resulting from that approach would be a "welcome restraint" on certain messages. That position conflicts with settled law protecting a variety of speech and speakers, was not necessary to the resolution of this case, and is applicable to many more situations than the Fourth Circuit's "highly-unique" prediction would suggest.

I. The Fourth Circuit's "Welcome Restraint" Analysis Conflicts With Numerous Settled Precedents.

Elected officials have to campaign for office, leaving trails of campaign statements, promises, and speeches. Often, those campaign trails are littered with scorching controversies, including those over religion.[11]

When these individuals speak during their campaigns, what they say is highly protected: "Indeed, as we have emphasized, the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McCutcheon*, 134 S.Ct. at 1441, *quoting Monitor Patriot Co.*, 401 U. S. at, 272.

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[11] For example, the courts below cited *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), a case involving "the Ten Commandments Judge," Alabama Chief Justice Roy Moore, who was later removed from office for his stance on the public display of the Ten Commandments. Pet. App. 51a-52a, 60a, 245a, 248a. Judge Moore is currently running for the Senate from Alabama. Ed Kilgore, "Alabama's 'Ten Commandments Judge' Is Running for Senate," *New York*, April 27, 2017, http://nymag.com/daily/intelligencer/2017/04/alabamas-ten-commandments-judge-is-running-for-senate.html.

Equally important,

> the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U. S. 460, 470 (2010); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 818 (2000) ("What the Constitution says is that" value judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

McCutcheon, 134 S. Ct. at 1449. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U. S. 310, 340 (2010); *Playboy Entertainment Group. Inc.*, 529 U. S. at 813 (striking down content-based restriction).

In this case, the two entwined concerns are speech about religion and speech about politics and candidates. The high degree to which those two areas of speech are protected is settled law:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as

> we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

New York Times, 376 U.S. at 271, *quoting Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker. *Cf. Speiser v. Randall*, 357 U.S. 513, 525-526 [(1958)]. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 [(1963)].

New York Times, 376 U.S. at 271.

Further, the degree of speech protection does not depend on the identity of the speaker:

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *See First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 784 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the

> speaker are all too often simply a means to control content.

Citizens United, 558 U. S. at 340.

Even where the candidates in question are judges, who must maintain the highest degree of impartiality, the candidates' speech is protected at the highest levels. *Republican Party of Minn.*, 536 U.S. at 776-777. Judges who had participated in formulating laws and even spoken out on them are not automatically disqualified. *Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Justice Black participated in deliberations over the Fair Labor Standards Act, even though he was one of its principal authors in the Senate).

These liberties are protected not merely in the interest of the speaker. The "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (internal citation omitted).

The Fourth Circuit's invitation to self-censorship, then, is self-defeating: if candidates intend to act contrary to the Constitution, including the Establishment Clause, they must "have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate [their] personal qualities and their positions on vital public issues" before voting. *Brown v. Hartlage,* 456 U.S. 45, 53 (1982) (citation and quotation marks omitted). It is not obvious that the cause of religious nondiscrimination is furthered by hiding candidates' views on relevant policies from scrutiny by the electorate.

Having been announced by a federal court of appeals sitting en banc, this invitation to chill speech will inevitably be influential. And dicta or not, the concept of "welcome restraint" will be tempting authority for future litigants probing the intentions of elected officials, with "every repetition imbed[ing] that principle more deeply in our law and thinking and expand[ing] it to new purposes." *Korematsu v. United States,* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Certiorari should be granted to correct the Fourth Circuit's injudicious overreach.

II. The Fourth Circuit's "Welcome Restraint" Analysis Was Not Necessary.

The "welcome restraint" analysis sets up a clash between the Free Speech, Association and Establishment Clauses of the First Amendment. This Court has not set a standard for reviewing candidate campaign statements as part of an Establishment Clause review, but in the context of false statements made by elected officials,[12] this Court rejected as "startling and dangerous" a "free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits." *United States v. Alvarez,* 507 U.S. 709, 711 (2012), *quoting Stevens,* 559 U.S. at 470.

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[12] *See, generally,* Richard Hasen, "A Constitutional Right to Lie in Campaigns and Elections?" 74 MONTANA L.REV. 53 (2013) http://scholarship.law.umt.edu/mlr/vol74/iss1/4. Margaret H. Zhang, "Note: *Susan B. Anthony List v. Driehaus* and the (Bleak) Future of Statutes That Ban False Statements In Political Campaigns," 164 U. PA. L. REV. ONLINE 19 (2015), www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-19.pdf.

At least one judge below felt that the majority could have come to the same conclusion – "for more practical reasons" – without using candidate Trump's statements. Pet. App. 129a (Thacker, J., concurring).[13] Judge Thacker noted that candidate Trump's statements: "reveal religious animus that is deeply troubling. Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so." Pet. App. 130a (citation omitted).

None of the cases cited for support in the majority opinion below, Pet. App. 59a-60a, found it necessary to look at candidates' campaign statements for Establishment Clause reviews. In *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), the "Ten Commandments Judge" case relied upon by both courts below to show that other courts have looked at campaign statements in Establishment Clause reviews, Pet. App. 51a, 60a, 245a, 248a, the Eleventh Circuit did not need the campaign statements of Chief Justice Moore to show his religious purpose. The Eleventh Circuit found Chief Justice Moore's purpose in his statements while in office at the unveiling of the Ten Commandments statue at issue, and in his testimony at trial.

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[13] Judge Thacker noted that courts "should hesitate to attach constitutional significance to words a candidate offers on the campaign trail." Pet. App. 129a.

Glassroth, 335 F.3d at 1286-87. The campaign statements were mentioned only in passing.[14]

This suggests that the Fourth Circuit majority's "welcome restraint" analysis was not narrowly-tailored or the least-restrictive alternative for dealing with candidate Trump's "troubling" campaign statements. Indeed, there is no indication that campaign statements, as opposed to other statements made after the President took the oath of office and accepted his duties to the Constitution, added anything to the Fourth Circuit's analysis worth the threat of chill to campaign speech and consequent distortion of our national political debates. The Petition should be granted to correct the use of the "welcome restraint" analysis.

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[14] Similarly, *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998), Pet. App. 59a n. 20, did not involve either government officials or candidates for office. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982), was an Equal Protection challenge. *California v. United States*, 438 U.S. 645, 663-64 (1978), was a challenge to the Reclamation Act of 1902, and noted only that both major political parties supported the act and, *once he assumed office*, so did the successful Presidential candidate: "In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation." 438 U.S. at 664; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) was another Equal Protection challenge, and addressed only official legislative or administrative histories.

III. The Broad Potential Application of the Fourth Circuit's "Welcome Restraint" Analysis Would Generate Its Own Problems.

The majority below contends that its new "welcome restraint" analysis will not be a jurisprudential burden because it is applicable only to a "**highly unique** set of circumstances."[15] Pet. App. 61a (emphasis added). It contends: "The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action." Pet. App. 59a-60a.

Yet there is nothing "highly unique" in the circumstances identified by the majority opinion below that cabins the application of the "welcome restraint" doctrine just to Candidate and President Trump. A wide variety of candidates, from presidential to local specialty districts, make statements that some may find offensive to religious sensitivities.[16]

In tiny, rural San Juan County, Washington, for example, the San Juan County Public Hospital District #1 is a junior taxing district, administering,

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[15] The District Court below also felt its Establishment Clause review of candidates' campaign statements was "highly unique." Pet. App. 252a.

[16] *See, e.g.,* the multiple suits including *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), involving the actions of Chief Justice Roy Moore – "the Ten Commandments Judge" case discussed in n. 10 *supra*; *New York Times*, 376 U.S. at 271 ("To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.").

inter alia, a public subsidy to a local rural hospital.[17] The local hospital, Peace Island Medical Center, is a Catholic-affiliated institution.[18] In 2015, a slate of candidates, headed by Monica Harrington, successfully ran for the Hospital District Board.[19] Harrington runs a website and blog called "Catholic Watch, Keeping Watch on Catholic Healthcare."[20] In 2017, Harrington and her colleagues on the Hospital District Board withdrew $50,000 of the public hospital subsidy and contracted with Planned

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[17] www.sjcphd.org.

[18] https://www.peacehealth.org/about-peacehealth/mission-values.

[19] "The Journal Endorses Sharp, Williams and Harrington For Hospital District Board," *The Journal of the San Juan Islands*, Oct. 20, 2015, http://www.sanjuanjournal.com/opinion/the-journal-endorses-sharp-williams-and-harrington-for-hospital-district-board-editorial/ ("We too sense that Harrington has a wider scope of issues with Catholic organizations than PeaceHealth, however her commitment to affordable healthcare and serving islanders comes first and foremost.").

[20] www.catholicwatch.org. "CatholicWatch is committed to safeguarding patients, physicians, and taxpayers from the imposition of theocracy-based medicine."

Harrington herself has publicly made statements that could reasonably be considered "vilification of men who have been, or are, prominent in church," *New York Times*, 376 U.S. at 271. Seattle Community Media, "Catholic HealthCare Your Only Choice," June 14, 2013, http://seattlecommunitymedia.org/series/moral-politics/episode/catholic-healthcare-your-only-choice, at 2:54 ("what it's about is increasing the span of control for the Catholic bishops and the health-care policies that they direct. ... It would be paranoid if it weren't for the fact that real women are paying the price with their lives and with their fertility.").

Parenthood to provide services which they claimed were not offered by the Catholic-affiliated hospital.[21]

These are the same circumstances that the majority below thought were "highly unique," though writ small. Even assuming that the Hospital District's Board vote was based on facially-neutral concerns and the District's resolution did not mention Catholic beliefs or Catholicism, under the Fourth Circuit's "welcome restraint" analysis, do the clear and relevant views in 2015 of candidates Harrington and her colleagues on the Board so taint the 2017 vote that the Planned Parenthood contract decision must be reviewed under the Establishment Clause? Given the contention over even this small taxing district's actions, would the Washington or federal courts have to judge Harrington's motives based on her blogging and campaign statements? By what standards would those courts decide these cases?[22]

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[21] Hayley Day. "Public Hospital District Votes to Contract With Planned Parenthood," *The Journal of the San Juan Islands*, May 31, 2017, http://www.sanjuanjournal.com/news/public-hospital-district-votes-to-contract-with-planned-parenthood/.

[22] As Judge Kozinski wrote in dissent in *Washington v. Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), pp. 5-6:

> [Review of candidate statements] will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?

As this Court noted in *Meek v. Pittenger*, 421 U.S. 349 (1975), the possibility of repeated, diverse challenges to such offensive statements may itself generate Establishment Clause problems.[23] It is not difficult to envision similar concerns arising from complex and difficult judicial analyses.

Under a "welcome restraint" analysis, the potential for litigation premised upon campaign speech, and divergent interpretations of various phrases in different courts and before different judges, is enormous. This is not an analysis that can be limited to presidential candidates and Executive Orders; the Fourth Circuit's treatment of campaign speech will inevitably be applied to Establishment Clause cases arising from the full range of political disputes. It should be reviewed.

> Weighing these imponderables is precisely the kind of "judicial psychoanalysis" that the Supreme Court has told us to avoid. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). ... Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry. But the panel has approved open season on anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.

[23] "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Pittenger*, 421 U.S. at 372.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully requests that this Court grant the Petition.

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, et al.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE
PROJECT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IDENTITY & INTEREST OF AMICUS CURIAE*

Southeastern Legal Foundation is a nonprofit, public-interest law firm and policy center. Founded in 1976, SLF is dedicated to advocating for individual liberties in the courts of law and public opinion. SLF's interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers, a critical safeguard of individual liberty.

SLF submits this brief to address one particularly disturbing aspect of the decision below: the Fourth Circuit's reliance on media statements to discern the "real purpose" behind Executive Order 13,780. Consulting these statements intrudes on the prerogative of the Executive Branch by allowing individuals outside the Article II hierarchy to speak for the President. Worse still, the Fourth Circuit consulted these statements to override the President's assessment of national security. And it read them in the worst possible light for the President, refusing to give him the presumption of regularity commensurate with his office. None of this bodes well for the separation of powers.

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* The parties received timely notice of amicus's intent to file this brief, and they provided written consent to its filing. No counsel for any party authored this brief in whole or in part; and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

Over the past few months, federal courts have been invoking the Establishment Clause to enjoin an executive order that bars certain aliens from entering the United States. According to these courts, the Order targets Muslims. But that conclusion is untenable. The Order's text is not discriminatory: it treats all religions the same. The Order's effect is not discriminatory: it targets countries known to have weak vetting procedures. And the Order's purpose is not discriminatory: the official statements about the Order show that it was enacted to promote national security. Yet, for the first time in our history, courts have enjoined a President's order based on things he said on the campaign trail. That is precisely what the Fourth Circuit did here.

These unprecedented injunctions, including the one that the Fourth Circuit upheld below, warrant the Court's immediate attention. Such evidence is not relevant, appropriate, or persuasive. When it comes to the admission of aliens, courts must defer to the political branches. They do not look behind the text of an order to discover its "real" purpose. Moreover, presidential candidates are not the President and, constitutionally, they cannot speak for him. Nor are their statements especially probative; proclamations on the campaign trail are contradictory, ambiguous, and quickly forgotten.

Courts should not evaluate federal laws this way. But if courts are going to consult these statements, they should at least give the speaker the benefit of the doubt and require much more proof of animus than the Fourth Circuit had here. In fact, the better reading of the evidence is that Donald Trump abandoned the idea of a "Muslim ban" during the campaign in favor of an entirely legitimate territory-based policy. In short, the Fourth Circuit relied not only on statements from the 2016 campaign, but a heavily revisionist version of them. This Court should grant certiorari and reverse the judgment below.

ARGUMENT

Review is warranted when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). It is difficult to think of a case that more obviously meets this criterion for certiorari. Whether a Presidential order issued to ensure national security should be enjoined for violating the Establishment Clause is a quintessentially important question. Accordingly, the pertinent question is whether the Fourth Circuit's decision is wrong. For the reasons set forth below, it clearly is.

I. The Fourth Circuit impermissibly ventured beyond the text to determine the Order's purpose.

As Chief Justice Warren cautioned nearly fifty years ago, "[i]nquiries into [the government's] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). For one thing, "discerning ... subjective motivation," even for "a single [actor]," is "almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting). For another, judicial evaluation of a law's purpose can easily morph into evaluation of a law's wisdom. "[T]hat the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted" is tempting in theory, but dangerous in practice. *McCray v. United States*, 195 U.S. 27, 56 (1904). Indulging it "would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions." *Id.* at 54-55. Courts therefore must evaluate the purpose of a law "with the most extreme caution." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 6 (1947). "[T]he stakes are sufficiently high for [courts] to eschew guesswork." *O'Brien*, 391 U.S. at 383-84.

To that end, courts generally look to the text of a law to determine its purpose. *See, e.g., Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971). Because courts "presume that [the government] act[s] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987), they are "reluctan[t] to attribute unconstitutional motives" to it "when a plausible secular purpose ... may be discerned from the face of the [law]." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). And because the "text" of a law is the only thing that the government actually "adopted," it is the "best evidence of [the law's] purpose." *W.Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991). That is why courts "must begin with the language employed by [the law] and the assumption that the ordinary meaning of that language accurately expresses [its] purpose." *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).

The judicial inquiry must end there, too, when the law regulates the admission of aliens into the United States. In *Kleindienst v. Mandel*, this Court held that "the Executive" need only offer "a *facially* legitimate and bona fide reason" for denying entry to aliens. 408 U.S. 753, 770 (1972) (emphasis added). Once the Executive does so, "'courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests" of the affected individuals. *Kerry v. Din*, 135 S.Ct. 2128, 2140 (2015) (Kennedy, J., concurring in judgment). There are no exceptions. This Court has applied *Mandel* to claims of discrimination under the First Amendment, 408 U.S. at 765-70, and the Fifth Amendment, *Fiallo v. Bell*, 430 U.S. 787, 791-99 (1977).

The reasons that underlie *Mandel's* "narrow standard of review" are the same "reasons that preclude judicial review of political questions." *Id.* at 796. The Constitution generally commits questions concerning the admission of aliens to the political branches—not the courts. Congress has "plenary ... power to make policies and rules for exclusion of aliens," which it "has delegated ... to the Executive." *Mandel*, 408 U.S. at 769-70; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); *see* 8 U.S.C. § 1182(f). "'[O]ver no conceivable subject is the legislative power of Congress more complete" because "the admission of aliens" is "a fundamental sovereign attribute." *Fiallo*, 430 U.S. at 792. In this area, courts are ill-equipped to weigh the competing concerns. The admission of aliens involves "a wide variety of classifications [that] must be defined in the light of changing political and economic circumstances," and the "decisions in these matters may implicate our relations with foreign powers." *Id.* at 796. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The *Mandel* rule "has particular force in the area of national security." *Din*, 135 S.Ct. at 2140 (Kennedy, J., concurring in judgment). "[W]hen it comes to collecting evidence and drawing factual inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010). When the political branches act in the national-security realm, courts should be hard-pressed to discard their stated purpose. After all, "most federal judges" do not "begin the day with briefings that may describe new and serious threats to our Nation and its people." *Id.* at 34. It is simply "not the judicial role in cases of this sort to probe and test the justifications for the [government's] decision." *Fiallo*, 430 U.S. at 799.

The Ninth Circuit has concluded that *Mandel* applies only to "an individual visa application," not the "*promulgation* of sweeping immigration policy ... at the highest levels of the political branches." *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017). But this distinction "cannot withstand the gentlest inquiry." *Washington*, 2017 WL 2468700, at *10 (Bybee, J., dissental). *Mandel* applies to "a wide variety" of "decisions made by the Congress or the President," including whether "particular classes of aliens ... shall be denied entry altogether." *Fiallo*, 430 U.S. at 796.

The Fourth Circuit wisely acknowledged that *Mandel* applies to the Order, but it nevertheless found that the Order's national-security justifications were not "facially legitimate and bona fide." Pet. App. 42a-47a. The Fourth Circuit interpreted "bona fide" to require that the proffered reason for the Order be the actual, primary reason—to be determined by consulting all of the extratextual evidence. That ruling finds no support in this Court's decisions.

The word "facially" in *Mandel* modifies both "legitimate" and "bona fide"; just like its legitimacy, the Order's bona fides must be determined based on the text alone. *See* Pet. App. 162a-65a (Niemeyer, J., dissenting). Otherwise, *Mandel* is meaningless. As the Fourth Circuit acknowledged, the *Lemon* test already requires courts to assess a law's primary purpose. *Id.* at 46a (majority op.). *Mandel* was not meant to simply duplicate this analysis; it requires the political branches to prove *less* out of respect for their authority over the admission of aliens. Hence, *Mandel* asks whether the Executive offered "*a* facially legitimate and bona fide reason," not whether that reason was the primary one. 408 U.S. at 770 (emphasis added).

Searching for the primary purpose would require courts to enter the forbidden territory of "look[ing] behind" the Executive's justifications, *id.*, and "prob[ing] and test[ing]" them, *Fiallo*, 430 U.S. at 799. Here, for example, a federal court could conclude that national security was not the primary purpose of the

Order only by first rejecting the accuracy of the President's national-security determinations. Indeed, the Fourth Circuit stated that the Order is based on "weak evidence" and does not "diminish the threat of potential terrorist activity." Pet. App. 44a. The specter of courts telling the President what national security requires is precisely what *Mandel* seeks to avoid.

The Fourth Circuit's principal rejoinder—that the immigration power "is still 'subject to important constitutional limitations,'" Pet. App. 40a-41a, 45a-46a—is unhelpful. It begs the question of what the constitutional limitations *are* in this context. The two deportation cases that the Fourth Circuit cited—*Zadvydas v. Davis*, 533 U.S. 678 (2001), and *INS v. Chadha*, 462 U.S. 919 (1983)—are not relevant. "Whatever the rule may be concerning deportation," it does not apply to "the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543. When the Executive does the latter, *Mandel* provides that courts can review only whether it offered a facially legitimate and bona fide reason. This is not a "*no* judicial review" standard; it is a "limited judicial review" standard. *Fiallo*, 430 U.S. at 795 n.6. The President's Order easily satisfies it. *See* Pet. App. 165a-68a (Niemeyer, J., dissenting).

II. The Fourth Circuit impermissibly consulted unofficial campaign statements to determine the Order's purpose.

When a law does not regulate the admission of aliens into this country, courts sometimes search more broadly for evidence of its purpose. But the judicial inquiry must remain "deferential and limited." *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in judgment). Courts cannot engage in "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). Accordingly, courts usually limit their search to "the face of the legislation," "its legislative history," and "its operative effect." *McGowan v. Maryland*, 366 U.S. 420, 453 (1961); *accord Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment). In all events, the evidence of purpose must be some "official act." *McCreary*, 545 U.S. at 862.

This principle has two important corollaries. First, courts should not rely on the views of private citizens to determine a law's purpose. *See Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004); *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002). Obviously, only the government can violate the Establishment Clause. "Private purpose" is thus not relevant unless "there is evidence that the government has adopted [it]." *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 850-51 (6th Cir. 2010).

Second, courts should not consult informal media statements to determine a law's purpose. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006); *Adland v. Russ*, 307 F.3d 471, 483 n.3 (6th Cir. 2002). Statements to the media are not "official acts." And they are unreliable indicia of purpose. Such "informal communications often exhibit a lack of 'precision of draftsmanship,'" and "internal inconsistencies are not unexpected." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995).

The Fourth Circuit ignored these principles. It concluded that the Order is a "Muslim ban" in disguise based largely on press releases, media interviews, and news articles from the 2016 campaign. This "evidentiary snark hunt" is not normal: "[n]o Supreme Court case ... sweeps so widely in probing politicians for unconstitutional motives." *Washington*, 2017 WL 2468700, at *5 (Kozinski, J., dissental). These media statements from nongovernmental actors all suffer from the defects mentioned above. And because most were made by a political candidate in the heat of a campaign, the statements present still more concerns.

If statements to the media are unreliable, then statements to the media by a politician in the thick of a campaign are doubly unreliable. A candidate's goal is "to get elected," not to make policy. *Id.* To get elected, the candidate must first win the primary, which requires drawing attention to himself. *See* Stephen J. Wayne, *Road to the White House 2016*, at 120 (10th ed. 2015) ("Candidates cannot win if they are not known. Recognition as a political leader is most important at the beginning of the nomination cycle ...."). "[I]nflammatory" statements often help in this regard. *Washington*, 2017 WL 2468700, at *5 (Kozinski, J., dissental). Over the course of the campaign, moreover, a candidate must win over primary voters and the general electorate—two very different groups—all while reacting to shifting poll numbers and swirling media narratives. Unsurprisingly, "subtle (or not-so-subtle) changes in a candidate's position during the course of the campaign are common." 1 Robert North Roberts et al., *Presidential Campaigns, Slogans, Issues, and Platforms: The Complete Encyclopedia* 160 (2012). But to avoid the dreaded label of a "flip flop," candidates also tend to insist that their position has been the same all along.

All of these dynamics result in a smatter of contradictory, chaotic, and ambiguous statements—not the kind of evidence that should decide the fate of a federal law.

The Fourth Circuit insisted that judges should not "shut our eyes to such evidence when it stares us in the face." Pet. App. 60a. But that is *exactly* what judges should do:

> [T]he Court ought to shut its mind to much of what all others think they see. That is precisely what courts are for. They try things out on evidence, by process of proof and refutation, and shut their minds to the kind of surmise by which the general public may reach politically sufficient conclusions. No doubt, ... courts as triers of fact draw inferences concerning matters of common knowledge in the shared experience of the community. But such common knowledge is not common gossip, or common political judgment.... [A court should not] infer, along with common gossip, that a legislature is corrupt, or that a politician is a self-seeking powermonger rather than a disinterested statesman[.]

Alexander M. Bickel, *The Least Dangerous Branch* 220 (1962). In fact, in any other case, many of the sources cited here would be disregarded as "hearsay" remarks that "do not constitute legal evidence." *ACLU of Ky. v. Grayson Cty.*, 605 F.3d 426, 430 (6th Cir. 2010). "[T]o rely in any way on what *these [sources] say* various [government officials] *said* is both incorrect and inappropriate." *ACLU of Ky.*, 605 F.3d at 430.

Nor can a court assume that the positions an official takes during the campaign match the policies he enacts once in office. Officials "change their own thinking as a function of whether they are running for office or having to make the hard choices that come with power.... A politician who is not in office can make strong promises and claims .... Once in office, however, ... their speech and thinking become more complex than they were during the campaign...." Roy F. Baumeister, *The Cultural Animal* 236 (2005).

Beyond these practical differences, our constitutional structure rejects any attempts to conflate a presidential candidate with the President. The President is not just a person; the President is an "Office." U.S. Const. art. II, § 1. While the Constitution vests "[t]he executive Power" in the President alone, *id.*, the President can appoint "Officers of the United States" and "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," *id.* § 2. This last part—the Opinion Clause—"place[s] the President at the apex of [an] awesome pyramid[] of power ... as Chief Administrator of the Executive Bureaucracy." Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 652 (1996). A presidential candidate thus does not have access to, and is not part of, this constitutional hierarchy. Here, for example, the Cabinet officials tasked with enforcing the Order agree that it is a vital national-security measure and targets countries with weak vetting procedures—not Muslims. *See* Sec'y John Kelly, *Statement on President's Executive Order Signed Today* (Mar. 6, 2017); Sec'y Rex Tillerson, *Remarks on the President's Executive Order Signed Today* (Mar. 6, 2017); Att'y Gen. Jeff Sessions, *Remarks on Revised Executive Order Protecting the Nation from Foreign Terrorist Entry* (Mar. 6, 2017).

Also unlike the President, a presidential candidate has not "take[n] the … Oath" in Article II. U.S. Const. art. II, § 1. The oath requires the President to "swear" that he will "preserve, protect and defend the Constitution," *id.*, and it activates his duty to "take Care that the Laws be faithfully executed," *id.* § 3. The oath is not a formality: it triggers the presumption that the President's actions are constitutional. *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc). Indeed, while the Constitution requires all officials to take an oath, U.S. Const. art. VI, Article II actually spells out the presidential oath with "emphatic language." Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 338 (2016). This distinction "indicates that the President's promise may be especially demanding and unyielding." *Id.* But conflating the pre-oath intentions of a candidate with the post-oath policies of a President treats that oath as a nullity.

The use of campaign statements to find violations of the Establishment Clause raises other concerns too. For starters, it is impossible to apply. *See* Pet. App. 170a-71a (Niemeyer, J., dissenting); *Washington*, 2017 WL 2468700, at *5 (Kozinski, J., dissental). And it invites courts to make decisions based on their subjective beliefs about the character of government officials. Moreover, the Fourth Circuit's reasoning turns the First Amendment against itself. "To view [campaign] statements as indicative of bad faith …

would ... chill political debate during campaigns ... in contravention of First Amendment values." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995). Yet "our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Washington*, 2017 WL 2468700, at *5 (Kozinski, J., dissental) (quoting *McCutcheon v. FEC*, 134 S.Ct. 1434, 1441 (2014)).

The Fourth Circuit tried to limit its ruling by emphasizing the "highly unique" and "direct" evidence in this case. Pet. App. 61a. But that is no limit at all. Consider an example. During the 2008 presidential campaign, then-Senator Obama made a statement about "bitter" people in "small towns" who "cling to guns or religion ... to explain their frustrations"—a statement that many perceived to be anti-Christian. *Obama Angers Midwest Voters with Guns and Religion Remark*, The Guardian (Apr. 14, 2008), goo.gl/ICSSVi. After he was elected, President Obama's administration issued a regulation requiring Catholic nonprofits to, in their view, facilitate contraceptive coverage and violate their deeply held religious beliefs. *See Zubik v. Burwell*, 136 S.Ct. 1557, 1559 (2016). Is Senator Obama's statement from the 2008 campaign evidence that he is an anti-Catholic bigot and, thus, evidence that the regulation has an unconstitutional purpose under the Establishment Clause? Under the Fourth Circuit's logic, a court would at least have to consider the possibility. And what may be "highly unique" and "direct" evidence of President Obama's motive to one judge may not be for another. This is where we are headed under the Fourth Circuit's approach.

Indeed, given the sheer amount of times that politicians reference the Bible in political campaigns, other possible scenarios abound. That is why considering this sort of evidence would be a "huge, total disaster." *Washington*, 2017 WL 2468700, at *6 (Kozinski, J., dissental). This Court should not countenance it.

III. The Fourth Circuit's finding that the Order has an impermissible purpose is untenable even considering all of the evidence.

As just explained, courts should not consider unofficial statements from political candidates or nongovernmental actors when evaluating the purpose of a federal law. But even under the no-holds-barred approach of the Fourth Circuit, there is not enough evidence here to conclude that the Order was enacted for an impermissible purpose.

Under the *Lemon* test, the government must show that the purpose on the face of the Order is "not a sham." *Edwards*, 482 U.S. at 587. This is a low bar. Courts do not invalidate laws when "a plausible secular purpose ... may be discerned from the [text]." *Mueller*, 463 U.S. at 394-95. And because the question here is whether to grant a preliminary injunction, any factual uncertainty requires reversal. *See* 11A *Fed. Prac. & Proc. Civ.* § 2948.3 (3d ed.).

The statements that the Fourth Circuit consulted here do not prove that the Order's national-security justifications are a "sham." In fact, a court could arrive at that conclusion only by plucking statements about the Order out of context and reading them in the worst possible light for the President. "[T]he purpose inquiry is not," however, "an invitation to courts to cherry pick." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 567 F.3d 595, 601 n.7 (9th Cir. 2009). And if courts are going to treat politicians like government officials, then they should at least give political statements the deference and presumptive regularity that government officials receive. With these principles in mind, the statements about the Order paint a very different picture: the best reading of the evidence is that the President was always concerned with national security, and he abandoned his initial call for a "Muslim ban" in favor of a policy that focused on geography instead of religion.

The first statement that the Fourth Circuit considered was the "Statement on Preventing Muslim Immigration" that Mr. Trump posted on his campaign website in December 2015. Pet. App. 49a. True, this statement—made two months before the Iowa Caucus and over a year before President Trump signed the first executive order—focused on "Muslims." Notably, however, it was concerned with national security. It was made in response to the terrorist attack in San Bernardino, and it discussed the need to prevent the country from being "the victims of horrendous attacks." *Id.* at 10a n.5.

What the Fourth Circuit did not appreciate is that Mr. Trump clearly abandoned this initial proposal. In May 2016, shortly before clinching the Republican nomination, Mr. Trump stated on a radio interview that his initial statement from December was "just a suggestion." *Kilmeade's Wide-Ranging Interview w/*

Donald Trump, Fox News Radio (May 11, 2016), goo.gl/C55oeX. Then, on June 13—one day after the nightclub shooting in Orlando—Mr. Trump announced his new plan to "suspend immigration from areas of the world when there is a proven history of terrorism." Press Release, *Donald J. Trump Addresses Terrorism, Immigration, and National Security* (June 13, 2016), goo.gl/Tr6aZJ. In the ensuing weeks, members of the Trump campaign explained that his new focus on "terror states" was a "changed" position and a "pivot[]" away from the initial statement he made in December. *Trump on Latest Iteration of Muslim Ban*, CNN (July 24, 2016), goo.gl/lIu40E. And that is how the media covered it at the time. *See, e.g.*, *Donald Trump Back-Pedals on Banning Muslims from U.S.*, Wall Street Journal (June 28, 2016), goo.gl/UATLkc; *What Is Donald Trump Even Running on Anymore? His "Muslim Ban" Shift Sells Out His Core Constituents*, Vox (June 28, 2016), goo.gl/nopqpn; *Trump Changing Muslim Ban to Countries with Terror Links*, Newsmax (June 27, 2016), goo.gl/VzW79d; Katherine Krueger, *Trump Pivots: Only Muslims from 'Terrorist Countries' Would Be Banned*, Talking Points Memo (June 25, 2016), goo.gl/qGxNGy; *see also The Final Push: Clinton*, FactCheck.org (Nov. 4, 2016), goo.gl/Zg0x10 ("Trump has clearly changed his initial call for a 'total and complete shutdown of Muslims entering the United States.'").

The Fourth Circuit asserted that Mr. Trump did not really change positions, but rather "attempt[ed] to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality." Pet. App. 49a. This speculative theory is not supported by the evidence.

The Fourth Circuit pointed to an interview on Meet the Press in July, where Mr. Trump was asked whether his new policy was a "rollback" from his original statement. *Id.* at 49a-50a. Mr. Trump challenged the word "rollback" but confirmed that he was "looking now at territories":

> I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. *I'm looking now at territories*. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. But just remember this: Our Constitution is great. But it doesn't necessarily give us the right to commit suicide, okay? Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently. Why are we committing suicide? Why are we doing that? But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. *We're making it territorial*. We have nations and we'll come out, *I'm going to be coming out over the next few weeks with a number of the places*.

Transcript, *Meet the Press* (July 24, 2016), goo.gl/jHc6aU (emphases added).

The Fourth Circuit read this statement as an admission that "territory" is code for "Muslim," but that reading is implausible. Mr. Trump clearly stated that he was *not* using religion and was now "looking at territories" and "making it territorial." His characterization of the territory-based proposal as an "expansion" of his initial proposal was true—looking at territories is an "expansion" in the sense that it involves considering people of *all* religions in a given territory. This is not evidence of anti-Muslim purpose.

The Fourth Circuit concluded that Mayor Giuliani confessed, during an interview on Fox News, that the territory-based proposal was just a way to create a Muslim ban that would stand up in court. Pet. App. 50a. Putting aside the absurdity of crediting a hearsay statement from a nongovernmental consultant about what the President said, *see Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment), Mayor Giuliani actually said the opposite:

> OK. I'll tell you the whole history of it. So when he first announced it he said "Muslim ban." He called me up and said, "Put a commission together, show me the right way to do it legally." I put a commission together with Judge Mukasey, with Congressman McCaul, Pete King, a whole group of other very expert lawyers on this. And what we did was *we focused on, instead of religion, danger*. The areas of the world that create danger for us. *Which is a factual basis. Not a religious basis.* Perfectly legal, perfectly sensible, and *that's what the ban is based on. It's not based on religion*. It's based on places where there are substantial evidence that people are sending terrorists into our country.

Dkt. 171-3 at 61, *Hawai'i v. Trump*, No. 17-cv-00050 (D. Haw.) (emphases added).

The Fourth Circuit read "show me the right way to do it legally" to mean "show me how to discriminate and get away with it." But it could have just as plausibly meant "show me how to prevent terrorism without engaging in religious discrimination." Indeed, that is precisely what Mayor Giuliani said it meant in the rest of his statement. Although the Fourth Circuit credited the first two sentences of Mayor Giuliani's statement, it inexplicably did not credit his assurances that "we focused on, instead of religion, danger" and that the Order is "not based on religion." The omission is glaring.

The Fourth Circuit also found it important that, "[o]n December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, 'You know my plans. All along, I've proven to be right. 100% correct.'" Pet. App. 49a. But this statement is horribly ambiguous. The Fourth Circuit assumed "plans" meant "Muslim ban," but the only "plan" that Mr. Trump had discussed for the previous six months was his territory-based policy. As his spokesperson Kellyanne Conway explained the next day: "You're going back to over a year ago in what he said about the ban" but later "he made it much more specific and talked about countries." *Conway: Trump Will Not Pursue Immigration Ban Based Solely on Religion*, CNN (Dec. 22, 2016), goo.gl/0fDOq6. Before signing the first order, moreover, President Trump told ABC News, "[N]o it's not the Muslim ban. But it's countries that have tremendous terror." Transcript, *David Muir Interviews President Trump*, ABC News (Jan. 25, 2017), goo.gl/q5MNDV.

The few post-inauguration statements that the Fourth Circuit cited fare no better. When President Trump signed the first order, he stated: "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." Pet. App. 50a. Any judge who claims to know what "that" means is engaged in psychoanalysis, not law. It likely does not mean "Muslim ban"—a concept the President abandoned six months earlier. Indeed, two days after signing the Order, the President reaffirmed that "[i]t's not a Muslim ban." *Here's What President Donald Trump's Immigration Executive Order Means*, ABC (Jan. 29, 2017), goo.gl/apck1X.

The Fourth Circuit also relied on two staffers who said that the Order had the same "principles" and "basic policies" as the first order with "mostly minor technical differences." Pet. App. 50a-51a. The President likewise described the Order as a "watered down" version of the first order. Pet. App. 51a. But these statements are only relevant if the first order was a Muslim ban. And it was not, as explained above. Indeed, both staffers emphasized that the first order was a lawful national-security measure. *See Miller: New Order Will Be Responsive to the Judicial Ruling*, Fox News (Feb. 21, 2017), goo.gl/wcHvHH; *Press Gaggle by Press Secretary Sean Spicer*, White House (Mar 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer. Moreover, none of these statements was made with respect to Muslims or the Establishment Clause. The Order was a reaction to the Ninth Circuit's decision in *Washington*, which invalidated the first order under the Due Process Clause only. The statements comparing the Order with its predecessor were all made in that context.

At bottom, the statements that purportedly show the Order is a "Muslim ban" in disguise do not hold up. Undeterred, the Fourth Circuit concluded that the Order was an attempt to discriminate against Muslims for another reason: because Mr. Trump allegedly expressed "anti-Muslim sentiment" on two occasions during the campaign. Pet. App. 49a. But in the first statement—an interview with CNN where Mr. Trump said "Islam hates us"—he clarified that the reference was to "radical Islam," not all Muslims. *Donald Trump: "I Think Islam Hates Us"*, CNN (Mar. 10, 2016), goo.gl/wcLcF7. And in the second statement—a response to the terrorist attack in Brussels—Mr. Trump clarified that he was talking about "people from the Middle East" and that he "didn't say shut it down ... I said you have to be very careful. We have to be very, very strong and vigilant at the borders." *Trump: 'Frankly, We're Having Problems with the Muslims'*, The Hill (Mar. 22, 2016), goo.gl/MmBvKO. Further, the Fourth Circuit did not credit more recent statements from President Trump, like his speech in Saudi Arabia where he called Islam "one of the world's great faiths" and called for "tolerance and respect for each other." *President Trump's Speech to the Arab Islamic American Summit*, White House (May 21, 2017), https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit.

More troublingly, by resorting to these generic statements, the Fourth Circuit was implying that the

President is *generally* anti-Muslim. By this logic, *any* action that he takes with respect to a majority-Muslim country is ripe for invalidation under the Establishment Clause. Even if his early comments were somehow insensitive, they cannot "forever taint" his ability to take actions in the Middle East. *McCreary*, 545 U.S. at 873-74. The theory of the decision below is that Mr. Trump did not *mean* it when he said, repeatedly, that he had changed his initial proposal. This is not law; this is "psychoanalysis." *Id.* at 862.

In short, the decision below is not supported by the record. Read fairly and accurately, the evidence indicates that President Trump has maintained a bona fide interest in national security and that any initial calls for a "Muslim ban" were abandoned, not smuggled into the Order. The Fourth Circuit reached the opposite conclusion by cherry picking snippets of statements and reading them in the light least favorable to the President—just the opposite of what the law requires.

CONCLUSION

For all these reasons, the Court should grant certiorari and reverse the Fourth Circuit.

Respectfully submitted,

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Nos. 16A1190 & 16-1436

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners/Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *et al.*,

Respondents.

No. 16A1191

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPLICATIONS FOR STAY TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

MOTION FOR LEAVE TO FILE AND BRIEF OF T.A. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND THEIR OPPOSITIONS TO STAYS

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MOTION FOR LEAVE TO FILE

T.A. respectfully moves for leave to file a brief as amicus curiae in support of Respondents and their oppositions to the stay applications. The parties have consented to the filing of the enclosed amicus brief.

Amicus respectfully requests that the Court consider the arguments herein and in the enclosed amicus brief demonstrating the absence of likely irreparable harm in opposition to Applicants' stay applications in *Trump v. Hawaii*, No. 16A1191 (S. Ct. filed June 1, 2017) and *Trump v. International Refugee Assistance Project*, No. 16A1190 (S. Ct. filed June 1, 2017). The attached amicus brief demonstrates the absence of likely irreparable harm on multiple grounds. These include that by the express terms of the current executive order, the travel ban expires on June 14, 2017, and the refugee ban expires on July 14, 2017, and President Trump's official statements that his Administration already has been engaging in "extreme vetting" *without* the bans. Because the lack of a likelihood of irreparable harm is a non-merits basis to deny a stay, Amicus's arguments "may be of considerable help to the Court." Sup. Ct. R. 37.1.

1. Statement Of Movant's Interest.

President Donald Trump signed Executive Order 13,780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Amended Order"), on March 6, 2017. T.A.* is a Muslim and United

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* The brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. This Court has permitted even parties to use pseudonyms and initials in similar circumstances. *See, e.g., Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000).

States citizen who was raised in Yemen. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. T.A. would be affected by the Amended Order. Under the Amended Order, much of T.A.'s extended family—including his father, aunts, uncles, and cousins—would be barred from entering the United States.

2. Statement Regarding Brief Form And Timing.

Given the expedited briefing of the stay applications, Amicus respectfully requests leave to file the enclosed brief supporting Respondents and their opposition to Petitioners' stay applications without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a). The petition for a writ of certiorari and applications for stay and for expedited briefing and consideration in this Court were filed on June 1, 2017. On June 2, 2017, this Court ordered a response to these filings by June 12, 2017. By June 3, 2017, counsel for T.A. had given notice to all parties of the intent to file an amicus brief in opposition to the applications for stays. All parties gave their consent by June 4, 2017. The above justifies the request to file the enclosed amicus brief supporting Respondents and their oppositions to the stay applications without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant Amicus Curiae leave to file the enclosed brief in support of Respondents and their oppositions to the stay applications.

DATED: June 9, 2017.

Respectfully submitted,

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STATEMENT OF INTEREST

Amicus files this brief to oppose both Applications for Stay in these cases. This brief focuses on the Applications' failure to make any showing of a likelihood of irreparable harm to our national security absent a stay. Among other reasons, there is no irreparable harm because, under the current executive order's own express terms, the travel ban expires June 14, 2017, the refugee ban expires July 14, 2017, and this Administration already has undertaken "EXTREME VETTING" *without* the bans. *See infra*, at 9-14. The absence of likely irreparable harm provides a dispositive, non-merits reason to deny the Applications for Stay.

Section 2(c) of President Trump's Amended Executive Order, dated March 6, 2017 (the "Amended Order"), bars entry by nationals of six Muslim-majority countries. T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. They and many others with plans to visit this country for school, medical, family, tourist, or other legitimate reasons would *immediately* be barred from entering the United States—causing havoc—if the stay applications were granted. Although banned persons "could" apply for

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus made a monetary contribution to its preparation or submission. This brief is filed with the consent of all parties.

"[c]ase by case" waivers under Section 3 of the Amended Order, Section 16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." 82 Fed. Reg. 13209 (Amended Order) at § 16(c). The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny entry, any timing for or notification of a denial, much less any reason, or any ability to challenge a denial.

BACKGROUND

On March 15, 2017, the Maryland District Court issued a preliminary injunction barring enforcement of Section 2(c) of the Amended Order. *See Int'l Refugee Assistance Project v. Trump*, No. TDC 17 0361, 2017 WL 1018235, at *18 ("*IRAP I*") (D. Md. Mar. 15, 2017), ECF No. 149. The Maryland District Court found that "the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." *Id.* at *15. The Maryland District Court further found that the Government had "not shown, or even asserted that national security cannot be maintained without an unprecedented six-country travel ban." *Id.* at *17. The Fourth Circuit substantially affirmed the decision of the Maryland District Court and demonstrated at length that "any national security justification for EO-2 . . . was offered as more of a 'litigating position' than as the actual purpose of EO-2." *See Int'l Refugee Assistance Project v. Trump*, No. 17-1351, 2017 WL 2273306, at *18 ("*IRAP II*") (4th Cir. May 25, 2017), ECF No. 295.

On March 29, 2017, the Hawaii District Court issued a preliminary injunction barring enforcement of Sections

2 and 6 of the Amended Order. The Hawaii District Court found that "the record here" is "full of religious animus, invective and *obvious pretext.*" *Hawaii v. Trump*, CV. No. 17-00050 DKW-KSC, 2017 WL 1167383, at *6 ("*Hawaii I*") (D. Haw. Mar. 29, 2017), ECF No. 270 (emphasis added). The Ninth Circuit is currently reviewing *Hawaii I* in *Hawaii v. Trump*, No. 17-15589 ("*Hawaii II*") (9th Cir. Apr. 20, 2017).

ARGUMENT

This brief focuses on one of many fully sufficient grounds to deny the Applications for Stay. The Applications have failed to carry the Applicants' burden to show likely irreparable harm. Not only do the Amended Order's travel and refugee bans expire soon by the Amended Order's own terms, but President Trump himself admits that his Administration has been engaging in "extreme vetting" without the travel and refugee bans. Nothing in the Applications even asserts that this Administration's "extreme vetting" would somehow be inadequate for nationals of the six countries or refugees during the brief period if there were any review by this Court.

I. Lack Of Likely Irreparable Injury Provides A Dispositive, Non-Merits Ground To Deny A Stay.

The Maryland District Court found that the Applicants had "not shown, or even asserted" that national security depended upon the Amended Order's travel ban. *IRAP I*, 2017 WL 1018235 at *17. The Maryland District Court also found that the United States was "not directly harmed" by the injunction preventing the enforcement of the Amended Order. *Id.* Likewise, the Hawaii District

Court found that the Government's assertion that national security was the basis for the travel and refugee bans was an "obvious pretext." *Hawaii I*, 2017 WL 1167383 at *17. These findings of a lack of harm may be set aside only for an abuse of discretion. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction.").

The requirements for a stay are conjunctive. The third requirement is "a *likelihood* that irreparable harm [*will*] *result* from the denial of a stay." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J.) (internal quotation marks and citations omitted). Here, the Applicants' failure to show that it is likely that irreparable harm will result provides a dispositive basis for this Court to deny a stay without addressing the merits. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (movant for equitable relief is required to show that he "is likely to suffer irreparable harm before a decision on the merits can be rendered") (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995)). Indeed, because denying a stay for lack of irreparable harm is not a merits decision, such a non-merits decision also need not decide "whether the parties present an Article III case or controversy." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

II. An Injunction Against Executive Action Is Not *Per Se* Irreparable Harm.

The Applicants' principal argument for irreparable harm is that such harm occurs "*whenever* . . . executive" officials are "enjoined in their official conduct." Application, at 34 (emphasis added).[2] This proposition is breathtaking, unprecedented, and wrong.

This Court has held that irreparable harm is traditionally determined based on the facts and circumstances of each case. In *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), this Court unanimously rejected a rule that "an injunction automatically follows" when a patent is infringed regardless of the facts of the specific case. *Id.* at 392-93; *see also id.* at 395-96 (Kennedy, J., joined by Stevens, Souter, and Breyer, J.) (explaining that irreparable harm is based on "the circumstances of a case" "without resort to categorical rules"). This Court held that "'a major departure from the tradition of equity practice'"—including that a case-specific irreparable harm must be shown—"'should not be lightly implied.'" *Id.* at 391 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)). The Court refused to do so when "[n]othing in the [pertinent text] indicates . . . such a departure." *Id.* at 391-92.

Here, the Applicants cite 28 U.S.C. §§ 1651(a) and 2101(f), and Sup. Ct. R. 23, as the pertinent texts concerning a stay. Application at 1. Although stays of injunctions against executive action are often sought under these provisions, nothing in them indicates a departure for such cases from the traditional requirement of irreparable harm based on the facts of the specific case. To the contrary, 28 U.S.C. § 1651(a) refers to issuing writs "agreeable to the usages and principles of law." As

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[2] All citations to the "Application" are to Application No. 16A1190 seeking a stay of *IRAP II*. Similar arguments are made in Application No. 16A1191 seeking a stay of *Hawaii I*.

eBay demonstrates, one of those "usages and principles" is requiring irreparable harm arising from facts in the particular case as a condition for equitable relief. *See eBay*, 547 U.S. at 391-94.

The Applicants misplace their reliance on the in-chambers opinions in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox. Co.*, 434 U.S. 1345 (1977) (Rehnquist, J.), and *Maryland v. King*, 133 S. Ct. at 1. In both of those cases, unlike here, there were substantial factual showings of likely harm and indisputable statutory authorization for the action enjoined by the lower court. In *New Motor Vehicle*, a statute expressly precluded the establishment and relocation of automobile dealerships prior to investigation and examination by a state board. *New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1345-46. Then-Justice Rehnquist's stay was based on an affidavit from the executive secretary of the state board "that in the first 44 days following the issuance of the District Court's injunction," 99 dealerships had been established or relocated "without . . . any scrutiny by the State." *Id.* at 1351. Only after that finding of irreparable harm in the specific case did Justice Rehnquist add the dictum: "It *also* seems to me that any time a State is enjoined by a court from effectuating *statutes* enacted by representatives of its people, it suffers a form of irreparable injury." *Id.* (emphasis added).

In *Maryland v. King*, the Chief Justice found "an ongoing and *concrete* harm to Maryland's law enforcement and public safety interests." 133 S. Ct. at 3 (emphasis added). Specifically, the enjoined statute expressly authorized collecting DNA "from individuals arrested for violent felonies" and had led to 58 criminal prosecutions for serious crimes in three years. *Id.* Although *Maryland v. King* quoted the dictum from *New Motor Vehicle*, the holding of *Maryland v. King* was case-specific: "That Maryland may not employ a duly enacted statute to help prevent *these injuries* constitutes irreparable harm." *Id.* (emphasis added).

The travel ban cases are entirely unlike *New Motor Vehicle* and *Maryland v. King* for two reasons. First, executive orders pose fundamentally different risks and have less claim to presumed legitimacy than do statutes. A single executive's action has neither the majority votes from multiple elected representatives nor the pre-enactment public deliberations and compromise that are hallmarks of statutes. Concerns about executive actions are older than the word "tyranny." The word "tyranny" is derived from the Greek "tyrannos," which means a single "lord, master, sovereign, absolute ruler unlimited by law or constitution." ONLINE ETYMOLOGY DICTIONARY, http://bit.ly/2qYvsFi. Our founders were especially focused on executive tyranny, as the Declaration of Independence describes over two dozen wrongs by "the present King of Great Britain" in seeking "the establishment of an absolute Tyranny over these States." DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Second, the Amended Order's travel and refugee bans are unsupported by anything like the indisputable statutory authorizations in *New Motor Vehicle* and *Maryland v. King.* To the contrary, three judges of the Fourth Circuit demonstrated that the Amended Order violates multiple statutory provisions. *See IRAP II*, 2017 WL 2273306 at *29-32 (Keenan, J., joined by Thacker, J., concurring); *id.* at *34-47 (Wynn, J., concurring); *id.* at *51-54 (Thacker, J. concurring).

Indeed, the Amended Order's travel and refugee bans override specific Congressional decisions about when entry is barred based on concerns about terrorism. For example, in 2015, Congress addressed the potential terrorism issue in the specific context of travel by nationals of the six countries. The solution enacted by Congress, as implemented by the Department of Homeland Security ("DHS"), was to require visas for nationals of the six countries, Application at 5-6—*not* to ban travel. Under the solution chosen by Congress, nationals of the six countries "go through the full vetting of the *regular* visa process, which includes *an in-person interview at a U.S. embassy or consulate*." Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, WASH. POST (Jan. 21, 2016), http://wapo.st/2sERVn1 (emphasis added); U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions* (Nov. 28, 2016), http://bit.ly/1Tz4wRn. Since such vetting began, the Applicants cite *no terrorist attack or attempted terrorist attack* in this country by any national of any of the six countries.

Congress also has provided in 8 U.S.C. § 1182(a)(3)(B) "specific criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., joined by Alito, J., concurring). To hold that the Amended Order's blanket travel and refugee bans have statutory authority "would impermissibly render superfluous" the detailed and specific criteria in Section 1182(a)(3)(B). *IRAP II*, 2017 WL 2273306 at *41-44 (Wynn, J., concurring).

Accordingly, Sections 2 and 6 of the Amended Order constitute *executive* action that, at a minimum, raises serious questions of constitutional *and statutory* invalidity. These cases therefore bear no resemblance to the holdings or dictum in *New Motor Vehicle* and *Maryland v. King.*

III. The Applicants Did Not And Cannot Show Likely Irreparable Harm.

The Applicants must show likely "irreparable harm before a decision on the merits can be rendered" by this Court. *Winter*, 555 U.S. at 22. Applicants did not and cannot show this for three independent reasons.

First, there can be no such showing because the Amended Order's travel and refugee bans soon will expire by the Amended Order's own express terms. By the express terms of the Amended Order, the travel ban ends "90 days from *the effective date of this order*," the refugee ban ends "120 days after *the effective date of this order*," and *the* "Effective Date" of "[t]his order" is defined as "March 16, 2017." Amended Order §§ 2(c), 6(a), 14 (emphasis added). Because Sections 2(c) and 6(a) of the Amended Order expressly tie the expiration of each ban to a period running from "*the* effective date of this *order*," there is no basis for judicial rewriting of the order to create a different period tied to when those sections were not subject to an injunction. *Cf., e.g., Freytag v. Comm'r*, 501 U.S. 868, 902 (1991); ("[t]he definite article 'the' obviously narrows . . ."); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent . . . ."). The single effective date for the entire order is March 16, 2017.

Indeed, Sections 1, 4-5, and 7-13 of the Amended Order have been in operation since March 16, 2017. Under the plain meaning of the Amended Order, therefore, the travel ban expires June 14, 2017—90 days after March 16, 2017. Likewise, the Amended Order's refugee ban expires July 14, 2017—120 days after March 16, 2017. There cannot be likely irreparable harm because not one word of the Applications even purports to show any threat to national security if the travel ban remains enjoined for a few days through its expiration on June 14, 2017, and the refugee ban remains enjoined through its expiration on July 14, 2017.

Second, President Trump indicated on June 5, 2017 that he wants a new, "much tougher" order. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 5, 2017 3:37 a.m.), http://bit.ly/2sJEOkN ("The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - *& seek much tougher version!*") (emphasis added). There can be no irreparable injury from the current injunctions of the Amended Order if the President plans a new order regardless of those injunctions. Indeed, the Applicants' attempt to obtain a ruling on the Amended Order while the President plans a new order constitutes a request for an advisory opinion in violation of Article III.

Third, in all events, there would be no likely irreparable harm even if (a) the Amended Order's expiration dates for the bans could somehow be judicially extended and (b) the Applicants were not seeking an advisory opinion. If this Court grants review, a decision would issue at most in a matter of months. *Cf. New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers decision issued four days after argument and five days after grant of certiorari). Applicants make no showing of any likely harm over any period, much less within a matter of months.

Nor could they. Procedurally, the Applicants cannot make a new argument in their reply brief. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 6.38, p. 511 (10th ed. 2013) ("[T]he only type of reply brief that the Court considers legitimate or justified is one that is 'addressed to new points raised in the brief in opposition.' This is designed to prevent mere reiteration or enlargement of arguments made in the petition.") (quoting S. Ct. R. 15.6).

Even without this procedural obstacle, the Applicants cannot show likely irreparable harm because (a) *this* Administration has already enhanced vetting procedures *without* a travel or refugee ban; and (b) Applicants do not assert that continuing to apply *this Administration's own enhanced* vetting procedures to nationals of the six countries and refugees is *currently* inadequate. Section 5(a) of the Amended Order has *never* been enjoined. It provides:

> "The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence *shall implement a program*, as part of the process for adjudications, *to identify individuals* who seek to enter the United States on a fraudulent basis, *who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk*

> *of causing harm subsequent to their entry.* This program shall include the development of a *uniform baseline for screening and vetting standards and procedures, such as in-person interviews*; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; *amended application forms that include questions aimed at identifying* fraudulent answers and *malicious intent*; a mechanism to ensure that applicants are who they claim to be; *a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States;* and *any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.*"

82 Fed. Reg. 13209 at § 5(a) (emphasis added).

In the subsequent three months, the Administration has "implement[ed]" the additional screening and vetting that Section 5(a) of the Amended Order required for all potential entrants, including nationals of the six countries and refugees. For example, on March 17, 2017, the State Department adopted enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ."

Hawaii II, ECF No. 114-2, at *12, 56, 70 (State Dep't Cable 25814 ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt).[3] On April 27, 2017, the Administration issued a new rule that adds a question to the Electronic Visa Update System, asking for information associated with an applicant's "online presence," meaning information related to his or her "Provider/Platform"; "social media identifier"; and "contact information." 82 Fed. Reg. 19380. On April 29, 2017, President Trump wrote that his Administration was "substantially improv[ing] vetting and screening." *See* Donald J. Trump, *President Trump: In my first 100 days, I kept my promise to Americans*, WASH. POST (Apr. 29, 2017), http://wapo.st/2s7BmUg ("Visa processes *are being reformed* to substantially improve vetting and screening . . . .") (emphasis added). On June 1, 2017, the State Department promulgated a new supplemental questionnaire for visa applicants that asks applicants to list (1) every place they have lived, worked, and traveled internationally—including how such travel was funded—for the past fifteen years; (2) every passport they have ever held, including number and country of issuance; (3) names and birth dates of all siblings, children, spouses, and partners; and (4) every social media handle, phone number, and email address they have used for the past five years. U.S. Dep't of State, *Supplemental Questions for Visa Applicants* (2017), http://bit.ly/2qBSrpv.

Indeed, on June 5, 2017, the President tweeted, "[i]n any event"—meaning without the travel and refugee bans—"we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 5. 2017 3:44 a.m.), http://bit.ly/2rtbEIK (capitalization in original). The next day, the White House Press Secretary stated that the President's tweets are "considered official statements by the President of the United States." Aric Jenkins, *Sean Spicer Says President Trump Considers His Tweets 'Official' White House Statements*, TIME (Jun. 6, 2017), http://ti.me/2rT57aO.[4]

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[3] Even before this Administration, *every* refugee was vetted by *numerous* federal agencies and the office of the United Nations High Commissioner for Refugees. *See Hawaii II*, ECF No. 155 at 9-12 (Br. of Amicus Curiae HIAS).

Statistics confirm the President's "official statements." For example, in the first six months of the 2017 fiscal year, searches of electronic devices of international travelers arriving at U.S. airports increased 36.5 percent. U.S. Customs and Border Prot., *CBP Releases Statistics on Electronic Device Searches* (2017), http://bit.ly/2oyyLAu. And, to the point, comparing April 2017 to the 2016 monthly averages, non-immigrant visa issuances were down 15% among all countries, 20% among Muslim-majority countries, almost 30% among Arab countries, and 55% among the six countries designated by Section 1(e) of the Amended Order. Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, POLITICO (May 25, 2017 10:28 EDT), http://politi.co/2r0XBHQ.

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[4] Thus, the President's "official statements" confirm that a March 10, 2017 letter to him from more than 130 generals and national security experts from across the political spectrum—including two former Secretaries of the Department of Homeland Security—was correct. That letter explained that the United States has been and would be able to "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of nationals of particular countries or religions." *Hawaii I*, ECF No. 201-5 (Nat'l Security Experts' March 10, 2017 Letter to President Trump, *available at* http://politi.co/2klc2FU).

That this Administration already has enhanced vetting substantially shows that no stay is needed to prevent a likely irreparable injury. The Government repeatedly has represented that the "short" and "temporary" travel and refugee bans would end when this Administration established "current screening and vetting procedures [that] are adequate to detect terrorists seeking to infiltrate this Nation." Application at 8, 30; *Hawaii II*, ECF No. 23 at 1-2, 10, 12, 36, 43 (Appellants' Br.). But the Applicants now seek a stay without even asserting that *their own substantially enhanced* "current screening and vetting procedures" are inadequate for nationals of the six countries or refugees. Accordingly, there is no basis to find that irreparable injury will likely result absent a stay from this Court.

The Amended Order certainly provides no such basis. It was issued before this Administration's current enhanced vetting was in place. When issued, it cited only one example that involved a native of any of the six countries. "[I]n October 2014, a native of Somalia *who had been brought to the United States as a child refugee* and later *became a naturalized United States citizen* was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." 82 Fed. Reg. 13209 at § 1(h) (emphasis added). The Amended Order, however, could not claim that this United States national was radicalized before he came to this country as a "child refugee." So this lone instance cannot support a suggestion that vetting ever was inadequate, much less that it is now.

The conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS, cited by Application at 8, also does not support any likely harm absent a stay. That letter has become stale. It did not and could not purport to address whether this Administration's own substantially improved vetting procedures, put in place *after* the March 6, 2017 letter, are currently adequate for nationals of the six countries and refugees. Even when issued, that letter was not joined by the then-senior national security officials with the most anti-terrorism experience—namely, then-FBI Director James Comey and NSA Director Admiral Michael Rogers. Moreover, the letter does not contradict the President's repeated admissions that the Amended Order is merely a "watered-down version of the first order." *Hawaii I*, ECF No. 239-1 (Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, TIME (Mar. 16, 2017), http://ti.me/2o09ixe); *see also* Donald J. Trump, TWITTER (Jun. 5, 2017 3:29 a.m.), http://bit.ly/2rDbHzY ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."). That first executive order was issued "*without* consulting the relevant national security agencies." *IRAP II*, 2017 WL 2273306 at *20 (emphasis added).

Further, before the Amended Order, the Government's vetting review had produced "internal reports" that "contradict th[e] national security rationale" for the travel ban. *Id.* A DHS internal report, made public on February 25, 2017, concluded that being a national from one of the six countries is an "unlikely indicator" of terrorism threats against the United States. *Hawaii I*, ECF No. 64-10 (DHS Rep't, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States, available at* http://bit.ly/2mh0GVh). A second DHS report, dated March 1, 2017, concluded that "most foreign-born, U.S.-based violent extremists [are] likely radicalized several years *after* their entry to the United States." *Hawaii I*, ECF No. 64-11 (DHS Report, *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist* (March 1, 2017), *available at* http://bit.ly/2qVWCYi) (emphasis added). Internal FBI data also "undermine[d] a key premise of the travel ban" because that data revealed that "most" foreign nationals who have posed a risk to the United States came from "countries unaffected" by the Amended Order. *See* Devlin Barrett, *Internal Trump Administration Data Undercuts Travel Ban*, WASH. POST (Mar. 16, 2017), *available at* http://wapo.st/2nVszOX. In sum, a "significant amount of internal government data" demonstrated the travel ban "is not likely to be effective in curbing the threat of terrorism in the United States." *Id.* Nothing in the Applications supports the contrary.

The President's recent attempts to bootstrap the need for the travel ban to terrorism in London flop. Within an hour of the June 3, 2017 terror attack in London, the President tweeted that it showed "[w]e need the Travel Ban." Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 3, 2017 4:17 p.m.), http://bit.ly/2rzYrwd; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 5, 2017 3:25 a.m.), http://bit.ly/2rtmled ("People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!") (capitalization in original). He added the next morning: "We must stop being politically correct." Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 4, 2017 4:19 a.m.), http://bit.ly/2qQRn1e.

But when President Trump tweeted, he could not have had any factual basis to believe that any of the three London attackers would be covered by the Amended Order's bans. Indeed, facts subsequently learned indicate that the Amended Order's bans would not have applied to the attackers. One was a British national; another an Italian national; and the third was a national of Morocco and perhaps also Libya. Paul Cruickshank, *Who was London attacker Khuram Butt?*, CNN (Jun. 6, 2017 2:42 a.m. ET), http://cnn.it/2qWaHd8 (describing first attacker as "British national born in Pakistan"); Martin Robinson, *Second London Bridge terrorist was a Moroccan-Libyan pastry chef living in Dublin with an Irish ID*, DAILYMAIL.COM (Jun. 5, 2017 10:44 a.m. EDT, updated Jun. 5, 2017 4:52 p.m. EDT), http://dailym.ai/2rMQTX8 ("Rachid Redouane is believed to have been born in Morocco but moved to Dublin around five years ago after marrying a Scottish woman . . . [and] was also carrying an Irish identity card when he was shot dead by police . . . ."); Robert Booth, Vikram Dodd, Lorenzo Tondo, and Stephanie Kirchgaessner, *London Bridge: third attacker named as Youssef Zaghba*, THE GUARDIAN (Jun. 6, 2017 3:57 p.m. EDT), http://bit.ly/2qWwO3v (describing third terrorist Youssef Zaghba as a "Moroccan-born Italian [national]"). The Amended Order does not apply to British, Italian, or Moroccan nationals, or dual nationals who travel under their status as a national of a non-designated country. Amended Order §§ 3(b)(iii). Moreover, none of the London attackers had been screened by, and passed, the equivalent of what President Trump has described as his Administration's current "EXTREME VETTING." *Supra*, at 12-14.

The President's tweets *as President* about the London attacks thus confirm that the basis for the Amended Order's bans has never been about the adequacy of vetting procedures for nationals of the six countries or refugees. Rather, the President's recent, blunt tweets inescapably show that the basis underlying his bans always has been the assumption that Muslims have a proclivity to commit terrorism.

There is no legally cognizable harm from an injunction against government action that is based on a stereotype about adherents to a particular religion. *See IRAP II*, 2017 WL 2273306 at *46 (Wynn., J. concurring). Just as this Court should never resurrect *Korematsu v. United States*, 323 U.S. 214 (1944), this Court should never grant any form of relief—much less grant discretionary equitable relief causing immediate chaos and havoc—in deference to executive action based on a religious stereotype. *Cf. id.* at 235 (Murphy, J., dissenting) (rejecting executive action based on "assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy . . ."); *id.* at 240 (rejecting "infer[ence] that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group").

CONCLUSION

The Applications for Stay should be denied.

DATED: June 9, 2017.

Respectfully submitted,

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Nos. 16A1190 & 16-1436

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPLICATION FOR STAY

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND THEIR STAY APPLICATION

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MOTION FOR LEAVE TO FILE

The States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi respectfully move for leave to file a brief as amici curiae in support of petitioners' stay application and to file the enclosed amicus brief supporting petitioners and their stay application without 10 days' advance notice to the parties of amici's intent to file. *See* Sup. Ct. R. 37.2(a).

The parties consent to the filing of the enclosed amicus brief.

Amici also respectfully request that the Court consider the arguments herein and in the enclosed amicus brief in support of petitioners' stay application in *Trump v. Hawaii*, No. 16A1191 (S. Ct. filed June 1, 2017).

1. *Statement of Movants' Interest.* The district court order enjoined in part Executive Order 13,780, signed by the President on March 6, 2017, and entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal government to set the terms and conditions for whether aliens may enter the States. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest. Amici's view on the standards governing plaintiffs'

challenge to the Executive Order "may be of considerable help to the Court." Sup. Ct. R. 37.1.

2. *Statement Regarding Brief Form and Timing.* Given the expedited consideration of this matter of significant national interest, amici respectfully request leave to file the enclosed brief supporting petitioners and their stay application without 10 days' advance notice to the parties of intent to file. The district court heard oral argument on March 15, 2017, and entered its injunction that day. The en banc court of appeals heard oral argument on May 8. On May 25, the court of appeals affirmed in part and vacated in part the injunction, and denied petitioners' motion for a stay pending appeal as moot. The petition for a writ of certiorari and application for stay and for expedited briefing and consideration in this Court were filed on June 1. On June 2, this Court ordered a response to these filings by June 12. This accelerated timing justifies the request to file the enclosed amicus brief supporting petitioners and their stay application without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in support of petitioners and their stay application.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal Executive Branch to restrict or set the terms of aliens' entry into the States for public-safety and national-security reasons, pursuant to the laws of Congress. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). And the Immigration and Nationality Act (INA) gives the Executive significant authority to suspend aliens' entry into the country. Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest.

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[1] Pursuant to Supreme Court Rule 37.2, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to the preparation or submission of this brief. The parties consented to the filing of this brief. Due to the nature of the expedited relief sought in this case of national significance, amici were unable to notify the parties of amici's intent to file 10 days before filing. Thus, amici submit an accompanying motion for leave to file this brief. Amici also respectfully request that the Court consider the arguments herein in support of petitioners' stay application in *Trump v. Hawaii*, No. 16A1191 (S. Ct. filed June 1, 2017).

SUMMARY OF ARGUMENT

The district court's injunction of the President's temporary suspension of entry for specified classes of nonresident aliens is remarkable. The injunction was issued despite *three* longstanding doctrines limiting the availability of judicial remedies for disagreement with policy decisions like the Executive Order here.

First, the Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry. And this Court has specifically recognized that there is no "judicial remedy" to override the Executive's use of its delegated 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry into this country. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Second, the Order must be accorded "the strongest of presumptions and the widest latitude of judicial interpretation," because it is in *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Third, the Court has long accorded facially neutral government actions a presumption of validity and good faith, so those actions can be invalidated under a discriminatory-purpose analysis only if there is the clearest proof of pretext. This longstanding, exacting standard for judicial scrutiny of government motives has been recognized by this Court in multiple types of constitutional challenges. *See infra* Part III.A. This limit respects institutional roles by precluding courts from engaging in a tenuous "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).

Plaintiffs cannot satisfy this Court's exacting standards for showing that the Executive Order is pretext masking a religious classification. The Order classifies aliens according to nationality based on concerns about the government's ability to adequately vet nationals of six covered countries who seek entry. Not only that, but these six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." The Order is therefore valid, as it provides a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

Campaign-trail statements regarding a potential future policy are far from the clearest proof needed to overcome the strong presumption of validity accorded to a different policy adopted by the President after he assumed the responsibilities of office and consulted with multiple high-ranking government officials. Accepting plaintiffs' arguments would discount the well-founded reasons for the exacting nature of a pretext challenge to neutral government actions.

This injunction is contrary to law, and it denies the federal government—under a statutory regime crafted by the representatives from the States in Congress—the latitude necessary to make national-security, foreign-affairs, and immigration policy judgments inherent in this country's nature as a sovereign. The Court should grant the petition and the stay application.

ARGUMENT

Plaintiffs must overcome *three* doctrines cabining the availability of judicial relief for their disagreement with the Executive Order's national-security decision on immigration policy. First, the Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry into the country. Second, the Order must be accorded the strongest of presumptions of validity because it is within *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. Third, a discriminatory-purpose challenge to facially neutral government action entails an exacting standard requiring the clearest proof of pretext.

Plaintiffs' claims fail under each of these three doctrines, any one of which is an independent bar to their claims. The injunction should therefore be stayed and ultimately reversed.

I. Nonresident Aliens Abroad Possess No Constitutional Rights Regarding Entry into This Country, and the Constitutional Provisions Invoked by Plaintiffs Do Not Extend Extraterritorially.

Plaintiffs challenged the Executive Order as violating rights against religious discrimination under the equal-protection component of the Fifth Amendment's Due Process Clause and under the Establishment Clause. First Am. Compl. ¶¶ 220-25, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361, Docket entry No. 93 (D. Md. Mar. 10, 2017). Plaintiffs' theory is the same as to both Clauses—that the Executive Order is a pretext for discrimination on account of religion.

That theory for relief is fundamentally untenable. Nonresident aliens outside territory under clear United States control possess no constitutional rights regarding the terms on which they may enter the country: It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Consequently, the Due Process Clause and Establishment Clause provide no "judicial remedy" to override the President's 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry. *Sale*, 509 U.S. at 188; *see id.* ("agree[ing] with the conclusion expressed in Judge Edwards' concurring opinion" regarding statutory and constitutional challenges in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987): "'there is *no solution to be found in a judicial remedy*'" overriding the Executive's exercise of § 1182(f) authority (emphasis added)).

This Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Rather, the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Constitution does not regulate immigration policy regarding foreign citizens who are neither resident nor present in United States territory. The Court has therefore recognized a key distinction between aliens inside versus outside the United States, according the former certain constitutional rights while not extending those rights to the latter. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *cf. Boumediene v. Bush*, 553 U.S. 723, 754 (2008) (involving (1) lengthy detention, rather than entry denial, at (2) Guantanamo Bay, where the United States had "plenary control, or practical sovereignty").

What is more, Congress has repeatedly designated members of certain religious groups—such as Soviet Jews, Evangelical Christians, and members of the Ukrainian Orthodox Church—as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation). That accepted practice underscores the inapplicability in this context of the religious-nondiscrimination rights invoked by plaintiffs.

Plaintiffs cannot make an end-run around the territorial limits on constitutional rights by relying on the alleged stigmatizing effect on individuals within the United States of a challenged decision about whether *nonresident aliens outside* this country are admitted. To hold otherwise would allow bootstrapping a constitutional claim based on government action regulating only aliens beyond constitutional protection. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated *other* persons who possessed no constitutional rights regarding entry. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing doctrine in a challenge to the expenditure of government funds in foreign countries).

II. The Executive Order Receives "the Strongest of Presumptions" of Validity Because It Is Within *Youngstown*'s First Category as Executive Action Pursuant to Power Delegated Expressly by Congress.

Even assuming for argument's sake that the constitutional protections invoked by plaintiffs could apply extraterritorially to aliens subject to the Executive Order, plaintiffs would face an exacting standard for review of their claim.

The President's action here is accorded "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). That is because the Order is within *Youngstown*'s first zone of executive action: Congress expressly delegated to the President the authority he exercised here. *See infra* pp. 8-9. The burden of persuasion will therefore "rest heavily upon" plaintiffs, as the parties challenging the President's *Youngstown*-zone-one action. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

A. The Executive Order temporarily suspends the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents (LPRs) of the United States, were outside this country ten days after the Executive Order issued, and do not qualify for other exceptions (such as holding a valid visa ten days after the Executive Order issued); and
- aliens seeking entry under the U.S. Refugee Admissions Program.

Executive Order 13,780 (EO) §§ 2, 3, 6, 82 Fed. Reg. 13,209, 13,212-16 (Mar. 9, 2017). This Executive Order exercises authority that Congress expressly delegated.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress too has recognized this sovereign power to exclude aliens, giving the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary*, *suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an

alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's broad § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding (as opposed to an entry denial), if the "revocation provides the sole ground for removal." *Id.*

And, as to refugees, the President's power to limit alien admission is authorized, not only by § 1182(f), but also by the INA's separate delegation to the President of power to control refugee admissions. *Id.* § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)).

2. Any challenge to congressional authorization for the Order's nationality-based suspension of entry under § 1182(f) founders on this Court's decision in *Sale*, 509 U.S. at 187-88. *Sale* held—in terms equally applicable here—that no "judicial remedy" exists to override the Executive's use of its § 1182(f) power to deny entry to specified classes of nonresident aliens. *Id.* at 188 (quoting *Gracey*, 809 F.2d at 841 (Edwards, J., concurring)).

Sale is fatal to any claim that the Order here is unauthorized by the INA. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

Likewise here. Congress's broad delegation of authority to suspend the entry of classes of aliens is not undermined by 8 U.S.C. § 1152(a)(1)(A), which makes no mention of § 1182(f). Section 1152(a)(1)(A) does not address the entry of aliens into the country at all. Instead, it is part of a set of restrictions on the issuance of *immigrant visas*—that is, permission for aliens to seek admission for permanent residence. *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier nationality-based quota system for allocating immigrant visas, § 1152(a)(1)(A) provides:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict requirement for repeal by implication). An alien's *entry* into this country is a different and much more consequential event than the preliminary step of receiving a *visa*, which merely entitles the alien to apply for admission into the country. *See* 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. Visa possession does not control or guarantee entry; the INA provides several ways in which visa-holding aliens can be denied entry. *E.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the President suspended the entry of Cuban nationals as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986); *see also* Pet. App. 166a & n.2 (C.A. am. op.) (Niemeyer, J., dissenting) (citing additional examples). Plaintiffs point to no instance in which the government has read § 1152(a)(1)(A)'s visa-allocation provisions as prohibiting nationality-based suspensions of entry under § 1182(f).

In all events, § 1152(a)(1)(A) applies only to *immigrant* visas, and does not cover other prospective entrants, such as those seeking *nonimmigrant* visas. So, even on plaintiffs' view, this section cannot possibly establish that § 2 of the Order is statutorily unauthorized as applied to aliens seeking entry as nonimmigrants.[2]

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[2] Similarly, refugee admission does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So § 1152(a)(1)(A)'s provisions regarding immigrant-visa issuance, even on plaintiffs' view, cannot show that Congress somehow withheld authority for the refugee-program directives in § 6 of the Order.

3. Nor is the President's § 1182(f) authority to suspend aliens' entry limited by 8 U.S.C. § 1182(a), which also makes no mention of § 1182(f). *Cf.* Mem. in Support of Mot. for TRO 29-37, *Hawaii v. Trump*, No. 1:17-cv-50, Docket entry No. 65-1 (D. Haw. Mar. 8, 2017) (Hawaii plaintiffs' argument on this provision). In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to this country, unless an exception applies. Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary."

As the District of Columbia Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not within one of the enumerated § 1182(a) categories that automatically make aliens inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

B. Executive action in the first *Youngstown* zone—exercising power delegated by Congress—is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674. Overcoming this strongest presumption is a burden that rests "heavily" on a challenger. *Id.*

This significant burden is well-founded here, not only because of the explicit congressional grant of authority to *deny* entry, 8 U.S.C. § 1182(f), but also because of the INA's complementary approach to *allowing* entry. Specifically, Congress enacted "extensive and complex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 132 S. Ct. at 2499; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress imposed these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously provided the Executive broad authority to *exclude* aliens from the country, under § 1182(f).

The President's authority in this context therefore "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). The injunction here is thus remarkable for interfering with a decision authorized by two branches of government. And it does so in a particularly sensitive area. The admission of aliens into this country is a federal prerogative "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

The strong presumption of validity due under *Youngstown* underscores that any judicial scrutiny of the President's decisions in the Executive Order must be highly deferential. Because the Executive Order involves the national-security, foreign-affairs, and immigration powers of Congress and the President, it receives the strongest presumption of validity. Plaintiffs cannot surmount that presumption here. And when the Executive expresses its "reasons for deeming nationals of a particular country a special threat," then "a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AADC*).

III. Plaintiffs Cannot Satisfy the Exacting Standard that Applies to Discriminatory-Purpose Challenges to Facially Neutral Government Actions.

As this Court has recognized for years and in many different contexts, a discriminatory-purpose challenge to facially neutral government action faces an exacting standard. The Court has articulated this exacting standard in different ways, but the central principle in this well-established body of case law is that only the clearest proof of pretext can invalidate a facially neutral government action. *See infra* pp. 16-18. This high standard for overriding government action by discerning a discriminatory purpose respects the "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted).

That heavy presumption cannot be overcome by plaintiffs' arguments here, especially given the Executive Order's detailed national-security findings, the resonance of those findings in determinations of numerous federal officials, and the judicial deference owed to executive decisions in this context. The lower courts' analysis deeming the Executive Order pretext for a religious test discounts those weighty considerations, and it undermines the sound reasons for the exacting standard required to invalidate facially neutral government action based on an alleged discriminatory purpose.

A. An exacting standard insulates government action from being deemed a discriminatory pretext absent the clearest proof to the contrary.

A discriminatory-purpose challenge to facially neutral government action faces an exacting standard under this Court's precedents: it requires the clearest proof of pretext.

1. This exacting standard for discriminatory-purpose challenges is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *Triplett*, 494 U.S. at 721.

And this presumption of constitutionality applies with particular force to the foreign-affairs and national-security determinations at issue here. *See AADC*, 525 U.S. at 491. After all, "[u]nlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797.

2. Consequently, this Court "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington*

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977); *see also Washington v. Trump*, No. 17-35105, slip op. 7 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of rehearing en banc). The Court has therefore permitted a discriminatory-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted a discriminatory-purpose analysis of government action, this Court has concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained for the Court over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing. 6 Cranch at 128.

The Court has thus repeatedly explained, in various contexts, that only clear proof of pretext can allow courts to override facially neutral government actions. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979)

(rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).

- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).
- "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make little "practical sense." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).

This exacting standard for a discriminatory-purpose challenge to facially neutral government action exists for good reason. It keeps a purpose inquiry judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

B. The Order here, which classifies aliens by nationality and reflects national-security concerns, cannot be deemed a pretext for a religious test.

The Executive Order classifies aliens by nationality—not religion.[3] The Order's temporary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.*

The Executive Order therefore is emphatically not a "Muslim ban." Numerous majority-Muslim countries in the world are not covered by the Executive Order, and data from the Pew-Templeton Global Religious Futures Project indicates that the six countries covered by the

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[3] Because the Executive Order classifies aliens by nationality, and not religion, any equal-protection analysis possibly applicable under the Constitution, *but see supra* Part I, subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

Executive Order contain only about 10% of the world's Muslims.[4]

The Order finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." EO § 2(c). All six of these countries were already included in the list of seven "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)." EO § 1(b)(i), (f). That set of seven countries under 8 U.S.C. § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The Order then explains at length the rationale for ordering a pause in entry for nationals of the six covered countries. *See* EO §§ 1-2. Those restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order thus further directs that, while entry from those countries is paused, the Secretary of Homeland Security in consultation with the Secretary of State and Director of National Intelligence undertake a worldwide review to identify what information is needed from foreign countries to allow adequate screening of entrants. Then, the Secretary must submit reports to the President naming any country that these officials believe should be added to or removed from the list of countries subject to a suspension of entry. EO § 2(a)-(b), (d)-(g).

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[4] *See Muslim Population by Country: 2010*, Pew-Templeton Global Religious Futures Project (last visited June 5, 2017), http://www.globalreligiousfutures.org/religions/muslims (providing statistics on Muslim population as a percentage of total population on a per-country basis).

Moreover, before the current Administration took office, numerous federal officials—including the FBI Director,[5] the Director of National Intelligence,[6] and the Assistant Director of the FBI's Counterterrorism Division[7]—expressed concerns about the country's current ability to vet alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[8] and "groups like ISIS may seek to exploit the current refugee flows."[9] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists have been recognized since the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).[10]

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[5] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

[6] *Id.*

[7] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[8] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[9] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terrorist Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

Given this national-security grounding, a challenge to the Executive Order as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the delicate policy judgments inherent in the Executive Order, as these decisions must account for factors indicating a heightened national-security risk that warrants a particular course of action regarding the Nation's borders. Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797; *AADC*, 525 U.S. at 491. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Order's detailed explanation of its national-security basis, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 20-22, and (3) the exacting standard for deeming facially neutral government action pretext for a discriminatory purpose, *see supra* Part III.A. Furthermore, this Court has recognized the limited significance of campaign statements made before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Washington v. Trump*, slip. op. 4-7 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernment officials are irrelevant for determining whether the Executive Branch took action as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

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[10] *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

Plaintiffs' claim that the Order is pretext for a religious classification thus fails. The Order must be accorded the strongest presumption of validity as *Youngstown*-zone-one action. *See supra* Part II. And the Order is accorded the heavy presumption that facially neutral government action is valid and taken in good faith. *See supra* Part III.A.

Especially with those presumptions in mind, the Executive provided a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770; *see also Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment) (federal government official informing alien of visa denial based expressly on statutory provision is a "facially legitimate and bona fide" reason under *Mandel*). Courts therefore must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.[11]

---

[11] In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a panel of the Ninth Circuit erroneously concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. *Id.* at 1164-65. As this Court has recognized, no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Nonresident aliens abroad have no constitutionally protected interest in entering the United States. *See Mandel*, 408 U.S. at 762. Regardless, whatever process could possibly be due was satisfied here by the Executive Order's "facially legitimate" public proclamation prospectively announcing an exercise of the Executive's § 1182(f) authority. *Id.* at 770. The *Washington v. Trump* panel posited that four categories of aliens, other than lawful permanent residents, may have "potential" claims to due-process protections, 847 F.3d at 1166, which was incorrect because those aliens lack due-process rights and actionable claims, *see* Amicus Br. for State of Texas et al., *Hawaii v. Trump*, No. 17-15589, at 22-25 (9th Cir. Apr. 10, 2017).

CONCLUSION

The Court should grant the petition for a writ of certiorari and the stay application.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

On Applications to Stay Pending Disposition of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and Pending Appeal to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE STATES OF VIRGINIA, MARYLAND, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN OPPOSITION TO THE STAY APPLICATIONS

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The States of Virginia, Maryland, California, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia move this Court for leave to file the attached amicus brief in opposition to the stay applications.

All parties have consented in writing to the filing of this amicus brief and to waive the required 10 days' advance notice otherwise required by Supreme Court Rule 37.2(a).

As set forth in the attached brief, the Amici States and our residents will suffer irreparable harm if the Court stays the preliminary injunctions against enforcement of the travel ban and refugee ban in Executive Order 13,780. The amicus brief describes and documents those harms. Because the Court must balance the equities in evaluating the stay applications, and because balancing the equities requires the Court "to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public," *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers), the information in the amicus brief about those harms is crucial to the required analysis.

Accordingly, the Court should grant amici curiae leave to file the attached brief in opposition to the stay applications.

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The Amici States of Virginia, Maryland, California, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia urge this Court to deny the applications to stay the preliminary injunctions entered by the District Court of Maryland in *International Refugee Assistance Project v. Trump* ("*IRAP*") and by the District Court of Hawaii in *Hawaii v. Trump*.

INTERESTS OF AMICI[1]

The interests of the Amici States are directly and adversely threatened by the two provisions of Executive Order 13,780 (EO-2)[2] at issue here: the travel ban in § 2(c), preliminarily enjoined by the district courts in *IRAP* and *Hawaii*, and the refugee ban in § 6, preliminarily enjoined by the district court in *Hawaii*. Section 2(c) of EO-2 imposes a 90-day ban on entry to the United States by nationals from six overwhelmingly Muslim countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Section 6 imposes a 120-day ban on the entry of refugees under the U.S. Refugee Admissions Program and reduces refugee admissions in Fiscal Year 2017 from 110,000 to 50,000. The enjoined provisions are substantially similar to provisions in Executive Order 13,769 (EO-1),[3] which EO-2 rescinded after courts issued preliminary injunctions blocking their enforcement.[4]

---

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented in writing to the filing of this amicus brief and to waive the required 10 days' advance notice otherwise required by Supreme Court Rule 37.2(a).

[2] 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[3] 82 Fed. Reg. 8,977 (Feb. 1, 2017).

Some of the Amici States have brought their own challenges to EO-2 or to its now-rescinded predecessor.[5] Others have filed amicus briefs supporting those challenges.[6] Permitting the enjoined provisions in EO-2 to take effect would inflict irreparable harm on the Amici States and our residents. Accordingly, the Amici States have a substantial interest in the outcome of these stay applications.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."[7] In evaluating whether the circumstances warrant a stay, it "is ultimately necessary . . . 'to balance the equities.' "[8]

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[4] *See, e.g.*, *Washington v. Trump*, 2:17-cv-00141-JLR, 2017 WL 462040, at *2-3 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans in EO-1), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban in EO-1 as applied to Virginia).

[5] *See* Second Am. Compl., *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Mar. 16, 2017) (challenge to EO-2 by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152; *Aziz*, 2017 WL 580855, at *1 (granting Virginia's motion to preliminarily enjoin § 3(c) of EO-1).

[6] *See* Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153; N.Y. & Mass. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 58-2.

Balancing the equities requires the Court "to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public."[9] For the reasons explained in Amici's separate brief in opposition to the petition for a writ of certiorari in *IRAP*, this Court should not grant certiorari at this juncture, and the lower courts' decisions are correct on the merits. This brief explains why the balance of the equities tilts decidedly in favor of denying the stay applications.

The Amici States will be irreparably harmed if the travel and refugee bans take effect. The immediate adverse impact will be felt by our colleges and universities, with effects rippling through our economies based on disruptions to persons seeking to travel to the United States on student, family, work, and tourist visas, or to resettle as refugees. Reinstating the travel and refugee bans would also send an unmistakable message of exclusion and religious intolerance that would harm our communities. In light of the irreparable harm that a stay would impose on the States and our residents, and the applicants' failure to adduce any evidence of harm resulting from the preliminary injunctions, this Court should leave those injunctions in place while the litigation in *IRAP* and *Hawaii* proceeds to final judgment.

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[7] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (describing similar standard for stay pending appeal to court of appeals).

[8] *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

[9] *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

I. IMPLEMENTING THE TRAVEL AND REFUGEE BANS WILL INFLICT IMMEDIATE IRREPARABLE HARM ON THE AMICI STATES AND OUR RESIDENTS.

Allowing the travel and refugee bans to take effect would impose various categories of irreparable harm on the Amici States and our residents.

Harm to colleges and universities. The most immediate harm would be felt by our colleges and universities, and the students and faculty on whom they depend. A recent survey by the Institute of International Education (IIE) found that "more than 15,000 students enrolled at U.S. universities during 2015-16 were from the 6 countries named in [EO-2]."[10] The IIE estimates that, nationwide, "these students contributed $496 million to the U.S. economy, including tuition, room and board and other spending."[11]

Approximately half of those students attend colleges and universities in the Amici States and Hawaii. The following table[12] lists the number of such students in each Amicus State during the 2015-16 academic year and the economic benefits generated as a result:

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[10] Inst. of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017), https://goo.gl/pCky9C.

[11] *Id.*

[12] The data is found at *id.*, App. 1.

Amici States & Hawaii	**Int'l Students & Scholars from 6 EO-2 Countries (2015/16)**	**Contribution to Economy**
California	2,121	$56,800,000
Connecticut	189	$5,000,000
Delaware	70	$1,700,000
District of Columbia	131	$4,000,000
Hawaii	38	$1,200,000
Illinois	962	$28,100,000
Iowa	235	$6,800,000
Maine	31	$800,000
Maryland	361	$8,600,000
Massachusetts	1,033	$26,100,000
New Mexico	199	$6,300,000
New York	1,033	$28,800,000
North Carolina	435	$11,800,000
Oregon	311	$9,300,000
Rhode Island	56	$1,500,000
Vermont	23	$600,000
Virginia	477	$14,900,000
Washington	301	$9,700,000
Total	**8,006**	**$222,000,000**

As this table shows, colleges and universities in the Amici States and Hawaii account for more than 8,000 of the international students and scholars from the six countries, generating $222 million in economic benefits.

To be sure, the 90-day travel ban in § 2(c) does not apply to persons who were present in the United States on a valid visa as of the date of EO-1 (January 27, 2017) or EO-2 (March 6, 2017).[13] But allowing the travel ban to take effect would pose huge obstacles for students from the six countries, whether or not they were present in the United States on those dates. Because only single-entry visas are permitted for two of the countries, and because the required visas are valid only for relatively short periods, most students have to apply for a new visa during the course of their academic studies. In particular:

- students from Somalia are issued single-entry visas that are valid for 3 months;[14]
- students from Libya are issued single-entry visas that are valid for 12 months;[15] and
- students from Iran, Sudan, Syria, and Yemen are issued multiple-entry visas, but visas for Iran and Syria have a validity period of only two years,[16] while the validity period is only 12 months for Yemeni

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[13] EO-2 § 3(a).

[14] U.S. Dep't of State, Bureau of Consular Affairs, *Somalia Reciprocity Schedule*, https://goo.gl/qIdYZh (select F-1 visa classification).

[15] *Id.*, *Libya Reciprocity Schedule*, https://goo.gl/LgEIkO (select F-1 visa classification).

[16] *Id.*, *Iran Reciprocity Schedule*, https://goo.gl/gJwGAV (select F-1 visa classification); *id.*, *Syria Reciprocity Schedule*, https://goo.gl/plUXFZ (select F-1 visa classification).

students[17] and 6 months for Sudanese students.[18]

In other words, foreign students on single-entry visas who have relied on the existing preliminary injunctions—whether to return home for the summer, conduct research in other countries, or travel abroad for other reasons—face the prospect of being denied a visa to reenter the United States. And reinstating the travel ban would pressure all students from the six countries to cancel their enrollment for programs that exceed the visa-duration period, given that they can have no confidence that their visas will be renewed to enable them to complete their studies.

While EO-2 gives consular officers discretion to waive the travel ban for students from the six countries,[19] the discretionary nature of the review process means students have no assurance of readmission. EO-2 does not describe the process for applying for a waiver, does not specify the timeframe for receiving one, and does not set any concrete guidelines beyond providing a list of circumstances in which waivers "could be appropriate."[20] The ultimate decision whether to issue a waiver is committed entirely to "the consular officer's or the [Customs and Border Protection] official's discretion."[21]

That uncertainty alone will likely induce many students not to apply to universities in the United States.

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[17] *Id.*, *Yemen Reciprocity Schedule*, https://goo.gl/vUuVQq (select F-1 visa classification).

[18] *Id.*, *Sudan Reciprocity Schedule*, https://goo.gl/2AHPFT (select F-1 visa classification).

[19] EO-2 § 3(c).

[20] *Id.*

[21] *Id.*

The University of Washington, for instance, received various communications from prospective students from the affected countries expressing anxiety about applying in light of the travel ban.[22] Newly admitted students face similar uncertainties, particularly if they have not yet traveled to the United States. Allowing the travel ban to take effect would disrupt their educational planning and drive them to pursue alternative educational opportunities in countries that do not discriminate against them. Not surprisingly, Canada, the United Kingdom, Australia, and New Zealand have already seen a jump in applications following issuance of EO-1 and EO-2.[23]

Such anxieties are easy to understand. For instance, a fourth-year student at George Mason University in Virginia, who flew home to visit her family in Libya over winter break, was left stranded for a week in Istanbul after EO-1 took effect during the middle of her return trip to the United States. She was able to reenter the United States to resume her studies only after the district court issued a temporary restraining order in *Washington v. Trump*. She had the highest high-school GPA in Libya in 2011, earned a full college scholarship, and chose to study here. But the "nightmare" she experienced has prompted her to look to Canada for her graduate studies.[24] EO-1 likewise blocked ten of Iran's top engineering students who had been admitted to the doctoral engineering program at the University of Illinois at Chicago, forcing them to look to programs in Canada as well.[25]

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[22] Decl. of David L. Eaton ¶ 5 & Ex. 2, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. G.

[23] Kirk Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, Nat'l Pub. Radio (Apr. 7, 2017), https://goo.gl/CqkNEy.

[24] Decl. of Najwa Elyazgi, *Aziz v. Trump*, No. 1:17-cv-116 (E.D. Va. Feb. 8, 2017), ECF No. 54; *see also* Susan Svrluga, *'I felt loved': Libyan student, banned from entry to the U.S., is able to return to George Mason University*, Wash. Post (Feb. 7, 2017), https://goo.gl/4I216w.

Moreover, the climate of uncertainty and discrimination created by the travel ban appears to be deterring international students from countries *other* than the six targeted by EO-2. A recent survey found that 80% of college registrars and admissions officers were concerned about the application yield of international students in the wake of EO-1 and EO-2.[26] For instance, the Special Education Program at Washington State University's Department of Teaching and Learning has seen the number of international applications drop from 63 last year to just ten this year.[27] Forty percent of colleges surveyed report a drop in applications from foreign students.[28] The Deputy Director of the American Association of College Registrars and Universities recently reported seeing an increase in foreign students "hedging their bets," applying to schools in " 'Canada, the U.K., Australia and New Zealand.' "[29] These are clear warning signs that allowing the travel ban to take effect would devastate the ability of American schools to attract and retain talented foreign students.

A stay of the injunctions would also pull the rug out from under students from the six targeted countries who have already accepted admission (or decided to continue their enrollment) for the fall academic semester, in reliance on the belief that the travel ban was enjoined. The commitment deadline has already passed for most colleges and universities; for others, it is imminent.[30] The inevitable adverse publicity that would flow from blocking those students' ability to matriculate would haunt our colleges and universities for years to come.

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[25] Miles Bryan, *10 Prospective UIC Students Ineligible to Enroll Due to Travel Ban*, WBEZ (Mar. 6, 2017), https://goo.gl/rqRwzz.

[26] Carapezza, *supra* note 23.

[27] Decl. of Asif Chaudhry ¶ 9, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. J.

[28] Carapezza, *supra* note 23.

[29] *Id.*

Every foreign student deterred or blocked from enrolling results in both tangible and intangible harms to the States. The loss of international students and scholars inhibits the free exchange of information, ideas, and talent that is so essential to academic life in our nation's colleges and universities. The tangible economic harms would also be serious. "For every seven international students enrolled, three U.S. jobs are created and supported by spending occurring in the higher education, accommodation, dining, retail, transportation, telecommunications and health insurance sectors."[31] As noted above, economic benefits of $496 million were generated as a result of foreign students from the six targeted countries during the 2015-16 academic year, with $222 million alone generated in the Amici States.

Permitting the travel ban to take effect would have similar adverse impacts on current and potential faculty members. For example, the University of Massachusetts employed in the previous academic year, in various academic departments, approximately 130 employees from the affected countries who are neither lawful permanent residents nor U.S. citizens.[32] The University of Maryland relies on "more than 200 graduate students, post-doctoral fellows, and faculty from the designated countries to staff its science laboratories."[33] "The loss of just one of these researchers will disrupt work and delay progress for an entire lab."[34]

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[30] *See, e.g.*, Univ. of Cal. (May 1), https://goo.gl/u8T31E; Ill. State Univ. (May 1), https://goo.gl/WqIaUT; James Madison Univ. (May 1), https://goo.gl/5dPhal; SUNY Albany (May 1), https://goo.gl/i8fbG9; N.C. State Grad. Eng'g Program (June 15), https://goo.gl/STVx1E.

[31] NAFSA, *Benefits from International Students* (2017), https://goo.gl/G6nlWw.

Permitting the travel ban to take effect would also harm recruitment of faculty and researchers, many of whom work in specialized fields. The City University of New York ("CUNY") Graduate Center is currently negotiating with an international senior research scholar who has expressed serious concerns about moving to the United States in the shadow of the travel ban.[35] CUNY's Baruch College, which hires a significant number of foreign faculty members, already reports that potential faculty members are voicing concerns about travel restrictions that would interfere with family obligations such as caring for elderly parents, attending important family events, and participating in cultural holidays.[36]

Harm to medical institutions. Allowing the travel ban to take effect would also threaten public hospitals, which employ physicians and medical residents, research faculty, and postdoctoral researchers from the designated countries. Qualified individuals from those countries have accepted job offers from Amici States' hospitals, but must await visa approval and are uncertain if or when they can start work.[37] Uncertainty created by EO-1 and EO-2 has already had "a profound chilling effect" on international students' applications to State hospitals' residency programs, imposing "a major disincentive for hospitals to select foreign nationals for their residency programs."[38] The consequent risk of understaffing medical facilities threatens harm to the States and to the health of their inhabitants.

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[32] Decl. of Deirdre Heatwole ¶¶ 4-10, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. A.

[33] Decl. of Ross D. Lewin ¶ 8, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. F.

[34] *Id.*

[35] Decl. of Vita Rabinowitz ¶ 21, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. H.

[36] *Id.*

Lost tax revenues. Implementing the travel and refugee bans would also cost Amici States significant tax revenues. Foreign students, tourists, business visitors, and resettled refugees contribute to our State treasuries, not only through direct payments like tuition and fees, but also through tax receipts from the businesses they patronize and the goods and services they purchase. Blocking thousands of travelers from entering the Amici States will halt their tax contributions.

The broader chilling effect on tourism would be even more extensive if the travel ban is reinstated, operating as a giant warning sign that foreign visitors are unwelcome. EO-2 has already prompted Canada's largest school district and one of its nationwide youth organizations to suspend U.S. travel.[39] An estimated 4.3 million fewer people are expected to visit the United States this year, "resulting in $7.4 billion in lost revenue . . . . Next year, the fallout is expected to be even larger, with 6.3 million fewer tourists and $10.8 billion in losses."[40] The preliminary injunctions may have helped stanch the losses in tourism revenue; with the injunctions in place, international inbound travel ticked up in April 2017, compared to April 2016, but travel-industry experts have cautioned that "uncertainty about the Trump Administration's policies could discourage foreign visitors in the months ahead."[41] Reviving the travel and refugee bans would certainly make America a less welcoming destination for foreign tourists.

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[37] *See, e.g.*, Decl. of Michael F. Collins, M.D. ¶ 9, *Louhghalam v. Trump*, No. 1:17-cv-10154 (D. Mass. Feb. 2, 2017), ECF No. 52-2.

[38] Decl. of Eric Scherzer ¶ 15, *Hawaii v. Trump*, No. 1:17-cv-00050 (D. Haw. Mar. 13, 2017), ECF No. 154-3, Ex. I.

Lasting harm to States' economies. The travel and refugee bans also threaten profound, long-term economic harm. The message of intolerance and uncertainty conveyed by EO-2 threatens Amici States' ability to continue attracting and retaining the foreign professionals, entrepreneurs, and companies that are mainstays of our economies. For example, foreign-born residents comprise 22.1% of the entrepreneurs and 37.7% of the software developers in Illinois,[42] and 27% of scientists, 21% of health care practitioners, and 19% of mathematicians and computer specialists in Maryland.[43] A recent study found that if even half of the more than 3,900 foreign-born graduates of Illinois universities in STEM fields (science, technology, engineering, and mathematics) stayed in the United States after graduation, it could result in the creation of more than 5,100 new jobs for U.S.-born workers by 2021.[44] Even a temporary disruption in the flow of these highly skilled workers into the United States puts companies across the country at a disadvantage compared to their global competitors, and threatens to act as a brake on our State economies.

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[39] Derek Hawkins, *Worried about Trump's travel ban, Canada's largest school district calls off U.S. trips*, Wash. Post (Mar. 24, 2017), https://goo.gl/nqCv1t; Linda Givetash, *Girl Guides Of Canada Cancels All Trips To U.S. Over Trump's Travel Ban*, Huffington Post (Mar. 14, 2017), https://goo.gl/OmOHWz.

[40] Abha Bhattarai, *Even Canadians are skipping trips to the U.S. after Trump travel ban*, Wash. Post (Apr. 14, 2017), https://goo.gl/a9tSjJ.

[41] Alana Wise, *Travel to the United States rose in April, but industry remains wary*, Reuters (June 6, 2017), https://goo.gl/dzjfYT.

Harm to refugee resettlement efforts. EO-2 also hinders the efforts of the Amici States to resettle and assist refugees. Between 2012 and 2015, California accepted 23,382 refugees, including 5,668 from Iran, 225 from Syria, and 119 from Sudan.[45] Between July 1, 2015 and June 30, 2016, California resettled 1,450 Syrian refugees, more than any other State.[46] According to the Maryland Office for Refugees and Asylees, during the five-year period ending September 30,

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[42] New Am. Econ., *The Contributions of New Americans in Illinois* 2, 10 (Aug. 2016), https://goo.gl/78amBf.

[43] Randy Capps & Karina Fortuny, *The Integration of Immigrants in Maryland's Growing Economy* 2, Urban Inst. (Mar. 2008), https://goo.gl/wVjnez.

[44] *The Contributions of New Americans in Illinois*, *supra* note 42, at 13.

[45] U.S. Office of Refugee Resettlement, *Refugee Arrival Data* (Nov. 24, 2015), https://goo.gl/lDNhUU.

[46] *California Leads The Nation In Resettlement Of Syrian Refugees*, CBS SF Bay Area (Sept. 29, 2016), https://goo.gl/FmXRnj.

2016, 1,121 refugees from the six designated countries were resettled in Maryland.[47]

Had it not been enjoined by the *Hawaii* court, § 6 of EO-2 would have stranded in crisis zones thousands of refugees—despite the fact that they have already been extensively vetted—in many cases isolating them from family members who are already in the United States.[48] In addition, it would have indefinitely excluded tens of thousands of otherwise eligible refugees by reducing the cap for Fiscal Year 2017 by more than half, from 110,000 to 50,000. Resettlement agencies whose funding is allocated on a per-arrival basis thereby face a reduction in resources if that provision takes effect. For example, the International Institute of Buffalo, which provides refugee resettlement services, has planned to lay off six employees as a result of the refugee ban.[49] Lutheran Community Services Northwest, based in Washington, has notified 15 of its 35 refugee assistance employees that they will be laid off if the refugee provisions take effect.[50] Such reductions in services have a constricting effect on local economies as employees are let go, interpreters are no longer hired, and fewer resettled refugees are available to help revitalize economically depressed neighborhoods.[51] The preliminary injunction entered by the court in *Hawaii* saved refugee resettlement organizations from having to drastically reduce their personnel, and the State Department has since advised such organizations to expect an increase in refugee arrivals.[52] Reinstating the refugee restrictions would do unnecessary damage to the vital services performed by these organizations.

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[47] Md. Office for Refugees & Asylees, *Refugees and SIV's Resettled in Maryland by Nationality, FY 2012–FY 2016* (2017), https://goo.gl/zAAeDU.

[48] *See* Joint Decl. of Madeleine K. Albright et al. ¶ 6, *IRAP v. Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 34-3, J.A. 666 ("Refugees receive the most thorough vetting of any traveler to the United States, taking on the average more than a year.").

[49] Decl. of Eva Hassett ¶ 21, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. N.

[50] Decl. of David Duea ¶ 9, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125, Ex. O.

[51] Decl. of Eva Hassett, *supra* note 49, ¶¶ 22-25.

Harm to States' Muslim communities. The travel and refugee bans also threaten to undermine our States' constitutional and statutory commitments to religious tolerance and diversity. Each State has an interest in "securing observance of the terms under which it participates in the federal system,"[53] including the Establishment Clause.[54] The Establishment Clause is a structural limitation on the exercise of federal power, including Executive power.[55] "It was in large part to get completely away from . . . systematic religious persecution that the Founders brought into being our Nation," with an express "prohibition against any governmental establishment of religion" in order to protect religious beliefs from "the pressures of government for change each time a new political administration is elected to office."[56] To safeguard our residents' rights, Amici States have adopted constitutions and other laws that protect against discrimination, including laws prohibiting our residents, businesses, and state and local governments from conditioning employment and other opportunities on national origin and religion.[57] EO-2 undermines those efforts.

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[52] Manya Brachear Pashman, *After sharp dip, refugee arrivals poised to increase*, Chi. Tribune (May 30, 2017), https://goo.gl/p98ZAt.

[53] *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982).

[54] U.S. Const. amend. I, cl. 1.

[55] *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 614 (2007) (plurality opinion) (noting that a party with standing may bring an Establishment Clause challenge to spending by an executive agency that advances religious purposes); *id.* at 639-40 (Souter, J., dissenting) ("[N]o one has suggested that the Establishment Clause lacks applicability to executive uses of money."); *Agostini v. Felton*, 521 U.S. 203, 244 (1997) (Souter, J., dissenting) (describing the Establishment Clause as among the Constitution's "structural and libertarian guarantees").

Allowing the travel and refugee bans to take effect would occur at the same time that hate crimes against Muslims are on the rise. In the Chicago area alone, 175 hate-related incidents were reported in the first two months of 2017, compared to 400 hate crimes reported in all of 2016.[58] On May 26, an assailant shouting anti-Muslim rants at two women in Portland, Oregon fatally stabbed two men and wounded a third as they tried to come to the women's defense.[59] Permitting the travel ban to take effect against citizens from overwhelmingly Muslim countries will only embolden the intolerant and amplify the message of fear and intimidation communicated to our Muslim communities.

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[56] *Engel v. Vitale*, 370 U.S. 421, 430, 433 (1962).

[57] *See, e.g.*, Cal. Const. art. I, §§ 4, 7-8, 31; Cal. Gov't Code §§ 11135-11137, 12900-12996; Cal. Civ. Code § 51, subd. (b); Conn. Gen. Stat. § 46a-60; Ill. Const. art. I, §§ 3, 17; 740 Ill. Comp. Stat. 23/5(a)(1); 775 Ill. Comp. Stat. 5/1-102(A); 775 Ill. Comp. Stat. 5/10-104(A)(1); Me. Rev. Stat. Ann. tit. 5, §§ 784, 4551-4634; Md. Code Ann., State Gov't § 20-606; Mass. Gen. L. ch. 151B, §§ 1, 4; *id.* ch. 93, § 102; N.M. Const. art. II, § 11; N.M. Stat. Ann. § 28-1-7; Or. Rev. Stat. § 659A.006(1); R.I. Gen. Laws § 28-5-7(1)(i); Vt. Stat. Ann. tit. 9, §§ 4500-07; Vt. Stat. Ann. tit. 21, § 495; Va. Const. art. I, § 16; Wash. Rev. Code § 49.60.030(1).

[58] Marwa Eltagouri, *Hate crime rising, report activists at Illinois attorney general's summit*, Chi. Tribune (Feb. 24, 2017), https://goo.gl/uVeaiQ; *see also* Azadeh Ansari, *FBI: Hate crimes spike, most sharply against Muslims*, CNN (Nov. 15, 2016), https://goo.gl/kyvh83.

[59] Matthew Haag & Jacey Fortin, *Two Killed in Portland While Trying to Stop Anti-Muslim Rant, Police Say*, N.Y. Times (May 27, 2017), https://goo.gl/MOzBcv.

By its express terms, the travel ban expires on June 14—90 days after it took effect.[60] The applicants, for their part, have taken irreconcilable positions on whether that time period has been running (and whether the 120-day period has been running on the refugee ban). In *IRAP*, the Acting Solicitor General told the Fourth Circuit that "Section 2(c)'s 90-day suspension *expires in early June*."[61] But in subsequent briefing, the applicants claimed that the 90-day period had not even begun to run, based on three alternative theories:

> Whether because Section 2(c) was never permitted to take effect on [its effective date], or because the "effective date" for Section 2(c) has been tolled during the pendency of the injunctions, or because those injunctions prevented Section 14's effective date from applying to Sections 2 and 3 (and those applications are severable under the express severability clause in Section 15), the Order's 90-day suspension will begin when the injunctions are lifted . . . .[62]

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[60] *See* EO-2 § 2(c) (suspending entry of nationals from six countries "for 90 days from the effective date of this order"), § 14 ("This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.").

[61] Mot. of Defs.-Appellants for a Stay Pending Expedited Appeal at 11, *IRAP v. Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 35 (emphasis added).

[62] Defs.-Appellants' Resp. to Pls.-Appellees' Mot. for Leave to Supplement the Record at 2-3, *IRAP v. Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 291.

We do not know which position to credit, and the applicants did not pick one in their three filings in this Court. However that question is ultimately resolved, we know one thing for certain: the harm to Amici States and our residents from reinstating the travel and refugee bans, even for a limited time, would be irreparable.

II. THE BALANCE OF EQUITIES STRONGLY FAVORS DENYING A STAY.

As noted at the outset, balancing the equities involved in a stay application requires the Court "to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public."[63] In considering these applications, therefore, the Court should take account of the irreparable harm described above that will be inflicted on the Amici States and our residents if the travel ban is permitted to take effect. The balance of equities here tips decidedly in favor of maintaining the preliminary injunctions pending review.

The applicants' interests do not outweigh the injury to the States and our residents that would result from permitting the travel ban to take effect. At no time in either the *IRAP* or *Hawaii* litigation have the applicants offered any evidence to rebut the joint declaration of numerous national security experts who explained why enjoining the travel and refugee bans pending a final decision on the merits "would not jeopardize national security."[64] As those experts noted, "[s]ince September 11, 2001, not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order."[65] Accordingly, the applicants have failed to carry their "heavy burden"[66] to show that the preliminary injunctions should be stayed pending final disposition of the underlying litigation.

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[63] *Lucas*, 486 U.S. at 1304.

[64] Joint Decl. of Madeleine K. Albright et al. ¶ 9, *IRAP v. Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 34-3, J.A.667.

A "presumptive correctness" attaches to the lower court's disposition,[67] a presumption that applies not only to ruling on "the merits," but also to rulings involving an "interim disposition of the case."[68] Thus, Justices have "weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim."[69] When the lower courts have already balanced the equities, as here, their "decision is entitled to weight and should not lightly be disturbed."[70] "Balancing the equities is always a difficult task, and few cases are ever free from doubt."[71] "Where there is doubt," however, "it should inure to the benefit of those who *oppose* grant of the extraordinary relief which a stay represents."[72]

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[65] *Id.* ¶ 4, J.A.667.

[66] *Nken v. Holder*, 556 U.S. 418, 439 (2009) (Kennedy, J., concurring) (quoting *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers)).

[67] *Conforte v. Comm'r*, 459 U.S. 1309, 1311 n.1 (1983) (Rehnquist, J., in chambers).

[68] *Rostker*, 448 U.S. at 1308.

[69] *Whalen v. Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J., in chambers) (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers)).

[70] *Zbaraz*, 442 U.S. at 1312; *see also Whalen*, 423 U.S. at 1316.

[71] *Zbaraz*, 442 U.S. at 1315.

[72] *Id.* at 1316 (emphasis added).

CONCLUSION

The applications to stay the preliminary injunction orders should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

JOINT APPENDIX
(VOLUME 1)

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CERTIORARI GRANTED: JUNE 26, 2017

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF MARYLAND

Docket No. 8:17-cv-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS,
ET AL., PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/7/17	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0416-6486891.), filed by Jane Doe 1, John Doe1-4, Samaneh Takaloo, Allan Hakky, HIAS, Inc., International Refugee Assistance Project. (Attachments: # 1 Civil Cover Sheet)(Rocah, David) (Entered: 02/07/2017)
		* * * * *
2/7/17	5	MOTION for Other Relief *for Leave to Proceed Under Pseudonyms* by Jane Doe 1, John Doe1-4

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Declarations of John Does 1-4 & Jane Doe 1, # 2 Declaration of Nicholas Espiritu & Exhibits A through V, # 3 Proposed Order)(Cox, Justin) (Entered: 02/07/2017)
		* * * * *
2/9/17	25	Summons Issued 60 days as to Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump, U.S. Attorney and U.S. Attorney General(jf3s, Deputy Clerk) (Entered: 02/09/2017)
		* * * * *
2/10/17	40	NOTICE by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo of *Intent to File a Motion for Preliminary Injunction* (Cox, Justin) (Entered: 02/10/2017)
2/10/17	41	PAPERLESS NOTICE that a TELEPHONE STATUS CONFERENCE is scheduled to discuss 6 Notice of Intent to File Motion for

DATE	DOCKET NUMBER	PROCEEDINGS
		Leave to Proceed Under Pseudonyms and 40 Notice of Intent to File Motion for a Preliminary Injunction for February 13, 2017 at 3:30 p.m. Instructions for the call will be emailed to the parties. (ps2s, Chambers) (Entered: 02/10/2017)
		* * * * *
2/13/17	57	Case Management Conference held on 2/13/2017 before Judge Theodore D. Chuang.(FTR-KLS-2B.) (klss, Deputy Clerk) (Entered: 02/14/2017)
		* * * * *
2/14/17	59	ORDER deeming as filed 5 Motion for Leave to Proceed Under Pseudonyms; granting Plaintiffs leave to file Motions; scheduling a Motions hearing for March 28, 2017 at 9:30 a.m. Signed by Judge Theodore D. Chuang on 2/14/2017. (jf3s, Deputy Clerk) (Entered: 02/15/2017)
		* * * * *
2/22/17	63	MOTION for Discovery *on an Expedited Basis* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Exhibit 1 & 2) (Cox, Justin) (Entered: 02/22/2017)
2/22/17	64	MOTION for Preliminary Injunction *& MEMORANDUM OF LAW IN SUPPORT THEREOF* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Declarations and Exhibits (J.R. 1-166)) (Cox, Justin) (Entered: 02/22/2017)
2/24/17	65	SUMMONS Returned Executed by Jane Doe 1, John Doe 1-4, Samaneh Takaloo, Allan Hakky, HIAS, Inc., International Refugee Assistance Project. All Plaintiffs. (Attachments: # 1 Exhibit Attachment to Certificate of Service)(Jadwat, Omar) (Entered: 02/24/ 2017)
3/1/17	66	MEMORANDUM ORDER granting Doe Plaintiffs' Motion for Leave to Proceed Under Pseudonyms. Signed by Judge Theodore D. Chuang on 3/1/2017. (jf3s, Deputy Clerk) (Entered: 03/01/2017)
		* * * * *
3/6/17	79	NOTICE by Michael Dempsey, Department of Homeland Security, Department of State, John F.

DATE	DOCKET NUMBER	PROCEEDINGS
		Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump *of Filing of Executive Order* (Attachments: # 1 Exhibit A)(Bennett, Michelle) (Entered: 03/06/2017)
		* * * * *
3/8/17	81	RESPONSE in Opposition re 63 MOTION for Discovery *on an Expedited Basis* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump.(Garg, Arjun) (Entered: 03/08/2017)
3/8/17	82	RESPONSE in Opposition re 64 MOTION for Preliminary Injunction & *MEMORANDUM OF LAW IN SUPPORT THEREOF* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun) (Entered: 03/08/2017)
3/9/17	83	Request for Conference (Espiritu, Nicholas) (Entered: 03/09/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/9/17	84	PAPERLESS NOTICE that a telephone Case Management Conference is scheduled for 9:15 a.m. on Friday, May 10, 2017 to discuss 83 Request for Conference. Instructions for the call have been emailed to the parties. (nr, Chambers) (Entered: 03/09/2017)
3/10/17	85	Case Management Conference held on 3/10/2017 before Judge Theodore D. Chuang.(FTR-KLS-2B.) (klss, Deputy Clerk) (Entered: 03/10/2017)
3/10/17	86	ORDER directing Plaintiffs to file an Amended Complaint by Friday, March 10, 2017 by 5:00 p.m.; granting plaintiffs leave to file motions—deemed timely if filed by Friday, March 10, 2017 by 5:00 p.m.; Motions hearing scheduled for Wednesday, March 15, 2017 at 9:30 a.m. Signed by Judge Theodore D. Chuang on 3/10/2017. (jf3s, Deputy Clerk) (Entered: 03/10/2017)
3/10/17	87	PAPERLESS ORDER. Plaintiffs are granted permission to file an oversize brief as to the consolidated Motion for a Temporary Restraining Order, Motion for a Preliminary Injunction, and Motion for Leave to

DATE	DOCKET NUMBER	PROCEEDINGS
		Proceed Under a Pseudonym. The Government is granted permission to file an oversize brief for its consolidated Memorandum in Opposition to that filing. Briefs should not exceed 40 pages and should be in 12-point font, including footnotes, with 1" margins on all sides. Plaintiffs are granted permission to file their renewed Motion for Expedited Discovery as a separate motion, to which the Government will then be entitled to file a separate Memorandum in Opposition. Signed by Judge Theodore D. Chuang on 3/10/2017. (nr, Chambers) (Entered: 03/10/2017)
		* * * * *
3/10/17	89	(FILED IN ERROR) AMENDED COMPLAINT against All Plaintiffs, filed by Jane Doe 1, John Doe 1-4, International Refugee Assistance Project, Allan Hakky, Samaneh Takaloo, HIAS, Inc.. (Attachments: # 1 Amended Complaint [REDLINED]) (Keaney, Melissa) Modified on 3/10/2017 (slss, Deputy Clerk). (Entered: 03/10/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/10/17	90	MOTION for Other Relief for *Jane Doe #2 to Proceed Under Pseudonym* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Exhibit Decl. of Jane Doe #2) (Cox, Justin) (Entered: 03/10/2017)
3/10/17	91	MOTION for Temporary Restraining Order *and/or Preliminary Injunction* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Exhibit IRAP Declaration, # 2 Exhibit HIAS Declaration, # 3 Exhibit MESA Declaration, # 4 Exhibit John Doe 1 Declaration, # 5 Exhibit John Doe 3 Declaration, # 6 Exhibit Mateab Declaration, # 7 Exhibit Jane Doe 2 Declaration, # 8 Exhibit Mohomed Declaration, # 9 Exhibit Harrison Declaration, # 10 Exhibit Hausman Declaration Pt. 1, # 11 Exhibit Hausman Declaration Pt. 2, # 12 Exhibit Hausman Declaration Pt. 3)(Jadwat, Omar) (Entered: 03/10/2017)
3/10/17	92	Supplemental MOTION to Expedite *Discovery* by HIAS, Inc., Allan

DATE	DOCKET NUMBER	PROCEEDINGS
		Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4(Jadwat, Omar) (Entered: 03/10/2017)
3/10/17	93	AMENDED COMPLAINT against All Plaintiffs, filed by Jane Doe 1, John Doe 1-4, International Refugee Assistance Project, Allan Hakky, Samaneh Takaloo, HIAS, Inc.. (Attachments: # 1 Amended Complaint [Redacted])(Keaney, Melissa) (Entered: 03/10/2017)
3/11/17	94	NOTICE by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo *of Corrected Brief and Exhibits* (Jadwat, Omar) (Entered: 03/11/2017)
3/11/17	95	Amended MOTION for Temporary Restraining Order *and/or Preliminary Injunction* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Exhibit IRAP Declaration, # 2 Exhibit HIAS Declaration, # 3 Exhibit MESA Declaration, # 4 Exhibit John Doe #1 Declaration, # 5 Exhibit John Doe #3

DATE	DOCKET NUMBER	PROCEEDINGS
		Declaration, # 6 Exhibit Meteab Declaration, # 7 Exhibit Jane Doe #2 Declaration, # 8 Exhibit Mohomed Declaration, # 9 Exhibit Harrison Declaration, # 10 Exhibit Hausman Declaration Pt.1, # 11 Exhibit Hausman Declaration Pt.2, # 12 Exhibit Hausman Declaration Pt.3)(Jadwat, Omar) (Entered: 03/11/2017)
		* * * * *
3/12/17	98	RESPONSE in Support re 64 MOTION for Preliminary Injunction & *MEMORANDUM OF LAW IN SUPPORT THEREOF* filed by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4.(Keaney, Melissa) (Entered: 03/12/2017)
		* * * * *
3/13/17	113	RESPONSE to Motion re 90 MOTION for Other Relief *for Jane Doe #2 to Proceed Under Pseudonym* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Entered: 03/13/2017)
		* * * * *
3/13/17	117	RESPONSE in Opposition re 92 Supplemental MOTION to Expedite *Discovery* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun) (Entered: 03/13/2017)
		* * * * *
3/13/17	122	RESPONSE in Opposition re 91 MOTION for Temporary Restraining Order *and/or Preliminary Injunction* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump.(Garg, Arjun) (Entered: 03/13/2017)
		* * * * *
3/14/17	130	REPLY to Response to Motion re 95 Amended MOTION for Temporary Restraining Order *and/or Preliminary Injunction* filed by HIAS, Inc., Allan Hakky, International

DATE	DOCKET NUMBER	PROCEEDINGS
		Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo.(Jadwat, Omar) (Entered: 03/14/2017)
		* * * * *
3/15/17	144	Motion Hearing held on 3/15/2017 re 95 Amended MOTION for Temporary Restraining Order *and/or Preliminary Injunction* filed by John Doe 1-4, HIAS, Inc., Allan Hakky, Jane Doe 1, International Refugee Assistance Project, Samaneh Takaloo before Judge Theodore D. Chuang.(Court Reporter: Cindy Davis—2B) (klss, Deputy Clerk) (Entered: 03/15/2017)
		* * * * *
3/16/17	149	MEMORANDUM OPINION. Signed by Judge Theodore D. Chuang on 3/15/2017. (aos, Deputy Clerk) (Entered: 03/16/2017)
3/16/17	150	ORDER granting in part and denying in part 95 Amended MOTION for Temporary Restraining Order and/or Preliminary Injunction. Signed by Judge Theodore D. Chuang on 3/15/2017. (aos, Deputy Clerk) (Entered: 03/16/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/16/17	151	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings (TRO Hearing) held on March 15, 2017, before Judge Theodore D. Chuang. Court Reporter Cindy Davis, Telephone number (301) 344-3228. Total number of pages filed: 87. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained from the Court Reporter or through PACER. Redaction Request due 4/6/2017. Redacted Transcript Deadline set for 4/17/2017. Release of Transcript Restriction set for 6/14/2017. (cd, Court Reporter) (Entered: 03/16/2017)
3/17/17	152	PAPERLESS ORDER finding as moot 91 Motion for a Preliminary Injunction and/or Temporary Restraining Order in light of 95 Amended Motion for a Preliminary Injunction and/or Temporary Restraining Order. Signed by Judge Theodore D. Chuang on 3/17/2017. (ps2s, Chambers) (Entered: 03/17/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/17/17	160	NOTICE OF APPEAL as to 150 Order on Motion for TRO, 149 Memorandum Opinion by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun) (Entered: 03/17/2017)
		* * * * *
3/17/17	163	ORDER granting 90 MOTION for Other Relief for Jane Doe #2 to Proceed Under Pseudonym. Signed by Judge Theodore D. Chuang on 3/17/2017. (jf3s, Deputy Clerk) (Entered: 03/17/2017)
3/17/17	164	USCA Case Number 17-1351 for 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Department of State, Office of the Director of National Intelligence, John F. Kelly, Michael Dempsey, Donald J. Trump. Case Manager—Jeffrey Neal (krc, Deputy Clerk) (Entered: 03/20/2017)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/20/17	167	ORDER scheduling a telephone status conference for March 21, 2017 at 3:00 p.m. Signed by Judge Theodore D. Chuang on 3/20/2017. (jf3s, Deputy Clerk) (Entered: 03/20/2017)
3/20/17	168	NOTICE of Intent to File a Motion for Preliminary Injunction of EO § 6 by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed (Cox, Justin) (Entered: 03/20/2017)
3/21/17	170	Case Management Conference held on 3/21/2017 before Judge Theodore D. Chuang. (FTR-KLS-2B.) (klss, Deputy Clerk) (Entered: 03/22/2017)
3/22/17	169	ORDER directing parties to submit briefing on issues of the Court's jurisdiction over the proposed motion; continuing the scheduled Motions Hearing. Signed by Judge Theodore D. Chuang on 3/22/2017. (jf3s, Deputy Clerk) (Entered: 03/22/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/22/17	171	NOTICE by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed re 63 MOTION for Discovery *on an Expedited Basis Notice of Withdrawal* (Jadwat, Omar) (Entered: 03/22/2017)
3/23/17	172	PAPERLESS ORDER directing Plaintiffs to clarify whether they also intend to withdraw 92 Renewed Motion for Expedited Discovery. Signed by Judge Theodore D. Chuang on 3/23/2017. (ps2s, Chambers) (Entered: 03/23/2017)
		* * * * *
3/23/17	174	NOTICE by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed re 92 Supplemental MOTION to Expedite *Discovery Notice of Withdrawal* (Jadwat, Omar) (Entered: 03/23/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/17	175	PAPERLESS ORDER, in light of 174 Notice of Withdrawal, finding as moot 63 Motion for Expedited Discovery and 92 Renewed Motion for Expedited Discovery. Signed by Judge Theodore D. Chuang on 3/23/2017. (ps2s, Chambers) (Entered: 03/23/2017)
3/23/17	176	STATUS REPORT by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump(Garg, Arjun) (Entered: 03/23/2017)
3/24/17	177	MOTION for Leave to File *Motion for Preliminary Injunction* by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed(Espiritu, Nicholas) (Entered: 03/24/2017)
3/24/17	178	STATUS REPORT by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National

DATE	DOCKET NUMBER	PROCEEDINGS
		Intelligence, Rex W. Tillerson, Donald J. Trump (Attachments: # 1 Exhibit A)(Garg, Arjun) (Entered: 03/24/2017)
3/30/17	179	NOTICE by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed (Attachments: # 1 Exhibit A—Hawaii Preliminary Injunction Order)(Keaney, Melissa) (Entered: 03/30/2017)
3/31/17	180	RESPONSE in Opposition re 177 MOTION for Leave to File *Motion for Preliminary Injunction* filed by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump.(Garg, Arjun) (Entered: 03/31/2017)
4/5/17	181	REPLY to Response to Motion re 177 MOTION for Leave to File *Motion for Preliminary Injunction* filed by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does

DATE	DOCKET NUMBER	PROCEEDINGS
		1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed. (Attachments: # 1 Joint Record 1-127)(Keaney, Melissa) (Entered: 04/05/2017)
4/10/17	182	MEMORANDUM ORDER denying without prejudice 177 Plaintiff's Motion for Leave to File Motion for Preliminary Injunction; staying courts resolution of Plaintiff's Motion for Preliminary Injunction. Signed by Judge Theodore D. Chuang on 4/10/2017. (jf3s, Deputy Clerk) (Entered: 04/10/2017)
4/14/17	183	NOTICE by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump re 93 Amended Complaint re Intent to File *Unopposed Motion to Stay Response Deadline* (Attachments: # 1 Text of Proposed Order)(Garg, Arjun) (Entered: 04/14/2017)
4/19/17	184	ORDER staying 93 Amended Complaint, pending resolution of appellate proceedings. Signed by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Theodore D. Chuang on 4/19/2017. (jf3s, Deputy Clerk) (Entered: 04/19/2017)
5/10/17	185	ORDER of USCA granting the unopposed motion to supplement the record include the "Supplemental Declaration of John Doe #3," executed on May 4, 2017, granting the motion and supplements the record on appeal pursuant to Federal Rule of Appellate Procedure 10(e) and Local Rule 10(d) as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (Attachment: # 1 Declaration)(krc, Deputy Clerk) (Entered: 05/11/2017)
5/25/17	186	JUDGMENT of USCA affirming in part and vacating in part the Judgment of the USDC as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump. This judgment shall take effect upon issuance of this

DATE	DOCKET NUMBER	PROCEEDINGS
		court's mandate in accordance with Fed. R. App. P. 41. (Attachments: # 1 Published Opinion, # 2 Notice of Judgment)(krc, Deputy Clerk) (Entered: 05/25/2017)
5/31/17	187	ORDER of USCA amending the caption of the opinion in this case as follows: The words and its clients are added at the end of the party text for the first Plaintiff-Appellee listed in the caption to read, INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients. re: 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 05/31/2017)
5/31/17	188	AMENDED PUBLISHED OPINION of USCA amending and superseding opinion dated 5/25/17 as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director

DATE	DOCKET NUMBER	PROCEEDINGS
		of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 05/31/2017)
6/5/17	189	SUPREME COURT Remark—petition for writ of certiorari filed 6/1/17 and placed on the docket 6/2/17 as No. 17-1436, re: 160 Notice of Appeal (USCA No. 17-1351)(krc, Deputy Clerk) (Entered: 06/05/2017)
6/15/17	190	AMENDED ORDER of USCA amending its opinion filed 5/25/17, as follows: On page 127, line three of text—the word the immediately preceding the word precisely is deleted; also on page 127, line six of text—the word million is corrected to read billion as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 06/16/2017)
6/15/17	191	AMENDED OPINION of USCA affirming in part and vacating in part by superseding published opinion dated 5/25/17 as to 160 Notice of

DATE	DOCKET NUMBER	PROCEEDINGS
		Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 06/16/2017)
6/29/17	192	SUPREME COURT Remark—petition for writ of certiorari granted and application for stay of preliminary injunction granted in part (USCA No. 17-1351) re: 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 06/29/2017)
7/17/17	193	MANDATE of USCA takes effect today as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 07/17/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
7/17/17	194	ORDER of USCA recalling the mandate. The mandate issued this date due to clerical error is hereby withdrawn as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 07/17/2017)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 17-1351

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL.,
PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/17/17	1	Case docketed. Originating case number: 8:17-cv-00361-TDC. Case manager: JeffNeal. [17-1351] (JSN)
3/17/17	2	DOCKETING NOTICE issued Re: [1] Case Initial forms due within 14 days. Originating case number: 8:17-cv-00361-TDC. Mailed to: Sonia Kumar, Brad Rosenberg, Nicholas Steiner. [17-1351] (JSN)
3/17/17	3	BRIEFING ORDER filed. Opening Brief and Appendix due

DATE	DOCKET NUMBER	PROCEEDINGS
		04/26/2017. Response Brief due 05/26/2017. Mailed to Sonia Kumar, Brad Rosenberg, Nicholas Steiner. [17-1351] (JSN)
		* * * * *
3/21/17	8	ORDER filed [1000046140] substituting party (FRAP 43). Daniel R. Coats substituted for Michael Dempsey. Copies to all parties. Mailed to: Sonia Kumar, Brad Rosenberg, Nicholas Steiner. [17-1351] (JSN)
		* * * * *
3/22/17	12	(ENTRY RESTRICTED) MOTION by Appellants Daniel R. Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson and Donald J. Trump to expedite decision, to accelerate case processing.. Date and method of service: 03/22/2017 ecf. [1000047126] [17-1351] —[Edited 03/23/2017 by JSN] H. Thomas Byron
3/22/17	13	NOTICE ISSUED to Justin Bryan Cox, Nicholas David Espiritu, Lee P. Gelernt, Omar C. Jadwat, Debo-

DATE	DOCKET NUMBER	PROCEEDINGS
		rah Jeon, Melissa S. Keaney, Daniel Mach, David Robert Rocah, Karen C. Tumlin, Cecillia D. Wang and Heather Lynn Weaver for Paul Harrison, Jane Doe #2, International Refugee Assistance Project, HIAS, Inc., Middle East Studies Association of North America, Inc., Muhammed Meteab, Ibrahim Ahmed Mohomed and John Does #1 & 3 requesting response to Motion to expedite decision [12], Motion to accelerate case processing [12]. Response due: 03/22/2017. [17-1351] (JSN)
3/22/17	14	Corrected MOTION by Appellants Daniel R. Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson and Donald J. Trump to expedite decision, to accelerate case processing.. Date and method of service: 03/22/2017 ecf. [1000047229] [17-1351] H. Thomas Byron
		* * * * *
3/22/17	22	RESPONSE/ANSWER by Jane Doe #2, John Does #1 & 3, HIAS,

DATE	DOCKET NUMBER	PROCEEDINGS
		Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to Motion to expedite decision [14], Motion to accelerate case processing [14]. [17-1351] Omar Jadwat
3/23/17	23	REPLY by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Motion to expedite decision [14], Motion to accelerate case processing [14].. [17-1351] H. Thomas Byron
		* * * * *
3/23/17	25	COURT ORDER filed [1000048277] granting Motion to accelerate case processing [14]; granting Motion to expedite decision [14]; scheduling oral argument. Argument Date or Session: 05/08/2017. Copies to all parties. [17-1351] (JSN)
3/23/17	26	Accelerated BRIEFING ORDER filed.. Opening Brief and Appendix due 03/24/2017. Response Brief

DATE	DOCKET NUMBER	PROCEEDINGS
		due 04/14/2017. Reply Brief due 04/21/2017. [17-1351] (JSN)
3/24/17	27	CASE CALENDARED for oral argument. Date: 05/08/2017. Registration Time: 12:15-12:30. Daily Arguments Begin: 1:00. Oral argument acknowledgment form due within 5 days. (BY ORDER ENTERED 4/13/2017, ARGUMENT START TIME CHANGED TO 2:30 P.M. ON MAY 8, 2017) [17-1351]—[Edited 05/07/2017 by PSC] (JLC)
		* * * * *
3/24/17	34	Joint FULL ELECTRONIC APPENDIX and full paper appendix by Appellants Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security. Method of Filing Paper Copies: courier. Date paper copies mailed dispatched or delivered to court: 03/27/2017. [1000049094] [17-1351] H. Thomas Byron
3/24/17	35	MOTION by Appellants Daniel R. Coats, Department of State,

DATE	DOCKET NUMBER	PROCEEDINGS
		John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security for stay pending appeal. Date of action to be stayed, if applicable:3/16/17.. Date and method of service: 03/24/2017 ecf. [1000049095] [17-1351] Sharon Swingle
3/24/17	36	BRIEF by Appellants Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security in electronic and paper format. Type of Brief: OPENING. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/27/2017. [1000049096] [17-1351] Sharon Swingle
3/24/17	41	OPENING BRIEF (PAPER) file-stamped, on behalf of Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland

DATE	DOCKET NUMBER	PROCEEDINGS
		Security. Number of pages: [73]. Sufficient: YES. Number of Copies: [4]. Entered on Docket Date: 03/28/2017. Received by clerk date: 03/28/2017. [1000050605] [17-1351] (JSN)
3/24/17	42	APPENDIX (PAPER) file-stamped, on behalf of Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security. Total number of volumes (including any sealed): 1. Total number of pages in all volumes: 823. Total number of sealed volumes: 0. Sufficient? Yes. CD/DVD/Other exhibit? No. Number of Copies: 4. Entered on Docket Date: 03/28/2017. Received by clerk date: 03/28/2017. [1000050610] [17-1351] (JSN)
		* * * * *
3/27/17	40	COURT ORDER filed [1000049798] directing filing of responses to court inquiry. Reponses due by 03/30/2017. Copies to all parties. [17-1351] (JSN)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/29/17	48	RESPONSE/ANSWER by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to court Order [40],court Order to court inquiry [40]. [17-1351] Sharon Swingle
		* * * * *
3/30/17	50	RESPONSE/ANSWER by Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to court Order [40],court Order to court inquiry [40]. [17-1351] Omar Jadwat
		* * * * *
3/31/17	74	RESPONSE/ANSWER by Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc.

DATE	DOCKET NUMBER	PROCEEDINGS
		and Ibrahim Ahmed Mohomed to Motion for stay pending appeal [35]. Nature of response: in opposition. [17-1351] Omar Jadwat
		* * * * *
4/5/17	102	REPLY by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Response [74].. [17-1351] Sharon Swingle
		* * * * *
4/10/17	108	COURT ORDER filed [1000059317] granting initial hearing en banc (FRAP 35) Copies to all parties. [17-1351] (PSC)
		* * * * *
4/13/17	125	ORDER filed [1000061649] scheduling oral argument. Argument Date or Session: 05/08/17 at 2:30 pm. Copies to all parties.. [17-1351] (JSN)
		* * * * *
4/14/17	132	(ENTRY RESTRICTED) RESPONSE/ANSWER by Jane

DATE	DOCKET NUMBER	PROCEEDINGS
		Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to opening Brief [41]. [17-1351]—[Edited 04/20/2017 by JSN] Omar Jadwat
4/14/17	137	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Number of pages: [69]. Sufficient: YES. Number of Copies: [16]. Entered on Docket Date: 04/17/2017. Received by clerk date: 04/17/2017. [1000062773] [17-1351] (JSN)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/18/17	142	Corrected BRIEF by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc.

DATE	DOCKET NUMBER	PROCEEDINGS
		and Ibrahim Ahmed Mohomed in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/17/2017. [1000064113] [17-1351] Omar Jadwat
		* * * * *
4/21/17	221	BRIEF by Appellants Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/24/2017. [1000066914] [17-1351] Anne Murphy
		* * * * *
4/21/17	260	REPLY BRIEF (PAPER) file-stamped, on behalf of Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United

DATE	DOCKET NUMBER	PROCEEDINGS
		States Department of Homeland Security. Number of pages: [40]. Sufficient: YES. Number of Copies: [16]. Entered on Docket Date: 04/25/2017. Received by clerk date: 04/25/2017. [1000068818] [17-1351] (JSN)
		* * * * *
4/24/17	254	MOTION by John Doe #8, Proposed Intervenor to intervene, to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal within time allowed by FRAP 29(e).. Date and method of service: 04/24/2017 ecf. [1000067990] [17-1351] Lena Masri
		* * * * *
4/24/17	256	NOTICE ISSUED to Donald J. Trump, United States Department of Homeland Security, Department of State, Rex Tillerson, Office of the Director of National Intelligence, John F. Kelly, Daniel R. Coats, International Refugee Assistance Project, Paul Harrison, Jane Doe #2, HIAS, Inc., Middle East Studies Association of North America, Inc., Muhammed Meteab, Ibrahim Ahmed Mohomed and

DATE	DOCKET NUMBER	PROCEEDINGS
		John Does #1 & 3, requesting response to Motion to intervene [254] . Responses due:04/27/2017. [1000068038].. [17-1351] (JSN)
		* * * * *
4/27/17	280	RESPONSE/ANSWER by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Motion to intervene [254], Motion to file amicus curiae brief [254]. Nature of response: in opposition. [17-1351] Lowell Sturgill
		* * * * *
5/3/17	283	COURT ORDER filed [1000075346] denying Motion to intervene [254]. Copies to all parties.. [17-1351] (JSN)
		* * * * *
5/4/17	287	MOTION by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed

DATE	DOCKET NUMBER	PROCEEDINGS
		to supplement record. Date and method of service: 05/04/2017 ecf. [1000076357] [17-1351] Omar Jadwat
5/4/17	288	(ENTRY RESTRICTED) Supplemental FULL ELECTRONIC APPENDIX and full paper appendix by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Method of Filing Paper Copies: mail. Date paper copies mailed dispatched or delivered to court: 05/04/2017. [1000076361] [17-1351] —[Edited 05/05/2017 by ABW] Omar Jadwat
5/5/17	289	Corrected Supplemental FULL ELECTRONIC APPENDIX and full paper appendix by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Method of Filing Paper

DATE	DOCKET NUMBER	PROCEEDINGS
		Copies: mail. Date paper copies mailed dispatched or delivered to court: 05/04/2017. [1000076932] [17-1351] Omar Jadwat
5/5/17	290	SUPPLEMENTAL APPENDIX (PAPER) file-stamped on behalf of Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Sealed volume: N. Total number of volumes (including any sealed): 1. Total number of pages in all volumes: 4. CD/DVD/Other exhibit? N. Number of Copies: [16]. Entered on Docket Date: 05/05/2017. Received by clerk date: 05/05/2017. [1000076942] [17-1351] (AB)
5/5/17	291	RESPONSE/ANSWER by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Motion to supplement [287]. [17-1351] Sharon Swingle

DATE	DOCKET NUMBER	PROCEEDINGS
5/7/17	292	REPLY by Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to Response [291], Motion to supplement [287].. [17-1351] Omar Jadwat
5/8/17	293	EN BANC ORAL ARGUMENT heard before the Honorable Roger L. Gregory, Paul V. Niemeyer, Diana Gribbon Motz, William B. Traxler, Jr., Robert B. King, Dennis W. Shedd, G. Steven Agee, Barbara Milano Keenan, James A. Wynn, Jr., Albert Diaz, Henry F. Floyd, Stephanie D. Thacker and Pamela A. Harris. Attorneys arguing case: Mr. Jeffrey Bryan Wall for Appellants United States Department of Homeland Security, Department of State, Rex Tillerson, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump and Daniel R. Coats and Mr. Omar C. Jadwat for Appellees Paul Harrison, Jane Doe #2, International Refugee Assistance Project, HIAS, Inc., Middle East Stu-

DATE	DOCKET NUMBER	PROCEEDINGS
		dies Association of North America, Inc., Muhammed Meteab, Ibrahim Ahmed Mohomed and John Does #1 & 3. Courtroom Deputy: RJ Warren. [1000077923] [17-1351] (RW)
5/10/17	294	COURT ORDER filed [1000079712] granting Motion to supplement [287]. Copies to all parties.. [17-1351] (JSN)
5/25/17	295	PUBLISHED AUTHORED OPINION filed. Motion disposition in opinion denying Motion for stay pending appeal [35]. Originating case number: 8:17-cv-00361-TDC. [1000088535]. [17-1351] (JSN)
5/25/17	296	JUDGMENT ORDER filed. Disposition method: 17-1351 opn.p.arg. Decision: Affirmed in part, vacated in part. Originating case number: 8:17-cv-00361-TDC. Entered on Docket Date: 05/25/2017. [1000088546] Copies to all parties and the district court/agency.. [17-1351] (JSN)
5/25/17	297	OPINION ATTACHMENT. [17-1351] (JSN)
5/31/17	298	AMENDING ORDER filed. Copies to all parties.. [17-1351] (JSN)

DATE	DOCKET NUMBER	PROCEEDINGS
5/31/17	299	AMENDED OPINION filed amending and superseding opinion dated 05/25/2017. Originating case number: 8:17-cv-00361-TDC Copies to all parties.. [17-1351] (JSN)
6/5/17	300	SUPREME COURT REMARK—petition for writ of certiorari filed. 06/01/2017. 16-1436. [17-1351] (SJC)
6/15/17	301	AMENDING ORDER filed. Copies to all parties. [17-1351] (TW)
6/15/17	302	AMENDED OPINION filed amending and superseding opinion dated 5/25/17. Originating case number: 8:17-cv-00361-TDC. Copies to all parties. Annotation added to opinion reflecting Supreme Court history [17-1351]—[Edited 07/12/2017 by SJC] (TW)
6/29/17	303	SUPREME COURT REMARK—petition for writ of certiorari granted and application for stay of preliminary injunction granted in part. 06/26/2017 [17-1351] (SJC)
7/17/17	305	(ENTRY RESTRICTED) Mandate issued. ENTRY WITHDRAWN DUE TO CLERICAL ERROR.. [17-1351]—[Edited 07/17/2017 by JSN] (JSN)

DATE	DOCKET NUMBER	PROCEEDINGS
7/17/17	306	ORDER filed [10001194411] recalling mandate. Copies to all parties.. [17-1351] (JSN)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS,
40 RECTOR ST, 9TH FL
NEW YORK, NY 10006;

HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS,
1300 SPRING STREET, SUITE 500
SILVER SPRING, MD 20910;

MIDDLE EAST STUDIES ASSOCIATION OF NORTH
AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS,
3542 N. GERONIMO AVENUE
TUCSON, AZ 85705;

MUHAMMED METEAB
43 JEFFERSON AVENUE
SPRINGFIELD MA 01107;

PAUL HARRISON
1800 FULLER WISER ROAD, #717
EULESS, TX 76039-4610;

IBRAHIM AHMED MOHOMED
631 BRENT BOULEVARD, APT. C3
COLUMBUS, OH 43228

JOHN DOES # 1 & 3;

JANE DOE #2, PLAINTIFFS

v.

DONALD TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES
1600 PENNSYLVANIA AVENUE NW

WASHINGTON, D.C. 20035;
DEPARTMENT OF HOMELAND SECURITY,
SERVE ON: JOHN F. KELLY,
SECRETARY OF HOMELAND SECURITY
WASHINGTON, D.C. 20528;

DEPARTMENT OF STATE,
SERVE ON: REX W. TILLERSON,
SECRETARY OF STATE
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OFFICE OF THE DIRECTOR OF NATIONAL
INTELLIGENCE,
SERVE ON: MICHAEL DEMPSEY,
ACTING DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, D.C. 20511;

JOHN F. KELLY
IN HIS OFFICIAL CAPACITY AS SECRETARY OF
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REX W. TILLERSON
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE
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MICHAEL DEMPSEY,
IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF
NATIONAL INTELLIGENCE
WASHINGTON , D.C. 20511, DEFENDANTS

[Mar. 10, 2017]

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUCTIVE RELIEF

INTRODUCTION

1. On March 6, 2017, President Trump signed an Executive Order entitled "Protecting the Nation from Terrorist Entry into the United States" (the "March 6 Order" or "Executive Order"). The March 6 Order, which Plaintiffs challenge in its entirety, was intended and designed to target and discriminate against Muslims, and it does just that in operation.

2. Once effective, the March 6 Order will rescind and replace a similar Executive Order, signed on January 27, 2017 (the "January 27 Order"; together, we refer to the January 27 and March 6 Executive Orders as the "Executive Orders"), that had the same purpose and effect, the implementation of which prompted chaos and widespread civil rights abuses in airports across the country. As a result of legal challenges to the January 27 Order, numerous courts enjoined several key provisions that banned the entry to the United States of both refugees and the nationals of seven predominantly Muslim countries.

3. The major provisions of the March 6 Order are nearly identical to those of the January 27 Order. The new order bans individuals from six of the seven predominantly Muslim countries identified in the January 27 Order—Yemen, Libya, Somalia, Sudan, Iran, and Syria—from entering the United States for at least 90 days. Like the previous order, the March 6 Order suspends the entire United States Refugee Admissions Program for at least 120 days and reduces the number of refugees allowed into the United States for the current fiscal year from 110,000 to 50,000. The March 6 Order also contains language that associates Muslims

with violence, terrorism, bigotry, and hatred, inflicting stigmatic and dignitary harms. As a result, the March 6 Order will have the same discriminatory and stigmatizing impact on Muslims as the January 27 Order, which was itself a product of the President's clearly expressed intent to prevent Muslims from entering the United States.

4. While the March 6 Order contains various additions and revisions intended to insulate it from the legal claims that led to the enjoining of the January 27 Order, the Trump Administration has made clear that the March 6 Order is intended to effectuate the same policy outcome as the January 27 Order. The March 6 Order likewise suffers from the same fundamental constitutional and statutory defects as the January 27 Order.

5. The President has been very clear about his desire to prevent Muslims from entering the United States. He specifically promised to do so as a candidate. Presented with early objections to that proposal, he asked advisors how he could implement a Muslim ban indirectly, and they helped him craft the January 27 Order. President Trump further admitted on national television that through the January 27 Order he intended to favor Christian refugees over Muslim refugees. Rarely in American history has governmental intent to discriminate against a particular faith and its adherents been so plain.

6. After key provisions of the January 27 Order were preliminarily enjoined, a Trump Administration spokesperson explained that the revised Executive Order (which was ultimately signed on March 6) would have only minor, technical changes from the original

Order, and would thus produce the same basic policy outcome. That basic goal and outcome was, and remains, the exclusion of Muslims from the United States.

7. Like the January 27 Order, the March 6 Order violates two of our most cherished constitutional protections: the guarantee that the government will not establish, favor, discriminate against, or condemn any religion, and the guarantee of equal protection of the laws.

8. The United States was born in part of an effort to escape religious persecution, and the Religion Clauses of the First Amendment reflect the harrowing history of our Founders. More than two centuries later, our nation is one of the most religiously diverse in the world and has become a sanctuary for immigrants and visitors of all faiths and no faith, including refugees fleeing persecution in their homelands.

9. Both the January 27 Order and the March 6 Order fly in the face of our historical commitment to welcoming and protecting people of all faiths, and no faith, and it violates the "clearest command of the Establishment Clause"—"one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

10. The United States was likewise founded on the principle that all people—regardless of their faith or where they are born—are created equal. The March 6 Order—which, like the January 27 Order, was motivated by animus toward Muslims and expressly dis-

criminates on the basis of national origin—runs afoul of this core constitutional value as well.

11. Plaintiffs challenge the March 6 Order under the Establishment Clause; the equal protection guarantee of the Due Process Clause of the Fifth Amendment; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*; the anti-discrimination provisions of the INA, 8 U.S.C. § 1152(a)(1)(A); the Refugee Act of 1980, as amended; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D).

12. Plaintiffs respectfully request that the Court issue appropriate declaratory relief and preliminarily and permanently enjoin the March 6 Order as a whole.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Plaintiffs' claims under the U.S. Constitution and federal statutes. The Court has additional remedial authority under 28 U.S.C. §§ 2201-02.

14. Venue is proper under 28 U.S.C. §1391(e) and Local Rule 501.4.a.ii. Defendants are officers or employees of the United States acting in their official capacities, and agencies of the United States. Plaintiffs HIAS and John Doe #1 reside in the Southern Division of this District. No real property is involved in this action.

PARTIES

15. Plaintiff International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc., provides and facilitates free legal services for

vulnerable populations around the world, including refugees, who seek to escape persecution and find safety in the United States and other Western countries.

16. Founded in 2008 as a student organization at Yale Law School, IRAP initially served Iraqi refugees who were victims of the Iraq War. In 2010, IRAP became part of the Urban Justice Center and now has offices in New York as well as the Middle East. IRAP has expanded its client base since its inception to assist refugees from Afghanistan, Egypt, Eritrea, Ethiopia, Iran, Jordan, Kuwait, Libya, Pakistan, Palestine, Somalia, Sudan, Syria, Turkey, and Yemen. Through in-house casework, as well as supervision of 1,200 students from 29 law schools in the United States and Canada and pro bono attorneys from over 75 international law firms and multinational corporations, IRAP directly assists thousands of refugees in urgent registration, protection, and resettlement cases every year.

17. IRAP lawyers provide legal assistance to refugees and other immigrants to the United States throughout the resettlement process. IRAP lawyers advise their clients on the resettlement process, write legal briefs and compile physical evidence in advance of clients' interviews with United States Citizenship and Immigration Services ("USCIS"), prepare them for their oral testimony in their interviews, and then conduct regular follow-up with USCIS until the clients are safely resettled.

18. IRAP assists many individuals in the United States who need assistance filing family reunification petitions for family members overseas. IRAP also assists U.S.-based Iraqi and Syrian citizens and lawful

permanent residents in filing petitions in order to get their family members overseas into the Direct Access Program of the United States Refugee Admissions Program. Finally, IRAP also assists countless Iraqi and Afghan citizens who have served the United States government to obtain Special Immigrant Visas, with the support of U.S. citizen veterans of Iraq and Afghanistan.

19. Since its inception, IRAP has helped to resettle over 3,200 individuals to 55 countries, with the majority resettled to the United States. It has provided legal assistance to nearly 20,000 more individuals.

20. The overwhelming majority of IRAP's clients, including clients abroad and those within the United States, identify as Muslim.

21. As set forth in greater detail below, implementation of the Executive Orders has caused substantial harm to IRAP and its clients, and will continue to harm them. IRAP asserts claims on behalf of itself and its clients in the United States and abroad. The rights of its clients that IRAP seeks to vindicate here are inextricably bound up with its organizational mission and purpose, and its clients face numerous hurdles to bringing this suit in their own name.

22. Plaintiff HIAS, the world's oldest refugee resettlement agency, is a faith-based organization that aims to rescue people around the world whose lives are in danger. The organization works toward a world in which refugees find welcome, safety, and freedom. Founded in 1881 to assist Jews fleeing pogroms in Russia and Eastern Europe, HIAS now serves refu-

gees and persecuted people of all faiths and nationalities around the globe. Since HIAS's founding, the organization has helped more than 4.5 million refugees start new lives.

23. HIAS has offices in twelve countries worldwide, including headquarters in Silver Spring, Maryland, which is its principal place of business, and another domestic office in New York City. HIAS also provides resettlement experts in support of the United Nations High Commissioner for Refugees (UNHCR). Refugee resettlement lies at the heart of HIAS's work in the United States. It is one of nine non-profit organizations designated by the federal government to undertake this humanitarian work through contracts with the Department of State and the Department of Health and Human Services.

24. In 2016, HIAS provided services to more than 350,000 refugees and asylum seekers globally. HIAS's client base includes refugees abroad and in the United States who are from Syria, Iraq, Iran, Sudan, Somalia, Yemen, Ukraine, Bhutan, the Democratic Republic of Congo, Afghanistan, Eritrea, Tanzania, Ethiopia, Burundi, South Sudan, Uganda, Russia, Belarus, and Burma, among other countries. Many of these clients are Muslim.

25. HIAS provides programs and services to refugees, including employment, psychosocial, and legal services. HIAS has also been approved to refer cases of particularly vulnerable refugees directly for third-country resettlement to the United States and other countries. Around the world, HIAS provides legal ser-

vices to protect the rights of refugees, and to register, document, and secure the status of refugees.

26. HIAS is also assigned clients via the State Department's allocation process, which determines which refugee clients will be resettled by HIAS. For clients who have newly arrived in the United States, HIAS either provides direct resettlement services or partners with other organizations across the country to do so. These services include arranging housing and providing essential furnishings, food, clothing, initial cash assistance, initial health screening, cultural and community orientation, and, through case management services, assistance with enrollment in English language classes and employment services, as well as referrals for health and legal services.

27. HIAS, directly and through affiliated agencies, also provides assistance to refugee and asylee clients in the United States who are seeking to gain entry for family members abroad who still face persecution. As set forth in greater detail below, implementation of the January 27 Order has caused substantial harm to HIAS and its clients, and the March 6 Order will continue to harm them. HIAS asserts claims on behalf of itself and its clients. The rights of its clients that HIAS seeks to vindicate here are inextricably bound up with its organizational mission and purpose, and its clients face numerous hurdles to bringing this suit in their own name.

28. Plaintiff Middle East Studies Association (MESA) is a non-profit learned society that brings together scholars, educators, and those interested in the study of the Middle East from all over the world. From its inception in 1966 with 51 founding members,

MESA has increased its membership to more than 2,400 and now serves as an umbrella organization for fifty-five institutional members. MESA's membership includes both graduate students and faculty working in the field of Middle East studies.

29. As set forth in greater detail below, MESA and its members will be harmed in a variety of ways by the Executive Order. MESA asserts claims on behalf of itself and its members.

30. Plaintiff John Doe #1 is a lawful permanent resident and national of Iran who lives in Montgomery County, Maryland. He is a scientist. He came to the United States in 2014 on an exchange visitor visa. In 2016, he obtained his lawful permanent resident status through the National Interest Waiver program for people with extraordinary abilities. His pioneering scholarly works are recognized as cutting edge in the sciences. Both John Doe #1 and his wife, who is not a party, are non-practicing Muslims.

31. Plaintiff John Doe #3 is a lawful permanent resident and national of Iran who lives in Anne Arundel County, Maryland. He came to the United States in 2011 through the Green Card lottery. John Doe #3 worked as a teacher in Iran, and currently works in the engineering field.

32. Plaintif Jane Doe #2 is a U.S. citizen of Syrian origin who lives in Mecklenburg County, North Carolina. She is from a Muslim family and is enrolled in college where she is studying to become a healthcare technician. She filed a family-based visa petition for her sister who is a Syrian refugee currently living in a

refugee-designated area in Saudi Arabia with her husband and two young children.

33. Plaintiff Mohammed Meteab is a lawful permanent resident of the United States who lives in Springfield, Massachusetts. He came to the United States in 2015 as a refugee along with his wife and two children. He now has a third child, a U.S. citizen born in the United States. Plaintiff Meteab is one of five brothers; he, his wife, his two elder children, and all five brothers are Iraqi. One brother came to the United States as a refugee. The other three brothers have been approved as refugees by the United Nations High Commission for Refugees and remain in Jordan, awaiting resettlement. Two of the three are approved to come to the United States but do not yet have travel documents. Mr. Meteab is a Sunni Muslim, as are his brothers.

34. Plaintiff Paul Harrison is a citizen of the United States by birth who lives in Euless, Texas. In November 2015, he met his partner, an Iranian national who lives in Tehran, Iran. In March 2016, Mr. Harrison petitioned for his partner—now his fiancé—to join him in the United States on a K-1 visa. After his November 2016 interview at the U.S. Embassy in Ankara, Turkey, his application was approved and administrative processing complete on January 17, 2017. A visa has not yet been issued, however.

35. Plaintiff Ibrahim Ahmed Mohomed is a United States citizen of Somali origin who lives in Columbus, Ohio. He came to the United States as a refugee in 2009. In 2013, his wife and nine children were approved to come to the United States as refugees but they are

still in Ethiopia awaiting authorization to travel to the United States to join Mr. Mohomed. Mr. Mohomed and his family are Muslim.

36. As set forth in greater detail below, implementation of the Executive Orders has caused and will continue to cause harm to Plaintiffs Meteab, Harrison, Mohomed, Jane Doe #2 and John Does #1 and #3 (collectively, the "Individual Plaintiffs").

37. Defendant Donald Trump is the President of the United States. He is sued in his official capacity. In that capacity, he issued the Executive Orders challenged in this suit.

38. Defendant U.S. Department of Homeland Security ("DHS") is a cabinet-level department of the United States federal government. Its components include U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE"). CBP's responsibilities include inspecting and admitting immigrants and nonimmigrants arriving with U.S. visas at international points of entry, including airports and land borders. USCIS's responsibilities include adjudicating requests for immigration benefits for individuals located within the United States. ICE's responsibilities include enforcing federal immigration law within the interior of the United States. The Executive Orders assign DHS a variety of responsibilities regarding their enforcement.

39. Defendant U.S. Department of State ("DOS") is a cabinet-level department of the United States federal government. DOS is responsible for the issuance

of immigrant and nonimmigrant visas abroad. The Executive Orders assign DOS a variety of responsibilities regarding their enforcement.

40. Defendant Office of the Director of National Intelligence ("ODNI") is an independent agency of the United States federal government. The ODNI has specific responsibilities and obligations with respect to implementation of the Executive Orders.

41. Defendant Rex Tillerson is the Secretary of State and has responsibility for overseeing enforcement and implementation of the Executive Orders by all DOS staff. He is sued in his official capacity.

42. Defendant John Kelly is the Secretary of Homeland Security. Secretary Kelly has responsibility for overseeing enforcement and implementation of the Executive Orders by all DHS staff. He is sued in his official capacity.

43. Defendant Michael Dempsey is the Acting Director of National Intelligence, and has responsibility for overseeing enforcement and implementation of the Executive Orders by all ODNI staff. He is sued in his official capacity.

FACTUAL ALLEGATIONS

President Trump's Expressed Intent To Target Muslims and To Favor Christians Seeking to Enter the Country

44. President Trump has repeatedly made clear his intent to enact policies that exclude Muslims from entering the United States and favor Christians seeking to enter the United States.

45. On December 7, 2015, then-Presidential candidate Trump issued a statement on his campaign website. Entitled, "DONALD J. TRUMP STATEMENT ON PREVENTING MUSLIM IMMIGRATION," the statement declared that "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."

46. The statement, which remains on President Trump's campaign website to this day, invokes stereotypes of Muslims, falsely suggesting that all Muslims believe in "murder against non-believers who won't convert" and "unthinkable acts" against women.

47. Defending his proposed Muslim ban the next day, candidate Trump told Good Morning America, "What I'm doing is I'm calling very simply for a shutdown of Muslims entering the United States—and here's a key—until our country's representatives can figure out what is going on."

48. When asked the same day on MSNBC how his Muslim ban would be applied by customs officials, candidate Trump said, "That would be probably—they would say, are you Muslim?" A reporter followed up by asking, "And if they said yes, they would not be allowed in the country[?]" Candidate Trump responded, "That's correct."

49. Candidate Trump repeatedly reiterated his support for targeting Muslims seeking to enter the United States.

50. On March 9, 2016, candidate Trump stated, "I think Islam hates us. There's . . . a tremendous

hatred there . . . . There's an unbelievable hatred of us . . . . We can't allow people coming into this country who have this hatred of the United States . . . and [of] people that are not Muslim. . . ."

51. The next day, during a debate, candidate Trump said he would "stick with exactly" what he had said the night before. When asked if he was referring to all 1.6 billion Muslims worldwide, he explained, "I mean a lot of them." Candidate Trump stated later in the same debate, "There is tremendous hate. There is tremendous hate. Where large portions of a group of people, Islam, large portions want to use very, very harsh means."

52. On March 22, 2016, candidate Trump stated that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country," adding, "You need surveillance. You have to deal with the mosques whether we like it or not . . . . These attacks aren't . . . done by Swedish people. That I can tell you."

53. The same day, candidate Trump stated on Twitter that a Democratic candidate for President, Hillary Clinton, wanted to "let the Muslims flow in."

54. On June 13, 2016, candidate Trump stated, "I called for a ban after San Bernardino and was met with great scorn and anger. But now many . . . are saying that I was right to do so."

55. In an interview aired on 60 Minutes on July 17, 2016, when asked about the proposed Muslim ban, candidate Trump replied: "Call it whatever you want. We'll call it territories, ok?" Asked again whether

Muslims would be banned, candidate Trump said that "there's nothing like" the Constitution "[b]ut it doesn't necessarily give us the right to commit suicide, as a country, okay?" He again reiterated: "Call it whatever you want."

56. In a July 24, 2016 interview on Meet the Press, candidate Trump was asked if a plan similar to the now-enacted Executive Order was a "rollback" from "[t]he Muslim Ban." Candidate Trump responded: "I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories."

57. Candidate Trump continued: "People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."

58. This explanation that the Muslim ban would use nationality as a proxy was later confirmed by Rudolph Giuliani, an advisor to candidate Trump and later an advisor to him as President. After the Executive Order was signed, Mr. Giuliani explained that "when [candidate Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" In response to this edict, according to Mr. Giuliani, the commission decided to focus on territories, rather than explicitly naming Muslims as the subjects of the ban.

The January 27 Order

59. After conducting a campaign in which a ban on Muslim admissions was a key promise, President Trump

took action to carry out that promise by issuing the January 27 Order one week after being inaugurated.

60. Statements made by President Trump and his advisors around the time of the signing of the January 27 Order confirm President Trump's intent to discriminate against Muslims. In an interview with the Christian Broadcasting Network released the same day that he signed the January 27 Order, President Trump stated that the Order was designed to give Christians priority when applying for refugee status. "If you were a Muslim you could come in [to the United States], but if you were a Christian, it was almost impossible," he said. "[T]hey were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."

61. Consistent with this expressed religious animus towards Muslims and preference for Christians, the January 27 Order disfavors Muslims while giving special treatment to non-Muslims.

62. Section 3, for example, bans any entry for 90 days for individuals from seven countries, each of which is more than ninety percent Muslim: Syria, Sudan, Iraq, Iran, Libya, Somalia, and Yemen.

63. The January 27 Order does not single out any countries for disfavored treatment that are not majority-Muslim.

64. The January 27 Order provides a mechanism for the government to extend and/or expand the 90-day ban at the end of the 90 day period. Sections 3 of the Order directs the Secretary of Homeland Security to "immediately conduct a review to determine the infor-

mation needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat," and to "submit to the President a report on the results of the review . . . within 30 days of the date of this order." At that point, the "Secretary of State shall request all foreign governments that do not supply such information to start providing such information," and 60 days after that—precisely at the end of the initial 90 day ban period—the January 27 Order provides for the President to issue a proclamation indefinitely banning travelers from a list of countries deemed to be non-compliant "until compliance occurs." On information and belief, the 30-day review to be conducted by the Secretary of Homeland Security has not yet resulted in a report to the President.

65. Section 5 of the January 27 Order prohibits refugee admissions for 120 days, except for Syrian refugees, who are banned indefinitely.

66. The January 27 Order discriminates between persons of majority and minority faiths in their country of origin. Section 5(b) requires the government to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality" once the 120-day ban on refugee admissions is complete.

67. During those 120 days, moreover, Section 5(e) allows the admission of certain refugees on a discretionary case-by-case basis, "only so long as [the Secre-

taries of State and Homeland Security] determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution."

68. As the President conceded, these provisions are intended to allow Christian refugees to enter the United States, even while Muslim refugees from the same countries are prohibited from doing so. And indeed, Muslims would be severely disadvantaged under the minority-faith preferences set forth in Sections 5(b) and 5(e). During the past three fiscal years, only 12% of Muslim refugees hailed from a country where Islam is a minority faith.

69. There is no statutory, regulatory, or constitutional basis for favoring refugees from minority faiths over refugees from majority faiths. There is no basis in the Refugee Act of 1980, as amended—which governs the admission of refugees to the United States and their resettlement herein—to prioritize refugees fleeing persecution on the basis of religion, as opposed to the other congressionally-recognized bases. *See* 8 U.S.C. § 1101(a)(42) (defining "refugee").

70. Section 5(d) reduces, by more than half, the annual refugee admissions allotment that was set prior to the current fiscal year by President Obama (reducing from 110,000 to 50,000).

71. Upon information and belief, as of February 2017, approximately 41,000 refugees had already been resettled in the United States. Upon information and belief, the number of refugees already somewhere in

the U.S. Refugee Admissions Program pipeline—well over 50,000—would put the U.S. refugee resettlement total above Section 5(d)'s reduced admissions allotment of 50,000.

72. As a result, upon information and belief, Defendants have already undertaken various actions to bring to a halt the U.S. refugee resettlement process as a result of Section 5(d)'s reduction in this fiscal year's figure.

73. For example, upon information and belief, shortly after the January 27 Order was signed, USCIS, a component of Defendant Department of Homeland Security, cancelled nearly all refugee processing interviews abroad.

74. Additionally, upon information and belief, Defendant Department of State has suspended security checks for refugees, a process that typically takes between 18-24 months.

75. Upon information and belief, Section 5(d)'s reduction in the annual refugee admissions allotment has all but ground to a halt the United States' refugee resettlement process.

76. Furthermore, Section 5(g) seeks to expand the limited role State and local governments have in the refugee resettlement process beyond that envisioned by Congress in order to authorize and facilitate the recently-stated desire and intent of some states and localities in the United States to discriminate against lawfully-admitted refugees on the basis of their nationality and/or religion. *See, e.g.*, *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902 (7th Cir. 2016)

(affirming preliminary injunction on equal protection grounds of state executive order issued by then-Governor of Indiana, Mike Pence, that sought to prevent the resettlement in the State of refugees from Syria).

77. In addition to Sections 3 and 5, other sections of the January 27 Order reinforce stereotypes about Muslims and discriminate against them. Multiple sections, for example, associate Muslims with violence, bigotry, and hatred, inflicting stigmatic and dignitary harms, among other types of injury. These include Sections 1 and 2, which portray the ban as protecting citizens from foreign nationals "who would place violent ideologies over American law" and "who intend to commit terrorist attacks in the United States"; and Section 10, which requires the Secretary of Homeland Security to periodically publish information about the number of "foreign nationals" involved in, among other things, terrorism-related activities, radicalization, and "gender-based violence against women, including honor killings"—direct echoes of thencandidate Trump's broad statements denigrating Islam and Muslims.

78. Further, on information and belief, since the January 27 Order was signed, CBP has questioned foreign nationals entering from certain countries about their religious beliefs to determine whether or not they are Muslim, and has subjected Muslim travelers from countries other than the seven designation nations to disproportionate and unwarranted scrutiny and interrogation.

79. There is no sound basis for concluding that Muslims generally, or Muslims from particular countries, are more likely to commit violent acts of terror.

80. A previous program to track certain foreign nationals predominantly from Muslimmajority countries, the National Security Entry-Exit Registration System ("NSEERS"), did not lead to the conviction or even identification of a single terrorist, even though it subjected tens of thousands of people to additional screening and investigation.

81. Many alternatives exist that do not involve targeting individuals based on their faith or using nationality as a proxy for faith, are less restrictive than the January 27 Order, and are more closely tailored to legitimate national security concerns.

82. The January 27 Order remains in effect until March 16, 2017, when the March 6 Order becomes effective and rescinds and replaces the January 27 Order.

The Chaotic and Irregular Implementation of the January 27 Order

83. The preparation and implementation of the January 27 Order were extremely unusual and chaotic. Upon information and belief, the White House bypassed regular channels for input and cooperation with other components of the Executive Branch, including the Secretaries of Homeland Security, Defense, and State. Moreover, upon information and belief, CBP was not given clear operational guidance during critical times in the implementation of the January 27 Order.

84. The January 27 Order was signed without final review or legal analysis from DHS, which—along with the DOS—is principally charged with implementing the Order.

85. Secretary of Homeland Security Kelly was reportedly in the midst of a conference call to discuss the January 27 Order when someone on the call learned from watching television that the Order they were discussing had been signed.

86. Similarly, Secretary of Defense Mattis, who had publicly criticized President Trump's proposal to ban Muslims from the United States, reportedly did not see a final version of the January 27 Order until the day it was signed and was not consulted during its preparation.

87. The January 27 Order did not arise out of the usual process of consulting with the relevant cabinet-level officials and agencies before issuing an Executive Order. Instead, the January 27 Order was primarily drafted by a small team of Presidential aides, overseen by chief White House strategist Stephen K. Bannon.

88. Mr. Bannon has previously made anti-Muslim comments. He criticized former President George W. Bush for referring to Islam as "a religion of peace," calling President Bush "one of the dumbest presidents in the history of these United States."

89. Congressional staff who worked on the January 27 Order reportedly were required to sign nondisclosure agreements, and not even the members of Congress they served were allowed to know of their work

on the January 27 Order. On information and belief, this arrangement was also highly unusual.

90. During the days leading up to and following the signing of the January 27 Order, its scope and provisions were changed without any rational relationship to the purported reasons for the January Order.

91. For example, the night before the January 27 Order was signed, the Department of Homeland Security issued guidance interpreting § 3(c) of the January 27 Order as not applying to lawful permanent residents. Overnight, the White House overruled that guidance, applying the January 27 Order to lawful permanent residents subject to a case-by-case exception process, in a decision closely associated with Mr. Bannon.

92. After the detention at airports of many individuals, including lawful permanent residents, led to chaos nationwide, Secretary Kelly issued a statement "deem[ing] the entry of lawful permanent residents to be in the national interest." Secretary Kelly's statement was made pursuant to Section 3(g) of the order, which requires such a decision to be made jointly with the Secretary of State and "on a case-by-case basis."

93. Finally, on February 1, the Counsel to the President purported to interpret the January 27 Order as exempting lawful permanent residents from the ban entirely.

94. Similarly, initial guidance from the Department of State indicated that individuals with dual citizenship, with one country of citizenship subject to the ban, would be banned from entering the United States. Word of a change in that policy spread irregularly, with

notice being given to airlines and foreign nations but contradicted in official U.S. government communications.

95. Finally, CBP announced a changed policy, explaining, in response to the question "Does 'from one of the seven countries' mean citizen, national or born in?" that "Travelers are being treated according to the travel document they present." According to this policy, currently in place, the very same individual both is and is not subject to the travel ban depending only on the travel document she presents.

96. The government also reversed itself on its policy toward holders of Special Immigrant Visas from Iraq. Holders of these visas are clearly banned under the terms of the January 27 Order, and they were refused entry when it went into effect. However, on February 2, 2017, the government changed course and allowed them to enter the United States despite the January 27 Order.

97. Still other aspects of the January 27 Order and its implementation demonstrate utter disregard for the individuals affected by it. For example, the Administration knew that the January 27 Order would bar the entry of individuals who were literally mid-air when the order was issued. Nonetheless, and absent any exigency that would justify it, the order was signed late on a Friday afternoon. That decision had a number of predictable consequences, including: making it more difficult for the federal employees tasked with enforcing the order to obtain instruction on how to interpret and enforce the order's sloppily-written provisions; prolonging the detentions at airports of those affected,

and leading many to be wrongfully deported; and increasing the difficulty advocates had in accessing their clients and the courts.

98. In a tweet on January 30, 2017, President Trump appeared to justify the rushed implementation of the January 27 Order by claiming that "[i]f the ban were announced with a one week notice, the 'bad' would rush into our country during that week. A lot of bad 'dudes' out there!"

99. Even once advocates were able to access the courts and obtain temporary injunctive relief against aspects of the Executive Order, DHS officials frequently refused or otherwise failed to comply with the court orders, undermining bedrock constitutional principles and inflicting further unlawful injury on the affected individuals.

100. Other actions taken by DHS and DOS to enforce the January 27 Order exhibit a zealous desire to go beyond even the draconian measures the order actually requires.

101. Notwithstanding that Section 3 of the January 27 Order only bars "entry into the United States of aliens from" one of the aforementioned seven Muslim-majority countries, DHS interpreted it to prohibit the granting of *any* immigration-related benefit to anyone from those countries—including to individuals who are already in the United States. That decision would have wide-ranging consequences, including: delaying naturalization of lawful permanent residents ("LPRs") from those countries who wish to become U.S. citizens; rendering asylees from those countries unable to be

lawfully employed once their Employment Authorization Documents expire; and either expelling or making undocumented any individuals here on nonimmigrant visas (including student, employment, and tourist) that otherwise would have been renewed.

102. DOS, at the request of DHS, issued a letter purporting to provisionally revoke *all* immigrant and nonimmigrant visas of nationals of the seven designated countries on a categorical basis. The letter is dated January 27, 2017, but only came to light on January 31, 2017, when Department of Justice lawyers filed it in pending litigation. DOS has stated that this action was taken to "implement[]" the Executive Order.

103. Upon information and belief, DOS has never before revoked a broad swath of valid visas in this manner. Nor, on information and belief, is visa revocation ordinarily undertaken in secret, with no notice to the visa holder and no individualized consideration of whether any particular visa should be revoked.

104. Still further evidence of discriminatory intent and effect is reflected in the statements by President Trump and his Administration seeking to defend and justify the January 27 Order after it was issued.

105. President Trump, for example, falsely stated that only 109 people were detained over the weekend following the issuance of the January 27 Order, even though he knew or should have known that the number was far higher.

106. Indeed, pursuant to a federal district court order, the federal government has since revealed that at least 746 individuals were detained over a period of

just 27 hours during the weekend after the January 27 Order was signed. This 27-hour period did not begin until a day after the January 27 Order went into effect.

107. These chaotic, irregular, and irrational policies, policy changes, and statements indicate that the purported justifications for the January 27 Order are pretextual and that it was at least substantially motivated by an intent to discriminate against Muslims.

The Nationwide Preliminary Injunction Enjoining the January 27 Order

108. A February 3, 2017, order issued by the District Court for the Western District of Washington currently prohibits the government from enforcing Sections 3(c), 5(a), 5(b), and 5(e) of the January 27 Order. Upon issuance of this Order, which the District Court described as a temporary restraining order, the government appealed to the Ninth Circuit and sought a stay pending appeal.

109. After hearing oral argument, the Ninth Circuit declined to stay the Order, noting that "although courts owe considerable deference with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).

110. In reaching its holding, the Court noted that "[t]he government has pointed to no evidence that any alien from any of the countries named in the order has perpetrated a terrorist attack in the United States." *Id.* at 1168.

111. The Court also acknowledged "evidence of numerous statements by the President about his intent to implement a 'Muslim ban'" and observed that "[i]t is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Id.* at 1167.

112. The Court also found that the February 3 Order, although styled a TRO, should be treated as a preliminary injunction.

113. Shortly after the Ninth Circuit's opinion issued, President Trump tweeted, "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!" He subsequently denounced the opinion as "a political decision" and stated, "[W]e're going to see them in court, and I look forward to doing that. It's a decision that we'll win, in my opinion, very easily."

114. On March 7, 2017, the government withdrew its appeal of the February 3 Order, leaving in place the preliminary injunction of Sections 3(c), 5(a), 5(b), and 5(e) of the January 27 Order.

The March 6 Order

115. In the weeks preceding the issuance of the March 6 Order, Stephen Miller, a senior advisor to President Trump, explained that the administration was preparing a new executive order "to be responsive to the judicial ruling" of the Ninth Circuit. He explained that the changes would be "mostly minor, technical differences. Fundamentally, you are still going to have the same, basic policy outcome for the country."

116. Consistent with Mr. Miller's statement, the March 6 Order, explicitly referring to the Ninth Circuit's ruling, exempts certain categories of noncitizens that have "prompted judicial concerns" from the ban, and alters the original order's "approach to certain other issues or categories of affected aliens" "in order to avoid spending additional time pursuing litigation" over the constitutionality of the January 27 Order.

117. Indeed, notwithstanding an expanded "Policy and Purpose" section and certain other changes discussed more fully below, the March 6 Order is extremely similar to the January 27 Order in most important respects.

118. Like the January 27 Order, the March 6 Order bans entry for a new 90 day period for individuals from the six of the same seven predominantly Muslim countries identified in the January 27 Order: Syria, Sudan, Iran, Libya, Somalia, and Yemen (Section 2(c)).

119. Like the January 27 Order, the March 6 Order also provides a mechanism for the government to extend and/or expand the 90-day ban at the end of the 90 day period. Section 2 of the Order directs the Secretary of Homeland Security to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." In addition, the March 6 Order explicitly provides that the review need not be conducted in a consistent matter between countries: "The Secretary of Homeland Security may

conclude that certain information is needed from particular countries even if it is not needed from every country." Again, the order provides for the submission of a report on this review within 30 days of the date of the order, a period (50 days rather than 60) for countries to respond to the order, and a provision for the President to thereafter issue a proclamation indefinitely banning travelers from a list of countries deemed to be non-compliant.

120. The corresponding provisions of the January 27 Order were never suspended and remain in effect.

121. The country-by-country report required by the January 27, 2017 Order was due on February 26, 2017, eight days before the March 6 Order was issued. On information and belief, this report was not produced.

122. The March 6 Order states that "Iraq presents a special case" because of the "close cooperative relationship between the United States and the democratically elected Iraqi government" and because the "Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal" (Section 4). With this justification, the March 6 Order exempts foreign nationals of Iraq from the categorical ban on entry applicable to other countries originally targeted by the January 27 Order. Instead, Iraqis are subject to "thorough review" and "consideration of whether the applicant has connections with ISIS or other terrorist organizations."

123. Like the January 27 Order, the March 6 Order allows for waivers to this ban on a discretionary case-by-case basis (Section 3(c)). In contrast to the January 27 Order, which simply stated that visas and other immigration benefits may be issued "when in the national interest," the March 6 Order provides nine examples of situations in which a waiver would be appropriate, such as when "the foreign national is an infant, a young child or adoptee" or "an individual needing urgent medical care" (Sections 3(c)(i)-(ix)). These and other similar circumstances enumerated in the March 6 Order reflect specific examples of individuals whose denial of entry pursuant to the January 27 Order resulted in the filing of lawsuits and widespread public outcry.

124. The March 6 Order also contains exceptions to this ban for, among others, lawful permanent residents and dual nationals traveling on passports issued by a non-designated country (Section 3(b)).

125. Like the January 27 Order, the March 6 Order cuts the number of refugees admissible to the United States for fiscal year 2017 from 110,000 to 50,000 and prohibits refugee admissions for 120 days, with an exception for discretionary case-by-case admissions (Sections 6(a), 6(b)). The March 6 Order also expressly suspends decisions on applications for refugee status for 120 days (Section 6(a)).

126. Defendant Department of State has informed Plaintiff HIAS that only refugees who are already booked for travel to the United States arriving at their port of entry through the end of March 15, 2017, i.e., before the March 6 Order's effective date of March 16,

2017 at 12:01 am, will be permitted to enter the United States. Defendant Department of State has indicated that no further bookings may be made.

127. Defendant Department of State has informed Plaintiff HIAS that all DHS screening interviews will continue to be suspended until further notice, unless exceptions are arranged on an individual basis.

128. Defendant Department of State has informed Plaintiff HIAS that no new Interagency Checks (IAC) and Security Advisory Opinion (SAC) security checks may be requested. Upon information and belief, all refugees must undergo both IAC and SAO security checks before traveling and being admitted to the US.

129. In addition to the provisions discussed above, the March 6 Order contains nearverbatim reproductions of all the other substantive provisions of the January 27 Order, including:

- Former Section 4(a), now Section 5(a), which requires the Secretaries of State and Homeland Security, the Attorney General, and the Director of National Intelligence to implement uniform screening standards to identify individuals "who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry."
- Former Section 5(g), now Section 6(d), which seeks to expand the limited role State and local governments have in the refugee resettlement process, potentially facilitating the stated desire

and intent of some states and localities in the United States to discriminate against lawfully-admitted refugees on the basis of their nationality and/or religion. *See, e.g.*, *Exodus Refugee Immigration*, 838 F.3d 902.

- Former Section 6, now Section 7, which directs the Secretaries of State and Homeland Security to consider rescinding certain waivers of terrorism-related inadmissibility grounds ("TRIG waivers") authorized by previous administrations. TRIG waivers have historically been used to facilitate the admission to the United States of certain individuals or groups of individuals—often refugees fleeing persecution—who have been forced to give aid to terrorist organizations under duress.
- Former Section 8, now Section 9, which suspends the Visa Interview Waiver Program.
- Former Section 10, now Section 11, which requires the Secretary of Homeland Security to periodically publish information about the number of "foreign nationals" involved in, among other things, terrorism-related activities, radicalization, and "gender-based violence against women, including so-called 'honor killings.'"

130. The signing and implementation of the March 6 Order was reportedly delayed because of the positive media reviews President Trump received after his address to a joint session of Congress on February 28, 2017. Although the Trump Administration had previously intended on releasing the revised executive

order the following day, on March 1, 2017, White House officials stated that they delayed the release of the revised Executive Order so that President Trump's speech could continue to receive positive press attention.

131. Upon information and belief, the delay following President Trump's congressional address marked the third time the administration put off the issuance of the revised Executive Order.

132. Before signing the March 6 Order, President Trump ordered the Department of Homeland Security and the Department of Justice to produce an intelligence report to demonstrate that the seven Muslim-majority countries originally identified in the January 27 Order present a substantial security threat and have exported terrorism to the United States.

133. Upon information and belief, such an attempt to reverse-engineer a national security justification for an executive action is not common practice.

134. In response, analysts at the Department of Homeland Security prepared a draft report, released to the press on February 24, 2017, indicating that there was insufficient evidence that the nationals of the seven Muslim-majority countries included in in the January 27 Order pose a terror threat to the United States.

135. The draft report found that citizenship is an "unlikely indicator" of terrorism threats to the United States, and that few people from the countries identified in the January 27 Order have carried out attacks or been involved in terrorism-related activities in the United States since Syria's civil war started in 2011.

136. A second Department of Homeland Security report, dated March 1, 2017, found that of the limited number of the foreign-born, U.S.-based violent extremists, most become radicalized after living in the U.S. for a number of years.

137. The Executive Order does not acknowledge or rely on either of these recent, specific security appraisals from the Department of Homeland Security. Instead, it relies on the State Department's Country Reports on Terrorism 2015 (June 2016). In relying on those reports, however, the Order disregards other countries that the State Department describes as safe havens for terrorists, and that pose a similar if not larger threat. For example, the State Department noted in its 2015 chapter on Terrorist Safe Havens that Venezuela has become a haven for terrorist groups, explaining that the country's "porous border with Colombia has made [it] attractive to the Revolutionary Armed Forces of Colombia and the National Liberation Army." Similarly, the State Department concluded that "[t]here are ungoverned, under-governed, and ill-governed areas of Mali that terrorist groups have used to organize, plan, raise funds, communicate, recruit, train and operative in relative security."

138. The Secretary of Homeland Security also said in an interview that many other countries not banned in the Executive Order raise similar security concerns. "There's probably thirteen or fourteen other countries —not all of them Muslim countries, not all of them in the Middle East—that have very questionable vetting procedures that we can rely on."

139. The Order also states that "more than 300 persons who entered the United States as refugees are currently subjects of counterterrorism investigations by the Federal Bureau of Investigation." The Order does not note that very few F.B.I. initial assessments of terrorism threats become intensive investigations: for example, in the four months from December 2008 to March 2009, the F.B.I. began 11,667 "assessments" related to terrorism, only 427 of which—less than 4%—led to more intensive investigations.

140. Over 970,000 individuals have been admitted to the United States as refugees between 2001 and the present.

141. The March 6 Order was motivated by the same anti-Muslim purpose that motivated the January 27 Order. In replicating much of the substance of the January 27 Order, the March 6 Order seeks to prevent the entry of Muslims into the United States and reinforces stereotypes about Muslims by associating them with terrorism, violence, bigotry, and hatred. .

142. White House spokesperson Sean Spicer echoed these comments on March 6, explaining, after President Trump signed the revised Order, "The principles of the executive order remain the same."

The Grave Harm to Plaintiffs and Their Clients

143. Implementation and enforcement of the January 27 Order has already caused Plaintiffs and their clients substantial, concrete, and particularized injury. Implementation of the March 6 Order threatens them with continued irreparable harm if not permanently enjoined.

144. Both Executive Orders suspend refugee resettlement and intentionally discriminate against Muslims. Both Executive Orders therefore frustrate IRAP's mission and impose a significant burden on IRAP's work. As a direct result of the imposition and enforcement of the January 27 Order, IRAP and its clients have suffered substantial, concrete injuries. Because the March 6 Order is substantively the same, these injuries will continue once the March 6 Order takes effect.

145. IRAP serves refugees and displaced persons of all faiths, but the vast majority of its clients are Muslim. IRAP counsels persecuted individuals on various legal avenues to safe countries and represents them throughout these processes, with a majority of its clients resettling in the United States.

146. The January 27 Order has already severely restricted IRAP's ability to carry out its work and mission. In the ten days immediately following the issuance of the January 27 Order, IRAP provided assistance to more than forty individuals from Iraq, Iran, Sudan, Libya, Syria, Somalia, and Yemen who, despite being vetted and given permission to enter the United States, had been prevented by the Order from doing so.

147. Of IRAP's 599 open cases, 402 families are from Syria, Iran, Sudan, Somalia, Libya, or Yemen or are refugees from other countries and therefore potentially affected by the new March 6 Order. IRAP has already used a significant portion of its financial resources and time to represent these 402 families through legal adjudications and to provide counseling through the demanding vetting process. Restricting

issuance of visas wastes that investment of resources and time.

148. Furthermore, the March 6 Order will create a significant backlog in the U.S. Refugee Admissions Program, delaying the processing of many of IRAP's clients' cases. This delay forces IRAP to exhaust more of its resources, as the average lifespan of a case now grows significantly.

149. IRAP attorneys are not providing only limited representation in certain new cases, which, prior to the Executive Order would have received full representation, as a result of the exorbitant delays in USRAP processing that the Executive Order will cause.

150. IRAP relies on volunteers from its law school chapters and pro bono firms to meet the needs of their vast client base. With the increased demands of their caseload resulting from the Executive Order, IRAP now has very limited capacity to open new law school chapters or begin new relationships with law firms to place cases for direct representation.

151. Under the Executive Order's freeze of the USRAP, IRAP may also be unable to place new cases with existing chapters or law firms because there is no movement on any refugee cases. IRAP risks losing hundreds of volunteers, and relationships with numerous law firms, because they are unable to provide them with a way to partner with them on cases.

152. IRAP's law firm partners also provide financial support to IRAP. If IRAP no longer has cases to place at law firms, and thus have to decrease our num-

ber of law firm partners, it will significantly cut into the corporate funding IRAP receives.

153. As a result of the Executive Order, IRAP's Resettlement Deployment Scheme with UNHCR, which allows IRAP resettlement experts since early 2016 to be deployed to UNHCR for assisting with their resettlement operations, may be terminated due to the drastic decrease in resettlement slots available in the United States and worldwide. This would lead to the termination of three IRAP staff as well as a revenue loss of approximately $260,000.

154. The delay also endangers the lives of IRAP's clients, because the longer it takes for their cases to be decided, the longer they are in life-threatening environments. In addition, some of the IRAP clients abroad have family ties to IRAP clients already in the United States, and those U.S. clients are suffering harm as a result of the ongoing delay in reunification with their family members, as well as the risk that their family members may suffer persecution or death in the meantime.

155. Both the January 27 Order and the March 6 Order, moreover, marginalize IRAP's Muslim clients, subject them to suspicion, scrutiny, and social isolation on the basis of religion and national origin, and inflict stigmatic and dignitary injuries. IRAP clients who are already inside the U.S. are afraid and fear they are not welcome. Some IRAP clients have been subjected to harassment by law enforcement agencies allegedly conducting "new" security checks. Others have been detained at airports, or rejected from flights multiple times even though they are presenting valid visas.

156. Both the January 27 Order and the March 6 Order, furthermore, have forced IRAP to devote substantial resources to addressing the order's effects on IRAP's clients and those similarly situated. Following the signing of the January 27 Order on January 27, 2017 at 4:42 P.M. EST, two IRAP clients, Mr. Hameed Khalid Darweesh and Mr. Haider Sameer Abdulkhaleq Alshawi, were detained at John F. Kennedy Airport ("JFK") despite having valid entry documents. As a result, IRAP attorneys were present at JFK from 2 am to 6:30 pm on January 28, 2017 attempting to secure their lawful release. Furthermore, together with co-counsel, IRAP filed a habeas petition on behalf of those two clients, together with a motion for class certification (*Darweesh et al. v. Trump et al.*, No. 1:17-cv-480 (E.D.N.Y. filed Jan. 28, 2017)). That litigation is ongoing. These actions are not in the scope of normal IRAP legal assistance, as previous IRAP clients were allowed to enter at U.S. Ports of Entry after receiving final approval to travel.

157. Both the January 27 Order and the March 6 Order have further caused IRAP to divert its resources as IRAP has become the focal point organization for volunteer attorneys all across the country who have gone to airports to attempt to secure the release of individuals detained pursuant to both Executive Orders. In addition to being the first organization to put out a call to volunteer attorneys, IRAP created and maintains a unique hotline email address (airport@refugeerights.org) to advise attorneys and affected individuals. Since the creation of this email address on January 28, 2017, IRAP has received and

responded to over a thousand email messages. IRAP has also developed templates and informational materials for attorneys, affected family members in the United States, and individuals overseas who have been denied travel pursuant to the Order.

158. IRAP also provides safe housing for clients whose lives are in immediate danger while they await the outcomes of USRAP. Clients in urgent situations who face additional four-month delays on their applications (at a minimum) will require IRAP to expend significant funding to ensure continued safe housing.

159. HIAS and its clients have likewise been significantly harmed by the January 27 and March 6 Orders. HIAS's refugee resettlement work is grounded in, and an expression of, the organization's sincere Jewish beliefs. The Torah, Judaism's central and most holy text, commands followers to welcome, love, and protect the stranger. The Jewish obligation to the stranger is repeated throughout the Torah, more than any other teaching or commandment. HIAS believes that this religious commandment demands concern for and protection of persecuted people of all faiths. The Torah also teaches that the Jewish people are to welcome, protect, and love the stranger because "we were strangers in the land of Egypt" (Leviticus 19:34). Throughout their history, violence and persecution have made the Jewish people a refugee people. Thus, both history and values lead HIAS to welcome refugees in need of protection. A refusal to aid persecuted people of any one faith, because of stigma attached to that faith, violates HIAS's deeply held religious convictions.

160. Like the January 27 Order, the March 6 Order severely impedes HIAS's religious mission and work by intentionally discriminating against Muslims and prohibiting the entry of all refugees into the United States for 120 days.

161. Before the January 27 and March 6 Orders were signed, arrangements had been made for many of HIAS's refugee clients to arrive in the United State in January, February, and the coming months. Despite having been previously vetted and granted refugee status, however, clients from Iran, Sudan, Somalia, Ukraine, Bhutan, the Democratic Republic of Congo, Afghanistan, Eritrea, Tanzania, Ethiopia, Uganda, Russia, Belarus, and Burma were delayed in or prevented from entering the country because of the January 27 Order. If the Temporary Restraining Order barring enforcement of the January 27 Order is lifted, or if the March 6 Order goes into effect, HIAS's clients will continue to face significant delays or be denied entry into the United States altogether.

162. Specifically, HIAS has identified nearly 1,400 clients worldwide who were allocated through the Department of State process, have been vetted, and have been approved for refugee status. These refugees have already been allocated and assured to one of HIAS's resettlement sites. Of these clients, less than 60 have been scheduled for travel following the signing of the March 6 Order. That means that any travel for the remaining approved refugees will be significantly delayed, and many will be unable to come at all in this Fiscal Year.

163. Under the Executive Order, the earliest that refugee resettlement could resume would be early July 2017. This would leave Resettlement Agencies, at most, with only two-and-a-half months before the end of the fiscal year to resettle hundreds or thousands of refugees who were supposed to be resettled over a much longer period of time. Refugee processing would be impacted by the 120-day ban since security checks and processing would be suspended during that time. Because security and medical clearances have expiration dates, it is likely that some refugees would lose their readiness for travel during the suspension period and lengthy checks would need to be repeated.

164. In addition, after the January 27 Order was issued, the U.S. Department of State notified HIAS that its resettlement commitment will be cut by 39 percent for the remainder of FFY 2017 due to the Order's drastic reduction in the planned level of refugee admission from 110,000 to 50,000. Thus, some of HIAS's clients who have been vetted and approved as refugees will simply not be able to enter the country in FFY 2017.

165. Of the nearly 1,400 HIAS clients worldwide who were allocated through the Department of State process, have been vetted, and have been approved for refugee status, 500 are nationals of one of the six banned countries. The overwhelmingly majority of these individuals are Muslim. Because they are national of the six banned countries, they will likely be ineligible for the case-by-case exception to the 120-day ban on for refugee applicants set forth in Section 6(c) of the March 6 Executive Order.

166. Every day that HIAS clients' entry is delayed, they remain in precarious situations.

167. Many of HIAS's clients abroad, whose refugee status has been approved but have yet to be scheduled for travel, including clients from the six banned countries, have family members in the United States, also HIAS clients, who will suffer as a result of the delay in reuniting with their family members. Some of these U.S. ties are, in fact, individuals who petitioned for refugee status (often through HIAS) for their family members.

168. In addition, more than 1,300 refugee applications initiated through HIAS by family members residing in the United States remain pending for HIAS clients abroad. The adjudication of these applications has been or will be substantially delayed because of the March 6 Order. In fact, since the Orders were signed, consideration of most refugee applicant cases in need of security checks have been suspended. This means that, for many refugees in the pipeline, security checks that typically lasted 18-24 months will now be paused and restarted, potentially adding years to their wait for stable resettlement. The delay in processing of these applications will subject these clients to further risk of persecution and abuse in their current situations, and their family members who petitioned for them to come to the United States will remain in limbo as to whether they will ever be reunited.

169. The Executive Orders convey an official message of disapproval and hostility toward HIAS's Muslim clients, making clear that the government deems them outsiders, not full members of the political com-

munity. HIAS's Muslim clients in the United States have been marginalized as a result of this anti-Muslim message, have been subjected to baseless suspicion, scrutiny, and social and political isolation on the basis of religion and national origin, and have suffered other dignitary and stigmatic injuries.

170. Additionally, as a result of the January 27 Order, at least one of HIAS's Muslim clients in the United States was detained at an airport for an extended period, handcuffed and separated from his family, and many other clients have otherwise had their travel significantly delayed.

171. Because HIAS is a non-profit resettlement organization that has a cooperative agreement with the federal government on a per-capita basis for each refugee served, and because the Department of State asked HIAS to increase its capacity from the 3,884 refugees resettled in federal fiscal year ("FFY") 2016 to 4,794 refugees in FFY 2017, HIAS would be denied crucial funding as a result of the March 6 Order, which bans all refugees for 120 days, bars all entry for the six Muslim-majority countries for 90 days, and limits the number of refugees to be admitted in the current fiscal year at 50,000, which is less than half the number the Department of State told the resettlement agencies to collectively plan to resettle.

172. After the January 27 Order was issued, the U.S. State Department notified HIAS that its resettlement obligation for FFY 2017 would be slashed from nearly 4,800 to just over 2900 refugees. The financial losses to HIAS and its affiliate network—up to $2.2 million—will be crippling, especially for many of HIAS's

affiliates, which are heavily dependent on funding that flows through HIAS. These losses will translate to irreparable harm to HIAS, its affiliates, and its clients because they will cause (and have already caused) a substantial reduction in program services and closure of resettlement sites. When this happens, the local expertise, relationships, and good will—developed by affiliate staff, often over years and years—are lost entirely or substantially diminished. Building a new resettlement site can take months or years of relationship-building, including cooperation with local government and elected officials, businesses who would be potential employers, landlords, volunteers, and the refugee communities themselves. In addition, fewer resettlement sites may limit the type of specialized assistance and services (e.g., for LGBT refugees) that clients can receive.

173. The January 27 and March 6 Orders would also result in the waste of HIAS resources. For example, in the past year, HIAS has devoted substantial private resources to developing a program with several congregations in Westchester, New York, to welcome Syrian refugee families. Because of the 90-day and 120-day bans, as well as the unexpected and dramatic lowering of the refugee admissions level, both the January 27 Order and the March 6 Order would put those resources to waste. Congregations and family members of HIAS clients have extended resources to prepare for anticipated refugees, by renting apartments and purchasing furnishings. In addition, some refugees who were anticipating resettlement through HIAS left jobs or travelled through other countries and now

face precarious situations as a direct result of the January 27 Order and March 6 Order.

174. In the weeks and months prior to the order, HIAS concluded a formal plan with the Department of State to increase HIAS's national resettlement capacity by 23.4% from 3,884 refugees in federal fiscal year 2016 to 4,794 refugees in federal fiscal year 2017. This plan caused HIAS to invest substantial resources into expanding existing resettlement sites and opening new refugee resettlement sites in Wisconsin, Delaware, New York, Illinois, and Massachusetts, as approved by the Department of State. These resources will be wasted, at least in part, because of the January 27 Order and the March 6 Order.

175. In addition, HIAS has been forced to divert substantial resources, and will continue to to do so, to dealing with the fallout from both executive orders and their effect on HIAS's clients, including devoting staff time to working with clients, and their families in the United States, who were denied entry and face precarious situations overseas.

176. Plaintiff MESA and its members will also be harmed by the March 6 Order. MESA has members from the six designated countries who are outside the United States and lack U.S. visas. Because of the March 6 Order, these members will not be able to travel to the United States to attend academic conferences, including an annual meeting sponsored by MESA. Participation in academic conferences is crucial to the professional success of both graduate students and professors, and to their ability to fully engage with the ideas and scholarship of the broader Middle Eastern

studies community. Many important conferences, including the MESA annual meeting, take place in the United States

177. Graduate students who are MESA members or are studying under MESA members in the United States often leave the country to complete field work for advanced degrees. Because of the Executive Order, many such students from the six designated countries fear exclusion from the United States if they leave the country. The inability to leave the United States with an assurance they will be permitted to reenter will impair their ability to engage in research and participate in academic conferences. Such students will also lose their ability to visit family and friends abroad with an assurance they will be permitted to reenter. For example, Iranian students affiliated with MESA have cancelled plans to return home for Persian New Year, an important holiday that will occur on March 21, because of the Executive Order.

178. MESA members who are U.S.-based faculty will be impacted by the Executive Order because potential students from the designated countries will be unable to obtain visas to study with them in the United States. Similarly, their current U.S.-based students from the designated countries will not be able to travel abroad for field work with an assurance they will be permitted to reenter, impacting faculty members' ability to facilitate quality research and educational opportunities. Likewise, U.S.-based MESA faculty members will forego opportunities to travel abroad for research and academic conferences for fear that they will not be readmitted, or will be subjected to

harassment or discrimination upon application for reentry to the United States. MESA members will also be precluded from traveling to the designated countries for research or academic conferences when those countries institute reciprocal actions in response to the Executive Order, as Iran has done.

179. A large number of MESA members are Muslim or are institutional members whose officers, employees, or members are Muslim. The Executive Orders convey an official message of disapproval and hostility toward these Muslim members, making clear that the government deems them outsiders, not full members of the political community. This marginalizes them, subjects them to suspicion, scrutiny, and social and political isolation on the basis of religion and national origin, and inflicts other stigmatic and dignitary injuries.

180. MESA itself will also be harmed by the Executive Order. As part of its goal to advance learning, facilitate communication, and promote cooperation, MESA sponsors an annual meeting that is a leading international forum for scholarship, intellectual exchange, and pedagogical innovation. Approximately thirty percent of MESA members are based outside of the United States and must travel to the United States to attend MESA's annual conference. At least 46 citizens of the six designated countries traveled to the United States to attend the last annual meeting. MESA expects that a substantial number of scholars will be unable to attend this year's meeting because of the restrictions imposed by the Executive Order. Moreover, in part because of the stigmatic message of the Executive Order, many members based in Europe and the Middle

East are likely to heed international calls to boycott academic conferences in the United States in protest of the Executive Order, including the MESA annual conference. The absence of these scholars, attributable to the Executive Order, will have a substantial negative effect on the meeting. These and other impacts of the Executive Order will negatively impact MESA's mission of fostering the study and public understanding of the Middle East.

181. In addition, the Executive Order will cause serious financial harms to MESA. A large portion of MESA's annual budget is funded through annual membership dues and registration fees to attend the annual meeting. For each individual who cannot or will not attend the annual meeting, MESA will lose $90-250 in registration fees. MESA will also suffer other financial injuries related to its annual meeting as a result of the executive order. Some individuals who cannot or will not attend the meeting will allow their MESA membership to lapse as a result. For each such lapsed membership, MESA will lose $25-300 in membership dues.

182. Plaintiff John Doe #1, a lawful permanent resident, has suffered and will continue to suffer harm because of the Executive Order. In August 2016, while John Doe #1's application to become a lawful permanent resident was pending, he married an Iranian national who lives in Iran. She applied for a visa as John Doe #1's dependent and her application was approved on November 3, 2016. As of January 9, 2017 John Doe #1 and his wife had submitted all of the requisite documentation and paid immigrant visa processing

fees, and were waiting for notification that an interview was scheduled. At the time the Executive Order went into effect, John Doe #1 expected his wife's interview to be scheduled within no more than six weeks based on information published by the National Visa Center. Under the Executive Order, John Doe #1's wife will not be interviewed or granted a visa.

183. The Executive Order's travel ban on Iranian nationals has created significant fear, anxiety and insecurity for John Doe #1 and his wife regarding their future. After her mother's unexpected death in 2013, John Doe #1's wife has been alone in Tehran. The Executive Order's ban forces John Doe to choose between his career and being together with his wife, who remains in Tehran.

184. Plaintiff John Doe #3, a lawful permanent resident, has suffered and will continue to suffer harm because of the Executive Order. John Doe #3 recently applied to become a naturalized citizen, and that petition remains pending with USCIS.

185. In the summer of 2014, John Doe #3 married a national of Iran. In October 2014, John Doe #3 applied for an immigration visa on her behalf. Approximately 19 months later, in May 2016, she had her interview at the U.S. Embassy. At that time, she was informed that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join her husband in two to three months. She therefore resigned from her job and began preparing to join her husband in the United States. The Executive Order, however, puts the couple's plans in peril, as it has at least delayed, and could prevent,

John Doe #3's wife from obtaining her visa and joining her husband in United States.

186. Since moving to the United States, John Doe #3 has returned to Iran on several occasions to visit his wife, but is now fearful of leaving the United States. He had planned to visit her in February 2017, but put his plans on hold in light of the Executive Order. John Doe #3 is afraid that if he leaves the United States to see his wife, he will not be permitted to reenter the United States or could be detained by immigration officials at the airport upon his return. As a result, if John Doe #3 must leave the United States to visit Iran for an urgent family member, he feels he must make plans for his apartment, car, savings account, and other aspects of his personal life in the United States in order to prepare for the possibility that he may not be allowed to return.

187. Their continued separation has placed extraordinary stress on John Doe #3 and his wife, and their relationship. John Doe #3 and his wife are young and feel as though they've been unable to start their lives together because of the delays and uncertainty caused by the Executive Order.

188. Plaintif Jane Doe #2, a U.S. citizen, has suffered and will continue to suffer harm because of the Executive Order. She is enrolled in a local college where she is studying to become a healthcare technician. She filed a family-based visa petition for her sister who is a Syrian refugee currently living in Saudi Arabia on the border with Yemen. The petition is currently pending a decision. Approval of the petition

would allow Jane Doe #2's sister to access the U.S. Refugee Admissions Program (USRAP).

189. Jane Doe #2's sister, who is Muslim, was born in Damascus, Syria, where she grew up and spent most of her life. She worked as a French teacher and her husband was a sales manager at a local business. They have two young children. In 2012, continuous bombing of her neighborhood forced her and her family to move to her parent-in-laws with nothing more than their passports and the clothes on their backs. The bombing of her neighborhood continued and she was never able to re-enter her home.

190. While internally displaced in Syria, Jane Doe #2's sister and husband learned that the Syrian government's selective service might be expanded to include men over the age of 30, which would include her husband. After some of her husband's friends were conscripted for the selective service, they determined that he should flee immediately to Yemen. Because Jane Doe #2's sister was a government employee, she was required to apply for government approval before stopping work and could not flee with him immediately. As a result, she and her oldest child remained in Syria —at the time she was pregnant with their youngst child. When, in 2013, she finally received government approval to discontinue work, she and her child fled to join her husband in Yemen. In Yemen, she registered with the U.N High Commissioner for Refugees, which provided her with a temporary protection certificate explaining that she should be protected from forcible return to Syria.

191. As a result of the war in Yemen, Jane Doe #2's sister and her family had to flee again, this time to Saudi Arabia, where they now live in a refugee hotel close to the border of Yemen. They remain under constant threat from nearby rocket file and military conflict. The shelling where they currently live is so constant that the local school is only open one to two days per week, if at all. Jane Doe #2's children are unable to go to school and are receiving no formal education.

192. The building where Jane Doe #2's family is living is infested with bugs and human refuse from the bathroom in the unit above theirs leaks into their room. Jane Doe #2 and her family, are constantly sick and her children regularly vomit. The Saudi Arabian government is also regularly turning off the power to the building there they live with other refugees in order to make life so intolerable that they will leave.

193. Jane Doe #2's sister and her family also face sever discrimination in Saudi Arabia on account of their status as Syrian refugees. Her husband has had a very difficult time finding work and even when he can work, he is often cheated out of his wages and otherwise exploited. Jane Doe #2's sister is unable to leave the apartment where they are staying in the daytime because without being accompanied by her husband, the risk that she would be abducted as a Syrian refugee woman is too high. As a result, her children did not believe that the sun rose and set in Saudi Arabia because the room that they are staying in does not have any windows and they only left the room at night when Jane Doe #2's husband could accompany them.

194. As Syrian refugees, Jane Doe #2's sister and her family are eligible and qualify for the Priority-2 Direct Access Program for Iraqi and Syrian Beneficiaries of Form I-130 Petition for Alien Relatives. If the Executive Order remains in effect, Jane Doe #2's sister will not be interviewed or granted a visa. Moreover, she will have little chance of traveling to the United States as a refugee given the suspension of USRAP, the high likelihood that Syrian refugees will continued to be barred from entry to the United States, and the lowered refugee admissions cap of 50,000.

195. Plaintiff Meteab, a lawful permanent resident, has also suffered and will continue to suffer harm because of the Executive Order. After the U.S. invasion of Iraq in 2003, Mr. Meteab and his four brothers all cooperated with the U.S. military in helping to establish the transitional government, in the wake of the conflict in Najaf, Iraq. Because of their cooperation with the U.S. government, they were targeted and threatened by armed militia groups in Iraq.

196. Mr. Meteab is a SunniMuslim, as are his brothers. In Iraq, they lived together in a Shi'a neighborhood. In 2013, Mr. Meteab and his family were warned by neighbors and community members that if they failed to leave the area, their family would be killed. In 2013, Mr. Meteab's nephew Mosad was shot in the leg. After this, on December 25, 2013, Plaintiff Meteab's older brother fled to Jordan with his children and two of his nephews, including Mosad. Plaintiff Meteab and his wife and children joined them in Jordan on January 5, 2014. Plaintiff Meteab's three other brothers also fled to Jordan in 2014. All of them applied

for and received recognition as refugees from the United Nations High Commission for Refugees.

197. In August 2015, after being approved as a refugee, Plaintiff Meteab came to the United States with his wife and children. His three other brothers, Ali, Abdulateef, and Ahmed, have been approved as refugees but remain in Jordan awaiting resettlement,. Abdulateef was approved for resettlement in Canada but is awaiting final clearance. Mr. Meteab's brothers Ali and Ahmed, were approved for resettlement in the United States.

198. In November 2016, Plaintiff Meteab's brothers Ali and Ahmed were told by the International Organization for Migration that while their refugee applications had been approved, they still did not have travel documents to come to the United States. Jewish Family Services notified Plaintiff Meteab's family of this update at the same time. When Mr. Meteab's brothers learned about the Executive Order from the news in January 2017, they realized the travel ban would prevent them from joining him in the United States.

199. Since the January 27th Executive Order was released, Mr. Meteab and his wife have experienced anti-Muslim sentiment and felt very uncomfortable and insecure in their community, causing them acute mental stress. They have experienced hostility in public, with people staring at Mr. Meteab's wife, who wears a hijab, and refusing to stop for them at crosswalks. Their nieces, who also came to the United States as refugees, have been harassed in school.

200. Plaintiff Harrison has suffered and will continue to suffer harm as a result of the Executive Order. Mr. Harrison is a citizen of the United States and lives in Euless, Texas. His fiancé is a citizen and resident of Iran and is Muslim. They have been together since November 2015.

201. In March 2016, Plaintiff Harrison petitioned for a K-1 (fiancé) visa for his partner (now-fiancé). After the petition was approved, Plaintiff Harrison's partner was interviewed at the U.S. Embassy in Ankara, Turkey on November 7, 2016. His K-1 visa application was approved and administrative processing completed on January 17, 2017. The U.S. Embassy in Ankara informed Mr. Harrison's partner that he needed to submit his passport for the visa to be issued.

202. On January 30, 2017, after the January 27 Order was signed, the U.S. Embassy in Turkey emailed Plaintiff Harrison's fiancé and explained that his visa process was on hold and that he should contact them again when the travel ban had been lifted to continue the processing of his visa.

203. Subsequently on on February 7, 2017, the U.S. Embassy in Turkey sent a follow-up email to Plaintiff Harrison's fiancé, stating that the embassy had been informed of the ruling in *Washington v. Trump* and that he should send in his passport to the U.S. Embassy in Ankara, Turkey.

204. On March 3, 2017, Plaintiff Harrison and his fiancé traveled again to Turkey to submit the passport and to see one another. On March 6, 2017, the new executive order was announced. As the embassy has

not provided additional information or told Plaintiff Harrison's fiancé that they are no longer processing visas, they submitted his passport on March 8, 2017. They fear the U.S. Embassy in Ankara will not issue the visa before March 16. Even if there is a waiver process might apply to his fiancé, Mr. Harrison is concerned he may not receive the waiver and/or that his fiancé may be required to start the entire process over, resulting in prolonged separation and anxiety for both of them.

205. If the Executive Order remains in effect, Plaintiff Harrison and his partner will remain separated. Mr. Harrison cannot currently travel to Iran, which has put in place a reciprocal ban on U.S. citizen visitors, and the travel to Turkey to see one another is a significant financial burden for Mr. Harrison. Moreover, Plaintiff Harrison's partner has had some negative interactions with the morality police in Iran, leading to harassment and, in one instance, an assault on Mr. Harrison's partner.

206. Plaintiff Ibrahim Ahmed Mohomed has suffered and will continue to suffer harm as a result of the Executive Order. Mr. Mohomed is a United States citizen of Somali origin who lives in Columbus, Ohio. He came to the United States as a refugee in 2009. He is Muslim.

207. Mr. Mohomed's wife and nine children have been approved to come to the United States as refugees. They are all in Ethiopia waiting for authorization to travel to the United States.

208. Plaintiff Mohomed is a member of a minority clan in Somalia. When he and his family were living in Mogadishu, Mr. Mohomed was targeted and threatened by members of the majority clans in Mogadishu, who knew he did not have protection. He came to the United States as a refugee in March 2009.

209. With the rise of insurgents from al-Shabaab and increased fighting in Mogadishu, after Mr. Mohomed's departure, his wife and children fled first to Yemen and then, in 2011, to Ethiopia, where Mr. Mohomed was able to visit them. He applied for them to join him in the United States, and in 2013, they were approved for resettlement in the United States. However, they were still waiting for travel documents when the January 27 order was issued.

210. After the January 27 order was signed, Mr. Mohomed and his family learned from the news that under the new Executive Order, his family would not be able to come to the United States. They remain in Ethiopia waiting to join Mr. Mohomed.

211. The Executive Orders conveys an official message of disapproval and hostility toward the individual Muslim Plaintiffs and their families, making clear that the government deems them outsiders or second-class citizens who are not full members of the political community. This marginalizes them, subjects them to suspicion, scrutiny, and social and political isolation on the basis of religion and national origin, and inflicts other stigmatic and dignitary injuries.

Class Allegations

212. Individual Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b) (1) and (b) (2), on behalf of themselves and all other persons in the United States for whom the Executive Order either interferes with family reunification or the ability to travel internationally and return to the United States. This class includes:

a. Individuals in the United States who currently have an approved or pending petition to the United States government to be reunited with family members who are nationals of Iran, Libya, Somalia, Sudan, Syria or Yemen (the "Designated Countries"), or who will soon file such petition;

b. Refugees in the United States who have currently pending, or will soon file, a petition to the United States government to be reunited with family members; and

c. Nationals of the Designated Countries who reside in the United States and who wish to travel abroad and return to United States or who, prior to issuance of the Executive Order, did travel abroad with the intent to return and are currently abroad.

213. The Plaintiff Class is so numerous that joinder is impracticable. According to the Annual Report of the Visa Office, in 2015, the last year for which data are available, the United States issued approximately 70,000 immigrant and non-immigrant visas to nationals from the six Designated Countries. The U.S. govern-

ment previously estimated that between 60,000 and 100,000 people were affected by Section 3(c) of the January 27 Order.

214. The claims of the Plaintiff Class members share common issues of law, including but not limited to whether the Executive Order violates their associational, religious exercise and due process rights under the First and Fifth Amendments, the Religious Freedom Restoration Act, the Immigration and Nationality Act and the Administrative Procedure Act.

215. The claims of the Plaintiff Class members share common issues of fact, including but not limited to whether the Executive Order is being or will be enforced so as to prevent them or their family members from entering the United States from abroad or from re-entering the United States should they choose to leave the United States briefly, even though they would otherwise be admissible.

216. The claims or defenses of the named Plaintiffs are typical of the claims or defenses of members of the Plaintiff Class.

217. The named Plaintiffs will fairly and adequately protect the interests of the Plaintiff class. The named Plaintiffs have no interest that is now or may be potentially antagonistic to the interests of the Plaintiff class. The attorneys representing the named Plaintiffs include experienced civil rights attorneys who are considered able practitioners in federal constitutional litigation. These attorneys should be appointed as class counsel.

218. Defendants have acted, have threatened to act, and will act on grounds generally applicable to the

Plaintiff Class, thereby making final injunctive and declaratory relief appropriate to the class as a whole. The Plaintiff Class may therefore be properly certified under Federal Rule of Civil Procedure 23(b) (2).

219. Prosecution of separate actions by individual members of the Plaintiff Class would create the risk of inconsistent or varying adjudications and would establish incompatible standards of conduct for individual members of the Plaintiff Class. The Plaintiff Class may therefore be properly certified under Federal Rule of Civil Procedure 23(b)(1).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Establishment Clause, First Amendment to the U.S. Constitution)

220. The foregoing allegations are repeated and incorporated as though fully set forth herein.

221. The Executive Order violates the Establishment Clause by singling out Muslims for disfavored treatment. It has the purpose and effect of inhibiting religion, and it is neither justified by, nor closely fitted to, any compelling governmental interest.

SECOND CLAIM FOR RELIEF

(Equal Protection, Fifth Amendment to the U.S. Constitution)

222. The foregoing allegations are repeated and incorporated as though fully set forth herein.

223. The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides that "No person

shall . . . be deprived of life, liberty, or property, without due process of law." The Clause contains an equal protection component.

224. The Executive Order discriminates on the basis of religion and national origin, each a suspect classification, and is not narrowly tailored to serve a compelling governmental interest, and thereby violates the equal protection component of the Due Process Clause.

225. Additionally, the Executive Order was substantially motivated by an intent to discriminate against Muslims, on whom it has a disparate effect, in further violation of the equal protection component of the Due Process Clause.

THIRD CLAIM FOR RELIEF

(Immigration and Nationality Act & Administrative Procedure Act)

226. The foregoing allegations are repeated and incorporated as though fully set forth herein.

227. The Immigration and Nationality Act provides, with certain exceptions not applicable here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

228. Several clients of IRAP are otherwise eligible and approved for refugee status, but pursuant to the Executive Order, their entry to the United States will be denied or delayed. The Executive Order on its face purports to deny entry to these clients of IRAP because

of their nationality, place of birth, and/or place of residence, in violation of § 1152(a)(1)(A).

229. Plaintiffs Harrison, Mohomed, Jane Doe #2 and John Does #1 and #3 have filed petitions for immigrant visas for members of their families, some of whom have subsequently received visas. Plaintiff Mohomed's wife and nine children's refugee visa applications have been approved, but they have not received travel documents or had their travel scheduled. Plaintiff Harrison's fiancé's visa has been approved and the processing complete but he still does not have a visa issued. Pursuant to the Executive Order, the processing of those petitions and/or the subsequent issuance of visas and travel documents will be delayed or denied, and/or their family members will be denied entry. The Executive Order on its face purports to deny or delay applications because Plaintiffs' family members' nationality, place of birth, and/or place of residence, in violation of § 1152(a)(1)(A).

230. The Executive Order on its face mandates discrimination against those who apply for and/or hold immigrant visas on the basis of their nationality, place of birth, and/or place of residence, in violation of § 1152(a)(1)(A).

231. The actions of Defendants, as set forth above, constitute final agency action and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and without observance of procedure required

by law, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)-(D).

FOURTH CLAIM FOR RELIEF

(Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*)

232. The foregoing allegations are repeated and incorporated as though fully set forth herein.

233. The Executive Order will have the effect of imposing a special disability on the basis of religious views or religious status, by denying or impeding Muslim Plaintiffs, on account of their religion, from accessing benefits relating to their own or their family members' immigration status. In doing so, the Executive Order places a substantial burden on Muslims' exercise of religion in a way that is not the least restrictive means of furthering a compelling governmental interest.

234. This substantial burden is not imposed in furtherance of a compelling governmental interest, and is not the least restrictive means of furthering a compelling governmental interest, in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

FIFTH CLAIM FOR RELIEF

(Refugee Act & Administrative Procedure Act)

235. The foregoing allegations are repeated and incorporated as though fully set forth herein.

236. Pursuant to the President's congressionally delegated authority under 8 U.S.C. § 1182(f), the Executive Order purports to limit the number of refugees who may be admitted in fiscal year 2017 to 50,000, despite

an earlier proclamation setting a limit of 110,000, in violation of the Refugee Act, 8 U.S.C. § 1157(a)(2).

237. President Trump did not engage in "appropriate consultation" prior to altering the number and allocation of refugee admissions for fiscal year 2017, in violation of the Refugee Act, 8 U.S.C. § 1157.

238. The Executive Order makes other alterations to the refugee admission process that are not authorized by the Refugee Act and are in violation of the Refugee Act.

239. The actions of Defendants that have been undertaken pursuant to Section 6 of the Executive Order, as set forth above, constitute final agency action and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and without observance of procedure required by law, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)-(D).

SIXTH CLAIM FOR RELIEF

(Administrative Procedure Act)

240. The foregoing allegations are repeated and incorporated as though fully set forth herein.

241. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

242. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, are contrary to constitutional right, power, privilege, or immunity, including rights protected by the First and Fifth Amendments to the U.S. Constitution, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(B).

243. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

244. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, were without observance of procedure required by law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. A preliminary and permanent injunction enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or participating with them from implementing or enforcing any portion of the Executive Order;

B. A declaration pursuant to 28 U.S.C. § 2201 that the entire Executive Order is unlawful and invalid;

C. An order awarding Plaintiffs costs of suit, and reasonable attorneys' fees and expenses pursuant to any applicable law;

D. Such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted, Dated: Mar. 10, 2017

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. TDC-17-0361

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, MUHAMMED METEAB, PAUL HARRISON, IBRAHIM AHMED MOHOMED, JOHN DOES NOS. 1 & 3, AND JANE DOE NO. 2, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF STATE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, MICHAEL DEMPSEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

Filed: Mar. 16, 2017

MEMORANDUM OPINION

On March 6, 2017, President Donald J. Trump issued an Executive Order which bars, with certain exceptions, the entry to the United States of nationals of six predominantly Muslim countries, suspends the entry of refugees for 120 days, and cuts by more than half the number of refugees to be admitted to the United States in the current year. This Executive Order follows a substantially similar Executive Order that is currently the subject of multiple injunctions premised on the conclusion that it likely violates various provisions of the United States Constitution. Pending before the Court is Plaintiffs' Motion for a Temporary Restraining Order or a Preliminary Injunction, filed on March 10, 2017. At issue is whether the President's revised Executive Order, set to take effect on March 16, 2017, should likewise be halted because it violates the Constitution and federal law. For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

INTRODUCTION

On January 27, 2017, President Trump issued Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("First Executive Order" or "First Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). On February 7, 2017, Plaintiffs filed a Complaint alleging that the First Executive Order violated the Establishment Clause of the First Amendment to the United States Constitution, U.S. Const. amend. I; the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-1524 (2012); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2012). On March 6, 2017, in the wake of several successful legal challenges to the First Executive Order, President Trump issued Executive Order 13,780 ("Second Executive Order" or "Second Order"), which bears the same title as the First Executive Order. 82 Fed. Reg. 13209 (Mar. 9, 2017). The Second Executive Order, by its own terms, is scheduled to go into effect and supplant the First Executive Order on March 16, 2017.

On March 10, 2017, Plaintiffs amended their Complaint to seek the invalidation of the Second Executive Order. Plaintiffs substituted certain individual plaintiffs and added an organizational plaintiff. Their causes of action remain the same. That same day, Plaintiffs filed the pending Motion, seeking to enjoin the Second Executive Order in its entirety before it takes effect. Defendants have received notice of the Motion and filed a brief in opposition to it on March 13, 2017. After Plaintiffs filed a reply brief on March 14, 2017, the Court held a hearing on the Motion on March 15, 2017. With the matter fully briefed and argued, the Court construes the Motion as a Motion for a Preliminary Injunction. The Court now issues its findings of fact and conclusions of law and rules on the Motion.[1]

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[1] On February 22, 2017, Plaintiffs filed a Motion for a Preliminary Injunction of § 5(d) of the Executive Order, ECF No. 64, requesting that the Court enjoin a specific provision of the First Executive Order. With the agreement of the parties, the Court set a briefing and hearing schedule extending to March 28, 2017. The Court will resolve that Motion, which the parties have agreed should be construed to apply to the successor provision of the Second Executive Order, in accordance with the previously established schedule.

FINDINGS OF FACT

I. Executive Order 13,769

The stated purpose of the First Executive Order is to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." 1st Order Preamble. To that end, the First Executive Order states that the United States must be "vigilant during the visa-issuance process," a process that "plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States." 1st Order § 1. The First Executive Order therefore mandates, as relevant here, two courses of action. The first, set forth in Section 3 entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern," invokes the President's authority under 8 U.S.C. § 1182(f) to suspend for 90 days "the immigrant and nonimmigrant entry into the United States of aliens" from the countries of Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen as "detrimental to the interests of the United States." 1st Order § 3(c). Each of these countries has a predominantly Muslim population, including Iraq, Iran, and Yemen which are more than 99 percent Muslim. In addition to providing certain exceptions for diplomatic travel, the provision contains exceptions on a "case-by-case basis" when such an exception is "in the national interest," a term not defined elsewhere in the Order. 1st Order § 3(g). During this 90-day period, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence are to "immediately conduct a review to determine the information needed from any country" to assess whether an individual from that country applying for a "visa, admission, or other benefit . . . is not a security or public-safety threat" and provide a report on their review to the President within 30 days of the issuance of the Order. 1st Order § 3(a)-(b).

The second course of action relates to refugees. As set out in Section 5(d), the President ordered, pursuant to § 1182(f), that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States" and thus suspended the entry of any refugees above that figure. 1st Order § 5(d). The Order also immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days and imposed an indefinite ban on the entry of refugees from Syria. The Order further required changes to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." 1st Order § 5(b).

The drafting process for the First Executive Order did not involve traditional interagency review by relevant departments and agencies. In particular, there was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security. When the Order was issued in the early evening of Friday, January 27, 2017, the State Department immediately stopped conducting visa interviews of, and processing visa applications from, citizens of any of the seven banned countries. Between 60,000 and 100,000 visas have been revoked.

II. Legal Challenges to the First Executive Order

The First Executive Order prompted numerous legal challenges, including an action filed by the State of Washington and the State of Minnesota in the United States District Court for the Western District of Washington based on the Due Process, Establishment, and Equal Protection Clauses of the Constitution that resulted in a nationwide temporary restraining order against several sections of the First Order. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit, construing the order as a preliminary injunction, upheld the entry of the injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). Although it did not reach the Establishment Clause claim, the Ninth Circuit noted that the asserted claim raised "serious allegations" and presented "significant constitutional questions." *Id.* at 1168. On February 13, 2017, the United States District Court for the Eastern District of Virginia found that plaintiffs had shown a likelihood of success on the merits of an Establishment Clause claim and issued an injunction against enforcement of Section 3(c) of the First Executive Order as to Virginia residents or students enrolled a Virginia state educational institution. *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). These injunctions remain in effect.

III. Executive Order 13,780

On March 6, 2017, President Trump issued a revised Executive Order, to become effective on March 16, 2017, at which point the First Executive Order will be revoked. 2d Order §§ 13, 14. The Second Executive

Order reinstates the 90-day ban on travel for citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen ("the Designated Countries"), but removes Iraq from the list based on its recent efforts to enhance its travel documentation procedures and ongoing cooperation between Iraq and the United States in fighting ISIS. The scope of the ban, however, was narrowed expressly to respond to "judicial concerns." 2d Order § (1)(i). The Order states that it applies only to individuals outside the United States who did not have a valid visa as of the issuance of the First Executive Order and who have not obtained one prior to the effective date of the Second Executive Order. In addition, the travel ban expressly exempts lawful permanent residents ("LPRs"), dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. The Second Executive Order also provides a list of specific situations in which a case-by-case waiver "could be appropriate." 2d Order § 3(c).

The refugee provisions continue to suspend USRAP for 120 days and to reduce the number of refugees to be admitted in fiscal year 2017 to 50,000. However, the minority religion preferences in refugee applications and the complete ban on Syrian refugees have been removed entirely.

Unlike the First Executive Order, the Second Executive Order provides certain information relevant to the national security concerns underlying the decision to ban the entry of citizens of the Designated Countries. The Second Order notes that "the conditions in these countries present heightened threats" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." 2d Order § 1(d). It provides information from the State Department's *Country Reports on Terrorism 2015* identifying Iran, Sudan, and Syria as longstanding state sponsors of terrorism and describing the presence of members of certain terrorist organizations within those countries. The asserted consequences of these conditions are that the governments of these nations are less willing or less able to provide necessary information for the visa or refugee vetting process, and there is a heightened chance that individuals from these countries will be "terrorist operatives or sympathizers." 2d Order § (1)(d). In light of these factors, the Second Order concludes, the United States is unable "to rely on normal decision-making procedures about travel" as to individuals from these nations, making the present risk of admitting individuals from these countries "unacceptably high." 2d Order § 1(b)(ii), (f). The Second Order expressly disavows that the First Executive Order was motivated by religious animus.

The Second Order also states that "Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" and references two Iraqi refugees who were convicted of terrorism-related offenses and a naturalized U.S. citizen who came to the United States from Somalia as a child refugee and has been convicted of a plot to detonate a bomb at a Christmas tree lighting ceremony. 2d Order § 1(h). The Second Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations. It does not identify any instances of individuals who came from Iran, Libya, Sudan, Syria, or Yemen engaging in terrorist activity in the United States.

The same day that the Second Executive Order was issued, Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President recommending a temporary suspension on the entry to the United States of nationals of certain countries so as to facilitate a review of security risks in the immigration system, for reasons that largely mirror the statements contained in the Second Executive Order.

IV. Public Statements About the Executive Orders

On December 7, 2015, then-presidential candidate Donald Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. Trump promoted the Statement on Twitter that same day, stating that he had "[j]ust put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.R. 209. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then, in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.R. 261. In a July 24, 2016 interview on Meet the Press soon after he accepted the Republican nomination, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his December 2015 call for a "Muslim ban," Trump characterized it instead as an "expansion." J.R. 220. He explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, he lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

On January 27, 2017, a week after his inauguration, President Trump stated in an interview on the Christian Broadcasting Network that the First Executive Order would give preference in refugee applications to Christians. Referring to Syria, President Trump stated that "[i]f you were a Muslim you could come in, but if you were a Christian, it was almost impossible," a situation that he thought was "very, very unfair." J.R. 201. When President Trump was preparing to sign the First Executive Order later that day, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142 The day after the Order was issued, former New York City Mayor Rudolph W. Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-248.

In response to the court-issued injunctions against provisions of the First Executive Order, President Trump maintained at a February 16, 2017 news conference that the First Executive Order was lawful but that a new Order would be issued. J.R. 91. Stephen Miller, Senior Policy Advisor to the President, described the changes being made to the Order as "mostly minor technical differences," emphasizing that the "basic policies are still going to be in effect." J.R. 319. White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. As of February 12, 2017, Trump's Statement on Preventing Muslim Immigration remained on his campaign website. J.R. 207.

Upon the issuance of the Second Executive Order, Secretary of State Rex Tillerson described it as "a vital measure for strengthening our national security." J.R. 115. In a March 7, 2017 interview, Secretary of Homeland Security Kelly stated that the Order was not a Muslim ban but instead was focused on countries with "questionable vetting procedures," then noted that there are 13 or 14 countries with questionable vetting procedures, "not all of them Muslim countries and not all of them in the Middle East." J.R. 150.

In a joint affidavit, 10 former national security, foreign policy, and intelligence officials who served in the White House, Department of State, Department of Homeland Security, and Central Intelligence Agency in Republican and Democratic Administrations, four of whom were aware of the available intelligence relating to potential terrorist threats to the United States as of January 19, 2017, have stated that "there is no national security purpose for a total bar on entry for aliens" from the Designated Countries and that they are unaware of any prior example of a president suspending admission for such a "broad class of people." J.R. 404, 406. The officials note that no terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001, and that no intelligence as of January 19, 2017 suggested any such potential threat. Nor, the former officials assert, is there any rationale for the abrupt shift from individualized vetting to group bans. J.R. 404.

V. The Plaintiffs

Plaintiffs, comprised of six individuals and three organizations, assert that they will be harmed by the implementation of the Second Executive Order. Collectively, they assert that because the Individual Plaintiffs are Muslim and the Organizational Plaintiffs serve or represent Muslim clients or members, the anti-Muslim animus underlying the Second Executive Order inflicts stigmatizing injuries on them all. The Individual Plaintiffs, who each have one or more relatives who are nationals of one of the Designated Countries and are currently in the process of seeking permission to enter the United States, also claim that if the Second Executive Order is allowed to go into effect, their separation from their loved ones, many of whom live in dangerous conditions, will be unnecessarily prolonged.

Two of the Organizational Plaintiffs, the Hebrew Immigrant Aid Society and the International Refugee Assistance Project, which provide services to refugees, assert that injuries they have suffered under the First Executive Order will continue if the Second Executive Order goes into effect, including lost revenue arising from a reduction in refugee cases that may necessitate reductions in staff. They also assert that their clients, many of whom are refugees now re-settled in the United States, will be harmed by prolonged separation from relatives in the Designated Countries currently seeking to join them. Plaintiff Middle East Studies Association, many of whose members are nationals of one of the Designated Countries, claims that the Second Executive Order would make it more difficult for certain members to travel for academic conferences and field work, and that the inability of its members to enter the United States threatens to cripple its annual conference, on which it relies for a large portion of its yearly revenue.

In light of these alleged imminent harms, Plaintiffs now ask this Court to preliminarily enjoin enforcement of the Second Executive Order.

CONCLUSIONS OF LAW

In this Motion, Plaintiffs seek a preliminary injunction based on their claims that the Second Executive Order violates (1) the Immigration and Nationality Act and (2) the Establishment Clause.

I. Standing

Article III of the Constitution limits the judicial power of the federal courts to actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. To invoke this power, a litigant must have standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). A plaintiff establishes standing by demonstrating (1) a "concrete and particularized" injury that is "actual or imminent," (2) "fairly traceable to the challenged conduct," (3) and "likely to be redressed by a favorable judicial decision." *Id.*; *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007). Standing must be demonstrated for each claim. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). The presence of one plaintiff with standing renders a claim justiciable. *Id.* at 370-71.

A. Immigration and Nationality Act

Several Individual Plaintiffs, specifically John Doe No. 1, John Doe No. 3 and Jane Doe No. 2, have standing to assert the claim that the travel ban for citizens of the Designated Countries violates the INA's prohibition on discrimination in the issuance of immigrant visas on the basis of nationality, 8 U.S.C. § 1152(a). These Individual Plaintiffs are all U.S. citizens or lawful permanent residents who have sponsored relatives who are citizens of one of the Designated Countries and now seek immigrant visas to enter the United States. They argue that the delay or denial of the issuance of visas will cause injury in the form of continued separation from their family members. *Cf. Covenant Media*, 493 F.3d at 428 (stating that not having an application processed in a timely manner is a form of cognizable injury).

Although neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has explicitly endorsed this basis for standing, the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner challenging the application of the immigration laws to that foreign individual. *See Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (considering an action brought by a U.S. citizen challenging the denial of her husband's visa that failed to result in a majority of the Court agreeing whether the plaintiff had a constitutionally-protected liberty interest in the processing of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (considering the merits of a claim brought by American plaintiffs challenging the denial of a visa to a Belgian journalist whom they had invited to speak in various academic forums in the United States); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (stating that because standing relates to a court's power to hear and adjudicate a case, it is normally "considered a threshold question that must be resolved in [the litigant's] favor before proceeding to the merits"); *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986) ("Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in

Mandel, it would have raised the issue on its own motion."). Other courts have done the same. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (considering an action by a United States citizen challenging the denial of her husband's visa and holding that the citizen had a procedural due process right to a "limited judicial inquiry regarding the reason for the decision"); *Allende v. Shultz*, 845 F.2d 1111, 1114 & n.4 (1st Cir. 1988) (evaluating the merits of a claim brought by scholars and leaders who extended invitations to a foreign national challenging the denial of her visa).

The United States Court of Appeals for the District of Columbia Circuit has found that U.S. citizens and residents have standing to challenge the denial of visas to individuals in whose entry to the United States they have an interest. *See Abourezk*, 785 F.2d at 1050 (finding that U.S. citizens and residents had standing to challenge the denial of visas to foreigners whom they had invited to "attend meetings or address audiences" in the United States); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). In *Legal Assistance*, the court specifically held that U.S. resident sponsors had standing to assert that the State Department's failure to process visa applications of Vietnamese citizens in Hong Kong violated the provision at issue here, 8 U.S.C. § 1152. *Id.* at 471. The court articulated the cognizable injury to the plaintiffs as the prolonged "separation of immediate family members" resulting from the State Department's inaction. *Id.* Here, the three Individual Plaintiffs who seek the entry of family members from the Designated Countries into the United States face the same harm of continuing separation from their respective family members. This harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation, in barring their entry, would cause the prolonged separation, and the injury is "likely to be redressed by a favorable judicial decision" because invalidation of the relevant provisions of the Executive Order would remove a barrier to their entry. *Hollingsworth*, 133 S. Ct. at 2661.

Defendants nevertheless argue that the Individual Plaintiffs' harm does not arise from a "legally protected interest," citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing an "injury in fact" as a "legally protected interest" which is "concrete and particularized"). However, the case cited by *Lujan* in referencing the "legally protected interest" requirement referred to an injury "deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), *cited with approval in Lujan*, 504 U.S. at 561. Indeed, in *Lujan*, the Court also noted that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63. Since *Lujan*, courts have clarified that a party is not required to have a "substantive right sounding in property or contract" to articulate a legally protected injury. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (recognizing aesthetic and recreational enjoyment as a legally protected interest); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (explaining that although standing "often turns on the nature and source of the claim asserted," "standing in no way depends on the merits" of a plaintiff's claim); *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 363-66 (D.C. Cir. 2005) (Williams, J., concurring) (suggesting that a legally protected interest is merely another label for a judicially cognizable interest). Plaintiffs' interests arising from the separation from family members are consistent with the injury requirement.

Because this claim is a statutory cause of action, these Individual Plaintiffs must also meet the requirement of having interests that fall within the "zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 (1987). In the context of the APA, the "zone of interests" test is "not especially demanding." *Lexmark*, 134 S. Ct. at 1389. A plaintiff's interest need only "arguably" fall within the zone of interests, and the test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (internal quotation marks omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). Because implementing the "underlying intention of our immigration laws regarding the preservation of the family unit" is among the INA's purposes, the interests of these Individual Plaintiffs, who have sponsored family members who will be denied entry pursuant to the Second Executive Order, fall within the zone of interest protected by the statute. *Legal Assistance*, 45 F.3d at 471-72 (quoting H.R. Rep. No. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680). The Court therefore finds that these three Individual Plaintiffs have standing to assert the claim under 8 U.S.C. § 1152.

Finally, although some of the Individual Plaintiffs' relatives may be eligible for a waiver under the Second Executive Order, because the waiver process presents an additional hurdle that would delay reunification, their claims are ripe. *See Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (finding in a Fair Housing Act action that plaintiffs' claim was ripe where, "assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted").

B. Establishment Clause

At least three of the Individual Plaintiffs, Muhammed Meteab, John Doe No. 1, and John Doe No. 3, each of whom is a Muslim and a lawful permanent resident of the United States, have standing to assert the claim that the Second Executive Order violates the Establishment Clause. John Doe No. 1 and John Doe No. 3 each has a wife who is an Iranian national, currently residing in Iran, who would be barred from entry to the United States by the Executive Orders. John Doe No. 1

has stated that the travel ban has "created significant fear, anxiety, and insecurity" for him and his wife and that the "anti-Muslim views" underlying the Executive Orders have caused him "significant stress and anxiety" to the point that he "worr[ies] that I may not be safe in this country." J.R. 45. John Doe No. 3 has stated that the "anti-Muslim attitudes that are driving" the Executive Orders cause him "stress and anxiety" and lead him to "question whether I even belong in this country." J.R. 49. Meteab, who has Iraqi family members seeking entry as refugees but who are now subject to the Executive Orders' suspension of refugee admissions, has stated that the "official anti-Muslim sentiment" of the Executive Orders has caused "mental stress" and has rendered him "isolated and disparaged" in his community. J.R. 53.

Courts have recognized that for purposes of an Establishment Clause claim, noneconomic, intangible harms to "spiritual, value-laden beliefs" can constitute a particularized injury sufficient to support standing. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. *1997)*; *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to "disfavored treatment" based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); *Catholic League v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a "psychological consequence" constitutes a concrete injury where it is "produced by government condemnation of one's own religion or endorsement of another's in one's own community"). The injury, however, needs to be a "personal injury suffered" by the plaintiff "*as a consequence* of the alleged constitutional error." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Such a "personal injury" can result, for example, from having "unwelcome direct contract with a religious display that appears to be endorsed by the state," *Suhre*, 131 F.3d at 1086, or from being a member of the geographic community in which the governmental action disfavoring their religion has an impact, *see Awad*, 670 F.3d at 1122-23; *Catholic League*, 624 F.3d at 1048 (finding that two devout Catholics and a Catholic advocacy group, all based in San Francisco, had standing to challenge an allegedly anti-Catholic resolution passed by the city government). Here, where the Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a "personal injury" as a "consequence" of the alleged Establishment Clause violation. *Valley Forge Christian Coll.*, 454 U.S. at 485.

The harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation will allegedly effect the disfavoring of Islam, and the injury is "likely to be redressed by a favorable judicial decision" invalidating the relevant provisions of the Executive Order. *Hollingsworth*, 133 S. Ct. at 2661. The Court therefore finds that these three Individual

Plaintiffs have standing to assert an Establishment Clause challenge.

Having identified at least one plaintiff with standing to assert the claims to be addressed on this Motion, the Court need not address the standing arguments of the other Plaintiffs.

II. Legal Standard

To obtain a preliminary injunction, moving parties must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). A moving party must satisfy each requirement as articulated. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Because a preliminary injunction is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

III. Likelihood of Success on the Merits

Because "courts should be extremely careful not to issue unnecessary constitutional rulings," *Am. Foreign Servo Ass'n v. Garfunkel*, 490 U.S. 153, 161 (1989) (per curiam), the Court first addresses the statutory claim and then proceeds, if necessary, to the constitutional claim.

A. Immigration and Nationality Act

Plaintiffs assert that the President's travel ban violated provisions of the INA. The formulation of immigration policies is entrusted exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954). In the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, Congress delegated some of its power to the President in the form of what is now Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f) ("§ 1182(f)"), which provides that:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In the Second Executive Order, President Trump invokes § 1182(f) in issuing the travel ban against citizens of the Designated Countries. *See* 2d Order § 2(c).

Plaintiffs argue that by generally barring the entry of citizens of the Designated Countries, the Second Order violates Section 202(a) of the INA, codified at 8 U.S.C. § 1152(a) ("§ 1152(a)"), which provides that, with certain exceptions:

> No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]

8 U.S.C. § 1152(a)(1)(A).

Section 1152(a) was enacted as part of the Immigration and Nationality Act of 1965, which was adopted expressly to abolish the "national origins system" imposed by the Immigration Act of 1924, which keyed yearly immigration quotas for particular nations to the percentage of foreign-born individuals of that nationality who were living in the continental United States, based on the 1920 census, in order to "maintain, to some degree, the ethnic composition of the American people." H. Rep. No. 89-745, at 9 (1965). President Johnson sought this reform because the national origins system was at odds with "our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." *Id.* at 11.

At first glance, President Trump's action appears to conflict with the bar on discrimination on the basis of nationality. However, upon consideration of the specific statutory language, the Court finds no direct conflict. Section 1182(f) authorizes the President to bar "entry" to certain classes of aliens. 8 U.S.C. § 1182(f). Section 1152(a) bars discrimination based on nationality in the "issuance of an immigrant visa." *Id.* § 1152(a)(1)(A). Although entry is not currently defined in the INA, until 1997 it was defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, voluntary or otherwise." *Id.* § 1101(a)(13) (1994). In the same section of the current INA, the term "admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). The term "immigrant visa" is separately defined as "an immigrant visa required by this chapter and properly issued by a consular officer at his office outside the United States to an eligible immigrant under the provisions of this chapter." *Id.* § 1101(a)(16). The INA, in turn, makes clear that "[n]othing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States." *Id.* § 1201(h). Thus, § 1152(a) and § 1182(f) appear to address different activities handled by different government officials. When two statutory provisions "are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Accordingly, an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas.

Although the Second Executive Order does not explicitly bar citizens of the Designated Countries from receiving a visa, the Government acknowledged at oral argument that as a result of the Second Executive Order, any individual not deemed to fall within one of the exempt categories, or to be eligible for a waiver, will be denied a visa. Thus, although the Second Executive Order speaks only of barring entry, it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries. Under the plain language of the statute, the barring of immigrant visas on that basis would run contrary to § 1152(a). Just as § 1152(a) does not intrude upon the President's

§ 1182(f) authority to bar entry to the United States, the converse is also true: the § 1182(f) authority to bar entry does not extend to the issuance of immigrant visas. The power the President has in the immigration context, and certainly the power he has by virtue of the INA, is not his by right, but derives from "the statutory authority conferred by Congress." *Abourezk*, 785 F.2d at 1061. Notably, the Government has identified no instance in which § 1182(f) was invoked to bar the issuance of visas based on nationality, a step not contemplated by the language of the statute.

To the extent the Government argues that § 1152(a) does not constrain the ability of the President to use § 1182(f) to bar the issuance of immigrant visas, the Court finds no such exception. Section 1152(a) requires a particular result, namely non-discrimination in the issuance of immigrant visas on specific, enumerated bases. Section 1182(f), by contrast, mandates no particular action, but instead sets out general parameters for the President's power to bar entry. Thus, to the extent that § 1152(a) and § 1182(f) may conflict on the question whether the President can bar the issuance of immigrant visas based on nationality, § 1152(a), as the more specific provision, controls the more general § 1182(f). *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *United States v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987). Moreover, § 1152(a) explicitly excludes certain sections of the INA from its scope, specifically §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. 8 U.S.C. § 1152(a)(1)(A). Section 1182(f) is not among the exceptions. Because the enumerated exceptions illustrate that Congress "knows how to expand 'the jurisdictional reach of a statute,'" the absence of any reference to § 1182(f) among these exceptions provides strong evidence that Congress did not intend for § 1182(f) to be exempt from the anti-discrimination provision of § 1152(a). *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991)).

The Government further argues that the President may nevertheless engage in discrimination on the basis of nationality in the issuance of immigrant visas based on 8 U.S.C. § 1152(a)(1)(B), which states that "[n]othing in [§ 1152(a)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." As that statutory provision expressly applies to the Secretary of State, it does not provide a basis to uphold an otherwise discriminatory action by the President in an Executive Order. Even if the Court were to construe Plaintiffs' claim to be that the State Department's anticipated denial of immigrant visas based on nationality for a period of 90 days would run contrary to § 1152(a), the text of § 1152(a)(1)(B) does not comfortably establish that such a delay falls within this exception. Although § 1152(a)(1)(B) specifically allows the Secretary to vary "locations" and "procedures" without running afoul of the nondiscrimination provision, it does not include within the exception any authority to make temporal adjustments. Because time, place, and manner are different concepts, and § 1152(a)(1)(B) addresses only place and manner, the Court cannot readily conclude that § 1152(a)(1)(B) permits the imminent 90-day ban on immigrant visas based on nationality despite its apparent violation of the non-discrimination provision of § 1152(a)(1)(A).

Finally, the Government asserts that the President has the authority to bar the issuance of visas based on nationality pursuant to Section 215(a) of the INA, codified at 8 U.S.C. § 1185(a) ("§ 1185(a)"), which provides that:

> Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). As support for this interpretation, the Government cites President Carter's invocation of 8 U.S.C. § 1185(a)(1) to bar entry of Iranian nationals during the Iran Hostage Crisis in 1979. Crucially, however, President Carter used § 1185(a)(1) to "prescribe limitations and exceptions on the rules and regulations" governing "Iranians holding nonimmigrant visas," a category that is outside the ambit of § 1152(a). 44 Fed. Reg. 67947, 67947 (1979). The Government has identified no instance in which § 1185(a) has been used to control the immigrant visa issuance process. Under the principle of statutory construction that "all parts of a statute, if at all possible, are to be given effect," *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973), the Court

concludes that, as with § 1182(f), the most fair reading of § 1182(a)(1) is that it provides the President with the authority to regulate and control whether and how aliens enter or exit the United States, but does not extend to regulating the separate activity of issuance of immigrant visas.

Because there is no clear basis to conclude that § 1182(f) is exempt from the nondiscrimination provision of § 1152(a) or that the President is authorized to impose nationality-based distinctions on the immigrant visa issuance process through another statutory provision, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas, which the statutory language makes clear is the extent of the scope of that anti-discrimination requirement. They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Beyond § 1152(a), Plaintiffs make the additional argument under the INA that because the Second Executive Order's nationality-based distinctions are ostensibly aimed at potential terrorist threats, the Order conflicts with 8 U.S.C. § 1182(a)(3)(B), which renders an individual inadmissible based on an enumerated list of terrorism considerations. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(I), (IV), and (VII). Plaintiffs contend that these provisions indicate that Congress has established a mechanism for the individualized assessment of the terror risk an immigrant poses, such that Congress did not envision that terrorism would be addressed through broad nationality- or religion-based bans pursuant to § 1182(f). But Plaintiffs provide no support for their contention and make no showing that § 1182(a)(3)(B) and § 1182(f) "cannot mutually coexist." *Radzanower*, 426 U.S. at 155. Although Plaintiffs try to cast § 1182(a) as an emphatically individualized enterprise, neither § 1182(a) nor § 1182(f) purports to limit the President to barring entry only to classes of aliens delineated in § 1182(a). Thus, Plaintiffs are unlikely to succeed on the merits of this claim.

B. Establishment Clause

Plaintiffs assert that the travel ban on citizens from the Designated Countries is President Trump's fulfillment of his campaign promise to ban Muslims from entering the United States. They argue that the Second Executive Order therefore violates the Establishment Clause. The First Amendment prohibits any "law respecting an establishment of religion," U.S. Const. amend. I, and "mandates governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When a law does not differentiate among religions on its face, courts apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). Under the *Lemon* test, to withstand an Establishment Clause challenge (1) an act must have a secular purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not "foster 'an excessive government entanglement with religion.'" *Id.* at 612-613 (quoting *Walz v. Tax*

Comm'n, 397 U.S. 664, 674 (1970)). All three prongs of the test must be satisfied. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The mere identification of any secular purpose for the government action does not satisfy the purpose test. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 865 n.13 (2005). Such a rule "would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action." *Id.* ("[A]n approach that credits *any* valid purpose . . . has not been the way the Court has approached government action that implicates establishment." (emphasis added)). Thus, although governmental statements of purpose generally receive deference, a secular purpose must be "genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864. If a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is "secondary," the purpose test has not been satisfied. *Id.* at 860, 862-65; *see also Edwards*, 482 U.S. at 594 (finding a violation of the Establishment Clause where the "primary purpose" of the challenged act was "to endorse a particular religious doctrine").

An assessment of the purpose of an action is a "common" task for courts. *McCreary*, 545 U.S. at 861. In determining purpose, a court acts as an "objective observer" who considers "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). An "understanding of official objective" can emerge from "readily discoverable fact" without "judicial psychoanalysis" of the decisionmaker. *Id.*

Plaintiffs argue that the Second Executive Order fails the purpose prong because there is substantial direct evidence that the travel ban was motivated by a desire to ban Muslims as a group from entering the United States. Plaintiffs' evidence on this point consists primarily of public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order. Considering statements from these time periods is appropriate because courts may consider "the historical context" of the action and the "specific sequence of events" leading up to it. *Edwards*, 482 U.S. at 594-95. Such evidence is "perfectly probative" and is considered as a matter of "common sense"; indeed, courts are "forbid[den] . . . 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)); *cf. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1987) (including the "historical background of the decision," the "specific sequence of events leading up [to] the challenged decision," and "contemporary statements of the decisionmaking body" as factors indicative of discriminatory intent), *cited with approval in Edwards*, 482 U.S. at 595.

> One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian

> heritage. This presents no incongruity, however, because purpose matters.

McCreary, 545 U.S. at 866 n.14.

Specifically, the evidence offered by Plaintiffs includes numerous statements by President Trump expressing an intent to issue a Muslim ban or otherwise conveying anti-Muslim sentiments. For example, on December 7, 2015, then a Republican primary candidate, Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website "calling for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." into the country." J.R. 261. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, Trump lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

Significantly, the record also includes specific statements directly establishing that Trump intended to effectuate a partial Muslim ban by banning entry by citizens of specific predominantly Muslim countries deemed to be dangerous, as a means to avoid, for political reasons, an action explicitly directed at Muslims. In a July 24, 2016 interview on Meet the Press, soon after becoming the Republican presidential nominee, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his call for a "Muslim ban," he described it as an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. When President Trump was preparing to sign the First Executive Order, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142. The day after the First Executive Order was issued, Mayor Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-48. These types of public statements were relied upon by the Eastern District of Virginia in enjoining the First Executive Order based on a likelihood of success on an Establishment Clause claim, *Aziz*, 2017 WL 580855, at *11, and the Ninth Circuit in concluding that an Establishment Clause claim against that Order raised "serious allegations" and presented "significant constitutional questions." *Washington*, 847 F.3d at 1168.

These statements, which include explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban. In particular, the direct statements by President Trump and Mayor Giuliani's account of his conversations with President Trump reveal that the plan had been to bar the entry of nationals of predominantly Muslim countries deemed to constitute dangerous territory in order to approximate a Muslim ban without calling it one precisely the form of the travel ban in the First Executive Order. *See Aziz*, 2017 WL 580855, at *4 (quoting from a July 17, 2016 interview during which then-candidate Trump, upon hearing a tweet stating "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," responded "So you call it territories. OK? We're gonna do territories."). Such explicit statements of a religious purpose are "readily discoverable fact[s]" that allow the Court to identify the purpose of this government action without resort to "judicial psychoanalysis." *McCreary*, 545 U.S. at 862. They constitute clear statements of religious purpose comparable to those relied upon in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), where the court found that a Ten Commandments display at a state courthouse was erected for a religious purpose in part based on the chief justice stating at the dedication ceremony that "in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1286, 1296 ("[N]o psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.").

Relying primarily on this record, Plaintiffs asks this Court to issue an injunction against the Second Executive Order on Establishment Clause grounds. In considering this request, the same record of public statements by President Trump remains highly relevant. In *McCreary*, where the Court was reviewing a third attempt to create a courthouse display including the Ten Commandments after two prior displays had been deemed unconstitutional, it held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absentedminded objective observer, not one presumed familiar with the history of the government's action and competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

The Second Executive Order, issued only six weeks after the First Executive Order, differs, as relevant here, in that the preference for religious minorities in the refugee process has been removed. It also removes Iraq from the list of Designated Countries, exempts certain categories of individuals from the ban, and lists other categories of individuals who may be eligible for a case-by-case waiver from the ban. Despite these changes, the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as "mostly minor technical differences," and stated that the "basic policies are still going to be in effect." J.R. 319. When the Second Executive Order was signed on March 6, 2017, White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. The Second Executive Order itself explicitly states that the changes, particularly the addition of exemption and waiver categories, were made to address 'judicial concerns," 2d Order § 1(i), including those raised by the Ninth Circuit, which upheld an injunction based on due process concerns, *Washington*, 847 F.3d at 1156.

The removal of the preference for religious minorities in the refugee system, which was the only explicit reference to religion in the First Executive Order, does not cure the Second Executive Order of Establishment Clause concerns. Crucially, the core policy outcome of a blanket ban on entry of nationals from the Designated Countries remains. When President Trump discussed his planned Muslim ban, he described not the preference for religious minorities, but the plan to ban the entry of nationals from certain dangerous countries as a means to carry out the Muslim ban. These statements thus continue to explain the religious purpose behind the travel ban in the Second Executive Order. Under these circumstances, the fact that the Second Executive Order is facially neutral in terms of religion is not dispositive. *See Bd. Of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-702 (1994) (holding that a facially neutral delegation of civic power to "qualified voters" of a village predominantly comprised of followers of Satmas Hasidism was a "purposeful and forbidden" violation of the Establishment Clause); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 542 (1993) (holding that a facially neutral city ordinance prohibiting animal sacrifice and intended to target the Santeria faith violated the Free Exercise Clause because "the Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and action targeting religion "cannot be shielded by mere compliance with the requirement of facial neutrality").

Defendants do not directly contest that this record of public statements reveals a religious motivation for the travel ban. Rather, they argue that many of the statements may not be considered because they were made outside the formal government decisionmaking process or before President Trump became a government official. Although *McCreary*, relied upon by Defendants, states that a court considers "the text, legislative history, and implementation" of an action and "comparable" official acts, it did not purport to list the only materials appropriate for consideration.[2] 545 U.S. at 862. Notably, in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit considered quotes from county commissioners that appeared in news reports in finding that a Ten Commandments display violated the Establishment Clause. *Id.* at 701. Likewise, in *Glassroth*, the United States Court of Appeals for the Eleventh Circuit found an Establishment Clause violation based on a record that included the state chief justice's campaign materials, including billboards and television commercials, proclaiming him to be the "Ten Commandments Judge." 335 F.3d at 1282, 1284-85, 1297.

Although statements must be fairly "attributed to [a] government actor," *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010), Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the "reasonable memory" of a "reasonable observer." *McCreary*, 545 U.S. at 866. Notably, the record in *Glassroth* also included the fact that the state chief justice, before securing election to that position, had made a campaign promise to install the Ten Commandments in the state courthouse, as well as campaign materials issued by members of his campaign committee. *Glassroth*, 335 F.3d at 1285. Because the state chief justice was the ultimate decisionmaker, and his campaign committee's statements were fairly attributable to him, such material is appropriately considered in assessing purpose under the Establishment Clause. *See id.* at 1285; *Glassman*, 628 F.3d at 147. Likewise, all of the public statements at issue here are fairly attributable to President Trump, the government decisionmaker for the Second Executive Order, because they were made by President Trump himself, whether during the campaign or as President, by White House staff, or by a close campaign advisor who was relaying a conversation he had with the President. In contrast, Defendants' cited case law does not involve statements fairly attributable to the government decisionmaker. *See, e.g.*, *Glassman*, 628 F.3d at 147 (declining to consider statements made by members of a church that was alleged to have benefited from government action); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) (declining to consider statements by the artist where the government's display of artwork is challenged); *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004) (declining to consider statements by a judge and county residents about a Ten Commandments display where the county government's purpose was at issue).

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[2] In *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006), cited by Defendants, the Court criticized a dissent's reliance on press statements by senior government officials, rather than the President's formal written determination mandated by the Uniform Code of Military Justice, to provide justification for the government's determination that applying court-martial rules to a terrorism suspect's military commission was impracticable. *Id.* at 624 & n.52. It did not address what facts could be considered in assessing government purpose under the Establishment Clause, where courts have held that facts outside the specific text of the government decision may be considered. *See Edwards*, 482 U.S. at 594-95.

Defendants also argue that the Second Executive Order explicitly articulates a national security purpose, and that unlike its predecessor, it includes relevant information about national security concerns. In particular, it asserts that there is a heightened chance that individuals from the Designated Countries will be "terrorist operatives or sympathizers" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and those governments are therefore less likely to provide necessary information for the immigrant vetting process. 2d Order § 1(d). The Order also references a history of persons born abroad committing terrorism-related crimes in the United States and identifies three specific cases of such crimes. The Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Plaintiffs argue that the stated national security rationale is limited and flawed. Among other points, they note that the Second Executive Order does not identify examples of foreign nationals from Iran, Libya, Sudan, Syria, or Yemen who engaged in terrorist activity in the United States. They also note that a report from the Department of Homeland Security, Office of Intelligence and Analysis, concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity" and that "few of the impacted countries have terrorist groups that threaten the West." J.R. 158. Furthermore, they note that the 300 FBI investigations are dwarfed by the over

11,000 counterterrorism investigations at any one time, only a fraction of which lead to actual evidence of illegal activity. Finally, they note that Secretary of Homeland Security Kelly stated that there are additional countries, some of which are not predominantly Muslim, that have vetting problems but are not included among the banned countries. These facts raise legitimate questions whether the travel ban for the Designated Countries is actually warranted.

Generally, however, courts should afford deference to national security and foreign policy judgments of the Executive Branch. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). The Court thus should not, and will not, second-guess the conclusion that national security interests would be served by the travel ban. The question, however, is not simply whether the Government has identified a secular purpose for the travel ban. If the stated secular purpose is secondary to the religious purpose, the Establishment Clause would be violated. *See McCreary*, 545 U.S. at 864, 866 n.14 (stating that it is appropriate to treat two like acts differently where one has a "history manifesting sectarian purpose that the other lacks"). Making assessments on purpose, and the relative weight of different purposes, is a core judicial function. *See id.* at 861-62.

In this highly unique case, the record provides strong indications that the national security purpose is not the primary purpose for the travel ban. First, the core concept of the travel ban was adopted in the First Executive Order, without the interagency consultation process typically followed on such matters. Notably, the document providing the recommendation of the Attorney General and the Secretary of Homeland Security was issued not before the First Executive Order, but on March 6, 2017, the same day that the Second Executive Order was issued. The fact that the White House took the highly irregular step of first introducing the travel ban without receiving the input and judgment of the relevant national security agencies strongly suggests that the religious purpose was primary, and the national security purpose, even if legitimate, is a secondary *post hoc* rationale.

Second, the fact that the national security rationale was offered only after courts issued injunctions against the First Executive Order suggests that the religious purpose has been, and remains, primary. Courts have been skeptical of statements of purpose "expressly disclaim[ing] any attempt to endorse religion" when made after a judicial finding of impermissible purpose, describing them as a "litigating position." *E.g.*, *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 444, 448 (6th Cir. 2010). Indeed, the Second Executive Order itself acknowledges that the changes made since the First Executive Order were to address "judicial concerns." 2d Order § 1(i).

Third, although it is undisputed that there are heightened security risks with the Designated Countries, as reflected in the fact that those who traveled to those countries or were nationals of some of those countries have previously been barred from the Visa Waiver Program, *see* 8 U.S.C. § 1187(a)(12), the travel ban represents an unprecedented response. Significantly, during the time period since the Reagan Administration, which includes the immediate aftermath of

September 11, 2001, there have been no instances in which the President has invoked his authority under § 1182(f) or § 1185 to issue a ban on the entry into the United States of all citizens from more than one country at the same time, much less six nations all at once. Kate M. Manuel, Congo Research Serv., R44743, Executive Authority to Exclude Aliens: In Brief (2017); J.R. 405-406. In the two instances in which nationals from a single country were temporarily stopped, there was an articulable triggering event that warranted such action. Manuel, *supra*, at 10-11 (referencing the suspension of the entry of Cuban nationals under President Reagan after Cuba stopped complying with U.S. immigration requirements and the revocation of visas issued to Iranians under President Carter during the Iran Hostage Crisis). The Second Executive Order does not explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks. But while the travel ban bears no resemblance to any response to a national security risk in recent history, it bears a clear resemblance to the precise action that President Trump described as effectuating his Muslim ban. Thus, it is more likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban. Accordingly, there is a likelihood that the travel ban violates the Establishment Clause.

Finally, Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a "facially legitimate and bona fide reason" for its action. *See Mandel*, 408 U.S. at 777. This standard is most typically applied when a court is asked to review an executive officer's decision to deny a visa. *See, e.g., Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); or in other matters relating to the immigration rights of individual aliens or citizens, *see Fiallo v. Bell*, 430 U.S. 787, 790 (1977). The *Mandel* test, however, does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches." *Washington*, 847 F.3d at 1162 (holding that courts possess "the authority to review executive action" on matters of immigration and national security for "compliance with the Constitution"). In such situations, the power of the Executive and Legislative branches to create immigration law remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

Even when exercising their immigration powers, the political branches must choose "constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 941. Courts have therefore rejected arguments that they forgo the traditional constitutional analysis when a plaintiff has challenged the Government's exercise of immigration power as violating the Constitution. *See, e.g., Zadvydas*, 533 U.S. at 695 (rejecting deference to plenary power in determining that indefinite detention of aliens violated the Due Process Clause); *Chadha*, 462 U.S. at 941-43 (stating that Congress's plenary authority over the regulation of aliens does not permit it to "offend some other constitutional restriction" and holding that a statute permitting Congress to overturn the Executive Branch's decision to allow a deportable alien to remain in the United States violated constitutional provisions relating to separation of powers); *Washington*, 847 F.3d at 1167-68 (referencing standard Establishment Clause principles as applicable to the claim that the First Executive Order violated the Establishment Clause). Thus, although "[t]he Executive has broad discretion over the admission and exclusion of aliens," that discretion "may not transgress constitutional limitations," and it is "the duty of the courts" to "say where those statutory and constitutional boundaries lie." *Abourezk*, 785 F.2d at 1061.

Mindful of "the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their Establishment Clause claim. Having reached this conclusion, the Court need not address Plaintiffs' likelihood of success on their Equal Protection Clause claim.

IV. Irreparable Harm

Having concluded that Plaintiffs have established a likelihood of success on the merits, the Court turns to whether they have shown a likelihood of irreparable harm. The Supreme Court has held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* *v. Burns*, 427 U.S. 347, 373 (1976) (finding irreparable harm upon a violation of the freedom of association). The Fourth Circuit has applied this holding to cases involving the freedom of speech and expression. *E.g.*, *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190, 191-92 (4th Cir. 2013); *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). Although the Fourth Circuit has not yet held that a violation of the Establishment Clause likewise necessarily results in irreparable harm, other circuits have. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (finding irreparable harm in an Establishment Clause case and stating that the "harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion").

Here, as in *Elrod*, "First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Elrod*, 427 U.S. at 373. "[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303. The Court accordingly finds that Plaintiffs have established a likelihood of irreparable harm when the Second Executive Order takes effect.

V. Balance of the Equities and the Public Interest

While Plaintiffs would likely face irreparable harm in the absence of an injunction, Defendants are not directly harmed by a preliminary injunction preventing them from enforcing an Executive Order likely to be found unconstitutional. *See Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Aziz*, 2017 WL 580855, at *10. Preventing an Establishment Clause violation has significant public benefit beyond the interests of the Plaintiffs. The Supreme Court has recognized the "fundamental place held by the Establishment Clause in our constitutional scheme." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). The Founders "brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion" because they understood that "governmentally established religions and religious persecution go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 432-33 (1962). When government chooses sides among religions, the "inevitable result" is "hatred, disrespect, and even contempt" from those who adhere to different beliefs. *See id.* at 431. Thus, to avoid sowing seeds of division in our nation, upholding this fundamental constitutional principle at the core of our Nation's identity plainly serves a significant public interest.

At the same time, the Supreme Court has stated that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Defendants, however, have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history. Thus, the balance of the equities and the public interest favor the issuance of an injunction.

VI. Scope of Relief

Plaintiffs have asked the Court to issue an injunction blocking the Executive Order in its entirety. The Court declines to grant such broad relief. The Plaintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order. The Court will enjoin that provision only. Although Plaintiffs have argued that sections relating to the temporary ban on refugees also offend the Establishment Clause, they did not sufficiently develop that argument to warrant an injunction on those sections at this time. As for the remaining portions of the Second Order, Plaintiffs have not provided a sufficient basis to establish their invalidity. Thus, the Court declines to enjoin the Second Order in its entirety.

With respect to Section 2(c), the Court concludes that nationwide relief is warranted. It is "well established" that a federal district court has "wide discretion to fashion appropriate injunctive relief in a particular case." *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992); *see also Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (holding that the "Constitution vests the District Court with 'the judicial Power of the United States,'" which "extends across the country" (quoting U.S. Const. art. III § 1)), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). However, nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See id.*; *Richmond Tenants Org., Inc.*, 956 F.3d at 1308-39; *Texas*, 809 F.3d at 188.

The Court has found that Plaintiffs are likely to be able to establish that Section 2(c) of the Second Executive Order violates the Establishment Clause. Both the Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States, indicating that nationwide relief may be appropriate. *Richmond Tenants Org., Inc.*, 956 F.3d at 1309 (holding that a nationwide injunction was "appropriately tailored" because the plaintiffs lived in different parts of the country). Moreover, although the Government has argued that relief should be strictly limited to the specific interests of the Plaintiffs, an Establishment Clause violation has impacts beyond the personal interests of individual parties. *Joyner v. Forsyth Cty.*, 653 F.3d 341, 355 (4th Cir. 2011) ("[T]hese plaintiffs are not so different from other citizens who may feel in some way marginalized on account of their religious beliefs and who decline to risk the further ostracism that may ensue from bringing their case to court or who simply lack the resources to do so."); *City of St. Charles*, 794 F.2d at 275 (stating that a violation of the Establishment Clause causes "harm to society"). Here, nationwide relief is appropriate because this case involves an alleged violation of the Establishment Clause by the federal government manifested in immigration policy with nationwide effect. *See Decker v.*

O'Donnell, 661 F.2d 598, 618 (7th Cir. 1980) (affirming a nationwide injunction in a facial challenge to a federal statute and regulations on Establishment Clause grounds).

Finally, under these facts, a "fragmented" approach "would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67. "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*, and the Supreme Court has described immigration policy as a comprehensive and *unified* system." *Texas*, 80 F.3d at 187-88 (footnotes and quotation marks omitted). In light of the constitutional harms likely to befall Plaintiffs in the absence of relief, and the constitutional mandate of a uniform immigration law and policy, Section 2(c) of the Second Executive Order will be enjoined on a nationwide basis.

CONCLUSION

For the foregoing reasons, the Motion is GRANTED IN PART and DENIED IN PART. The Court will issue an injunction barring enforcement of Section 2(c) of the Second Executive Order. A separate Order shall issue.

Date: Mar. 15, 2017

/s/ THEODORE D. CHUANG
THEODORE D. CHUANG
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. TDC-17-0361

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, MUHAMMED METEAB, PAUL HARRISON, IBRAHIM AHMED MOHOMED, JOHN DOES NOS. 1 & 3, AND JANE DOE NO. 2, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF STATE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, AND MICHAEL DEMPSEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

Filed: Mar. 16, 2017

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court finds that the Plaintiffs have standing to maintain this civil action and have established that they are likely to prevail on the merits, that they are likely to suffer irreparable harm in the absence of injunctive relief, and that the balance of the equities and the public interest favor an injunction.

Accordingly, it is hereby ORDERED that:

1. Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order is construed as a Motion for a Preliminary Injunction.
2. The Motion, ECF No. 95, is GRANTED IN PART and DENIED IN PART.
3. The Motion is GRANTED as to Section 2(c) of Executive Order 13,780 ("Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States"). **Defendants, and all officers, agents, and employees of the Executive Branch of the United States government, and anyone acting under their authorization or direction, are ENJOINED from enforcing Section 2(c) of Executive Order 13,780.**
4. This Preliminary Injunction is granted on a nationwide basis and prohibits the enforcement of Section 2(c) of Executive Order 13,780 in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas, pending further orders from this court.
5. Plaintiffs are not required to pay a security deposit.
6. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this Order be filed.

7. The Motion is DENIED as to all other provisions of Executive Order 13,780.

Date: Mar. 15, 2017

/s/ THEODORE D. CHUANG
THEODORE D. CHUANG
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1351

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS; HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2, PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; DANIEL R. COATS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS-APPELLANTS

Argued: May 8, 2017
Decided: May 25, 2017
Amended: May 31, 2017

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:17-cv-00361-TDC)

Affirmed in part, vacated in part by published opinion. Chief Judge Gregory wrote the opinion, in which Judges Motz, King, Wynn, Diaz, Floyd, and Harris joined in full. Judge Traxler wrote an opinion concurring in the judgment. Judge Keenan wrote an opinion concurring in part and concurring in the judgment, in which Judge Thacker joined except as to Part II.A.i. Judge Wynn wrote a concurring opinion. Judge Thacker wrote a concurring opinion. Judge Niemeyer wrote a dissenting opinion, in which Judges Shedd and Agee joined. Judge Shedd wrote a dissenting opinion, in which Judges Niemeyer and Agee joined. Judge Agee wrote a dissenting opinion, in which Judges Niemeyer and Shedd joined.

Before: GREGORY, Chief Judge, and NIEMEYER, MOTZ, TRAXLER, KING, SHEDD, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, and HARRIS, Circuit Judges.

GREGORY, Chief Judge[1]:

The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866), remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation. Therefore, for the reasons that follow, we affirm in substantial part the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order.

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[1] Judges Motz, King, Wynn, Diaz, Floyd, and Harris join this opinion in full, Judge Traxler concurs in the judgment, and Judges Keenan and Thacker concur in substantial part and concur in the judgment.

I.

A.

In the early evening of January 27, 2017—seven days after taking the oath of office—President Donald J. Trump signed Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("EO-1" or "First Executive Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). Referencing the past and present failings of the visa-issuance process, the First Executive Order had the stated purpose of "protect[ing] the American people from terrorist attacks by foreign nationals." EO-1, Preamble. To protect Americans, EO-1 explained, the United States must ensure that it does not admit foreign nationals who "bear hostile attitudes" toward our nation and our Constitution, who would "place violent ideologies over American law," or who "engage in acts of bigotry or hatred" (such as "'honor' killings"). *Id.* § 1.

To that end, the President invoked his authority under 8 U.S.C. § 1182(f) and immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.[2] *See* EO-1, § 3(c). During the ninety-day period, the Secretary of Homeland Security, Secretary of State, and Director of National Intelligence were to "immediately conduct a review to determine the information needed from any country" to assess whether individuals seeking entry from those countries posed a national security threat. Those cabinet officers were to deliver a series of reports updating the President as to that review and the implementation of EO-1. *See id.* § 3(a)-(b), (h).

The First Executive Order also placed several constraints on the admission of refugees into the country. It reduced the number of refugees to be admitted in fiscal year 2017 from 110,000 to 50,000 and barred indefinitely the admission of Syrian refugees. *Id.* § 5(c)-(d). It further ordered the Secretary of State to suspend for 120 days the United States Refugee Admissions Program ("USRAP"). *Id.* § 5(a). Upon resumption of USRAP, EO-1 directed the Secretary of State to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b).

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[2] According to the Pew Research Center, Iraq's population is 99% Muslim, Iran's is 99.5%, Libya's is 96.6%, Sudan's is 90.7%, Somalia's is 99.8%, Syria's is 92.8%, and Yemen's is 99.1%. *See* Pew Res. Ctr., *The Global Religious Landscape* 45-50 (2012).

Individuals, organizations, and states across the nation challenged the First Executive Order in federal court. A judge in the Western District of Washington granted a Temporary Restraining Order ("TRO"), enjoining enforcement nationwide of Sections 3(c), 5(a)-(c), and 5(e). *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit subsequently denied the Government's request to stay the TRO pending appeal and declined to "rewrite" EO-1 by narrowing the TRO's scope, noting that the "political branches are far better equipped" for that task. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam). At the Ninth Circuit's invitation, and in an effort to avoid further litigation concerning the First Executive Order, the President enacted a second order ("EO-2" or "Second Executive Order") on March 6, 2017. Exec. Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). The Second Executive Order revoked and replaced the First Executive Order. *Id.* § 1(i).

Section 2(c) of EO-2—"Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period"—is at the heart of the dispute in this case. This section reinstated the ninety-day suspension of entry for nationals from six countries, eliminating Iraq from the list, but retaining Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "Designated Countries"). EO-2, § 2(c). The President, again invoking 8 U.S.C. § 1182(f) and also citing 8 U.S.C. § 1185(a), declared that the "unrestricted entry" of nationals from these countries "would be detrimental to the interests of the United States." *Id.*[3]

The Second Executive Order, unlike its predecessor, states that nationals from the Designated Countries warrant "additional scrutiny" because "the conditions in these countries present heightened threats." *Id.* § 1(d). In justifying the selection of the Designated Countries, EO-2 explains, "Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones."[4] *Id.* The Second Executive Order states that "until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* § 1(f).

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[3] Section 2(c) reads in full:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

The Second Executive Order also provides brief descriptions of the conditions in each of the Designated Countries. It notes, for instance, that "Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas[, and] . . . elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country." *Id.* § 1(e)(iv). The Second Executive Order further states that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States." *Id.* § 1(h). It provides the following examples: two Iraqi refugees who were convicted of terrorism-related offenses in January 2013, and a naturalized citizen who came to this country as a child refugee from Somalia and who was sentenced for terrorism-related offenses in October 2014. *Id.* The Second Executive Order does not include any examples of individuals from Iran, Libya, Sudan, Syria, or Yemen committing terrorism-related offenses in the United States.

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[4] As the Government notes, nationals from these six countries are ineligible for the Visa Waiver Program, which currently allows nationals of thirty-eight countries seeking temporary admission to the United States for tourism or certain business purposes to enter without a visa. *See* 8 U.S.C. § 1187(a). The program excludes nationals of or aliens who have recently visited Iraq or Syria and nationals of or recent visitors to countries designated as state sponsors of terror (Iran, Sudan, and Syria). *See* 8 U.S.C. § 1187(a)(12); *see* U.S. Dep't of State, *U.S. Visa Waiver Program* (Apr. 6, 2016), https://www.dhs.gov/visa-waiver-program (saved as ECF opinion attachment). It also excludes recent visitors to Libya, Somalia, and Yemen. U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (saved as ECF opinion attachment). Thus, nationals from the six countries identified in Section 2(c), like nationals from the vast majority of countries, must undergo the individualized vetting of the regular visa process.

The Second Executive Order clarifies that the suspension of entry applies to foreign nationals who (1) are outside the United States on its effective date of March 16, 2017, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of EO-1—January 27, 2017. *Id.* § 3(a). Section 2(c) does not bar entry of lawful permanent residents, dual citizens traveling under a passport issued by a non-banned country, asylees, or refugees already admitted to the United States. *Id.* § 3(b). The Second Executive Order also includes a provision that permits consular officers, in their discretion, to issue waivers on a case-by-case basis to individuals barred from entering the United States. *Id.* § 3(c).

The Second Executive Order retains some—but not all—of the First Executive Order's refugee provisions. It again suspends USRAP for 120 days and decreases the number of refugee admissions for fiscal year 2017 by more than half, *id.* § 6(a), but it does not include the indefinite ban on Syrian refugees. The Second Executive Order also eliminates the provision contained in EO-1 that mandated preferential treatment of religious minorities seeking refugee status. It explains that this provision "applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion." *Id.* § 1(b)(iv). It further explains that EO-1 was "not motivated by animus toward any religion," but rather was designed to protect religious minorities. *Id.*

Shortly before the President signed EO-2, an unclassified, internal report from the Department of Homeland Security ("DHS") Office of Intelligence and Analysis dated March 2017 was released to the public. *See* J.A. 425-31. The report found that most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States, and concluded that increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States. J.A. 426. According to a news article, a separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat. J.A. 424. In a declaration considered by the district court, ten former national security, foreign policy, and intelligence officials who previously served in the White House, State Department, DHS, and Central Intelligence Agency—four of whom were aware of intelligence related to terrorist threats as of January 20, 2017—advised that "[t]here is no national security purpose for a total ban on entry for aliens from the [Designated Countries]." J.A. 91.

B.

The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump's assumption of office. We now recount certain of those statements.

On December 7, 2015, then-candidate Trump published a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." J.A. 346.[5] That same day, he highlighted the statement on Twitter, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.A. 470. And Trump read from the statement at a campaign rally in Mount Pleasant, South Carolina, that evening, where he remarked, "I have friends that are Muslims. They are great people—but they know we have a problem." J.A. 472.

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[5] Trump's "Statement on Preventing Muslim Immigration" reads in full:

> (New York, NY) December 7th, 2015,—Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension.

In an interview with CNN on March 9, 2016, Trump professed, "I think Islam hates us," J.A. 516, and "[W]e can't allow people coming into the country who have this hatred," J.A. 517. Katrina Pierson, a Trump spokeswoman, told CNN that "[w]e've allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.A. 518. In a March 22, 2016 interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration, claiming that this proposed ban had received "tremendous support" and stating, "we're having problems with

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> Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.—*Donald J. Trump*

J.A. 346. The district court noted that, as of February 12, 2017, this statement remained on Trump's campaign website. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *4 (D. Md. Mar. 16, 2017). The statement was subsequently removed from the campaign website shortly before the May 8, 2017 oral argument in this case.

the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. "You need surveillance," Trump explained, and "you have to deal with the mosques whether you like it or not." J.A. 522.

Candidate Trump later recharacterized his call to ban Muslims as a ban on nationals from certain countries or territories. On July 17, 2016, when asked about a tweet that said, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," then-candidate Trump responded, "So you call it territories. OK? We're gonna do territories." J.A. 798. He echoed this statement a week later in an interview with NBC's Meet the Press. When asked whether he had "pulled back" on his "Muslim ban," Trump replied, "We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place." J.A. 480. Trump added, "I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." J.A. 481. Trump continued, "Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently." J.A. 481.

On December 19, 2016, following a terrorist attack in Germany, President-Elect Trump lamented the attack on people who were "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.A. 506. Two days later, when asked whether recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump commented, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful." J.A. 506.

The President gave an interview to the Christian Broadcasting News on January 27, 2017, the same day he issued the First Executive Order. In that interview, the President explained that EO-1 would give preference to Christian refugees: "They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible. . . . " J.A. 461. He found that situation "very, very unfair." J.A. 461. Just before signing EO-1, President Trump stated, "'This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The following day, former New York City Mayor and presidential advisor Rudolph Giuliani appeared on Fox News and was asked, "How did the President decide the seven countries?" J.A. 508. Giuliani answered, "I'll tell you the whole history of it. So when [the President] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508. Giuliani said he assembled a group of "expert lawyers" that "focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It's based on places where there [is] substantial evidence that people are sending terrorists into our country." J.A. 508-09.

In response to the Ninth Circuit's decision not to stay enforcement of the nationwide injunction, the President stated at a news conference on February 16, 2017, that he intended to issue a new executive order tailored to that court's decision—despite his belief that the First Executive Order was lawful. *See* J.A. 334. In discussing the Ninth Circuit's decision and his "[e]xtreme vetting" proposal, the President stated, "I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result." J.A. 352. A few days later Stephen Miller, Senior Policy Advisor to the President, explained that the new order would reflect "mostly minor technical differences," emphasizing that it would produce the "same basic policy outcome for the country." J.A. 339. White House Press Secretary Sean Spicer stated, "The principles of the executive order remain the same." J.A. 379. And President Trump, in a speech at a rally in Nashville, Tennessee, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/ (saved as ECF opinion attachment)).

At the March 6, 2017 press conference announcing the Second Executive Order, Secretary of State Rex Tillerson said, "This executive order is a vital measure for strengthening our national security." J.A. 376. That same day, Attorney General Jefferson Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President detailing how weaknesses in our immigration system compromise our nation's security and recommending a temporary pause on entry of nationals from the Designated Countries. Appellants' Br. 8 n.3 (citing Letter from Jefferson B. Sessions III, Attorney Gen., and John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump (Mar. 6, 2017)). In a CNN interview the next day, Secretary Kelly specified that there are probably "13 or 14 countries" that have "questionable vetting procedures," not all of which are Muslim countries or in the Middle East. J.A. 411. He noted that there are "51 overwhelmingly Muslim countries" and rejected the characterization of EO-2 as a "Muslim ban." J.A. 412.

C.

This action was brought by six individuals, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, and three organizations that serve or represent Muslim clients or members.

Four of the individual Plaintiffs—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—allege that EO-2 would impact their immediate family members' ability to obtain visas. J.A. 213-14, 245-52, 305, 308-09, 318-19. Collectively, they claim that Section

2(c) of EO-2, the provision that suspends entry for certain foreign nationals for ninety days, will prolong their separation from their loved ones. *See, e.g.*, J.A. 306. John Doe #1 has applied for a spousal immigration visa so that his wife, an Iranian national, can join him in the United States; the application was approved, and she is currently awaiting her visa interview. J.A. 305. Jane Doe #2, a college student in the United States, has a pending I-130 visa application on behalf of her sister, a Syrian refugee living in Saudi Arabia. J.A. 316, 318-19. Since the filing of the operative Complaint on March 10, 2017, two of Plaintiffs' family members have obtained immigrant visas. The Government informed the district court that Paul Harrison's fiancé secured and collected a visa on March 15, 2017, the day before EO-2 was to take effect. Appellants' Br. 19 n.6 (citing J.A. 711-12, 715). Doe #3's wife secured an immigrant visa on May 1, 2017, and Plaintiffs anticipate that she will arrive in the United States within the next eight weeks. J.A. 819. The remaining two individual Plaintiffs—Muhammed Meteab and Ibrahim Ahmed Mohomed—allege that EO-2 would delay or deny the admission of their family members as refugees. J.A. 214, 249-50, 252, 313-14, 321-22.

Beyond claiming injury to their family relationships, several of the individual Plaintiffs allege that the anti-Muslim message animating EO-2 has caused them feelings of disparagement and exclusion. Doe #1, a scientist who obtained permanent resident status through the National Interest Waiver program for people with extraordinary abilities, references these "anti-Muslim views," worries about his safety in this country, and contemplates whether he should return to Iran to be with his wife. J.A. 304, 306. Plaintiff Meteab relays that the "anti-Muslim sentiment" motivating EO-2 had led him to feel "isolated and disparaged in [his] community." J.A. 314. He explains that when he is in public with his wife, who wears a hijab, he "sense[s] a lot of hostility from people" and recounts that his nieces, who both wear a hijab, "say that people make mean comments and stare at them for being Muslim." J.A. 314. A classmate "pulled the hijab off" one of his nieces in class. J.A. 314.

Two of the organizational Plaintiffs, the International Refugee Assistance Project and the Hebrew Immigrant Aid Society, primarily assist refugees with the resettlement process. *See* J.A. 210-13, 235-43. These organizations claim that they have already diverted significant resources to dealing with EO-2's fallout, and that they will suffer direct financial injury from the anticipated reduction in refugee cases. J.A. 238, 243, 276-77. They further claim that their clients, who are located in the United States and the Middle East, will be injured by the delayed reunification with their loved ones. J.A. 268, 282-83. The final Plaintiff, the Middle East Studies Association, an umbrella organization dedicated to fostering awareness of the Middle East, asserts that EO-2 will, among other injuries, reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees. J.A. 243-45, 300-03.

D.

Plaintiffs initiated this suit on February 7, 2017, seeking declaratory and injunctive relief against enforcement of the First Executive Order. Plaintiffs claimed that EO-1 violated the Establishment Clause of the First Amendment; the equal protection component of the Due Process Clause of the Fifth Amendment; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-24 (2012); and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2012). They named as Defendants the President, DHS, the Department of State, the Office of the Director of National Intelligence, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence.

On March 10, 2017, four days after the President issued EO-2, Plaintiffs filed the operative Complaint, along with a motion for a TRO and/or preliminary injunction. Plaintiffs sought to enjoin implementation of EO-2 in its entirety, prior to its effective date. In quick succession, the Government responded to the motion, Plaintiffs filed a reply, and the parties appeared for a hearing.

The district court construed the motion as a request for a preliminary injunction, and on March 16, 2017, it granted in part and denied in part that motion. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *1. In its Memorandum Opinion, the district court first found that three individual Plaintiffs (Doe #1, Doe #2, and Doe #3) had standing to bring the claim that Section 2(c) violates the INA's provision prohibiting discrimination on the basis of nationality in the issuance of immigrant visas, 8 U.S.C. § 1152(a)(1)(A). *Id.* at *6.

The court also determined that at least three individual Plaintiffs (Meteab, Doe #1, and Doe #3) had standing to pursue the claim that EO-2 violates the Establishment Clause. *Id.* at *7.

After finding Plaintiffs' claims justiciable, the district court turned to the merits of their claims. The court determined that Plaintiffs are likely to succeed only in part on the merits of their INA claim. *Id.* at *10. It found that Section 2(c) likely violates § 1152(a)(1)(A), but only as to its effective bar on the issuance of *immigrant* visas, because § 1152(a)(1)(A) explicitly applies solely to immigrant visas. To the extent that Section 2(c) prohibits the issuance of nonimmigrant visas and bars entry on the basis of nationality, the court found that it was not likely to violate § 1152(a)(1)(A). *Id.* The court did not discuss this claim in addressing the remaining preliminary injunction factors.

The district court next found that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim. *Id.* at *16. It then considered the remaining preliminary injunction requirements, but only as to the Establishment Clause claim: it found that Plaintiffs would suffer irreparable injury if EO-2 were to take effect, that the balance of the equities weighed in Plaintiffs' favor, and that a preliminary injunction was in the public interest. *Id.* at *17. The district court concluded that a preliminary injunction was therefore proper as to Section 2(c) of EO-2 because Plaintiffs' claims centered primarily on that provision's suspension of entry. The court accordingly issued a nationwide injunction barring enforcement of Section 2(c). *Id.* at *18.

Defendants timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II.

Because the district court enjoined Section 2(c) in its entirety based solely on Plaintiffs' Establishment Clause claim, we need not reach the merits of Plaintiffs' statutory claim under the INA.

In Section 2(c) of EO-2, the President suspended the entry of nationals from the six Designated Countries, pursuant to his power to exclude aliens under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f), and Section 215(a)(1) of the INA, codified at 8 U.S.C. § 1185(a)(1). The Government contends that Section 2(c)'s suspension of entry falls squarely within the "expansive authority" granted to the President by § 1182(f)[6] and § 1185(a)(1).[7] Appellants' Br. 28. Plaintiffs, on the other hand, argue that Section 2(c) violates a separate provision of the INA, Section 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), prohibiting discrimination on the basis of nationality "in the issuance of immigrant visas."[8]

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[6] Section 1182(f), entitled "Suspension of entry or imposition of restrictions by President," provides in pertinent part that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

[7] Section 1185(a)(1) provides that "[u]nless otherwise ordered by the President, it shall be unlawful[] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject

The district court determined that Plaintiffs are likely to succeed on their claim under § 1152(a)(1)(A) only in limited part. Because Section 2(c) has the practical effect of halting the issuance of immigrant visas on the basis of nationality, the court reasoned, it is inconsistent with § 1152(a)(1)(A). To that extent—and contrary to the Government's position—the court found that Presidential authority under § 1182(f) and § 1185(a)(1) is cabined by the INA's prohibition on nationality-based discrimination in visa issuance. But the district court's ruling was limited in two important respects. First, because § 1152(a)(1)(A) applies only to the issuance of *immigrant* visas, the district court discerned no conflict between that provision and the application of Section 2(c) to persons seeking *non-immigrant* visas. And second, the district court found that because § 1152(a)(1)(A) governs the issuance of visas rather than actual entry into the United States, it poses no obstacle to enforcement of Section 2(c)'s

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to such limitations and exceptions as the President may prescribe. . . . " 8 U.S.C. § 1185(a)(1).

[8] Section 1152(a)(1)(A) provides, with certain exceptions not relevant here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

nationality-based entry bar. The district court summarized as follows:

> Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas. . . . They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Int'l Refugee Assistance Project, 2017 WL 1018235, at *10.

This narrow statutory ruling is not the basis for the district court's broad preliminary injunction enjoining Section 2(c) of EO-2 in all of its applications. Rather, Plaintiffs' constitutional claim, the district court determined, was what justified a nationwide preliminary injunction against any enforcement of Section 2(c). If we were to disagree with the district court that § 1152(a)(1)(A) partially restrains the President's authority under § 1182(f) and § 1185(a)(1), then we would be obliged to consider Plaintiffs' alternative Establishment Clause claim. And, importantly, even if we were to *agree* with the district court's statutory analysis, we still would be faced with the question of whether the scope of the preliminary injunction, which goes beyond the issuance of immigrant visas governed by § 1152(a)(1)(A) to enjoin Section 2(c) in its entirety, can be sustained on the basis of Plaintiffs' Establishment Clause claim.

In light of this posture, we need not address the merits of the district court's statutory ruling. We recognize, of course, the doctrine of constitutional avoidance, which counsels against the issuance of "unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam). But as we have explained, the district court's constitutional ruling was necessary to its decision, and review of that ruling is necessary to ours. Accordingly, we decline to reach the merits of Plaintiffs' claim under § 1152(a)(1)(A). The breadth of the preliminary injunction issued by the district court may be justified if and only if Plaintiffs can satisfy the requirements for a preliminary injunction based on their Establishment Clause claim. We therefore turn to consider that claim.

III.

The Government first asks us to reverse the preliminary injunction on the grounds that Plaintiffs' Establishment Clause claim is non-justiciable. In its view, Plaintiffs have not satisfied the foundational Article III requirements of standing and ripeness, and in any event, the doctrine of consular nonreviewability bars judicial review of their claim. We consider these threshold challenges in turn.

A.

The district court found that at least three individual Plaintiffs—Muhammed Meteab, Doe #1, and Doe #3—have standing to assert the claim that EO-2 violates the Establishment Clause. We review this legal determination de novo. *Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 n.2 (4th Cir. 2007).

The Constitution's gatekeeping requirement that federal courts may only adjudicate "Cases" or "Controversies," U.S. Const. art. III, § 2, obligates courts to determine whether litigants have standing to bring suit, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). To demonstrate standing and thus invoke federal jurisdiction, a party must establish that "(1) it has suffered an injury in fact, (2) the injury is fairly traceable to the defendants' actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The parties' core dispute is whether Plaintiffs have suffered a cognizable injury. To establish a cognizable injury, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560); *see also Beck v. McDonald*, 848 F.3d 262, 270-71 (4th Cir. 2017).

In evaluating standing, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *see also Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd by District* *of Columbia v. Heller*, 554 U.S. 570 (2008) ("The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."). This means, for purposes of standing, we must assume that Section 2(c) violates the First Amendment's prohibition against governmental "establishment of religion."

"Standing in Establishment Clause cases may be shown in various ways," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011), though as oft-repeated, "the concept of injury for standing purposes is particularly elusive" in this context, *Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). Nevertheless, the Supreme Court and this Circuit have developed a set of rules that guide our review.

To establish standing for an Establishment Clause claim, a plaintiff must have "*personal contact* with the *alleged* establishment of religion." *Id.* at 1086 (emphasis added). A "mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Id.* The Supreme Court has reinforced this principle in recent years: "plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion." *Winn*, 563 U.S. at 129. This "direct harm" can resemble injuries in other contexts. Merchants who suffered economic injury, for instance, had standing to challenge Sunday closing laws as violative of the Establishment Clause. *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961); *Czyzewski v.*

Jevic Holding Corp., 137 S. Ct. 973, 983 (2017) (noting that, in *McGowan*, appellants who were "fined $5 plus costs had standing"). But because Establishment Clause violations seldom lead to "physical injury or pecuniary loss," the standing inquiry has been adapted to also include "the kind of injuries Establishment Clause plaintiffs" are more "likely to suffer." *Suhre*, 131 F.3d at 1086. As such, "noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Id.* "Feelings of marginalization and exclusion are cognizable forms of injury," we recently explained, "particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

Doe #1—who is a lawful permanent resident of the United States, Muslim, and originally from Iran—filed a visa application on behalf of his wife, an Iranian national. Her application has been approved, and she is currently awaiting her consular interview. J.A. 305. If it took effect, EO-2 would bar the entry of Doe #1's wife. Doe #1 explains that because EO-2 bars his wife's entry, it "forces [him] to choose between [his] career and being with [his] wife," and he is unsure "whether to keep working here" as a scientist or to return to Iran. J.A. 306. Doe #1 adds that EO-2 has "created significant fear, anxiety, and insecurity" for him and his wife. He highlights the "statements that have been made about banning Muslims from entering, and the broader context," and states, "I worry that I may not be safe in this country." J.A. 306; *see also* J.A. 314 (Plaintiff Meteab describing how the "anti-Muslim sentiment motivating" EO-2 has led him to feel "isolated and disparaged in [his] community").

Doe #1 has therefore asserted two distinct injuries stemming from his "personal contact" with the alleged establishment of religion—EO-2. *Suhre*, 131 F.3d at 1086. First, EO-2 will bar his wife's entry into the United States and prolong their separation. And second, EO-2 sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community.

We begin with Doe #1's allegation that EO-2 will prolong his separation from his wife. This Court has found that standing can be premised on a "threatened rather than actual injury," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc), as long as this "threat of injury [is] both real and immediate," *Beck*, 848 F.3d at 277 (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)). The purpose of the longstanding "imminence" requirement, which is admittedly "a somewhat elastic concept," is "to ensure that the alleged injury is not too speculative for Article III purposes —that the injury is '*certainly* impending.'" *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

The Government does not contest that, in some circumstances, the prolonged separation of family members can constitute an injury-in-fact. The Government instead argues that Doe #1's claimed injury is speculative and non-imminent, Appellants' Br. 19, such that it is not "legally and judicially cognizable." *Id.* at 18 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). According to the Government, Doe #1 has failed to show that his threatened injury—prolonged separation from his wife—is imminent. It asserts that Doe #1 has offered no reason to believe that Section 2(c)'s "short pause" on entry "will delay the issuance of [his wife's] visa." Appellants' Br. 19.

But this ignores that Section 2(c) appears to operate by design to delay the issuance of visas to foreign nationals. Section 2(c)'s "short pause" on entry effectively halts the issuance of visas for ninety days—as the Government acknowledges, it "would be pointless to issue a visa to an alien who the consular officer already knows is barred from entering the country." Appellants' Br. 32; *see also* Brief for Cato Institute as Amicus Curiae Supporting Appellees 25-28, ECF No. 185 (arguing that Section 2(c) operates as a ban on visa issuance). The Government also cites 8 U.S.C. § 1201(g), which provides in relevant part that "[n]o visa or other documentation shall be issued to an alien if [] it appears to the consular officer . . . that such alien is ineligible to receive a visa or other documentation under section 1182 of this title." *See also* U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016). A ninety-day pause on issuing visas would seem to necessarily inject at least some delay into any pending application's timeline. And in fact, the Government suggests that pending visa applications might not be delayed, but *denied*. *See* Appellants' Br. 33 (explaining that "when an alien subject to the Order is denied an immigrant visa, . . . he is being denied a visa because he has been validly barred from entering the country"). A denial on such grounds would mean that once the entry suspension period concludes, an alien would have to restart *from the beginning* the lengthy visa application process. What is more, Section 2(c) is designed to "reduce investigative burdens on relevant agencies" to facilitate *worldwide* review of the current procedures for "screening and vetting of foreign nationals." Logically, dedicating time and resources to a global review process will further slow the adjudication of pending applications.

Here, Doe #1 has a pending visa application on behalf of his wife, seeking her admission to the United States from one of the Designated Countries. Prior to EO-2's issuance, Doe #1 and his wife were nearing the end of the lengthy immigrant visa process, as they were waiting for her consular interview to be scheduled. J.A. 305. They had already submitted a petition, received approval of that petition, begun National Visa Center ("NVC") Processing, submitted the visa application form, collected and submitted the requisite financial and supporting documentation to NVC, and paid the appropriate fees. J.A. 305; *see* U.S. Dep't of State, *The Immigrant Visa Process*, https://travel.state.gov/content/visas/en/immigrate/immigrant-process.html (last visited May 14, 2017) (saved as ECF opinion attachment) (diagramming steps of the immigrant-visa application process). If Section 2(c) were in force—restricting the issuance of visas to nationals in the Designated Countries for ninety days and initiating the worldwide review of existing visa standards—we find a "real and immediate" threat that it would prolong Doe #1's separation from his wife, either by delaying the issuance of her visa or denying her visa and forcing her to restart the application process. *Beck*, 848 F.3d at 277 (quoting *Lebron*, 670 F.3d at 560).

This prolonged family separation is not, as the Government asserts, a remote or speculative possibility. Unlike threatened injuries that rest on hypothetical actions a plaintiff may take "some day," *Lujan*, 504 U.S. at 564, or on a "highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148, the threatened injury here is imminent, sufficiently "real" and concrete, *Spokeo*, 136 S. Ct. at 1549, and would harm Doe #1 in a personal and "particularized" way, *id.* at 1548. The progression of Doe #3's wife's visa application illustrates this. Doe #3's wife received a visa on May 1, 2017, while Section 2(c) was enjoined. If Section 2(c) had been in effect, she would have been ineligible to receive a visa until after the expiration of the ninety-day period. *See* 8 U.S.C. § 1201(g). Put simply, Section 2(c) would have delayed the issuance of Doe #3's wife's visa. This cuts directly against the Government's assertion that it is uncertain whether or how Section 2(c) would affect visa applicants. Clearly Section 2(c) will delay and disrupt pending visa applications.

Even more, flowing from EO-2 is the alleged state-sanctioned message that foreign-born Muslims, a group to which Doe #1 belongs, are "outsiders, not full members of the political community." *Moss*, 683 F.3d at 607 (quoting *McCreary*, 545 U.S. at 860).[9] Doe #1 explains how the Second Executive Order has caused him to fear for his personal safety in this country and wonder whether he should give up his career in the United States and return to Iran to be with his wife. J.A. 306. This harm is consistent with the "[f]eelings of marginalization and exclusion" injury we recognized in *Moss*. 683 F.3d at 607.

In light of these two injuries, we find that Doe #1 has had "personal contact with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086. Regardless of whether EO-2 actually violates the Establishment Clause's command not to disfavor a particular religion, a merits inquiry explored in Section IV.A, his injuries are on par with, if not greater than, injuries we previously deemed sufficient in this context. *See Moss*, 683 F.3d at 607 (finding Jewish daughter and father who received letter describing public school policy of awarding academic credit for private, Christian religious instruction suffered injury in part because they were made to feel like "'outsiders' in their own community").[10]

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[9] The Government would have us, in assessing standing, delve into whether EO-2 sends a sufficiently religious message such that it violates the Establishment Clause. But this "put[s] the merits cart before the standing horse." *Cooksey*, 721 F.3d at 239 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006)). The question of whether EO-2 "conveys a message of endorsement or disapproval [of religion]" is a merits determination. *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985)). And both parties address it as a merits question in their briefs. Appellants' Br. 48 ("The Order, in contrast, conveys no religious message. . . . "); *id.* at 52 ("Here, the Order does not convey a religious message. . . . "); Appellees' Br. 38 ("The Order's purpose to exclude Muslims conveys the exact same message. . . . "). Because we assume the merits of Plaintiffs' claim in assessing standing, we need not reach the Government's argument on this point.

The Government attempts to undercut these injuries in several ways. It first frames Plaintiffs' injuries as "stress." Appellants' Br. 23. That minimizes the psychological harm that flows from confronting official action preferring or disfavoring a particular religion and, in any event, does not account for the impact on families. The Government next argues that because the Second Executive Order "directly applies only to aliens abroad from the specified countries," it is "not directly targeted at plaintiffs," who are based in the United States, "in the way that local-or state-government messages are." Appellants' Reply Br. 3. An executive order is of course different than a local Sunday closing law or a Ten Commandments display in a state courthouse, but that does not mean its impact is any less direct. Indeed, because it emanates from the highest elected office in the nation, its impact is arguably felt even more directly by the individuals it affects.

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[10] Plaintiffs' injuries are also consistent with the injuries that other courts have recognized in Establishment Clause cases that do not involve religious displays or prayer. *See Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (recognizing injury stemming from amendment that "condemn[ed] [plaintiff's] religious faith and expose[d] him to disfavored treatment"); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc) (finding "exclusion or denigration on a religious basis within the political community" to be sufficiently concrete injury).

From Doe #1's perspective, the Second Executive Order does not apply to arbitrary or anonymous "aliens abroad." It applies to his wife.

More than abstractly disagreeing with the wisdom or legality of the President's policy decision, Plaintiffs show how EO-2 impacted (and continues to impact) them *personally*. Doe #1 is not simply "roam[ing] the country in search of governmental wrongdoing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982). Rather, he is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life.[11] This case thus bears little resemblance to *Valley Forge*.

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[11] For similar reasons, this case is not, as the Government claims, comparable to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008). In that case, the court found that non-liturgical Protestant chaplains who were part of the Navy's Chaplain Corps lacked standing to bring a claim that the Navy preferred Catholic chaplains in violation of the Establishment Clause. *Id.* at 765. The court stated its holding as follows: "When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown an injury-in-fact to bring an Establishment Clause claim." *Id.* at 764-65. The court repeatedly emphasized that plaintiffs were not themselves affected by the challenged action. *See id.* at 758 ("[T]he plaintiffs do not claim that the Navy actually discriminated against any of them."); *id.* at 760 ("But plaintiffs have conceded that they themselves did not suffer employment discrimination. . . . Rather, they suggest that *other* chaplains suffered discrimination."). In fact, plaintiffs' theory of standing was so expansive that their counsel conceded at oral argument that even the "judges on th[e] panel" would have standing to challenge the

We likewise reject the Government's suggestion that Plaintiffs are seeking to vindicate the legal rights of third parties. The prudential standing doctrine includes a "general prohibition on a litigant's raising another person's legal rights." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This "general prohibition" is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.[12]

For all of these reasons, we find that Doe #1 has met his burden to establish an Article III injury. We

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allegedly discriminatory conduct. *Id.* at 764. Here, by contrast, Doe #1 *is* directly affected by the government action—both its message and its impact on his family. Thus, contrary to the Government's assertion, Appellants' Br. 24, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it.

[12] The district court here correctly recognized that the Supreme Court has on multiple occasions "reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *5 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (reaching merits where American citizen challenged denial of husband's visa application); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (reaching merits where American scholars challenged denial of temporary nonimmigrant visa to Marxist Belgian journalist)); *see also Mandel*, 408 U.S. at 772 ("Even assuming, arguendo, that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveler's lectures do." (Douglas, J., dissenting)). The Supreme Court's consideration of the merits in these cases suggests, at least at a general level, that Americans have a cognizable interest in the application of immigration laws to their foreign relatives.

further find that Doe #1 has made the requisite showing that his claimed injuries are causally related to the challenged conduct—the Second Executive Order—as opposed to "the independent action of some third party not before the court." *Cooksey*, 721 F.3d at 238 (quoting *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005)). Enjoining enforcement of Section 2(c) therefore will likely redress those injuries. Doe #1 has thus met the constitutional standing requirements with respect to the Establishment Clause claim. And because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

Lastly, the Government asserts that Plaintiffs' Establishment Clause claim is unripe. It argues that under EO-2, Plaintiffs' relatives can apply for a waiver, and unless and until those waiver requests are denied, Plaintiffs' claims are dependent on future uncertainties. When evaluating ripeness, we consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). An action is fit for resolution "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). The "hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." *Lansdowne on the*

Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 199 (4th Cir. 2013) (quoting *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992)).

Our ripeness doctrine is clearly not implicated here. Plaintiffs have brought a facial challenge, alleging that EO-2 violates the Establishment Clause regardless of whether their relatives secure waivers. This legal question is squarely presented for our review and is not dependent on the factual uncertainties of the waiver process. What is more, Plaintiffs will suffer undue hardship, as explained above, were we to require their family members to attempt to secure a waiver before permitting Plaintiffs to challenge Section 2(c). We accordingly find the claim ripe for judicial decision.

B.

In one final justiciability challenge, the Government asserts that consular nonreviewability bars *any* review of Plaintiffs' claim. This Court has scarcely discussed the doctrine, so the Government turns to the District of Columbia Circuit, which has stated that "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). But in the same opinion, the court explained that judicial review was proper in cases involving "claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." *Id.* at 1163 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986)). This is precisely such a case. More fundamentally, the doctrine of consular nonreviewability does not bar judicial review of constitutional claims. *See, e.g.*, *Din*, 135 S. Ct. at 2132 (reviewing visa denial where plaintiff asserted due process claim). The Government's reliance on the doctrine is therefore misplaced.

Behind the casual assertion of consular nonreviewability lies a dangerous idea—that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, *see infra* Section IV.A, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake. To the contrary, the Supreme Court has affirmed time and again that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This "duty will sometimes involve the 'resolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). In light of this duty, and having determined that the present case is justiciable, we now proceed to consider whether the district court properly enjoined Section 2(c) of the Second Executive Order.

IV.

A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power" and is "to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola,* *Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)). For a district court to grant a preliminary injunction, "a plaintiff 'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). The district court found that Plaintiffs satisfied all four requirements as to their Establishment Clause claim, and it enjoined Section 2(c) of EO-2. We evaluate the court's findings for abuse of discretion, *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012), reviewing its factual findings for clear error and its legal conclusions de novo, *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

A.

The district court determined that Plaintiffs are likely to succeed on the merits of their claim that EO-2 violates the Establishment Clause. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *16. It found that because EO-2 is "facially neutral in terms of religion," *id.* at *13, the test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), governs the constitutional inquiry. And applying the *Lemon* test, the court found that EO-2 likely violates the Establishment Clause. The Government argues that the court erroneously applied the *Lemon* test instead of the more deferential test set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). And under *Mandel*, the Government contends, Plaintiffs' claim fails.

1.

We begin by addressing the Government's argument that the district court applied the wrong test in evaluating Plaintiffs' constitutional claim. The Government contends that *Mandel* sets forth the appropriate test because it recognizes the limited scope of judicial review of executive action in the immigration context. Appellants' Br. 42. We agree that *Mandel* is the starting point for our analysis, but for the reasons that follow, we find that its test contemplates the application of settled Establishment Clause doctrine in this case.

In *Mandel*, American university professors had invited Mandel, a Belgian citizen and revolutionary Marxist and professional journalist, to speak at a number of conferences in the United States. 408 U.S. at 756. But Mandel's application for a nonimmigrant visa was denied under a then-existing INA provision that barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism." 8 U.S.C. § 1182(a)(28)(D) (1964). The Attorney General had discretion to waive § 1182(a)(28)(D)'s bar and grant Mandel an individual exception, but declined to do so on the grounds that Mandel had violated the terms of his visas during prior visits to the United States. 408 U.S. at 759. The American professors sued, alleging, among other things, that the denial of Mandel's visa violated their First

Amendment rights to "hear his views and engage him in a free and open academic exchange." *Id.* at 760.

The Supreme Court, citing "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,'" *id.* at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), found that the longstanding principle of deference to the political branches in the immigration context limited its review of plaintiffs' challenge, *id.* at 767. The Court held that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." *Id.* at 770. The Court concluded that the Attorney General's stated reason for denying Mandel's visa—that he had violated the terms of prior visas—satisfied this test.[13] It therefore did not review plaintiffs' First Amendment claim.

Courts have continuously applied *Mandel*'s "facially legitimate and bona fide" test to challenges to individual visa denials. *See Din*, 135 S. Ct. at 2139-40 (Kennedy, J., concurring in the judgment) (applying *Mandel*'s test to challenge to visa denial); *Cardenas v. United States*, 826 F.3d 1164, 1172-73 (9th Cir. 2016) (same); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) (same). Subsequently, in *Fiallo*

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[13] The Court specifically declined to decide "what First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced." *Id.*

v. Bell, 430 U.S. 787 (1977), the Supreme Court applied *Mandel's* test to a facial challenge to an immigration law, finding "no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. And in a case where plaintiffs brought a constitutional challenge to an immigration law, this Court has found that "we must apply the same standard as the *Fiallo* court and uphold the statute if a 'facially legitimate and bona fide reason' supports [it]." *Johnson*, 647 F.3d at 127.[14] *Mandel* is therefore the starting point for our review.

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[14] In *Johnson*, this Court considered an equal protection challenge to an immigration law. *Id.* at 126-27. Relying on several of our sister circuits, we equated *Mandel's* "facially legitimate and bona fide" test with rational basis review. *Id.* at 127 (citing *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065-66 (9th Cir. 2003), *as amended* (June 9, 2003); *Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000)). But the *Johnson* Court's interpretation is incomplete. Rational basis review does build in deference to the government's reasons for acting, like *Mandel's* "facially legitimate" requirement, but it does not call for an inquiry into an actor's "bad faith" and therefore does not properly account for *Mandel's* "bona fide" requirement. Even more, *Johnson* and similar cases applying rational basis review did so in the context of equal protection challenges. *See, e.g.*, *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000). But courts do not apply rational basis review to Establishment Clause challenges, because that would mean dispensing with the purpose inquiry that is so central to Establishment Clause review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *see also Colorado Christian Univ. v. Weaver*,

But in another more recent line of cases, the Supreme Court has made clear that despite the political branches' plenary power over immigration, that power is still "subject to important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), and that it is the judiciary's responsibility to uphold those limitations. *Chadha*, 462 U.S. at 941 (stating that Congress and the Executive must "cho[ose] a constitutionally permissible means of implementing" their authority over immigration). These cases instruct that the political branches' power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action's constitutionality is in question.

We are bound to give effect to both lines of cases, meaning that we must enforce constitutional limitations on immigration actions while also applying *Mandel*'s deferential test to those actions as the Supreme Court has instructed. For the reasons that follow, however, we find that these tasks are not mutually exclusive, and that *Mandel*'s test still contemplates meaningful judicial review of constitutional challenges in certain, narrow circumstances, as we have here.

To begin, *Mandel*'s test undoubtedly imposes a heavy burden on plaintiffs, consistent with the significant deference we afford the political branches in the immigration context. *See Mathews v. Diaz*, 426 U.S. 67,

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534 F.3d 1245, 1255 n.2 (10th Cir. 2008) (suggesting that rational basis review cannot be used to evaluate an Establishment Clause claim) (citing *Heller*, 554 U.S. 570). We therefore decline to apply *Johnson*'s interpretation of *Mandel*'s "facially legitimate and bona fide" test to this case.

82 (1976) (describing the "narrow standard of [judicial] review of decisions made by the Congress or the President in the area of immigration and naturalization"). The government need only show that the challenged action is "facially legitimate and bona fide" to defeat a constitutional challenge. *Mandel*, 408 U.S. at 770. These are separate and quite distinct requirements. To be "facially legitimate," there must be a valid reason for the challenged action stated on the face of the action. *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in the judgment) (finding visa denial "facially legitimate" where government cited a statutory provision in support of the denial).

And as the name suggests, the "bona fide" requirement concerns whether the government issued the challenged action in good faith. In *Kerry v. Din*, Justice Kennedy, joined by Justice Alito, elaborated on this requirement. *Id.* at 2141.[15] Here, the burden is on the plaintiff. Justice Kennedy explained that where a plaintiff makes "an affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity," courts may "look behind" the challenged action to assess its "facially legitimate" justification. *Id.* (suggesting that if plaintiff had sufficiently alleged that government denied visa in bad faith, court should inquire whether the government's stated statutory basis for denying the visa was the actual reason for the denial). In the typical case, it will be difficult for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity. *See, e.g.*, *Cardenas*, 826 F.3d at 1173 (applying *Din* and finding that plaintiff who alleged that consular officer refused to consider relevant evidence and acted based on racial bias had failed to make an affirmative showing of bad faith). And absent this affirmative showing, courts must defer to the government's "facially legitimate" reason for the action.

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[15] The Ninth Circuit has found that Justice Kennedy's concurrence is the controlling opinion in *Din*. It relied on the Supreme Court's holding in *Marks v. United States*, which stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Cardenas*, 826 F.3d at 1171 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). We agree that Justice Kennedy's opinion sets forth the narrowest grounds for the Court's holding in *Din* and likewise recognize it as the controlling opinion.

Mandel therefore clearly sets a high bar for plaintiffs seeking judicial review of a constitutional challenge to an immigration action. But although *Mandel*'s "facially legitimate and bona fide" test affords significant deference to the political branches' decisions in this area, it does not completely insulate those decisions from *any* meaningful review. Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action. In other words, *Mandel*'s requirement that an immigration action be "bona fide" may in some instances compel more searching judicial review. Plaintiffs ask this Court to engage in such searching review here under the traditional Establishment Clause test, and we therefore turn to consider whether such a test is warranted.

We start with *Mandel*'s requirement that the challenged government action be "facially legitimate." EO-2's stated purpose is "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." EO-2, Preamble. We find that this stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry. EO-2 therefore satisfies *Mandel*'s first requirement. Absent allegations of bad faith, our analysis would end here in favor of the Government. But in this case, Plaintiffs have alleged that EO-2's stated purpose was given in bad faith. We therefore must consider whether they have made the requisite showing of bad faith.

As noted, Plaintiffs must "plausibly allege[] with sufficient particularity" that the reason for the government action was provided in bad faith. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Plaintiffs here claim that EO-2 invokes national security in bad faith, as a pretext for what really is an anti-Muslim religious purpose. Plaintiffs point to ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and included a preference for religious minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which President Trump and his advisors described as having the same policy goals as EO-1. *See, e.g.*, J.A. 339, 346, 370, 379, 403, 470, 472, 480, 481, 506, 508, 516-18, 522, 798. Plaintiffs also point to the comparably weak evidence that EO-2 is meant to address national security interests, including the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity.

Based on this evidence, we find that Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the "facially legitimate" reason proffered by the government is not "bona fide," we no longer defer to that reason and instead may "look behind" EO-2. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment).

Since Justice Kennedy's concurrence in *Din*, no court has confronted a scenario where, as here, plaintiffs have plausibly alleged with particularity that an immigration action was taken in bad faith. We therefore have minimal guidance on what "look[ing] behind" a challenged immigration action entails. *See id.* In addressing this issue of first impression, the Government does not propose a framework for this inquiry. Rather, the Government summarily asserts that because EO-2 states that it is motivated by national security interests, it therefore satisfies *Mandel's* test. But this only responds to *Mandel's* "facially legitimate" requirement—it reads out *Mandel's* "bona fide" test altogether. Plaintiffs, for their part, suggest that we review their claim using our normal constitutional tools. And in the Establishment Clause context, our normal constitutional tool for reviewing facially neutral government actions is the test in *Lemon v. Kurtzman.*

We find for several reasons that because Plaintiffs have made an affirmative showing of bad faith, applying the *Lemon* test to analyze EO-2's constitutionality is appropriate. First, as detailed above, the Supreme Court has unequivocally stated that the political branches' immigration actions are still "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also Chadha*, 462 U.S. at 941-42. The constitutional limitation in this case is the Establishment Clause, and this Court's duty to uphold the Constitution even in the context of a presidential immigration action counsels in favor of applying our standard constitutional tool. Second, that Plaintiffs have satisfied *Mandel's* heavy burden to plausibly show that the reason for the challenged action was proffered in bad faith further supports the application of our established constitutional doctrine. The deferential framework set forth in *Mandel* is based in part on general respect for the political branches' power in the immigration realm. Once plaintiffs credibly call into question the political branches' motives for exercising that power, our reason for deferring is severely undermined. In the rare case where plaintiffs plausibly allege bad faith with particularity, more meaningful review—in the form of constitutional scrutiny—is proper. And third, in the context of this case, there is an obvious symmetry between *Mandel*'s "bona fide" prong and the constitutional inquiry established in *Lemon*. Both tests ask courts to evaluate the government's purpose for acting.

Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine. Applying this doctrine harmonizes our duty to engage in the substantial deference required by *Mandel* and its progeny with our responsibility to ensure that the political branches choose constitutionally permissible means of exercising their immigration power. We therefore proceed to "look behind" EO-2 using the framework developed in *Lemon* to determine if EO-2 was motivated by a primarily religious purpose, rather than its stated reason of promoting national security.

2.

To prevail under the *Lemon* test, the Government must show that the challenged action (1) "ha[s] a secular legislative purpose," (2) that "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) that it does "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674 (1970)) (citation omitted). The Government must satisfy all three prongs of *Lemon* to defeat an Establishment Clause challenge.

Edwards v. Aguillard, 482 U.S. 578, 583 (1987). The dispute here centers on *Lemon*'s first prong.

In the Establishment Clause context, "purpose matters." *McCreary*, 545 U.S. at 866 n.14. Under the *Lemon* test's first prong, the Government must show that the challenged action "ha[s] a secular legislative purpose." *Lemon*, 403 U.S. at 612. Accordingly, the Government must show that the challenged action has a secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)). The government cannot meet this requirement by identifying *any* secular purpose for the challenged action. *McCreary*, 545 U.S. at 865 n.13 (noting that if any secular purpose sufficed, "it would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action"). Rather, the government must show that the challenged action's *primary* purpose is secular. *Edwards*, 482 U.S. at 594 (finding an Establishment Clause violation where the challenged act's "primary purpose . . . is to endorse a particular religious doctrine," notwithstanding that the act's stated purpose was secular).

When a court considers whether a challenged government action's primary purpose is secular, it attempts to discern the "official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. The court acts as a reasonable, "objective observer," taking into account "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* (quoting *Santa Fe*, 530 U.S. at 308). It also considers the action's "historical context" and "the specific sequence of events leading to [its] passage." *Edwards*, 482 U.S. at 595. And as a reasonable observer, a court has a "reasonable memor[y]," and it cannot "'turn a blind eye to the context in which [the action] arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315).

The evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious. Then-candidate Trump's campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a "Statement on Preventing Muslim Immigration," in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on" and remarked, "[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in

Jihad, and have no sense of reason or respect for human life." J.A. 346. In a March 9, 2016 interview, Trump stated that "Islam hates us," J.A. 516, and that "[w]e can't allow people coming into this country who have this hatred," J.A. 517. Less than two weeks later, in a March 22 interview, Trump again called for excluding Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. And on December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.A. 506.

As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion. On July 17, 2016, in response to a tweet stating, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," Trump said, "So you call it territories. OK? We're gonna do territories." J.A. 798. One week later, Trump asserted that entry should be "immediately suspended[ed] . . . from any nation that has been compromised by terrorism." J.A. 480. When asked whether this meant he was "roll[ing]back" his call for a Muslim ban, he said his plan was an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.A. 481.

Significantly, the First Executive Order appeared to take this exact form, barring citizens of seven predominantly Muslim countries from entering the United States. And just before President Trump signed EO-1 on January 27, 2017, he stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The next day, presidential advisor and former New York City Mayor Giuliani appeared on Fox News and asserted that "when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508.

Shortly after courts enjoined the First Executive Order, President Trump issued EO-2, which the President and members of his team characterized as being substantially similar to EO-1. EO-2 has the same name and basic structure as EO-1, but it does not include a preference for religious-minority refugees and excludes Iraq from its list of Designated Countries. EO-2, § 1(e). It also exempts certain categories of nationals from the Designated Countries and institutes a waiver process for qualifying individuals. EO-2, § 3(b), (c). Senior Policy Advisor Miller described the changes to EO-2 as "mostly minor technical differences," and said that there would be "the same basic policy outcomes for the country." J.A. 339. White House Press Secretary Spicer stated that "[t]he principles of the [second] executive order remain the same." J.A. 379. And President Trump, in a speech at a rally, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Reilly, *supra*). These statements suggest that like EO-1, EO-2's purpose is to effectuate the promised Muslim ban, and that its changes from EO-1 reflect an effort to help it survive judicial scrutiny, rather than to avoid targeting Muslims for exclusion from the United States.

These statements, taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States. The statements also reveal President Trump's intended means of effectuating the ban: by targeting majority-Muslim nations instead of Muslims explicitly. And after courts enjoined EO-1, the statements show how President Trump attempted to preserve its core mission: by issuing EO-2—a "watered down" version with "the same basic policy outcomes." J.A. 339. These statements are the exact type of "readily discoverable fact[s]" that we use in determining a government action's primary purpose. *McCreary*, 545 U.S. at 862. They are explicit statements of purpose and are attributable either to President Trump directly or to his advisors. We need not probe anyone's heart of hearts to discover the purpose of EO-2, for President Trump and his aides have explained it on numerous occasions and in no uncertain terms. *See Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003) ("Besides, no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the [government actor's] purpose."). EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Muslim ban and EO-2 itself.[16] *See McCreary*, 545 U.S. at 866 (rejecting notion that court could consider only "the latest news about the last in a series of governmental actions, however close they may all be in time and subject"). The reasonable observer could easily connect these statements to EO-2 and understand that its primary purpose appears to be religious, rather than secular.

The Government argues, without meaningfully addressing Plaintiffs' proffered evidence, that EO-2's primary purpose is in fact secular because it is facially neutral and operates to address the risks of potential terrorism without targeting any particular religious group. Appellants' Br. 42-44. That EO-2's stated objective is religiously neutral is not dispositive; the entire premise of our review under *Lemon* is that even facially neutral government actions can violate the Establishment Clause. *See Lemon*, 403 U.S. at 612 (recognizing that "a law 'respecting' . . . the establishment of religion[] is not always easily identifiable as one," and creating a three-part test for discerning when a facially neutral law violates the Establishment Clause); *see also Santa Fe*, 530 U.S. at 315 ("Our examination [under *Lemon*'s purpose prong] . . . need not stop at an analysis of the text of the policy.").

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[16] We reject the government's contentions that none of these statements "in substance corresponds to [Section 2(c)]," Appellants' Br. 52, and that Section 2(c) "bears no resemblance to a 'Muslim ban,'" *id.* at 53. These statements show that President Trump intended to effectuate his proposed Muslim ban by targeting predominantly Muslim nations, rather than Muslims explicitly. Section 2(c) does precisely that.

We therefore reject the Government's suggestion that EO-2's facial neutrality might somehow fully answer the question of EO-2's primary purpose.[17]

The Government's argument that EO-2's primary purpose is related to national security, Appellants' Br. 43-44, is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, J.A. 397, and that those agencies only offered a national security rationale after EO-1 was enjoined. Furthermore, internal reports from DHS contradict this national security rationale, with one report stating that "most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." J.A. 426. According to former National Security Officials, Section2(c) serves "no legitimate national security purpose," given that "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years" and that there is no evidence of any new security risks emanating from these countries. Corrected Brief for Former National Security Officials as Amici Curiae Supporting Appellees 5-8, ECF No. 126-1.[18] Like the district court, we think this strong evidence that any national security justification for EO-2 was secondary to its primary religious purpose and was offered as more of a "litigating position" than as the actual purpose of EO-2. *See McCreary*, 545 U.S. at 871 (describing the government's "new statements of purpose . . . as a litigating position" where they were offered to explain the third iteration of a previously enjoined religious display). And EO-2's text does little to bolster any national security rationale: the only examples it provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis—Iraq is not a designated country in EO-2—and a Somalian refugee who entered the United States as a child and was radicalized here as an adult. EO-2, § 1(h). The Government's asserted national security purpose is therefore no more convincing as applied to EO-2 than it was to EO-1.

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[17] Plaintiffs suggest that EO-2 is not facially neutral, because by directing the Secretary of Homeland Security to collect data on "honor killings" committed in the United States by foreign nationals, EO-2 incorporates "a stereotype about Muslims that the President had invoked in the months preceding the Order." Appellees' Br. 5, 7; *see* J.A. 598 (reproducing Trump's remarks in a September 2016 speech in Arizona in which he stated that applicants from countries like Iraq and Afghanistan would be "asked their views about honor killings," because "a majority of residents [in those countries] say that the barbaric practice of honor killings against women are often or sometimes justified"). Numerous amici explain that invoking the specter of "honor killings" is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric. *See, e.g.*, Brief for New York University as Amicus Curiae Supporting Appellees 21, ECF No. 82-1; Brief for Muslim Justice League, et al., as Amici Curiae Supporting Appellees 17-18, ECF No. 152-1; Brief for History Professors and Scholars as Amici Curiae Supporting Appellees 2-3, ECF No. 154-1; Brief for Constitutional Law Scholars as Amici Curiae Supporting Appellees 19 n.3, ECF No. 173-1; Brief for Members of the Clergy, et al., as Amici Curiae Supporting Appellees 13, ECF No. 179-1. The Amici Constitutional Law Scholars go so far as to call the reference to honor killings "anti-Islamic dog-whistling." Brief for Constitutional Law Scholars 19 n.3. We find this text in EO-2 to be yet another marker that its national security purpose is secondary to its religious purpose.

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[18] A number of amici were current on the relevant intelligence as of January 20, 2017. *Id.* at 9.

Relatedly, the Government argues that EO-2's operation "confirms its stated purpose." Appellants' Br. 43. "[I]t applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion." *Id.* In support of its argument that EO-2 does not single out Muslims, the Government notes that these six countries are either places where ISIS has a heavy presence (Syria), state sponsors of terrorism (Iran, Sudan, and Syria), or safe havens for terrorists (Libya, Somalia, and Yemen). Appellants' Br. 5-6. The Government also points out that the six Designated Countries represent only a small proportion of the world's majority-Muslim nations, and EO-2 applies to everyone in those countries, even non-Muslims. *Id.* at 44. This shows, the Government argues, that EO-2's primary purpose is secular. The trouble with this argument is that EO-2's practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from the United States. And that EO-2 is underinclusive by targeting only a small percentage of the world's majority-Muslim nations and overinclusive for targeting all citizens, even non-Muslims, in the Designated Countries, is not responsive to the purpose inquiry. This evidence might be relevant to our analysis under *Lemon*'s second prong, which asks whether a government act has the primary *effect* of endorsing or disapproving of religion, *see Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), but it does not answer whether the government acted with a primarily religious purpose to begin with. If we limited our purpose inquiry to review of the operation of a facially neutral order, we would be caught in an analytical loop, where the order would always survive scrutiny. It is for this precise reason that when we attempt to discern purpose, we look to more than just the challenged action itself. And here, when we consider the full context of EO-2, it is evident that it is likely motivated primarily by religion. We do not discount that there may be a national security concern motivating EO-2; we merely find it likely that any such purpose is secondary to EO-2's religious purpose.

The Government separately contends that our purpose inquiry should not extend to "extrinsic evidence" that is beyond EO-2's relevant context. Appellants' Br. 45. The Government first argues that we should not look beyond EO-2's "text and operation." *Id.* at 45-46. But this is clearly incorrect, as the Supreme Court has explicitly stated that we review more than just the face of a challenged action. *See, e.g., Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("[O]ur [Establishment Clause] analysis does not end with the text of the statute at issue.")

(citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534).[19]

The Government next argues that even if we do look beyond EO-2 itself, under ***McCreary***, we are limited to considering only "the operative terms of governmental action and official pronouncements," Appellants' Br. 46, which we understand to mean only EO-2 itself and a letter signed by the Attorney General and the Secretary of State that largely echoes EO-2's text, *id.* at 8 n.3 (citing Letter, *supra*). We find no support for this view in *McCreary*. The *McCreary* Court considered "the traditional external signs that show up in the 'text, legislative history, and implementation of the [challenged action],'" 545 U.S. at 862 (quoting *Santa Fe*, 530 U.S. at 308), but it did not limit other courts' review to those particular terms. *Id.* Nor did it make such an artificial distinction between "official" and "unofficial" context. Rather, it relied on principles of "common sense" and the "reasonable observer[']s . . . reasonable memor[y]" to cull the relevant context surrounding the challenged action. *Id.* at 866. The Government would have us abandon this approach in favor of an unworkable standard that is contrary to the well-established framework for considering the context of a challenged government action.

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[19] The Government separately suggests that we should limit our review to EO-2's text and operation based on "the Constitution's structure and its separation of powers," and the "'presumption of regularity' that attaches to all federal officials' actions." Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926)). In support of this point, the Government relies on pre-*McCreary* cases discussing, variously, judicial deference to an executive official's decision to deport an alien who had violated the terms of his admission to the United States, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), the President's absolute immunity from damages liability based on his or her official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), and the presumptive privilege we afford a President's conversations and correspondence, *United States v. Nixon*, 418 U.S. 683, 708 (1974). These cases suggest that in certain circumstances, we insulate the President and other executive officials from judicial scrutiny in order to protect and promote the effective functioning of the executive branch. But these cases do not circumscribe our review of Establishment Clause challenges or hold that when a President's official acts violate the Constitution, the acts themselves are immune from judicial review. We find no support in this line of cases for the Government's argument that our review of EO-2's context is so limited. In fact, the Supreme Court has suggested quite the opposite. *See Zadvydas*, 533 U.S. at 695 ("Executive and Legislative Branch decisionmaking . . . power is subject to important constitutional limitations." (citing *Chadha*, 462 U.S. at 941-42)).

And finally, the Government argues that even if we could consider unofficial acts and statements, we should not rely on campaign statements. Appellants' Br. 49. Those statements predate President Trump's constitutionally significant "transition from private life to the Nation's highest public office," and as such, they are less probative than official statements, the Government contends. *Id.* at 51.[20] We recognize that in many cases, campaign statements may not reveal all that much about a government actor's purpose. But we decline to impose a bright-line rule against considering campaign statements, because as with any evidence, we must make an individualized determination as to a statement's relevancy and probative value in light of all the circumstances. The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action. *See Glassroth*, 335 F.3d at 1297 (reviewing an elected judge's campaign materials that proclaimed him the "Ten Commandment's Judge" as part of its inquiry into the constitutionality of a Ten Commandments display he installed); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (considering facially neutral campaign statements related to bussing in an equal protection challenge); *California v. United States*, 438 U.S. 645, 663-64 (1978) (referring to candidates' political platforms when considering the Reclamation Act of 1902); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that in the equal protection context, "[w]hen there is [] proof that a discriminatory purpose has been a motivating factor in the decision," a court may consider "contemporary statements by members of the decisionmaking body").

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[20] The government also suggests that we can never rely on private communications to impute an improper purpose to a government actor. *See, e.g.*, *Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d Cir. 2004) (limiting its review to statements made by the elected officials who oversaw the government action). But this is incorrect. These cases merely establish that the motives of people not involved in the decisionmaking process cannot *alone* evince the government's motive. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not *direct* evidence of discrimination." (emphasis added)). But when those statements reveal something about the government's purpose, they are certainly part of the evidence we review for purpose. In *McCreary*, the Court noted that a pastor had delivered a religious message at the ceremony for the challenged religious display. 545 U.S. at 869. Based on this and other evidence of purpose, the Court concluded that "[t]he reasonable observer could only think that the [government] meant to emphasize and celebrate the [display's] religious message." *Id.* In any event, none of these cases contemplate the situation here, where the private speaker and the government actor are one and the same. We need not impute anyone's purpose to anyone else, for the same person has espoused these intentions all along. The distinction between candidate and elected official is thus an artificial one where the inquiry is only whether the reasonable observer would understand the candidate's statements to explain the purpose of his actions once elected.

Just as the reasonable observer's "world is not made brand new every morning," *McCreary*, 545 U.S. at 866, nor are we able to awake without the vivid memory of these statements. We cannot shut our eyes to such evidence when it stares us in the face, for "there's none so blind as they that won't see." Jonathan Swift, *Polite Conversation* 174 (Chiswick Press ed., 1892). If and when future courts are confronted with campaign or other statements proffered as evidence of governmental purpose, those courts must similarly determine, on a case-by-case basis, whether such statements are probative evidence of governmental purpose. Our holding today neither limits nor expands their review.[21]

The Government argues that reviewing campaign statements here would encourage scrutiny of all religious statements ever made by elected officials, even remarks from before they assumed office. Appellants' Br. 49-50. But our review creates no such sweeping implications, because as the Supreme Court has counseled, our purpose analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266; *see also Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one. . . . "). Just as a reasonable observer would not understand general statements of religious conviction to inform later government action, nor would we look to such statements as evidence of purpose. A person's particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause—rarely, if ever, will such evidence reveal anything about that person's actions once in office. For a past statement to be relevant to the government's purpose, there must be a substantial, specific connection between it and the challenged government action. And here, in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more." J.A. 370.

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[21] This finding comports with the *McCreary* Court's observation that "past actions [do not] forever taint" a government action, 545 U.S. at 873-74. Whether a statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement.

For similar reasons, we reject the Government's argument that our review of these campaign statements will "inevitably 'chill political debate during campaigns.'" Appellants' Br. 50 (quoting *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995)). Not all—not even most—political debate will have any relevance to a challenged government action. Indeed, this case is unique not because we are considering campaign statements, but because we have such directly relevant and probative statements of government purpose at all. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) (observing that government actors "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate"). To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.

Lastly, the Government contends that we are ill-equipped to "attempt[] to assess what campaign statements reveal about the motivation for later action." Appellants' Br. 50. The Government argues that to do so would "mire [us] in a swamp of unworkable litigation," *id.* (quoting Amended Order, *Washington v. Trump*, No. 17-35105, slip op. at 13 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of reconsideration en banc)), and "forc[e us] to wrestle with intractable questions," such as "the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative." *Id.* But discerning the motives behind a challenged government action is a well-established part of our purpose inquiry. *McCreary*, 545 U.S. at 861 ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine." (citations omitted)). As part of this inquiry, courts regularly evaluate decisionmakers' statements that show their purpose for acting. *See, e.g.*, *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801 (10th Cir. 2009) (considering news reports quoting county commissioners who described both their determination to keep challenged religious display at issue and the strength of their religious beliefs); *Glassroth*, 355 F.3d at 1297 (reviewing elected judge's campaign materials for evidence of his purpose in installing religious display); *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001) (reviewing state legislators' statements in discerning purpose of statute challenged under the Establishment Clause); *see also Edwards*, 482 U.S. at 586-87 (looking to statute's text together with its sponsor's public comments to discern its purpose). And the purpose inquiry is not limited to Establishment Clause challenges; we conduct this analysis in a variety of contexts. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down federal statute based in part on "strong evidence" that "the congressional purpose [was] to influence or interfere with state sovereign choices about who may be married"); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-80 (1979) (upholding public hiring preferences based in part on finding that government had not created preferences with purpose of discriminating on the basis of sex); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, No. 16-833, 2017 WL 2039439 (U.S. May 15, 2017) (concluding that challenged voting restrictions were unconstitutional because they were motivated by racially discriminatory intent). We therefore see nothing "intractable" about evaluating a statement's probative value based on the identity of the speaker and how specifically the statement relates to the challenged government action, for this is surely a routine part of constitutional analysis. And this analysis is even more straightforward here, because we are not attempting to discern motive from many legislators' statements, as in *Brown*, but rather are looking primarily to one person's statements to discern that person's motive for taking a particular action once in office.

The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.

EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails *Lemon*'s purpose prong in violation of the Establishment Clause.[22] Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

B.

Because we uphold the district court's conclusion that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim, we next consider whether Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 22; *Musgrave*, 553 F.3d at 298. As we have previously recognized, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190 (4th Cir. 2013) (en banc) (quoting *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 471 (D. Md. 2011)). Accordingly, our finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the absence of an injunction, they will suffer irreparable harm.

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[22] What is more, we think EO-2 would likely fail any purpose test, for whether religious animus motivates a government action is a fundamental part of our Establishment Clause inquiry no matter the degree of scrutiny that applies. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (upholding town's legislative prayer policy in part because "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 696 (1989) (finding that the challenged statute satisfied *Lemon*'s purpose prong in part because "there is no allegation that [it] was born of animus"); *Lynch*, 465 U.S. at 673 (stating that the Establishment Clause "forbids hostility toward any [religion]"); *see also* Brief for Constitutional Law Scholars 6-11. There is simply too much evidence that EO-2 was motivated by religious animus for it to survive any measure of constitutional review.

Indeed, the Supreme Court has stated in no uncertain terms that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). Though the *Elrod* Court was addressing freedom of speech and association, our sister circuits have interpreted it to apply equally to Establishment Clause violations. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986). We agree with these courts that because of "the inchoate, one-way nature of Establishment Clause violations," they create the same type of immediate, irreparable injury as do other types of First Amendment violations. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303; *see also id.* ("[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place. . . . "). We therefore find that Plaintiffs are likely to suffer irreparable harm if Section 2(c) of EO-2 takes effect.

C.

Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This is because "courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937)). As the district court did, we consider the balance of the equities and the public interest factors together.

The Government first contends that "the injunction causes [it] direct, irreparable injury" that outweighs the irreparable harm to Plaintiffs because "'no governmental interest is more compelling than the security of the Nation.'" Appellants' Br. 54 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). When it comes to national security, the Government argues, the judicial branch "should not second-guess" the President's "'[p]redictive judgment[s].'" Appellants' Br. 55 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)). The Government further argues that the injunction causes institutional injury, because according to two single-Justice opinions, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The Government contends that this principle applies here because the President "represents the people of all 50 states." Appellants' Reply Br. 25.

At the outset, we reject the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined. This Court has held that the Government is "in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). "If anything," we said, "the system is improved by such an injunction." *Id.* (quoting *Giovani Carandola*, 303 F.3d at 521). Because Section 2(c) of EO-2 is likely unconstitutional, allowing it to take effect would therefore inflict the greater institutional injury. And we are not persuaded that the general deference we afford the political branches ought to nevertheless tip the equities in the Government's favor, for even the President's actions are not above judicial scrutiny, and especially not where those actions are likely unconstitutional. *See Zadvydas*, 533 U.S. at 695; *Chadha*, 462 U.S. at 941-42.

We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries. *See United States v. Robel*, 389 U.S. 258, 264 (1967) ("Th[e] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . [O]ur country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). National security may be the most compelling of government interests, but this does not mean it will always tip the balance of the equities in favor of the government. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (agreeing with the dissent that the government's "authority and expertise in [national security and foreign relations] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals" (quoting *id.* at 61 (Breyer, J., dissenting))). A claim of harm to national security must still outweigh the competing claim of injury. Here and elsewhere, the Government would have us end our inquiry without scrutinizing either Section 2(c)'s stated purpose or the Government's asserted interests, but "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history," *Patrolmen's Benevolent Ass'n of New York v. City of New York*, 310 F.3d 43, 53-54 (2d. Cir. 2002) (citing *Korematsu v. United States*, 323 U.S. 214, 223 (1944)), and is incompatible with our duty to evaluate the evidence before us.

As we previously determined, the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country. We remain unconvinced that Section 2(c) has more to do with national security than it does with effectuating the President's promised Muslim ban. We do not discount that EO-2 may have some national security purpose, nor do we disclaim that the injunction may have some impact on the Government. But our inquiry, whether for determining Section 2(c)'s primary purpose or for weighing the harm to the parties, is one of balance, and on balance, we cannot say that the Government's asserted national security interest outweighs the competing harm to Plaintiffs of the likely Establishment Clause violation.

For similar reasons, we find that the public interest counsels in favor of upholding the preliminary injunction. As this and other courts have recognized, upholding the Constitution undeniably promotes the public interest. *Giovani Carandola*, 303 F.3d at 521 ("[U]pholding constitutional rights surely serves the public interest.");

see also Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002))); *Dayton Area Visually Impaired Pers., Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties."). These cases recognize that when we protect the constitutional rights of the few, it inures to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large.

When the government chooses sides on religious issues, the "inevitable result" is "hatred, disrespect and even contempt" towards those who fall on the wrong side of the line. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Improper government involvement with religion "tends to destroy government and to degrade religion," *id.*, encourage persecution of religious minorities and nonbelievers, and foster hostility and division in our pluralistic society. The risk of these harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group. "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963)

(Goldberg, J. concurring). We therefore conclude that enjoining Section 2(c) promotes the public interest of the highest order. And because Plaintiffs have satisfied all the requirements for securing a preliminary injunction, we find that the district court did not abuse its discretion in enjoining Section 2(c) of EO-2.

V.

Lastly, having concluded that Plaintiffs are entitled to a preliminary injunction, we address the scope of that injunction. The Government first argues that the district court erred by enjoining Section 2(c) nationwide, and that any injunctive relief should be limited solely to Plaintiffs.

It is well-established that "district courts have broad discretion when fashioning injunctive relief." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). Nevertheless, "their powers are not boundless." *Id.* The district court's choice of relief "should be carefully addressed to the circumstances of the case," *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts may issue nationwide injunctions consistent with these principles. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992).

The district court here found that a number of factors weighed in favor of a nationwide injunction, and we see no error. First, Plaintiffs are dispersed throughout the United States. *See* J.A. 263, 273; *see also Richmond Tenants Org.*, 956 F.2d at 1308-09 (upholding nationwide injunction where challenged conduct caused irreparable harm in myriad jurisdictions across the country). Second, nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that "the immigration laws of the United States should be enforced vigorously and *uniformly*." *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (quoting Immigration Reform and Control Act of 1996, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384); *see also Arizona v. United States*, 132 S. Ct. 2492, 2502 (2015) (describing the "comprehensive and unified system" of "track[ing] aliens within the Nation's borders"). And third, because Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications. Its continued enforcement against similarly situated individuals would only serve to reinforce the "message" that Plaintiffs "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). For these reasons, we find that the district court did not abuse its discretion in concluding that a nationwide injunction was "necessary to provide complete relief." *Madsen*, 512 U.S. at 778.

Finally, the Government argues that the district court erred by issuing the injunction against the President himself. Appellants' Br. 55 (citing *Mississippi v.*

Johnson, 71 U.S. (4 Wall.) 475, 501 (1866) (finding that a court could not enjoin the President from carrying out an act of Congress)). We recognize that "in general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (opinion of O'Connor, J.) (quoting *Johnson*, 71 U.S. at 501), and that a "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows," *id.* at 802. In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself. We therefore lift the injunction as to the President only. The court's preliminary injunction shall otherwise remain fully intact.

To be clear, our conclusion does not "in any way suggest[] that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). Even though the President is not "directly bound" by the injunction, we "assume it is substantially likely that the President . . . would abide by an authoritative interpretation" of Section 2(c) of the Second Executive Order. *Id.* at 803 (opinion of O'Connor, J.).

VI.

For all of these reasons, we affirm in part and vacate in part the preliminary injunction awarded by the district court. We also deny as moot Defendants' motion for a stay pending appeal.

AFFIRMED IN PART, VACATED IN PART

TRAXLER, Circuit Judge, concurring in the judgment:

I concur in the judgment of the majority insofar as it affirms the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the Executive Order against the officers, agents, and employees of the Executive Branch of the United States, and anyone acting under their authorization or direction, who would attempt to enforce it, because it likely violates the Establishment Clause of the United States Constitution. I also concur in the judgment of the majority to lift the injunction as to President Trump himself.

BARBARA MILANO KEENAN, Circuit Judge, with whom JUDGE THACKER joins except as to Part II.A.i., concurring in part and concurring in the judgment:

I concur in the majority opinion's analysis with respect to its conclusions: (1) that the stated "national security purpose" of the Second Executive Order[1] likely fails *Mandel*'s "bona fide" test and violates the Establishment Clause, *see Kleindienst v. Mandel*, 408 U.S. 753 (1972); and (2) that the record before us supports the award of a nationwide injunction.[2] I write separately to express my view that although the plaintiffs are unlikely to succeed on the merits of their claim under Section 1152(a)(1)(A), their request for injunctive relief under the INA nevertheless is supported by the failure of Section 2(c) to satisfy the threshold requirement of Section 1182(f) for the President's lawful exercise of authority.[3]

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[1] Exec. Order No. 13,780, *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[2] Based on my view that the Second Executive Order does not satisfy the threshold requirement of 8 U.S.C. § 1182(f) for exercise of a president's authority under that statute, I would conclude that the Second Executive Order is not "facially legitimate" within the meaning of *Mandel*, 408 U.S. at 770. Nevertheless, I join in the majority opinion's holding that the plaintiffs are likely to succeed on the merits of their Establishment Clause claim, based on my further conclusion that the Second Executive Order likely fails *Mandel*'s "bona fide" test. In reaching this conclusion, I additionally note that I do not read the majority opinion as holding that a plausible allegation of bad faith alone would justify a court's decision to look behind the government's proffered justification for its action. Rather, in accordance with Justice Kennedy's concurrence in *Din*, a plaintiff must make an affirmative showing of bad faith to satisfy the "bona fide" requirement of *Mandel*. *See Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment).

I.

As an initial matter, I conclude that John Doe #1 has standing to raise a claim that the Second Executive Order violates the INA.[4] To establish standing under Article III, a plaintiff must show that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff seeking "to enjoin a future action must demonstrate that he is immediately in danger of sustaining some direct injury as the result" of the challenged conduct, which threat of injury is "both real and immediate." *Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) (internal quotation marks omitted) (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)).

Prolonged separation from one's family members constitutes a cognizable injury-in-fact. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other*

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[3] We may consider this facial deficiency not raised by the plaintiffs because this defect is apparent from the record. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (explaining that the Court may affirm on any grounds apparent from the record).

[4] Because only one plaintiff must have standing for the Court to consider a particular claim, I do not address whether the other plaintiffs also have standing to challenge the Second Executive Order under the INA. *See Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

grounds, 519 U.S. 1 (1996) (per curiam). As the government concedes, by barring entry of nationals from the six identified countries, Section 2(c) of the Second Executive Order operates to delay, or ultimately to prevent, the issuance of visas to nationals from those countries.

Before the President issued the Second Executive Order, John Doe #1 filed a visa application on behalf of his Iranian national wife, and took substantial steps toward the completion of the visa issuance process. However, his wife's request for a visa is still pending. It is self-evident from the language and operation of the Order that the 90-day "pause" on entry, which the government may extend, is likely to delay the issuance of a visa to John Doe #1's wife and her entry into the United States, a likelihood that is not remote or speculative.[5] Accordingly, I conclude that John Doe #1 has established the existence of an injury-in-fact that is fairly traceable to the Second Executive Order, and which is likely to be redressed by a favorable decision in this case.

II.

I turn to consider whether the plaintiffs are entitled to a preliminary injunction based on the likelihood that the Second Executive Order violates the INA. This Court evaluates a district court's decision to grant a preliminary injunction based on an abuse-of-discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Under this standard, we review the district court's factual findings for clear error and review its legal conclusions de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

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[5] For the same reasons, I reject the government's contention that the plaintiffs' claims are not ripe for review. The harm to the plaintiffs caused by separation from their family members is imminent and concrete, and is not ameliorated by the hypothetical possibility that the plaintiffs might receive a discretionary waiver under Section 3(c) of the Second Executive Order at some point in the future.

A preliminary injunction is an "extraordinary remedy," which may be awarded only upon a "clear showing" that a plaintiff is entitled to such relief. *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345-46 (4th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)), *vacated on other grounds*, 559 U.S. 1089 (2010). Preliminary relief affords a party before trial the type of relief ordinarily available only after trial. *Id.* at 345. A preliminary injunction must be supported by four elements: (1) a likelihood of success on the merits; (2) that the plaintiff likely will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities weighs in the plaintiff's favor; and (4) that a preliminary injunction is in the public interest. *Id.* at 346.

A.

I begin by considering whether the plaintiffs are likely to succeed on the merits of a claim that the Second Executive Order fails to comply with the requirements of the INA. In interpreting a statute, courts first must consider the plain meaning of the statutory language. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). A statute's plain meaning derives from consideration of all the words employed, rather than from reliance on isolated statutory phrases. *Id.* (citing *United States v. Mitchell*, 518 F.3d 230, 233-34 (4th Cir. 2008)).

i.

Initially, I would reject the plaintiffs' contention that 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas, operates as a limitation on the President's authority under 8 U.S.C. § 1182(f) to "suspend the entry of all aliens or any class of aliens" if he finds that the entry of such aliens "would be detrimental to the interests of the United States." Section 1152(a)(1)(A) provides that:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Thus, the plain language of Section 1152(a)(1)(A) addresses an alien's ability to obtain an immigrant visa. Section 1182(f), on the other hand, explicitly addresses an alien's ability to *enter* the United States, and makes no reference to the issuance of visas. *See* 8 U.S.C. § 1182(f). I am unpersuaded by the plaintiffs' attempt to read into Section 1152(a)(1)(A) terms that do not appear in the statute's plain language.

Sections 1152(a)(1)(A) and 1182(f) address two distinct actions in the context of immigration, namely, the issuance of a visa and the denial of an alien's ability to enter the United States. Indeed, the fact that an alien possesses a visa does not guarantee that person's ability to enter the United States. For example, an alien who possesses a visa may nonetheless be denied admission into the United States for a variety of reasons set forth elsewhere in the INA. *See* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [sic] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."). For these reasons, I would reject the plaintiffs' assertion that Section 1152(a)(1)(A) provides a basis for affirming the preliminary injunction issued by the district court.

ii.

Nevertheless, I would conclude that the plaintiffs' request for injunctive relief is supported by the President's failure to comply with Section 1182(f). In issuing his proclamation under Section 2(c), the President relied exclusively on two provisions of the INA. The President stated in material part:

> I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

82 Fed. Reg. at 13,213.

Section 1185(a), however, does not confer any authority on a president. Instead, that statute imposes certain requirements on persons traveling to and from the United States, and renders unlawful their failure to comply with the requirements of the statute.

In contrast, Section 1182(f) addresses a president's authority to impose restrictions on the entry of aliens into the United States. Section 1182(f) states, in relevant part: "Whenever the [p]resident finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," the president may "suspend the entry [into the United States] of all aliens or any class of aliens." Although this language provides broad discretion to a president to suspend the entry of certain aliens and classes of aliens, that discretion is not unlimited.

The plain language of Section 1182(f) permits a president to act only if he "finds" that entry of the aliens in question "*would be* detrimental to the interests of the United States" (emphasis added). In my view, an unsupported conclusion will not satisfy this "finding" requirement. Otherwise, a president could act in total disregard of other material provisions of the INA, thereby effectively nullifying that complex body of law enacted by Congress.

Here, the President's "finding" in Section 2(c) is, in essence, a non sequitur because the "finding" does not follow from the four corners of the Order's text. In particular, the text fails to articulate a basis for the President's conclusion that entry by any of the approximately 180 million[6] individuals subject to the ban "would be detrimental to the interests of the United States."

I reach this conclusion by examining the Order's relevant text. In Section 1(a) of the Order, the President declares that the policy of the United States is "to protect its citizens from terrorist attacks, including those committed by foreign nationals," and "to improve the screening and vetting protocols and procedures" involved in issuing visas and in the administration of the United States Refugee Admissions Program. 82 Fed. Reg. at 13,209. The Order explains that such screening and vetting procedures are instrumental "in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." *Id.*

The Order further states that the governments of Iran, Libya, Somalia, Sudan, Syria, and Yemen are unlikely to be willing or able "to share or validate important information about individuals seeking to travel to the United States," because these countries: (1) have porous borders facilitating "the illicit flow of weapons, migrants, and foreign terrorist fighters"; (2) have been compromised by terrorist organizations; (3) contain "active conflict zones"; or (4) are state sponsors of terrorism. *Id.* at 13,210-11. In light of these conditions, the Second Executive Order proclaims that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13,211.

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[6] *See* Cent. Intelligence Agency, *The World Factbook, Country Comparison: Population*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (last visited May 19, 2017) (saved as ECF opinion attachment) (listing populations of the six identified countries, in the total amount of more than 180 million). Notably, the class of banned "nationals" potentially includes citizens of one of the six identified countries whether or not those citizens have ever been physically present in one of these countries. *See* Cent. Intelligence Agency, *The World Factbook, Field Listing: Citizenship*, https://www.cia.gov/library/publications/the-world-factbook/fields/2263.html (last visited May 19, 2017) (saved as ECF opinion attachment).

Significantly, however, the Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States. Nor does the Order articulate a relationship between the unstable conditions in these countries and any supposed propensity of the nationals of those countries to commit terrorist acts or otherwise to endanger the national security of the United States. For example, although the Order states that several of the six countries permit foreigners to establish terrorist safe havens within the countries' borders, the Order does not assert that any *nationals* of the six countries are likely to have joined terrorist organizations operating within those countries, or that members of terrorist organizations are likely to pose as *nationals* of these six countries in order to enter the United States to "commit, aid, or support acts of terrorism." *See id.* at 13,210-12 (noting, among other things, that the Syrian government "has allowed or encouraged extremists to pass through its territory to enter Iraq," and that "ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States").

The text of the Second Executive Order therefore does not identify a basis for concluding that entry of any member of the particular class of aliens, namely, the more than 180 million nationals of the six identified countries, would be detrimental to the interests of the United States. In the absence of any such rationale articulating the risks posed by this class of foreign nationals, the President's proclamation under Section 2(c) does not comply with the "finding" requirement of the very statute he primarily invokes to issue the ban imposed by Section 2(c).

The government asserted at oral argument in this case that the Second Executive Order nevertheless can stand on the rationale that the President is "not sure" whether any of the 180 million nationals from the six identified countries present a risk to the United States. Oral Arg. 38:04-40:11. I disagree that this rationale is sufficient to comply with the specific terms of Section 1182(f). Although this statute does not require the President to find that the entry of any alien or class of aliens would present a danger to the United States, the statutory text plainly requires more than vague uncertainty regarding whether their entry might be detrimental to our nation's interests. Indeed, given the scope of Section 2(c), the President was required under Section 1182(f) to find that entry of any members of the identified class *would be* detrimental to the interests of the United States.

Instead of articulating a basis why entry of these foreign nationals "would be detrimental" to our national interests, the Order merely proposes a process under which the executive branch will study the question. *See* 82 Fed. Reg. at 13,212-13. This "study" proposal is an implicit acknowledgement that, presently, there is no affirmative basis for concluding that entry of nationals from these six countries "*would be* detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added).

The government likewise fails in its attempt to justify the Second Executive Order by relying on the prior exclusion of individuals from the Visa Waiver Program who had certain connections to the six countries identified in the Order. *See* 82 Fed. Reg. at 13,209. Generally, the Visa Waiver Program allows nationals of specific countries to travel to the United States without a visa for purposes of tourism or business for up to 90 days. *See generally* 8 U.S.C. § 1187. Based on modifications to the Program made by Congress in 2015 and by the Secretary of Homeland Security in 2016, people with certain connections to the six named countries no longer were permitted to participate in the Program.[7] As a result, those newly ineligible aliens became subject to the *standard* procedures required for the issuance of visas.[8] Thus, exclusion from the Visa Waiver Program merely reimposed for such aliens the customary requirements for obtaining a visa, and did not impose any additional conditions reflecting a concern that their entry "would be detrimental to the interests of the United States." Further, the above-described limitations of the Visa Waiver Program underscore the fact that, currently, the relevant class of aliens does not enjoy "*unrestricted* entry" into the United States as incorrectly stated in Section 2(c) of the Second Executive Order. *See* 82 Fed. Reg. at 13,213 (emphasis added).

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[7] *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989-91; Department of Homeland Security, U.S. Customs and Border Protection-009 Electronic System for Travel Authorization System of Records, 81 Fed. Reg. 39,680, 39,682 (June 17, 2016).

Accordingly, I would hold that the text of Section 2(c) fails to meet the statutory precondition for the lawful exercise of a president's authority under Section 1182(f). I thus conclude that the plaintiffs likely would succeed on the merits of this particular statutory issue. *See Winter*, 555 U.S. at 20.

B.

I also would conclude with respect to Section 1182(f) that the plaintiffs would satisfy the remaining *Winter* factors, because they are "likely to suffer irreparable harm in the absence of preliminary relief," the balance of the equities would resolve in their favor, and an injunction would be in the public interest. *Id.* First, at a minimum, plaintiff John Doe #1 has shown that absent an injunction, he likely will be subject to imminent and irreparable harm based on the prolonged separation from his wife that will result from enforcement of the Second Executive Order. *See Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). And, based on my conclusion that Section 2(c) is invalid on its face, I would hold that an injunction should be issued on a nationwide basis.

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[8] *See* U.S. Customs & Border Prot., *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions*, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq (last visited May 19, 2017) (saved as ECF opinion attachment).

Next, the balance of harms weighs in favor of granting a preliminary injunction. *See Winter*, 555 U.S. at 24. The government's interest in enforcing laws related to national security as a general matter would be a strong factor in its favor. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). However, because the Second Executive Order does not comply with the threshold requirement for a president's lawful exercise of authority under Section 1182(f), the government's interest cannot outweigh the real harms to the affected parties. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (reviewing the First Executive Order, dismissing the government's claim of irreparable injury, and noting that "the Government has done little more than reiterate" its general interest in combating terrorism).

Finally, the public interest also strongly favors a preliminary injunction, because the public has an interest "in free flow of travel" and "in avoiding separation of families." *Id.* at 1169. And, most importantly, the public interest is served by ensuring that any actions taken by the President under Section 1182(f) are lawful and do not violate the only restraint on his authority contained in that statute.

III.

Accordingly, in addition to affirming the district court's judgment with respect to the plaintiffs' Establishment Clause claim and the issuance of a nationwide injunction, I would affirm the court's judgment and award of injunctive relief on the separate basis that the Second Executive Order is invalid on its face because it fails to comply with the "finding" requirement of Section 1182(f).

WYNN, Circuit Judge, concurring:

Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination. We have matured from the lessons learned by past experiences documented, for example, in *Dred Scott* and *Korematsu*. But we again encounter the affront of invidious discrimination—this time layered under the guise of a President's claim of unfettered congressionally delegated authority to control immigration and his proclamation that national security requires his exercise of that authority to deny entry to a class of aliens defined solely by their nation of origin. Laid bare, this Executive Order is no more than what the President promised before and after his election: naked invidious discrimination against Muslims. Such discrimination contravenes the authority Congress delegated to the President in the Immigration and Nationality Act (the "Immigration Act"), 8 U.S.C. § 1101 *et seq.*, and it is unconstitutional under the Establishment Clause.

To that end, I concur fully in the majority opinion, including its analysis and conclusion that Section 2(c) of the Executive Order, which suspends entry of nationals from six predominantly Muslim countries, likely violates the Establishment Clause. In particular, I agree that even when the President invokes national security as a justification for a policy that encroaches on fundamental rights, our courts must not turn a blind eye to statements by the President and his advisors bearing on the policy's purpose and constitutionality. Those statements characterized Section 2(c) as the realization of the President's repeated promise, made before and after he took office, to ban Muslims.[1] And I agree that "the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country."[2] *Ante* at 75.

I write separately because I believe Plaintiffs' claim that Section 2(c) exceeds the President's authority under the Immigration Act also is likely to succeed on the merits. That statute authorizes the President to suspend the "entry of any aliens or of any class of aliens" that he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Because the Executive Order here relies on national origin as a proxy for discrimination based on religious animus, the Government's argument that Section 2(c)'s suspension on entry "falls squarely within the President's broad authority" under Section 1182(f) essentially contends that Congress delegated to the President virtually unfettered discretion to deny entry to any class of aliens, including to deny entry solely on the basis of nationality and religion. Appellants' Br. at 28. Not so.

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[1] The answer to the rhetorical question of whether the President will be able to "free himself from the stigma" of his own self-inflicted statements, *post* at 189, lies in determining whether the Executive Order complies with the rule of law. That requires us to consider, in each instance, how the character, temporality, and nature of the President's repeated, public embrace of an invidiously discriminatory policy offensive to the Constitution bear on a challenged policy.

[2] It strains credulity to state that "the security of our nation is indisputably *lessened* as a result of the injunction." *Post* at 188 (emphasis added). Rather, the district court's order only enjoined implementation of Section 2(c) of the Executive Order—a provision that the President maintained would *increase* national security. Indeed, two reports released by the Department of Homeland Security in February 2017 and March 2017 found that citizenship is an "unlikely indicator" of whether an individual poses a terrorist threat to the United States and that most of the individuals who have become U.S.-based violent extremists have been radicalized after living in the United States for a period of years. J.A. 233. The Government has not provided any information suggesting, much less establishing, that the security risks facing our country are any different today than they were when the President first sought to impose this temporary ban only seven days into his presidency.

To the contrary, the Immigration Act provides no indication that Congress intended the "broad generalized" delegation of authority in Section 1182(f) to allow the President "to trench . . . heavily on [fundamental] rights."[3] And even if the plain language of Section 1182(f) suggested Congress had given the President such unfettered discretion to invidiously discriminate based on nationality and religion—which it does not—a statute delegating to the President the authority to engage in such invidious discrimination would raise grave constitutional concerns. Indeed, imposing burdens on individuals solely on the basis of their race, national origin, or religion—"a classification of persons undertaken for its own sake . . . inexplicable by anything but animus towards the class it affects"[4]—is "odious to a free people whose institutions are founded upon the doctrine of equality."[5] That is why—even when faced with a congressional delegation of seemingly unbridled power to the President or his appointees —the Supreme Court repeatedly "ha[s] read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation" when the delegation provides no explicit statement that Congress intended for the executive to use the delegated authority in a manner in conflict with constitutional protections.[6]

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[3] *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

[4] *Romer v. Evans*, 517 U.S. 620, 636, 632 (1996).

Accordingly, I conclude that Section 2(c)'s suspension on entry likely exceeds the President's authority under the Immigration Act to deny entry to classes of aliens.

I.

The majority opinion does not reach the merits of Plaintiffs' claim that Section 2(c)'s suspension on entry violates the Immigration Act, and Section 1182(f), in particular. *Ante* at 28-31. The district court, however, concluded that the Executive Order likely violates the Immigration Act insofar as Section 2(c) effectively prohibits the issuance of immigrant visas to aliens from the six countries based on their nationalities. *Int'l Refugee Assistance Project v. Trump*, – F. Supp. 3d –, 2017 WL 1018235, at *10 (D. Md. Mar. 16, 2017). And the Government has argued, both on appeal and before the district court, that the suspension on entry falls within the President's delegated power under

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[5] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[6] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Section 1182(f). Appellants' Br. at 28-30. Accordingly, the question of whether Section 2(c) complies with Section 1182(f) is squarely before this Court.[7]

Section 1182(f) provides, in relevant part, that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Like the district court, the majority opinion finds, and I agree, that Plaintiffs are likely to establish—based on statements by the President and his advisors—that in promulgating Section 2(c), the President relied on one suspect classification (national origin) as a proxy to purposely discriminate against members of another suspect class (adherents to a particular religion) solely on the basis of their membership in that class. *Ante* at 58. Thus, in considering Plaintiffs' statutory claim, we confront the following question: Did Congress, in enacting Section 1182(f), authorize the President to deny entry to a class of aliens on the basis of invidious discrimination?

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[7] The Government also asserts that Section 2(c)'s suspension on entry is authorized by Section 1185(a) of the Immigration Act, which "authorizes the President to prescribe 'reasonable rules, regulations, and orders,' as well as 'limitations and exceptions,' governing the entry of aliens." Appellants' Brief at 29 (quoting 8 U.S.C. § 1185(a)). The Government does not argue that Sections 1182(f) and 1185(a) confer meaningfully different powers on the President. Because Section 1182(f) is specifically tailored to the suspension on entry, and because there is no reason to believe that the analysis would be different under Section 1185(a), my analysis will proceed under Section 1182(f).

Additionally, because the Executive Order cites the Immigration Act as the sole statutory basis for the President's authority to proclaim Section 2(c)'s suspension on entry, I need not, and thus do not, take any position on the scope of the President's delegated power to deny entry to classes of aliens under other statutes. Likewise, because the claim at issue relates only to Section 2(c)'s compliance with the Immigration Act, I do not address whether, and in what circumstances, the President may deny entry to classes of aliens under his inherent powers as commander-in-chief, even absent express congressional authorization. *See The Prize Cases*, 67 U.S. 635 (1862).

Finally, I agree with Judge Keenan's analysis and conclusion that, at a minimum, John Doe #1 has standing to pursue Plaintiffs' Immigration Act claim. *Ante* at 82-83.

A.

Two related canons of statutory construction bear directly on this question. First, under the "constitutional avoidance canon," "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible' [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted) (quoting *Crowell*, 285 U.S. at 62). This canon "rest[s] on the reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Put differently, "[t]he courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Supreme Court has applied the constitutional avoidance canon on several occasions to narrow facially broad statutes relating to immigration and national security. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court assessed whether Section 1231(a)(6) of the Immigration Act—which provides that certain categories of aliens who have been ordered removed "may be detained beyond the removal period" —authorized the detention of such categories of aliens indefinitely. 533 U.S. at 689. Notwithstanding that Section 1231(a)(6) placed no express limitation on the duration of such detentions, the Supreme Court "read an implicit limitation into the statute . . . limit[ing] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* Explaining that "permitting indefinite detention of an alien would raise a serious constitutional problem" and noting the absence of "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed," the Supreme Court concluded that the constitutional avoidance canon required adoption of the "implicit limitation." *Id.* at 690, 697.

The Supreme Court also relied on the constitutional avoidance canon in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). In that case, the Supreme Court rejected the Government's arguments that two statutes amending the Immigration Act (1) deprived the judiciary of jurisdiction to review habeas petitions filed by certain aliens subject to removal orders and (2) retroactively deprived certain aliens who had pled guilty to criminal offenses —which convictions rendered such aliens removable— the opportunity to pursue a discretionary waiver of removal, notwithstanding that such aliens had been entitled to pursue such a waiver at the time of their plea. *Id.* at 292-93, 297. In reaching these conclusions, the Supreme Court acknowledged that Congress, at least in certain circumstances, has the constitutional authority to repeal habeas jurisdiction and to make legislation retroactive. *Id.* at 298-99, 315-16. Nonetheless, because (1) the Government's proposed constructions would require the Supreme Court to hold that Congress intended to exercise "the outer limits of [its] power" under the Constitution and (2) the legislation included no "clear, unambiguous, and express statement of congressional intent" indicating that Congress intended to exercise the "outer limits" of its power, the Supreme Court rejected the Government's positions. *Id.* at 299, 313-26.

The second applicable canon of construction—which is a corollary to the constitutional avoidance canon— requires an even clearer indication of congressional intent regarding the infringement on constitutional rights due to the absence of direct action by Congress. That canon forbids courts from construing a "broad generalized" delegation of authority by Congress to the executive as allowing the executive to exercise that delegated authority in a matter that "trench[es]" upon fundamental rights, *Kent v. Dulles*, 357 U.S. 116, 129 (1958), absent an "explicit" statutory statement providing the executive with such authority, *Greene v. McElroy*, 360 U.S. 474, 507 (1959). Under this canon, which I will refer to as the "delegation of authority canon," courts must "construe narrowly all delegated powers that curtail or dilute" fundamental rights. *Kent*, 357 U.S. at 129; *see also United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in a delegation] narrows, however, when the regulation . . . potentially affects fundamental rights. . . . This is because the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake."). The Supreme Court requires that delegations that potentially authorize the executive to encroach on fundamental rights "be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting *and* implementing our laws." *Greene*, 360 U.S. at 507 (emphasis added) (citation omitted).

As with the constitutional avoidance canon, the Supreme Court has applied the delegation of authority canon to statutes involving immigration and national security. For example, in *United States v. Witkovich*, 353 U.S. 194 (1957), the Supreme Court interpreted Section 242(d)(3) of the Immigration and Nationality Act of 1952, which provided that the Attorney General could require any alien subject to a final order of deportation that had been outstanding for more than six months "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." 353 U.S. at 195 (quoting 8 U.S.C. § 1252(d)(3) (1952)). The Government asserted that the plain language of the provision afforded the Attorney General near unfettered discretion to demand information from such aliens. *Id.* at 198. Although the Supreme Court acknowledged that "[t]he language of [Section] 242(d)(3), if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of [such] aliens," the Supreme Court limited the Attorney General's authority under Section 242(d)(3) to "questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue." *Id.* at 199, 202. In rendering this narrowing construction, the Supreme Court emphasized, first, that the broad reading proposed by the Government would call into question the statute's constitutional validity and, second, that the context and legislative history did not provide unambiguous evidence that Congress intended to give the Attorney General the unbridled authority the Government claimed. *Id.* at 199-200.

The Supreme Court also applied the delegation of authority canon in ***Kent v. Dulles***, 357 U.S. 116 (1958). There, the Supreme Court was asked to construe a statute providing that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States." 357 U.S. at 123 (internal quotation marks omitted) (quoting 22 U.S.C. § 211a (1952)). Pursuant to that authority, the executive branch promulgated a regulation authorizing the Secretary of State to demand an affidavit from any passport applicant averring whether the applicant had ever been a Communist and barring issuance of passports to Communists. *Id.* at 118 & n.2. Under that regulation, the Department of State denied a passport to an applicant on grounds he refused to submit such an affidavit. *Id.* at 118-19. Thereafter, the applicant sought a declaratory judgment that the regulation was unconstitutional. *Id.* at 119. Despite the breadth of the plain language of the delegating statute, the Supreme Court "hesitate[d] to impute to Congress . . . a purpose to give [the Secretary of State] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Id.* at 128. Emphasizing (1) that the authority to deny a passport necessarily involved the power to infringe on the fundamental right to travel and (2) that the statutory delegation provision's "broad generalized" terms were devoid of any "explicit" indication Congress had intended to "give[] the Secretary authority to withhold passports to citizens because of their beliefs or associations," the Supreme Court refused "to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." *Id.* at 129-30.

Taken together, the two canons reflect the basic principle that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 548 (1950) (Frankfurter, J., dissenting) (explaining that legislation potentially encroaching on fundamental rights "should not be read in such a decimating spirit unless the letter of Congress is inexorable"). Although closely related, the two canons are analytically distinct. In particular, the constitutional avoidance canon involves *direct actions* by Congress that potentially encroach upon fundamental rights. By contrast, the delegation of authority canon governs *delegations* by Congress that potentially allow a delegatee to exercise congressional power to encroach on fundamental rights. Because Congress does not itself decide when or how its delegated authority will be exercised, any encroachment on individual rights by Congress's delegatee must be supported by an "explicit" statement that Congress intended to permit such encroachment, *Greene*, 360 U.S. at 507—a more stringent requirement than the "clear indication" necessary when Congress acts directly, *Zadvydas*, 533 U.S. 696-97.

B.

The constitutional avoidance canon and the delegation of authority canon bear directly on the scope of authority conferred on the President by Congress under Section 1182(f) because, if construed broadly, Section 1182(f) could authorize the President to infringe on fundamental constitutional rights. In particular, the Supreme Court has "consistently repudiated '(d)istinctions between citizens solely because of their ancestry' [or race] as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "[T]he imposition of special disabilities" upon a group of individuals based on "immutable characteristic[s] determined solely by the accident of birth," like race and national origin, runs contrary to fundamental constitutional values enshrined in the Fifth and Fourteenth Amendments because it "violate[s] 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). Accordingly, the Constitution forbids "[p]referring members of any one group for no reason other than race or ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring in judgment). Or, more simply, the Constitution prohibits "discrimination for its own sake." *Id.*

Although religion, unlike race and national origin, is not an immutable characteristic, the Constitution treats classifications drawn on religious grounds as equally offensive. The First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S.

97, 104 (1968)). To that end, the Constitution forbids both discriminating against "those who embrace[] one religious faith rather than another" and "preferring some religions over others—an invidious discrimination that would run afoul of the [Constitution]." *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

If, as the Government's argument implies, Congress delegated to the President the authority to deny entry to an alien or group of aliens based on invidious discrimination against a race, nationality, or religion, then Section 1182(f) would encroach on the core constitutional values set forth in the First, Fifth, and Fourteenth Amendments: The President could deny entry to aliens of a particular race solely based on the color of their skin. The President could deny entry to citizens of a particular nation solely on the basis of their place of birth. The President could deny entry to adherents of a particular religion solely because of their subscription to that faith. Or, as this Court concludes the President likely did here, the President could rely on one form of invidious discrimination—discrimination based on national origin—to serve as pretext for implementing another form of invidious discrimination—discrimination based on religion.

The President justified his use of this layered invidious discrimination on grounds that citizens of the six predominantly Muslim countries subject to the suspension on entry pose a special risk to United States security. Revised Order § 1(e). In particular, the Executive Order generally points to "the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations." *Id.* § 1(d). The order also cites, as the sole example of an act of terrorism by a native of one of the six countries, a native of Somalia who was brought to the United States as a refugee at the age of two and was convicted, as an adult, of "attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." *Id.* § 1(h).

Accordingly, the President relies on the acts of *specific* individuals and groups of individuals (*i.e.*, "terrorist organizations" and "their members") within the six countries to establish that *all* citizens of those countries pose a danger to the United States. Dissenting from the Supreme Court's sanctioning of the forced internment of Japanese Americans during World War II, Justice Murphy explained the danger such rationales pose to the core constitutional value of equality:

> [T]o infer that examples of individual [misconduct] prove group [misconduct] and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference . . . has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

To be sure, the Supreme Court has recognized that, particularly in times of war,[8] Congress has broad authority to control immigration, including the power to authorize the President to establish policies restricting the entry of aliens. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that "the power to admit or exclude aliens is a sovereign prerogative" entrusted almost exclusively to Congress). And "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

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[8] Congress's constitutional power to control immigration—and authority to delegate that control—fundamentally differs in a time of war. *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) ("[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless."). The Supreme Court's broadest statements regarding the scope of the President's delegated powers over immigration—which are relied upon by the Government—are in cases in which Congress expressly declared war and authorized the President to deny entry to aliens as part of his prosecution of the conflict. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 & n.7 (1953) ("Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife [including] *the present emergency* [the Korean War]." (emphasis added)); *Knauff*, 338 U.S. at 543 ("[B]ecause the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country *during a time of national emergency* [World War II]." (emphasis added)).

But the Supreme Court also has long, and repeatedly, held that Congress's power to create immigration laws remains "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (holding that Congress's constitutionally devised powers to control immigration, among other powers, are "restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). That is particularly true when the discriminatory burdens of an immigration policy fall not just on aliens who have no claim to constitutional rights, but also on citizens and other individuals entitled to constitutional protections. *Cf. Zadvydas*, 533 U.S. at 693-94 (surveying the Supreme Court's immigration jurisprudence and finding that whether a plaintiff alien could lay claim to constitutional protections "made all the difference").

Here, aliens who are denied entry by virtue of the President's exercise of his authority under Section 1182(f) can claim few, if any, rights under the Constitution. But when the President exercises that authority based solely on animus against a particular race, nationality, or religion, there is a grave risk—indeed, likelihood—that the constitutional harm will redound to *citizens*. For example, we hold today that the denial of entry to a class of aliens solely based on their adherence to a particular religion likely violates the Establishment Clause by sending "a state-sanctioned message that foreign-born Muslims . . . are 'outsiders, not full members of the political community.'" *Ante* at 38 (quoting *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012)). Likewise, were the President to deny entry to a class of aliens solely based on their race, *citizens* of that race would be subjected to a constitutionally cognizable "feeling of inferiority as to their status in the community." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954). And denying entry to classes of aliens based on invidious discrimination has the potential to burden the fundamental right of *citizens* to marry the partner of their choice based on nothing more than the partner's race, nationality, or religion.[9] *Loving*, 388 U.S. at 12 ("'There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."). Put simply, when the Government engages in invidious discrimination—be it against aliens or citizens—individuals whose rights the Constitution protects face substantial harm.

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[9] *See Kerry v. Din*, 135 S. Ct. 2128, 2142 (2015) (Breyer, J., dissenting) (stating that a United States citizen and resident has a procedural due process interest in knowing the Government's grounds for denying a visa application by her husband, an Afghan citizen with no claim to rights under the Constitution); *id.* at 2139 (Kennedy, J., concurring in judgment) (recognizing that a United States citizen may have "a protected liberty interest in the visa application of her alien spouse").

Because construing Section 1182(f) as authorizing the President to engage in invidious discrimination is plainly inconsistent with basic constitutional values and because the violation of those values implicates the rights of citizens and lawful permanent residents, not just aliens, the Government's proposed construction "raise[s] serious constitutional problems." *St. Cyr*, 533 U.S. at 299-300.

C.

Having concluded that the Government's broad reading of Section 1182(f) raises serious constitutional concerns, we must reject that construction absent a "clear indication of congressional intent" to allow the President to deny the entry of classes of aliens on invidiously discriminatory bases. *Zadvydas*, 533 U.S. at 696-97. And because Section1182(f) involves a delegation of congressional authority, not a direct action by Congress, the indication of congressional intent to authorize the President, as delegatee, to encroach on fundamental rights must be "explicit." *Greene*, 360 U.S. at 507.

To ascertain congressional intent, we look to the "plain meaning" of Section 1182(f). *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt.)*, 706 F.3d 245, 251 (4th Cir. 2013). "To determine a statute's plain meaning, we not only look to the language itself but also the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (internal quotation marks omitted); *see also U.S. Nat'l*

Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (holding that in ascertaining congressional intent, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (internal quotation marks omitted)). Here, neither the language of Section 1182(f), nor the context in which the language is used, nor the "object and policy" underlying the Immigration Act "explicitly" state, much less "clear[ly] indicat[e]," that Congress intended to authorize the President to deny entry to aliens based on invidious discrimination.

1.

Beginning with the plain language, Section 1182(f) permits the President to suspend the entry of "any aliens or of any class of aliens" *only* when he "finds that the entry of [such aliens] would be detrimental to the interests of the United States." Accordingly, the plain language of Section 1182(f) does not explicitly authorize the President to deny entry to a class of aliens solely defined by religion or by race, national origin, or other immutable characteristic.

Nonetheless, in arguing that Section 1182(f) authorizes the Executive Order's suspension on entry, the Government focuses on that statute's use of the (concededly broad) term "any class of aliens." Appellants' Br. at 28-29. But the Government's argument omits the crucial limitation Congress imposed by requiring that the President may bar entry *only* upon a finding that entry of a class of aliens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That restriction requires a substantive connection between an alien's membership in a particular class and the likelihood that her entry would be detrimental to the interests of the United States.

Detrimental is defined as "harmful" or "damaging." Webster's Third New International Dictionary (2002). Accordingly, Section 1182(f) authorizes the President to deny entry to an alien if the President has reason to believe that, by virtue of the alien being a member of a particular class, her entry is more likely to damage or harm the interests of the United States. But the Constitution forbids imposing legal burdens on a class of individuals solely based on race or national origin precisely because those immutable characteristics bear no "relationship to individual responsibility." *Weber*, 406 U.S. at 175. Because an alien's race or national origin bears no "relationship to individual responsibility," those characteristics, by themselves, cannot render it more likely that the alien's entry will damage or harm the interests of the United States. *Cf. Romer*, 517 U.S. at 632, 636 (holding that "a classification of persons undertaken for its own sake" is "inexplicable by anything but animus towards the class it affects[, has no] relationship to legitimate state interests," and therefore violates the Fourteenth Amendment). Likewise, the Constitution's prohibition on discriminating against "those who embrace[] one religious faith rather than another," *Seeger*, 380 U.S. at 188 (Douglas, J., concurring), means that an alien's adherence to a particular religion alone also provides no constitutionally cognizable basis for concluding that her entry is disproportionately likely to harm or damage the interests of the United States.

Because race, national origin, and religion bear no factual or constitutionally cognizable relationship to individual responsibility, courts have long interpreted delegation provisions in the Immigration Act as barring executive officials from engaging in invidious discrimination. For example, in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (Hand, J.), the Second Circuit recognized "implied limitations" on Congress's facially broad delegation of authority to the Attorney General to suspend the deportation of any alien unlawfully present in the country. 180 F.2d at 490. Writing for the court, Judge Hand suggested that denying suspension of deportation based on "irrelevant" reasons having no bearing on whether the "alien's continued residence [was] prejudicial to the public weal"—such as "becom[ing] too addicted to attending baseball games, or ha[ving] bad table manners"—would exceed the Attorney General's congressionally delegated authority. *Id.* Factors like these, Judge Hand explained, are "considerations that Congress *could not have intended to make relevant*" to a determination of whether an alien could permissibly remain in the United States.[10] *Id.* at 491 (emphasis added). Under the dictates of equality established by the Constitution, an alien's race, nationality, or religion is as irrelevant to the potential for his entry to harm the interests of the United States as is the alien's addiction to baseball or his poor table manners.

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[10] Notably, *Kaloudis* found a basis for this clear outer limit on congressional delegations of discretionary authority to the executive branch in the Immigration Act well before Congress made explicit, in comprehensively amending the Immigration Act, that discrimination on the basis of race, sex, ethnicity, and nationality has no place in controlling immigration. *See infra* Part I.C.3.

Judge Friendly made this point clear in *Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2d Cir. 1966) (Friendly, J.). There, the Second Circuit again confronted a question regarding the scope of the Attorney General's authority —delegated by Congress—to suspend an alien's deportation. 360 F.2d at 716-17. Judge Friendly concluded that "the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or *rested on an impermissible basis such as an invidious discrimination against a particular race or group.*" *Id.* at 719 (emphasis added). Like addiction to baseball and poor table manners, invidious discrimination is a "consideration[] that Congress could not have intended to make relevant" to decisions regarding whether to allow an alien residence in the United States, Judge Friendly held. *Id.* (internal quotation marks omitted) (quoting *Kaloudis*, 180 F.2d at 491).

Just as Congress "could not have intended to make" considerations like "invidious discrimination against a particular race or group" relevant to the Attorney General's discretionary decision to suspend an alien's deportation from the United States, *id.*, Congress "could not have intended to make" invidious discrimination relevant to the President's discretionary determination regarding whether the entry of a particular alien or class of aliens is "detrimental to the interests of the United States," 8 U.S.C. § 1182(f). That is because invidious discrimination has no connection to whether an alien's residence in the United States would be harmful or damaging to the nation or its interests. Accordingly, not only does the plain language of Section 1182(f) fail to "explicitly" authorize the President to use invidious discrimination in determining whether to deny entry to a class of aliens, *see Greene*, 360 U.S. at 507, it does not even provide a "clear indication" that Congress intended to delegate to the President the power to invidiously discriminate, *see Zadvydas*, 533 U.S. at 696-97.

2.

Nor does the broader context of the Immigration Act, and Section 1182(f)'s place within it, suggest that Congress intended Section 1182(f) to allow the President to suspend the entry of a class of aliens based on invidious discrimination. In Section 1182(a), Congress enumerates numerous specific classes of aliens who are ineligible for visas or admission. These categories encompass, for example, classes of individuals who pose a variety of health, safety, and security risks, or are likely to become public charges. *See generally* 8 U.S.C. § 1182(a). Many of the categories are quite specific, providing particularized reasons why individual aliens may be deemed inadmissible. For example, aliens who have been convicted of certain crimes, served as foreign government officials and committed "particularly severe violations of religious freedom," or participated in the commission of torture are inadmissible. 8 U.S.C. § 1182(a)(2)(A), (G); *id.* § 1182(a)(3)(E)(iii). Likewise, Section 1182(a) deems inadmissible aliens who have been members of a totalitarian or Communist party, abused their status as student visa holders, or "engaged in the recruitment or use of child soldiers." *Id.* § 1182(a)(3)(D); *id.* § 1182(a)(6)(G); *id.* § 1182(a)(3)(G).

Importantly, most of the categories of inadmissible classes of aliens Congress sets forth in Section 1182(a) relate to past *conduct* by an alien that renders the alien particularly dangerous to the interests of the United States. *E.g.*, § 1182(a)(2); § 1182(a)(3); § 1182(a)(6)(E); § 1182(a)(8)(B); § 1182(a)(9)(A). And, in accordance with Congress's decision to define categories of inadmissible aliens largely based on individual conduct and responsibility rather than considerations over which aliens have no control, none of the Section 1182(a) categories render a class of aliens inadmissible solely on the basis of religion or of race, national origin, or other immutable characteristic.

Notwithstanding Congress's enumeration of the many general and specific categories and classes of aliens that the executive branch may or must deem inadmissible—and its failure to include any category defined by race, national origin, or religion alone—the Government argues that, in enacting Section 1182(f), Congress delegated to the President the authority to deny entry to any class of aliens for any reason whatsoever, necessarily including for invidiously discriminatory reasons. Appellants' Br. at 28-29. But in construing a statutory provision, we must, if at all possible, avoid a construction "that would render another provision [in the same statute] superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010). And reading Section 1182(f) as conferring on the President the unbridled authority to deny entry to any class of aliens would impermissibly render superfluous the numerous specific classes of inadmissible aliens that Congress has enumerated in Section 1182(a).

The District of Columbia Circuit reached an identical conclusion in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ginsburg, J.). There, the court considered 8 U.S.C. § 1182(a)(27) ("Subsection (27)"), which required the Attorney General to exclude an alien if the Attorney General had reason to believe that the alien sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." 785 F.2d at 1047 (internal quotation marks omitted) (quoting 8 U.S.C. § 1182(a)(27) (1982)). The question at issue was whether Subsection (27) allowed the Attorney General to "exclude aliens whose entry might threaten [United States'] foreign policy objectives simply because of their membership in Communist organizations," *id.* at 1057, when an adjacent provision in the statute, 8 U.S.C. § 1182(a)(28) ("Subsection (28)"), specifically dealt with exclusion of aliens who were or previously had been members of any Communist party, *Abourezk*, 785 F.2d at 1048. Then-Judge (now Justice) Ginsburg concluded that reading the Attorney General's vague and generalized delegated authority under Subsection (27) to allow exclusion on such a basis would impermissibly render Subsection (28) "superfluous." *Id.* at 1057.

"To preserve the significance of both sections, and the congressional intent that guided their adoption," the court held that the Attorney General could not rely on Subsection (27) to exclude aliens who were or had been members of a Communist party unless "the reason for the threat to the 'public interest[,] . . . welfare, safety, or security'" that the Attorney General put forward as a basis for barring entry under Subsection (27) was "*independent of* the fact of membership in or affiliation with the proscribed organization." *Id.* at 1058 (alterations in original) (quoting 8 U.S.C. § 1182(a)(27)). Put differently, the court prohibited the executive branch from using the general exclusionary authority conferred by Congress in Subsection (27) to circumvent the more specific provision in Subsection (28) dealing with exclusion of aliens affiliated with the Communist party. *Id.* at 1057-58.

For the same reason, the President's reliance on Section 1182(f) as a basis for Section 2(c)'s suspension on entry also is inconsistent with Section 1182(a)(3)(B), which includes "specific criteria for determining terrorism-related inadmissibility." *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). Recall that the Executive Order justified the President's suspension on entry, in part, on grounds that certain nationals of the six countries were members of terrorist organizations or previously had engaged in acts of terrorism and, therefore, that admitting aliens from those countries would be detrimental to the interests of the United States. *See supra* Part I.B.

Section 1182(a)(3)(B) renders inadmissible aliens who have been, are, or may in the future be connected to or engaged in terrorist activity, including aliens who have "engaged in a terrorist activity"; those whom government officials know or have reasonable cause to believe are "likely to engage after entry in any terrorist activity"; those who have "incited terrorist activity";

and those who "endorse[] or espouse[] terrorist activity or persuade[] others to" do so or who "support a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i). That subsection also provides detailed definitions of "terrorist activity," "terrorist organization," the act of "engag[ing] in terrorist activity," and "representative" of a terrorist organization. *Id.* § 1182(a)(3)(B)(iii)-(vi).

Congress established these "specific criteria for determining terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140, against the backdrop of the executive branch's exclusion of aliens based on "mere membership in an organization, some members of which have engaged in terrorist activity" even when there was no indication that *the alien seeking admission* was himself engaged in such activity. H.R. Rep. No. 100-882, at 19 (1988). By enacting specific provisions regarding the inadmissibility of aliens who are or have been engaged in terrorist activity, Congress sought to make clear that "the definitions of 'terrorist activity' and 'engages in terrorist activity' must be applied on a case by case basis" and that "simple membership in any organization . . . is not *per se* an absolute bar to admission to the United States"—whether under the President's general authority to bar entry or otherwise. *Id.* at 30.

If Congress has deemed it unlawful for the President to absolutely bar the entry of aliens who *are members of an organization* that includes some members who engage in terrorism, it defies logic that Congress delegated to the President in Section 1182(f) the far broader power to absolutely bar the entry of aliens who *happen to have been born in a particular country*, within the borders of which some individuals have engaged in terrorism. Indeed, this is precisely why courts apply the canon of statutory construction "that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal quotation marks omitted). When, as here, a statute includes "a general authorization [Section 1182(f)] and a more limited, specific authorization [Section 1182(a)(3)(B)] . . . side-by-side" that canon requires that "[t]he terms of the specific authorization must be complied with" in order to avoid "the superfluity of a specific provision that is swallowed by the general one." *Id.* Accordingly, Section 1182(a)(3)(B), not Section 1182(f), is the congressionally authorized mechanism for the President to deny entry to aliens whom he concludes are detrimental to the United States because they pose a threat of engaging in terrorist activities. *See Abourezk*, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under Section 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*." (emphasis added)).

Interpreting Section 1182(f) to allow the President to suspend the entry of aliens based solely on their race, nationality, or other immutable characteristics also would conflict with 8 U.S.C. § 1152(a), which provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Congress passed Section 1152(a) in 1965, more than a decade after it enacted Section 1182(f), as part of a comprehensive revision to the Immigration Act intended to eliminate nationality-based discrimination in the immigration system. *See infra* Part I.C.3.

Section 1152(a) deals with issuance of *immigrant visas*, rather than entry, which is governed by Section 1182. Nonetheless, reading Section 1182(f) as authorizing the President to deny entry based on invidious discrimination would place Section 1182(f) in conflict with Section 1152(a), which prohibits invidious discrimination in the issuance of visas. In particular, the Immigration Act authorizes the executive branch to refuse to issue a visa to any alien who "is ineligible to receive a visa or such other documentation under section 1182." 8 U.S.C. § 1201(g). As the Government concedes, the President's exercise of his authority under Section 1182(f) to deny entry to aliens from the six predominantly Muslim countries, were it lawful, also would bar, by virtue of Section 1201(g), such aliens from obtaining visas, including *immigrant* visas. This would be the very result Congress sought to avoid in ending nationality-based discrimination in the issuance of immigrant visas through its passage of Section 1152(a).

Accordingly, Section 1182(f)'s function within the Immigration Act does not clearly indicate that Congress intended to delegate to the President the authority to suspend the entry of aliens based on invidious discrimination. On the contrary, construing Section 1182(f) as broadly authorizing the President to engage in invidious discrimination in denying entry would render superfluous the numerous categories of inadmissible aliens Congress took pains to identify in Section 1182(a), including the provisions directly addressing aliens who pose a risk of engaging in terrorist activities, and conflict with Section 1152(a)'s prohibition on discrimination based on race, nationality, and other immutable characteristics.

3.

Reading Section 1182(f) as allowing the President to deny entry to classes of aliens based on invidious discrimination also would contradict the "object and policy" underlying the Immigration Act. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455. Although the specific language of Section 1182(f) dates to 1952, Congress "comprehensive[ly] revis[ed]" the Immigration Act in 1965 (the "1965 Revisions"). *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 78 (1964) (statement of Sen. Fong). Those revisions were drafted concurrently with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and enacted at the height of the civil rights movement with the express purpose of "eliminat[ing] the national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965); *see also S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 3*, 88th Cong. 107 (1964) (statement of Sen. Hart) ("A law that says that one man is somewhat less than another simply because of accident of his place of birth is not tolerable in the year 1964. A formula based on equality and fair play must be enacted. Selection should be based primarily on questions of our own national interest.").

Prior to the 1965 Revisions, the Immigration Act employed nationality-based quotas, limiting the number of immigrants admissible to the nation each year based on nation of birth. President Kennedy called on Congress to repeal the nationality-based quota system, condemning it as a system "without basis in either logic or reason" that "neither satisfie[d] a national need nor accomplishe[d] an international purpose" but instead "discriminate[d] among applicants for admission into the United States on the basis of accident of birth." Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, 1963 PUB. PAPERS 594, 595 (July 23, 1963). After President Kennedy's assassination, President Johnson renewed Kennedy's request for "the elimination of the national origins quota system," which he described as "incompatible with our basic American tradition" and "our fundamental belief that a man is to be judged—and judged exclusively—on his worth as a human being." Special Message to the Congress on Immigration, 1965 PUB. PAPERS 37, 37, 39 (Jan. 13, 1965).

The 1965 Revisions answered President Kennedy's and President Johnson's calls. Congress explained that the 1965 Revisions abolished nationality-based discrimination in the immigration system in order to "firmly express in our immigration policy the dedication which our nation has to the principles of equality, of human dignity, and of the individual worth of each man and woman." *S. 1932 & Other Legislation Relating to the*

Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 1, 88th Cong. 4 (1964) (statement of Sen. Kennedy). Time and again Congress connected the need to eliminate the nationality-based quota system to American "tenets of equality irrespective of race, creed, or color" and emphasized that abolishing nationality-based quotas "demonstrat[ed] to the whole world that we practice what we preach, and that all men are equal under law." *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 100-01 (1964) (statement of Sen. Fong); *see also id. Vol. 1*, at 9 (statement of Sen. Hart) (explaining that the 1965 Revisions abolished the "irrational . . . national origins concept, which said in clear and echoing words that the people of some nations [we]re more welcome to America than others" based on "[a]rbitrary ethnic and racial barriers").

Upon signing the bill into law at Liberty Island, New York, President Johnson lauded the end of the nationality-based discrimination that previously defined the American system of immigration, describing the 1965 Revisions as abolishing "the harsh injustice of the national origins quota system," which "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." 1965 PUB. PAPERS 1037, 1038-39 (Oct. 3, 1965). As a result of the 1965 Revisions, immigrants would be permitted to come to America "because of what they are, and *not because of the land from which they sprung*." *Id.* at 1039 (emphasis added).

To effect its purpose of eliminating discrimination in the immigration system, Congress stripped the Immigration Act of all provisions expressly authorizing national origin-based invidious discrimination and added Section 1152(a)(1)'s prohibition on discrimination in the issuance of visas based on nationality and other immutable characteristics, such as race. As evidenced by Section 1152(a)(1), disregarding national origin in selecting which immigrants to admit to the United States remains a core principle of United States immigration policy. Far from evidencing "any clear indication" that Congress intended the President to have the authority to exercise his Section 1182(f) powers based on invidious discrimination, the "object and policy" of the Immigration Act suggest that Congress *did not* intend to grant the President unbridled authority to engage in invidious discrimination when deciding whether and to what extent to suspend alien entry.[11]

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[11] The Government points to a number of orders promulgated by Presidents pursuant to their authority under Section 1182(f) as evidence that that statutory provision authorizes the President to engage in national origin-based discrimination. But the previous orders the Government cites materially differ from Section 2(c), in that they did not suspend the entry of classes of aliens based on national origin alone, let alone use national origin as a proxy to suspend the entry of a class of aliens based on another invidiously discriminatory basis, such as religion. *See* Proclamation 8693 (July 24, 2011) (suspending the entry of aliens subject to travel bans issued by the United Nations Security Council's resolution barring member nations from permitting the entry of individuals who threaten peace in various nations); Proclamation 8342 (Jan. 22, 2009) (suspending the entry of senior government officials "who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies,

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In sum, the language of Section 1182(f), related provisions in the Immigration Act, and the "object and

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or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons"); Proclamation 6958 (Nov. 22, 1996) (suspending the entry of "members of the Government of Sudan, officials of that Government, and members of the Sudanese armed forces" based on the Sudanese government's harboring of individuals who attempted to assassinate the Egyptian President in Ethiopia, in violation of Ethiopian sovereignty); Executive Order No. 12,807 (May 24, 1992) (suspending the entry of "undocumented aliens [entering the United States] by sea" during the mass exodus of Haitian nationals fleeing a military coup, often in dangerous and overcrowded sea vessels); Proclamation 5887 (Oct. 22, 1988) (suspending the entry of "officers and employees" of the Nicaraguan government as nonimmigrants to the United States based on the Nicaraguan government's "unjustified expulsion" of American diplomats and "long-standing . . . suppression of free expression and press and support of subversive activities throughout Central America"); Proclamation 5829 (June 10, 1988) (suspending the entry of "Panamanian nationals . . . who formulate or implement the policies of Manuel Antonio Noriega and Manuel Solis Palma" due to those officials' act of "preventing the legitimate government . . . from restoring order and democracy" to Panama).

Of the executive orders cited by the government, President Reagan's suspension on the entry of Cuban nationals *as immigrants* comes closest to a nationality-based suspension on alien entry. Proclamation 5517 (Aug. 22, 1986). But that executive action was not challenged as a violation of either Section 1182(f) or Section 1152(a)(1), and therefore the judiciary never had the opportunity to address whether the order complied with those provisions or the Constitution. Nor does a single, unchallenged executive action "demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence." *Abourezk*, 785 F.2d at 1056.

policy" of the statute do not "explicitly" state, much less provide a "clear indication," that Congress intended to delegate to the President wholly unconstrained authority to deny entry to any class of aliens, including based on invidiously discriminatory reasons. *See Zadvydas*, 533 U.S. at 697. Accordingly, Section 2(c)—which this Court finds was likely borne of the President's animus against Muslims and his intent to rely on national origin as a proxy to give effect to that animus—exceeds the authority Congress conferred on the President in Section 1182(f). As Judge Friendly put it, "Congress could not have intended to make relevant" to the President's exercise of his delegated authority to suspend the entry of aliens "invidious discrimination against a particular race or group." *Wong Wing Hang*, 360 F.2d at 719 (internal quotation marks omitted).

II.

Invidious "discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). Yet the Government asks this Court to hold that, in enacting Section 1182(f), Congress intended to delegate to the President the power to deny entry to a class of aliens based on nothing more than such aliens' race, national origin, or religion.

One might argue, as President Trump seemed to suggest during the campaign, *ante* at 18-21, that *as a matter of statistical fact*, Muslims, and therefore nationals of the six predominantly Muslim countries covered by the Executive Order, disproportionately engage in acts of terrorism, giving rise to a *factual* inference that admitting such individuals would be detrimental to the interests of the United States. Indeed, viewing the Executive Order in its most favorable light, that is the precisely the rationale underlying Section 2(c). Setting aside the question of whether that *factual finding* is true, or even reasonable—which is, at best, highly debatable given the 180 million people in the countries subject to the suspension on entry and the 1.6 million Muslims worldwide—that is precisely the inference that the Framers of the Constitution and the Reconstruction Amendments concluded was impermissible as a matter of *constitutional law.*[12] *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting). In particular, classifying individuals based solely on their race, nationality, or religion—and then relying on those classifications to discriminate against certain races, nationalities, or religions—necessarily results in placing special burdens on individuals who lack any moral responsibility, a result the Framers deemed antithetical to core democratic principles and destabilizing to our Republic. *Id.*

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[12] Our country adheres to the rule of law in preserving core constitutional protections. Thus, when the President can identify no change in circumstances justifying an invidious encroachment on constitutional rights, a simple claim of potential harm to national security does not provide the President with unfettered authority to override core constitutional protections. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that a claim of potential harm to national security does not provide the executive branch with unconstrained authority to override the freedom of the press). Indeed, even the invocation of Congressional war powers to protect national defense do "not remove constitutional limitations safeguarding essential liberties." *Robel*, 389 U.S. at 264-67 (internal quotation marks omitted).

Even though the Constitution affords greater latitude to the political branches to draw otherwise impermissible distinctions among classes of aliens, the harm to core constitutional values associated with governmental sanctioning of invidious discrimination—and the harm to citizens stemming from the abridgement of those values—demands evidence of "careful and purposeful consideration by those responsible for *enacting and implementing* our laws" before such discrimination should be sanctioned by the judiciary. *Greene*, 360 U.S. at 507 (emphasis added). Because Congress did not provide any indication—let alone the requisite "explicit" statement—that it intended to delegate to the President the authority to violate fundamental constitutional values of equality in exercising his authority to deny entry to classes of aliens, I reject the Government's proposed construction of Section 1182(f).

In emphasizing the larger constitutional problems raised by construing Section 1182(f) as a delegation of authority to engage in invidious discrimination, we must not forget that the Constitution embraces equality in order to forestall highly personal harms. Plaintiff John Doe #1, a lawful permanent resident, seeks to be reunited with his wife, an Iranian national, whom Section 2(c) bars from entering the United States. As Justice Jackson explained when confronted with another broad delegation of congressional authority over immigration, "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized [the President] to break up the family of [a lawful permanent resident] or force him to keep his wife by becoming an exile." *Knauff*, 338 U.S. at 551-52 (Jackson, J., dissenting).

THACKER, Circuit Judge, concurring:

I concur in the majority's opinion but write separately for three reasons: (1) I would not consider remarks made by candidate Trump before he took his presidential oath of office; (2) I would nonetheless find that Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of the Second Executive Order ("EO-2") violates the Establishment Clause, based solely on remarks made or sentiments expressed after January 20, 2017; and (3) I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c), as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the Immigration and Nationality Act ("INA").

I.

I agree with the majority's conclusion that Appellees have standing to challenge the constitutionality of § 2(c) of EO-2 and that EO-2 likely violates the Establishment Clause. However, in my view, we need not—and should not—reach this conclusion by relying on statements made by the President and his associates before inauguration.

While on the campaign trail, a non-incumbent presidential candidate has not yet taken the oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, and may speak to a host of promises merely to curry favor with the electorate. Once a candidate becomes President, however, the Constitution vests that individual with the awesome power of the executive office while simultaneously imposing constraints on that power. Thus, in undertaking the Establishment Clause analysis, I believe we should focus our attention on conduct occurring on President Trump's inauguration date, January 20, 2017, and thereafter. Indeed, for the reasons below, looking to pre-inauguration conduct is neither advisable nor necessary.

A.

In confining my analysis to post-inauguration statements and actions, I do not draw on a blank slate. To begin, "the Establishment Clause protects religious expression from *governmental interference*." ***Mellen v. Bunting***, 327 F.3d 355, 376 (4th Cir. 2003) (emphasis supplied). To this end, Establishment Clause jurisprudence has focused on government action rather than "a[] judicial psychoanalysis" of individuals. ***McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.***, 545 U.S. 844, 862 (2005). We have neither the right nor the ability to peer inside an official's "heart of hearts"; indeed, we will "not look to the veiled psyche of government officers"—much less that of *candidates* for public office—to divine the purpose of a law. *Id.* at 862-63.

The Government relies on the doctrines of executive privilege and presidential immunity to contend that EO-2 is essentially unreviewable, arguing that courts "should not second-guess the President's stated purpose by looking beyond the policy's text and operation," and that we should instead apply a "presumption of regularity" to his actions. Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). While I do not agree with this proposition for the reasons ably set forth by Chief Judge

Gregory, I do believe the Supreme Court's decisions in the executive privilege and immunity context support confining our review to statements by the President and his administration made after the inauguration, once the President began operating pursuant to Article II. Those decisions explain that the judiciary's ability to probe official, presidential conduct is related to his discharge of *official* power. *See Clinton v. Jones*, 520 U.S. 681, 703 (1997) ("[W]e have long held that when the President takes *official action*, the Court has the authority to determine whether he has acted within the law." (emphasis supplied)); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) ("It is well established that 'a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any *ordinary individual*.'" (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)) (emphasis supplied)). Indeed, the executive privilege—and, by that token, the separation of powers—applies where the President operates within the executive's core constitutional powers. *See Nixon*, 418 U.S. at 708-09. It follows that a president's conduct after he takes office, but not before, carries the imprimatur of official "government" action, and can only then be considered "government interference" under the Establishment Clause. *Mellen*, 327 F.3d at 376.

B.

For more practical reasons, we should also hesitate to attach constitutional significance to words a candidate utters on the campaign trail. Campaign speeches are inevitably scattered with bold promises, but once the dust settles after an election—when faced with the reality of the office and with benefit of wise counsel—a newly inducted public official may act with a different philosophy. Presidents throughout history have dialed back or even reversed campaign promises.[1] To be sure, the President's statements regarding Islam before assuming office reveal religious animus that is deeply troubling. *See, e.g.*, J.A. 346 ("Donald J. Trump Statement on Preventing Muslim Immigration," dated December 7, 2015).[2] Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so.

II.

Even without focusing on any campaign rhetoric, the record in this case amply demonstrates the primary purpose of EO-2 was to ban Muslims from entering the

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[1] Indeed, many might argue that this President has repeatedly and regularly dialed back or reversed course on his campaign promises. *See, e.g.*, Priya Krishnakumar et al., *Tracking President Trump's Campaign Promises*, L.A. Times (Apr. 26, 2017), http://www.latimes.com/projects/la-na-pol-trump-100-days-promises/ (reporting President Trump has "scaled back" or "abandoned" 9 out of 31 campaign promises) (saved as ECF opinion attachment).

[2] Given that they were made on the campaign trail, I do not consider as part of my analysis the President's campaign website's archived statements about the plan to ban all Muslims from entering the United States. However, I must note it is peculiar that those statements were removed shortly before we began hearing arguments in this case. *See* Dan Merica, *Trump campaign removes controversial Muslim ban language from website*, CNN (May 8, 2017, 3:37 PM), http://www.cnn.com/2017/05/08/politics/trump-muslim-ban-campaign-website/ (saved as ECF opinion attachment).

United States in violation of the Establishment Clause. I would thus base our Establishment Clause analysis on the morphing of the First Executive Order ("EO-1") into EO-2, the statements of presidential representatives and advisors, the lack of evidence supporting a purported national security purpose, and the text of and logical inconsistencies within EO-2.

The Government argues that we should simply defer to the executive and presume that the President's actions are lawful so long as he utters the magic words "national security." But our system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate. Although the executive branch may have authority over national security affairs, *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)), it may only exercise that authority within the confines of the law, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46, 654-55 (1952) (Jackson, J., concurring); and, of equal importance, it has always been the duty of the judiciary to declare "what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A.

The President issued EO-1 on January 27, 2017. *See* Exec. Order 13,769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 banned citizens of seven majority Muslim nations—Libya, Iran, Iraq, Somalia, Syria, Sudan, and Yemen—from entering the United States. The ban applied to over 180 million Muslims, or just over 10% of the world Muslim population, and was executed without input from relevant cabinet officials. Indeed, the President actively shielded certain officials from learning the contents of EO-1: per then-acting Attorney General Sally Yates, the administration advised "the Office of Legal Counsel . . . not to tell the attorney general about [EO-1] until after it was over." *Full Transcript: Sally Yates and James Clapper testify on Russian election interference*, Wash. Post (May 8, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference (saved as ECF opinion attachment).

As Rudy Giuliani, an advisor to the President, explained on January 28, 2017, EO-1 did all this with the *purpose* of discriminating against Muslims. Giuliani was quite clear that the President wanted to enact a "Muslim ban" and had assembled a commission to study how to create a "Muslim ban" legally. J.A. 508. Per Giuliani, EO-1 was the President's attempt at a legal "Muslim ban." *Id.*[3]

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[3] Giuliani is purportedly a member, and claims to be chairman, of an expert legal commission assembled to study how to create a lawful way to ban Muslims from entering the country and an acknowledged advisor to the President. *See* J.A. 508-09. Courts routinely analyze statements and reports from presidential commissions such as the one of which Giuliani is a member. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (citing and quoting President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967) to demonstrate importance of privacy in communications); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing Attorney General's Commission on Pornography to establish state's interest in punishing child pornography possession).

To further this goal, EO-1 suspended the entry of refugees for 120 days but directed the Secretary of State "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." EO-1, § 5(b). The President explained that this exception was designed to give Christians priority in entering the United States as refugees. He said that in Syria,

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the *Christians*. And I thought it was very, very unfair. So we are going to help *them*.

J.A. 462 (emphases supplied).[4] The statements of the President, his advisor, and the text of EO-1 made crystal clear a primary purpose of disfavoring Islam and promoting Christianity.

After the Ninth Circuit upheld the stay of EO-1, the President set about to issue a new executive order. But significantly, in revising the order, the executive branch did not attempt to walk away from its previous discriminatory order. Instead, it simply attempted to effectuate the same discrimination through a slightly different vehicle—the proverbial wolf in sheep's clothing. Indeed, Press Secretary Sean Spicer confirmed that "[t]he principles of the executive order remain the same," J.A. 379,[5] and the President's Senior Policy Advisor, Stephen Miller, described the changes in the new order as "mostly minor technical differences," *id.* at 339.

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[4] Presidential statements necessarily shed light on executive policy. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015) (using presidential statement to show United States' position on status of Jerusalem); *Clinton v. City of New York*, 524 U.S. 417, 495-96 (1998) (Breyer, J., dissenting) (relying on presidential statements to demonstrate effect of Line Item Veto Act).

B.

The President issued EO-2 on March 6, 2017. *See* Exec. Order 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017). Like its predecessor, EO-2 lacks evidentiary support, is logically inconstant, and evinces an intent to discriminate against Muslims.

1.

First, the Government offers very little evidence in an attempt to support the President's ban of approximately 180 million people. EO-2 claims, "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" but cites only two such examples, each of which is weakly related, if at all, to the purported purpose of EO-2. EO-2, § 1(h). One example is from Iraq, but, as Iraq is not part of EO-2, it does not support *this* ban at all. The other example involves a child brought to the United States as a two-year-old. As this two-year-old was ultimately radicalized in the United States and not abroad, this case is unrelated to better screening and vetting—the purported purpose of EO-2. *See* Br. for Cato Institute as Amicus Curiae Supporting Appellees at 12-13, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 19, 2017), ECF No. 185; EO-2, § 1(a), (h).

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[5] When relevant, the press secretary and other White House Official's statements can represent official government position. *See, e.g.*, *Reynolds v. United States*, 123 S. Ct. 975, 984 (2012) (citing to the Office of the Press Secretary to show President's position on registration of sex offenders who committed offenses before enactment of the Adam Walsh Child Protection and Safety Act of 2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 549 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (relying on Office of the White House Press Secretary's statement to identify official executive policy).

In sharp contrast to the dearth of evidence to support the purported purpose of EO-2, 42 bipartisan former national security officials concluded EO-2 "bear[s] no rational relation to the President's stated aim of protecting the nation from foreign terrorism." Corrected Br. for Former National Security Officials as Amici Curiae Supporting Appellees at 4, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 13, 2017), ECF No. 126. In addition, since the issuance of EO-1, a report by the Department of Homeland Security has found that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," likewise undermining any purported security justification for the Order. J.A. 419.

2.

The Government's untenable position is made even worse by the fact that the Government's purported justification for EO-2 does not logically support the ban it created. EO-2 reasoned that people coming from the six banned countries posed an increased risk of committing terrorist acts because, according to the Department of State's Country Reports on Terrorism 2015 (the "Country Reports"), "each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and were unwilling or unable "to share or validate important information about individuals seeking to travel to the United States." EO-2, § 1(d); *see* § 1(e) (citing Country Reports). However, given these conditions as the reason for the ban, and based on the Country Reports, two other majority Christian countries—Venezuela and the Philippines—should have logically been included. *See* U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2015 78-85, 297-98, 308-09, 314-15, 352, 380 (June 2016), https://www.state.gov/documents/organization/258249.pdf (excerpts saved as ECF opinion attachment). Neither country is willing and able to help the Government verify information about people attempting to travel to the United States, and both countries have terrorist organizations operating within their boundaries. Therefore, applying the Government's logic, the potential of a terrorist act from a national of Venezuela or the Philippines would also justify a blanket ban on all nationals from these countries. Interestingly, however, the CIA World Factbook reports that Venezuelan population is, at most, 2% Muslim, and the Philippine population is 5% Muslim. *See* Cent. Intelligence Agency, ***Field Listings: Religions***, World Factbook, https://www.cia.gov/library/

publications/the-world-factbook/fields/2122.html (last visited May 23, 2017) (saved as ECF opinion attachment). Thus, the Government has not consistently applied the criteria it claims it used, and the reason seems obvious—and inappropriate.

Moreover, if the conditions in the six countries subject to EO-2 truly motivated the Government's travel ban, the Government would have based its ban on *contact* with the listed countries, not *nationality*. Under EO-2, a person who is a citizen of Syria would not be allowed to enter the United States even if they had never set foot in Syria. However, a person who lived his or her whole life in Syria but never obtained Syrian citizenship, and had even recently lived near terrorist-controlled regions of Syria, would be unaffected and freely allowed to enter the United States.[6] As a result, EO-2 is at once both overinclusive and underinclusive and bears no logical relationship to its stated objective.

Last, but by no means least, EO-2 identifies and discriminates against Muslims on its face. It identifies only Muslim majority nations, thus banning approximately 10% of the world's Muslim population from entering the United States. It discusses only Islamic terrorism. And, it seeks information on honor killings

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[6] Syrian citizenship is not based on country of birth. *See* Legislative Decree 276-Nationality Law [Syrian Arab Republic], Legislative Decree 276, 24 November 1969. Therefore, a person can have Syrian citizenship without ever setting foot in the country and a person who lives in Syria for their entire lifetime may not have Syrian citizenship.

—a stereotype affiliated with Muslims[7]—even though honor killings have no connection whatsoever to the stated purpose of the Order.[8]

C.

All of this evidence—arising after January 20, 2017 —leads to only one conclusion: the principal motivation for the travel ban was a desire to keep Muslims from entering this country. EO-2 does not pass constitutional muster. Our constitutional system creates a strong presumption of legitimacy for presidential action; however, this deference does not require us to cover our eyes and ears and stand mute simply because a president incants the words "national security." The Constitution and our system of democracy requires that we ensure that any and every action of the President complies with the protections it enshrines.

III.

Finally, I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of EO-2, as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the INA.[9]

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[7] Honor killings, in which family members kill one of their own (usually a woman) under the belief that the murder is necessary to vindicate the family's honor, occur within societies of many faiths and, notably, in countries that were not subject to either Executive Order. *See* Kimberly Winston, *Activists: Trump Call for Honor Killings Report Targets Muslims*, USA Today (March 7, 2017, 3:06 PM), https://www.usatoday.com/story/news/2017/03/07/activists-trump-call-honor-killings-report-targets-muslims/98861230/ (saved as ECF opinion attachment).

[8] EO-1 also sought information on honor killings. *See* EO-1 § 10(a)(iii).

Section 1182(f) of Title 8 states that the President may "suspend the entry of all aliens or any class of aliens" "for such period as he shall deem necessary" when the President finds that such entry "would be detrimental to the interests of the United States." However, § 1152(a)(1)(A), which was promulgated after § 1182(f), states that no person seeking an immigrant visa[10] "shall . . . be discriminated against" on the basis of "nationality." To be sure, EO-2 discriminates on the basis of nationality, suspending entry of "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen" (the "Designated Countries"). EO-2, § 2(c). The crux of the Government's argument, however, is that § 1152(a)(1)(A) does not prevent the President, acting pursuant to his § 1182(f) authority, from suspending *entry* based on nationality, even if that suspension necessarily mandates the denial of immigrant visas based on nationality. This is nonsensical. I find this argument to contravene longstanding canons of statutory construction as well as the text and effect of EO-2 itself.

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[9] I join in Part I of Judge Keenan's opinion, concluding that the plaintiffs possess standing to bring a claim under the INA.

[10] Immigrant visas are issued to persons seeking admission to the United States with the goal of obtaining lawful permanent residence status. *See* 8 U.S.C. §§ 1101(a)(15), (20), 1201(a)(1)(A). Those seeking admission for other purposes, such as business, study, or tourism, typically receive nonimmigrant visas. *See id.* §§ 1101(a)(15), 1201(a)(1)(B). I would decline Appellees' invitation to extend § 1152(a)(1)(A) to nonimmigrant visas.

A.

Our jurisprudence gives ample guidance for a situation in which two statutes conflict with one another. But the Government believes § 1182(f) and § 1152(a)(1)(A) do not conflict at all. Instead, the Government posits that the two statutes "address different activities handled by different government officials." Appellants' Br. 31 (internal quotation marks omitted). The Government thus believes the specific visa denial warranted by EO-2 falls squarely within the broad ambit of § 1182(f).

I will first address whether we are faced with any real conflict between these provisions. "When two acts touch upon the same subject, both should be given effect if possible." *United States v. Mitchell*, 39 F.3d 465, 472 (4th Cir. 1994) (citation omitted). And "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). We must "fit, if possible, all parts into an harmonious whole." *Id.* (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). In this vein, 8 U.S.C. § 1201(g) provides, "No visa . . . shall be issued to an alien . . . ineligible to receive a visa . . . under section 1182. . . . " Thus, when a President suspends entry to a national from a Designated Country and renders him inadmissible under § 1182(f), there is a strong argument that the alien *must be* denied a visa. *See generally* 8 U.S.C. § 1182 (titled "Inadmissible aliens"). To conclude that the two statutes operate independently and deal with totally separate executive functions would be to ignore this link.

Furthermore, although the Government contends the provisions at issue do not touch upon the same subject—asserting that the visa issuance process is a "different activity" than suspension of entry—its own arguments and the text and operation of EO-2 belie this notion.

EO-2 directs that the entry of nationals of the Designated Countries be suspended, but the Government admits the Department of State will "implement th[e] suspension [of entry] by *declining to issue visas* to aliens who are covered by the Order and who are not found eligible for a waiver." Appellants' Br. 34 n.12 (emphasis supplied); *see also* J.A. 729 (Government counsel admitting immigrant visa applicants "will be denied a visa if they are a national from the listed country"). EO-2 also delineates who is entitled to or restricted from entry *based on* one's visa status. *See* EO-2, § 3(a) (defining the scope of entry suspension to those outside the United States on the effective date of the order who "did not have a valid visa" on the date of the now-revoked first executive order; and "do not have a valid visa" as of the effective date of EO-2). Further, the Government offers the precarious justification that "when an alien subject to [EO-2] is denied an immigrant visa, he is not suffering discrimination on the basis of nationality of the sort prohibited by Section 1152(a)(1)(A); instead, he is being denied a visa because he has been validly barred from entering the country." Appellants' Br. 33. Following this circular logic, an alien is barred from entry because he does not have and cannot attain a visa, but he is denied a visa because he is barred from entry. It is clear that in EO-2, the visa issuance and entry concepts are intertwined to the point of indistinguishability.[11]

The Government also contends it would be a "fruitless exercise" and would "make no sense" to enable issuances of immigrant visas pursuant to § 1152(a)(1)(A), when those aliens receiving the visas would nonetheless be barred from entering the United States once they reach our borders. Appellants' Br. 31, 35. I fail to see how permitting a national of one of the Designated Countries to continue with her immigrant visa process would be fruitless, unless, of course, the Government intends to use the ban as a gateway to a much more permanent ban, ultimately sweeping in those nationals whose processes were halted by the order. *See* Section 1(a) (stating that a "Policy and Purpose" of the EO-2 is to improve the protocols and procedures "associated with the visa-issuance process"). Moreover, being a visa holder, even if one maybe temporarily inadmissible, carries with it a certain status with regard to EO-2. *See, e.g.*, EO-2, § 3(c) (suggesting that one receiving a visa from U.S. Customs and Border Protection during the protocol review period could gain entry to the United States).

I likewise fail to see how allowing one to continue with her incipient visa process would "make no sense," when that national could be one step closer to ultimately reuniting with her loved ones. For example, in the case of John Doe #1, his wife could conceivably proceed with her visa application interview, obtain her visa, and once the protocol review period has ended, join her husband in the United States as soon as possible thereafter, quickly redressing John Doe #1's constitutionally cognizable injury of being separated from an immediate family member.

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[11] Indeed, Section 3 of EO-1, the predecessor to EO-2's Section 2, was entitled "Suspension of *Issuance of Visas* and Other Immigration Benefits to Nationals of Countries of Particular Concern."

For all of these reasons, I would reject the Government's argument that § 1152(a)(1)(A) and § 1182(f) operate in separate statutory spheres. I believe § 1152(a)(1)(A)'s prohibition limits the President's § 1182(f) authority in the issuance of EO-2. As the Government itself mentioned in its opening brief, "courts judge the legitimacy of a law by what it says and does." Appellants' Br. 2. Here, the ultimate effect of what EO-2 actually *does* is require executive agencies to deny visas based on nationality.

Therefore, I next turn to the traditional canons of statutory construction to determine how to resolve this tension between § 1182(f) and § 1152(a)(1)(A). I approach this analysis mindful that the executive branch's authority over immigration affairs is conferred and cabined by Congress. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (The Executive's "broad discretion over the admission and exclusion of aliens . . . extends only as far as the statutory authority conferred by Congress.").

B.

When faced with provisions that apparently conflict, we must give effect to each provision, with a later enacted, more specific statute trumping an earlier, more general one. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").

First, § 1152(a)(1)(A) must be given effect. Reading § 1182(f) as bestowing upon the President blanket authority to carry out a suspension of entry, which involves rejecting a particular country's immigrant visa applications as a matter of course, would effectively nullify the protections in § 1152(a)(1)(A) and create an end-run around its prohibitions against discrimination. It would collapse the statutory distinction between entry and visa issuance, *see* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."), and ultimately allow the chief executive to override any of Congress's carefully crafted visa criterion or grounds for inadmissibility.

Second, § 1182(f) was enacted in 1952, but § 1152(a)(1) was enacted in 1965 as part of a sweeping amendment of the INA. We assume that "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010). Thus, we must accept that Congress knew about the President's broad authority in § 1182(f) when it enacted § 1152(a)(1)(A), and the latter lists several exceptions, none of which include the former. *See* § 1152(a)(1)(A) (exempting §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153). Section 1152(a)(1)(A) is also more specific, applying to demarcated types of discrimination and a certain type of visa. *See Radzanower*, 426 U.S. at 153 (preference should be given to statute involving a "narrow [and] precise . . . subject").

Finally, the Government's suggestions of potential statutory discord are unconvincing. For example, the Government relies on 8 U.S.C. § 1185(a)(1), which makes it unlawful for any alien to enter the United States "except under such reasonable rules, regulations, and orders, and subject to such limitations" prescribed by the President. But this provision merely acts as an implementation provision flowing from § 1182(f), which, as stated above, is limited by § 1152(a)(1)(A). In addition, § 1152(a)(1)(B) is of no concern to this analysis given that it applies to the Secretary of State, and § 2(c) of EO-2 bars visa issuance to nationals of the Designated Countries, rather than regulating visa processing locations.

C.

For these reasons, I find Appellees' statutory argument that EO-2 violates § 1152(a)(1)(A) because it requires the denial of immigrant visas on the basis of nationality the more compelling argument. Therefore, I would conclude that Appellees have shown a likelihood of success on the merits on this point. I otherwise join Judge Keenan's opinion, with the exception of Part II.A.i.

IV.

In conclusion, I believe the district court's injunction should be affirmed based on the majority's Establishment Clause conclusion, although I would do so based only on consideration of post-inauguration conduct. I also believe that the plaintiffs will likely succeed on the merits of their argument that EO-2 violates the INA for the reasons stated by Judge Keenan and set forth in Part III of this opinion.

NIEMEYER, CIRCUIT JUDGE, with whom JUDGE SHEDD and JUDGE AGEE join, dissenting:

The district court issued a nationwide preliminary injunction against Executive Order No. 13,780 issued by President Donald Trump on March 6, 2017, to suspend temporarily, while vetting procedures could be reviewed, the entry of aliens from six countries, reciting terrorism-related concerns. While the court acknowledged the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to enter the Order and also acknowledged that the national security reasons given on the face of the Order were legitimate, the court refused to apply *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which held that courts are precluded from "look[ing] behind" "facially legitimate and bona fide" exercises of executive discretion in the immigration context to discern other possible purposes, *id.* at 770. Relying on statements made by candidate Trump during the presidential campaign, the district court construed the Executive Order to be directed against Muslims because of their religion and held therefore that it likely violated the Establishment Clause of the First Amendment.

I conclude that the district court seriously erred (1) by refusing to apply the Supreme Court's decision in *Mandel*; (2) by fabricating a new proposition of law —indeed, a new rule—that provides for the consideration of campaign statements to recast a later-issued executive order; and (3) by radically extending Supreme Court Establishment Clause precedents. The district court's approach is not only unprecedented, it is totally unworkable and inappropriate under any standard of analysis.

The majority reworks the district court's analysis by applying *Mandel*, albeit contrary to its holding, to defer only to the facial *legitimacy* of the Order but not to its facial *bona fides*, despite the *Mandel* Court's holding that "when the Executive exercises this power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of the plaintiffs. *Mandel*, 408 U.S. at 770 (emphasis added). In addition, the majority, after violating *Mandel*, then adopts the same new rule of law adopted by the district court to consider candidate Trump's campaign statements to find the Executive Order's stated reasons "pretext[ual]," *ante* at 51, and then to rewrite the Order to find it in violation of the Establishment Clause. This too is unprecedented and unworkable.

Accordingly, I respectfully dissent. I would vacate the district court's injunction.

I

A

The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, requires that an alien, to obtain admission into the United States, must normally both possess a visa and be admissible upon his or her arrival at a port of entry, *id.* §§ 1181, 1182(a)(7), 1201(h).

Exceptions exist which allow for entry without a visa. For instance, Congress has established a Visa Waiver Program, which allows nationals of certain countries to seek temporary admission into the United States for

90 days or less. 8 U.S.C. § 1187. In December 2015, however, Congress excluded aliens from admission under this program who are dual nationals of or have recently visited Iraq, Syria, any country designated by the Secretary of State to be a state sponsor of international terrorism, or any country that the Secretary of Homeland Security has deemed to be a country or area of concern. Pub. L. No. 114-113, div. O, tit. II, § 203, 129 Stat. 2988, 2989-91 (2015) (codified at 8 U.S.C. § 1187(a)(12)). At all times relevant to this litigation, the countries designated by the Secretary of State to be state sponsors of international terrorism have been Iran, Sudan, and Syria. U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 4, 299-302 (June 2016), https://perma.cc/KJ4B-E4QZ. Also, in February 2016, the Department of Homeland Security ("DHS") excluded recent visitors to and nationals of Libya, Somalia, and Yemen from the Program. DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://perma.cc/87CZ-L4FU.

Even when an alien possesses a visa, the alien must also be *admissible* to the United States when arriving at a port of entry. Congress has accorded the President broad discretion over the admission of aliens, providing in 8 U.S.C. § 1182(f):

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or

> nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

In addition, Congress has specified that the entry of aliens is governed by "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

B

On January 27, 2017, the President issued Executive Order 13,769, 89 Fed. Reg. 8977, which was challenged in several courts. A district court in Washington enjoined nationally the enforcement of several provisions of that order, *see Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and the Ninth Circuit declined to stay the district court's injunction pending appeal, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

Rather than challenge that decision further, the President issued a revised order—Executive Order 13,780—on March 6, 2017, entitled, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13,209, which is the Order before us. This Order revoked the earlier order and rendered moot the challenge to the earlier order.

The first Section of the revised Executive Order announces the policy goals of "protect[ing] the Nation from terrorist activities by foreign nationals" by "improv[ing] the screening and vetting protocols and procedures associated with the visa-issuance process and the [United States Refugee Admissions Program]" that "play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." Order Preamble, § 1(a).

The Order then recites the previous Administration's response to terrorist activities in the countries covered by the current Order:

> Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen . . . had [during the prior Administration] already been identified as presenting heightened concerns about terrorism and travel to the United States. . . . [And] [i]n 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of . . . statutory factors related to terrorism and national security. . . . Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

Order § 1(b)(i). Describing further the threats posed generally by these nations, the Order states:

> Nationals from the countries previously identified . . . warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the signifi-

> cant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

Order § 1(d). Finally, the Order describes as follows "the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States," relying on the Department of State's *Country Reports of Terrorism 2015*:

> (i) Iran. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and . . . al Qa'ida. . . . Iran does not cooperate with the United States in counterterrorism efforts.
>
> (ii) Libya. Libya is an active combat zone. . . . In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. . . . The United States Embassy in Libya suspended its operations in 2014.
>
> (iii) Somalia. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Soma-

> lia has porous borders, and most countries do not recognize Somali identity documents. . . .
>
> (iv) Sudan. Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas . . . [and it] provided safe havens for al-Qa'ida and other terrorist groups to meet and train. . . . [E]lements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.
>
> (v) Syria. Syria has been designated as a state sponsor of terrorism since 1979. [Although] [t]he Syrian government is engaged in an ongoing military conflict against ISIS[,] . . . ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.
>
> (vi) Yemen. . . . Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited [internal] conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations. . . .

Order § 1(e). Based on this collection of information, the Order concludes that, "[i]n light of the conditions in these six countries, until [an] assessment of current screening and vetting procedures . . . is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Order § 1(f).

The operative provisions, as relevant here, are stated in Section 2 of the Order, which directs the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." Order § 2(a). The Secretary of Homeland Security is then directed to present a report with his findings to the President. Order § 2(b). And finally, pending the review, the Order prohibits the entry of certain nationals from the six countries, as follows:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C.

> 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

Order § 2(c).

The referenced limitations in Section 3 specify that the suspension does not apply to nationals of the designated countries who are inside the United States on the effective date of the Order (March 16, 2017) or who had a valid visa at 5:00 p.m. on January 27, 2017 or on the effective date of the Order. Order § 3(a). The Section goes on to create exceptions that allow the entry of lawful permanent residents of the United States, foreign nationals with valid travel documents that are not visas, dual nationals traveling on passports issued by a non-designated country, foreign nationals traveling on diplomatic visas, foreign nationals granted asylum, refugees already admitted to the United States, and any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture. Order § 3(b). Finally, Section 3 allows consular officers or the Commissioner of U.S. Customs and Border Protection to "decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest." Order § 3(c).

In sum, nationals of the designated countries who lack visas were, prior to the Order, unable to enter the United States under the Visa Waiver Program, 8 U.S.C. § 1187. Nationals who possess visas are exempted from the Order, as are most other nationals who have the ability to enter the United States through another travel document. *See* Order §§ 2, 3. The Order thus affects nationals of the designated countries who, lacking visas, were already unable to enter the United States but who had hoped to obtain a visa and to enter the United States within the 90 day period of the Order.[1]

C

The plaintiffs are three organizations and six individuals. Two of the organizations, the International Refugee Assistance Project ("IRAP") and HIAS, Inc., provide legal assistance and aid to refugees, while the third organization, the Middle East Studies Association ("MESA"), is an organization of students and scholars of Middle Eastern studies. The six individual plaintiffs are U.S. citizens or lawful permanent residents who alleged that the Order would prevent or delay foreign-national family members from entering the United States.

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[1] Other portions of the Order, not at issue here, suspend adjudication of applications under the Refugee Program for 120 days, subject to case-by-case waivers, and limit to 50,000 the number of refugees admitted in fiscal year 2017. Order § 6(a)-(c).

On March 10, 2017, after Executive Order 13,780 was issued but before it went into effect, the plaintiffs filed their operative complaint, as well as a motion for a preliminary injunction to enjoin enforcement of the Order. They alleged, as relevant here, that the Order violates the Establishment Clause of the First Amendment and 8 U.S.C. § 1152(a), which prohibits discrimination based on nationality in issuing immigrant visas. After expedited briefing and argument, the district court entered a nationwide preliminary injunction that barred enforcement of Section 2(c) of the Order.

The district court began its analysis by concluding that at least three of the individual plaintiffs had standing.

On the merits, the court concluded that the plaintiffs were likely to succeed on their claim that the Order violated the Establishment Clause. Although the court acknowledged that "the Second Executive Order is facially neutral in terms of religion" and that "national security interests would be served by the travel ban," it nonetheless looked behind the Order to statements made during the presidential campaign by candidate Trump and concluded, based on these statements, that the Order was likely motivated by anti-Muslim animus. In looking behind the Order, the court refused to apply *Mandel*, stating as its reason that *Mandel* applied to the review of decisions by immigration officers denying visas and "does not apply to the promulgation of a sweeping immigration policy at the highest levels of the political branches."

The district court also found that the plaintiffs were likely to succeed on a small portion of their statutory claim, concluding that the Order conflicted with federal law insofar as it had "the specific effect of halting the issuance of [immigrant] visas to nationals of the Designated Countries." Otherwise, it found that "an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) [did] not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas." (Internal quotation marks omitted).

From the entry of the preliminary injunction, the government filed this appeal.

II

In affirming the district court's ruling based on the Establishment Clause, the majority looks past the face of the Order's statements on national security and immigration, which it concedes are neutral in terms of religion, and considers campaign statements made by candidate Trump to conclude that the Order denigrates Islam, in violation of the Establishment Clause. This approach (1) plainly violates the Supreme Court's directive in *Mandel*; (2) adopts a *new rule of law* that uses campaign statements to recast the plain, unambiguous, and religiously neutral text of an executive order; and (3) radically extends the Supreme Court's Establishment Clause holdings. I address these legal errors in turn.

A

I begin with the majority's failure faithfully to apply *Mandel.*

In *Mandel,* Ernest Mandel, a Belgian citizen, was denied a nonimmigrant visa to enter the United States to participate in conferences and to give speeches. In denying his admission to the United States, the Attorney General relied on 8 U.S.C. §§ 1182(a)(28)(D), (G)(v) and 1182(d)(3)(A), which provided that aliens who advocate or publish "the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship" shall be excluded from admission to the United States unless granted a waiver by the Attorney General. Mandel admitted that he was a Marxist who advocated the economic, governmental, and international doctrines of world communism, and the Attorney General refused to grant him a waiver. *Mandel,* 408 U.S. at 756, 759. University professors in the United States, who had invited Mandel to the United States to speak, as well as Mandel himself, filed an action challenging the constitutionality of the relevant statutory provisions and the Attorney General's exercise of his authority under those provisions. *Id.* at 759-60. They alleged that the relevant statutory provisions and the Attorney General's denial of a waiver were unconstitutional because they deprived the American plaintiffs of their First Amendment rights to hear and meet with Mandel. *Id.* at 760.

Despite its conclusion that the professors' First Amendment rights were well-established, the Supreme Court held that Mandel's exclusion was lawful. At the outset, the Court explicitly accepted that Mandel's exclusion implicated the First Amendment. It found, however, that its "[r]ecognition that First Amendment rights are implicated . . . [was] not dispositive of [its] inquiry." *Mandel*, 408 U.S. at 765. The Court stated that, based on "ancient principles of the international law of nation-states," Congress could categorically bar those who advocated Communism from entry, explaining that "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Id.* The Court repeated Justice Harlan's holding that the government's power "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." *Id.* at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)).

The Court then rejected the argument that the Attorney General's denial of a waiver violated the First Amendment. The Court forbade judges from interfering with the executive's "facially legitimate and bona fide" exercise of its immigration authority or balancing that exercise against constitutional rights. *Mandel*, 408 U.S. at 770. Specifically, it recognized that "Congress has delegated conditional exercise of this power [of exclusion] to the Executive" and declined to apply more scrutiny to executive exercise of that power than it would to Congress's own actions. *Id.* It concluded:

> We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, ***the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests*** of those who seek personal communication with the applicant.

Id. (emphasis added).

The holding of *Mandel* ineluctably requires that we vacate the district court's preliminary injunction. The similarities between *Mandel* and this case are numerous and significant. In both cases, Congress delegated power to the executive to prohibit the entry of a certain class of foreign nationals. 8 U.S.C. § 1182(a)(28)(D), (d)(3)(A) (1970); 8 U.S.C. § 1182(f) (2016). The plaintiffs in each case challenged the executive's exercise of that statutory discretion as violative of their individual First Amendment rights. The court in *Mandel* rejected this challenge because, even assuming a constitutional violation lurked beneath the surface of the executive's implementation of his statutory authority, the reasons the executive had provided were "facially legitimate and bona fide." We must thus reject this similar challenge today.

The Court has consistently reaffirmed and applied *Mandel*'s holding. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court declined to scrutinize a statute that gave different immigration status to a child born out of wedlock depending on whether it was the child's mother or father who was a citizen or lawful permanent resident. Although that statute involved two suspect classifications—gender and legitimacy—the Court, citing *Mandel*, nonetheless concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. *Id.* at 799. Accordingly, in response to the plaintiffs' arguments that the distinction was based "on an overbroad and outdated stereotype," the Court indicated that "this argument should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.

And both *Mandel* and *Fiallo* were reaffirmed more recently in Justice Kennedy's opinion in *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment). In *Din*, the Court considered a suit by a United States citizen who alleged that the government deprived her of a liberty interest protected under the Due Process Clause by denying her husband's visa application without adequate explanation, providing only a citation to the provision under which the visa was denied. Justice Kennedy, writing for himself and Justice Alito to provide the fourth and fifth votes in favor of the government, stated that "[t]he reasoning and the holding in *Mandel* control here" and that the reasoning of *Mandel* "has particular force in the area of national security." *Id.* at 2140. He concluded that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that, because the government had provided Din with a facially legitimate and bona fide reason for its action, Din had no viable constitutional claim. *Id.* at 2141.

The plaintiffs can provide no coherent basis for their assertion that this case is not controlled by *Mandel* and its progeny. They do argue that the holding of *Mandel* does not apply to claims under the Establishment Clause, but they are unable to point to any case in which the Supreme Court has ever suggested the existence of such a limitation, or, indeed, any case in which it has suggested that some areas of law are not governed by the rule laid out in *Mandel*. Absent such a case, we are not now at liberty to craft—out of whole cloth—exceptions to controlling Supreme Court precedents.

To reach its conclusion, the majority does not adopt the plaintiffs' broad argument that *Mandel* does not even apply. Instead, in its attempt to escape *Mandel's* clear holding, it asserts that "[w]here plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith," the court may "step away from our deferential posture and look behind the stated reason for the challenged action" to attempt to discern the action's purpose. *Ante* at 50. This approach, which totally undermines *Mandel*, is the foundation of its new rule that campaign statements may be considered to recast an unambiguous, later-adopted executive order on immigration. The majority states that even though the Order is on its face legitimate and provides reasons rooted in national security, because the plaintiffs "have more than plausibly alleged" bad faith, "we no longer defer" to the Order's stated purpose "and instead may 'look behind' [the Order]" in an attempt to discern whether the national security reason was *in fact* provided as a pretext for its religious purpose. *Ante* at 52. This approach casually dismisses *Mandel*, *Fiallo*, and *Din*.

If the majority's understanding had been shared by the Supreme Court, it would have compelled different results in each of *Mandel*, *Fiallo*, and *Din*, as in each of those cases the plaintiffs alleged bad faith with at least as much particularity as do the plaintiffs here. In *Mandel*, the allegations were such that Justice Marshall, writing in dissent, observed that "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham." *Id.* at 778 (Marshall, J., dissenting). In *Fiallo*, Justice Marshall, again writing in dissent, pointed to the fact that the statute in question relied on "invidious classifications." *Fiallo*, 430 U.S. at 810 (Marshall, J., dissenting). And in *Din*, the plaintiffs argued that the consular decision should be reviewed because it fell within the "limited circumstances where the government provides no reason, or where the reason on its face is illegitimate." Brief for Respondent at 31, *Din*, 135 S. Ct. 2128 (No. 13-1402), 2015 WL 179409. But, as those cases hold, a lack of good faith must appear on the face of the government's action, not from looking behind it.

As support for its dramatic departure from Supreme Court precedent, the majority relies on a scattershot string of quotations drawn out of context from one sentence in *Din*. The carelessness of the majority's presentation is demonstrated simply by a comparison of its characterization of *Din* and the actual language of *Din* taken in context. Here is how the majority characterizes *Din*:

> Justice Kennedy explained that where a plaintiff makes **"an affirmative showing of bad faith"** that is **"plausibly alleged with sufficient particularity,"** courts may **"look behind"** the challenged action to assess its "facially legitimate" justification.

Ante at 50. And here is what Justice Kennedy in *Din* actually said, with the language quoted by the majority in bold:

> Absent **an affirmative showing of bad faith** on the part of the consular officer who denied Berashk a visa—which Din has not **plausibly alleged with sufficient particularity**—*Mandel* instructs us not to **"look behind"** the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed.

Din, 135 S. Ct. at 2141 (emphasis added).

More problematic is the majority's misunderstanding of *Din*'s actual holding, which the majority tries to reshape for its own ends. In *Din*, when the plaintiff refused to accept the curt explanation of why her husband was denied a visa, she claimed that due process required that the government disclose the factual basis for its determination. Faced with Din's request for these underlying facts, the Supreme Court declined, instead applying *Mandel*'s requirement that the plaintiff must show that the government's reasons were not *facially* legitimate and not *facially* bona fide. As Justice Kennedy explained:

> Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis.
>
> * * *
>
> Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular office relied.
>
> * * *
>
> [But] the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. [Citing *Fiallo*, 430 U.S. at 795-96]. And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this.
>
> * * *
>
> For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a *facially legitimate and bona fide reason* for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). *By requiring the Government to provide more, the Court of Appeals erred* in adjudicating Din's constitutional claims.

Din, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in judgment) (emphasis added) (citations omitted). Nowhere did the *Din* Court authorize going behind the government's notice for the purpose of showing bad faith. The plaintiff had to show *facially* that the notice was in bad faith, *i.e.*, not bona fide. The majority's selective quotations from *Din*, which conceal *Din*'s faithful application of *Mandel*, are simply misleading. Indeed, the impetus for the majority's approach is revealed when it states, "If we limited our purpose inquiry to review of the operation of a *facially neutral* order, we would be caught in an analytical loop, where the order would always survive scrutiny." *Ante* at 62 (emphasis added). That consequence—that facially neutral executive orders survive review—is precisely what *Mandel* requires.

In looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited. *Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion in search of circumstantial evidence of alleged bad faith. The majority, now for the first time, rejects these holdings in favor of its politically desired outcome.

B

Considering the Order on its face, as we are required to do by *Mandel*, *Fiallo*, and *Din*, it is entirely without constitutional fault. The Order was a valid exercise of the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to suspend the entry of "any aliens" or "any class of aliens" and to prescribe "reasonable rules, regulations, and orders" regarding entry, so long as the President finds that the aliens' admission would be "detrimental to the interests of the United States." And Executive Order No. 13,780 was not the first to be issued under this authority. Such orders were entered by Presidents Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama.[2] Moreover, the particular reasons given for the issuance of the Executive Order respond directly to the described risk of terrorism from six countries, justifying the imposition of a 90-day pause in the admission of nationals from those countries while the Administration determines whether existing screening and vetting procedures are adequate.

The Executive Order begins by noting that the previous Administration, in conjunction with Congress, identified seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—"as presenting heightened concerns about terrorism and travel to the United States," specifically noting that the previous Administration's Secretary of Homeland Security designated Libya, Somalia, and Yemen as countries of concern for travel purposes based on terrorism and national security. Order § 1(b)(i). And finally it notes that Members of Congress had expressed concerns about "screening and vetting procedures" following terrorist attacks in 2016 in Europe, as well as in this country. *Id.*

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[2] *See, e.g.*, Exec. Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981) (Reagan); Proclamation 5,517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Reagan); Exec. Order 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (George H.W. Bush); Proclamation 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996) (Clinton); Proclamation 7,359, 65 Fed. Reg. 60,831 (Oct. 10, 2000) (Clinton); Executive Order 13,276, 67 Fed. Reg. 69,985 (Nov. 15, 2002) (George W. Bush); Exec. Order 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (Obama); Exec. Order 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016) (Obama).

Adding to the historical assessment of those risks, the Executive Order continues with its conclusions, based on additional data, that the conditions in the countries previously identified had worsened, at least with respect to six of the seven countries (excepting Iraq), noting that some of those countries were state sponsors of terrorism or were significantly compromised by terrorist organizations. Several of the countries were unwilling or unable to share or validate information about nationals seeking to travel to the United States, and in some, the conditions increasingly enabled "terrorist operatives or sympathizers to travel to the United States." Order § 1(d).

Finally, the Order addresses the particular circumstances of each of the six countries covered by the Order, noting for example, that Iran, Sudan, and Syria were state sponsors of terrorism; that the governments in Libya, Somalia, and Syria were rendered partially or entirely unable to resist terrorist organizations because of the organizations' activities; and that Iran, Libya, Syria, and Yemen either were not cooperating with the United States in its counterterrorism efforts or were unable to do so.

None of the facts or conditions recited as reasons for the issuance of the Executive Order have been challenged as untrue or illegitimate. Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive Order, they would have had no problem with the Order.

As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional." Similarly, the district court found the face of the Order to be neutral in terms of religion. And the majority too so concludes. *Ante* at 52, 59.

Moreover, these reasons amply support the modest action taken by the Executive Order, which imposes only a temporary pause of 90 days to assess whether the screening and vetting procedures that are applied to nationals from these high-risk countries are adequate to identify and exclude terrorists. Even this pause is accompanied by an authorization to issue waivers designed to limit any harmful impact without compromising national security.

While the legitimate justifications for the Order are thoroughly established, its supposed ills are nowhere present on its face. Far from containing the sort of religious advocacy or disparagement that can violate the Establishment Clause, the Order contains no reference to religion whatsoever. Nor is there any trace of discriminatory animus. In short, under *Mandel* and its progeny, Executive Order 13,780 comfortably survives our review.[3]

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[3] The opinions in support of affirmance betray an object beyond a disciplined analysis. Judge Gregory states, for example, that the Executive Order "drips with religious intolerance, animus, and discrimination," *ante* at 12, and Judge Wynn states similarly, "this Executive Order is no more than . . . naked invidious discrimination against Muslims," *ante* at 94. These statements flatly mischaracterize an order that undisputedly contains no facial reference to religion.

C

The majority's new rule, which considers statements made by candidate Trump during the presidential campaign to conclude that the Executive Order does not mean what it says, is fraught with danger and impracticability. Apart from violating all established rules for construing unambiguous texts—whether statutes, regulations, executive orders, or, indeed, contracts—reliance on campaign statements to impose a new meaning on an unambiguous Executive Order is completely strange to judicial analysis.

The Supreme Court has repeatedly warned against "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). And consistent with that warning, the Court has never, "in evaluating the legality of executive action, deferred to comments made by such officials to the media." *Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24 n.52 (2006). The Court's reluctance to consider statements made in the course of campaigning derives from good sense and a recognition of the pitfalls that would accompany such an inquiry.

Because of their nature, campaign statements are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas; they are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise. And they are often ambiguous. A court applying the majority's new rule could thus have free reign to select whichever expression of a candidate's developing ideas best supports its desired conclusion.

Moreover, opening the door to the use of campaign statements to inform the text of later executive orders has no rational limit. If a court, dredging through the myriad remarks of a campaign, fails to find material to produce the desired outcome, what stops it from probing deeper to find statements from a previous campaign, or from a previous business conference, or from college?

And how would use of such statements take into account intervening acts, events, and influences? When a candidate wins the election to the presidency, he takes an oath of office to abide by the Constitution and the laws of the Nation; he appoints officers of the government and retains advisors, usually specialized in their field. Is there not the possibility that a candidate might have different intentions than a President in office? And after taking office, a President faces new external events that may prompt new approaches altogether. How would a court assess the effect of these intervening events on presidential intent without conducting judicial psychoanalysis?

The foibles of such a rule are unbounded and its adoption would have serious implications for the democratic process. As Judge Kozinski said well when he wrote about the Ninth Circuit's use of the same campaign statements:

> Even if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result —namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate. If a court were to find that

> campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official's "heart of hearts" to divine whether he really changed his mind, just as the Supreme Court has warned us not to? *See McCreary*, 545 U.S. at 862.

Washington v. Trump, No. 17-35105 (9th Cir. March 17, 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc).

The danger of the majority's new rule is that it will enable any court to justify its decision to strike down any executive action with which it disagrees. It need only find one statement that contradicts the stated reasons for a subsequent executive action and thereby pronounce that reasons for the executive action are a pretext. This, I submit, is precisely what the majority opinion does.

Moreover, the unbounded nature of the majority's new rule will leave the President and his Administration in a clearly untenable position for future action. It is undeniable that President Trump will need to engage in foreign policy regarding majority-Muslim nations, including those designated by the Order. And yet the majority now suggests that at least some of those future actions might also be subject to the same challenges upheld today. Presumably, the majority does not intend entirely to stop the President from creating policies that address these nations, but it gives the President no guidelines for "cleansing" himself of the "taint" they have purportedly identified.

Finally, the new rule would by itself chill political speech directed at voters seeking to make their election decision. It is hard to imagine a greater or more direct chill on campaign speech than the knowledge that any statement made may be used later to support the inference of some nefarious intent when official actions are inevitably subjected to legal challenges. Indeed, the majority does not even deny that it employs an approach that will limit communication to voters. Instead, it simply opines remarkably that such chilling is "a welcome restraint." *Ante* at 68.

The Supreme Court surely will shudder at the majority's adoption of this new rule that has no limits or bounds—one that transforms the majority's criticisms of a candidate's various campaign statements into a constitutional violation.

D

Finally, it is readily apparent that the plaintiffs' attempt to use campaign statements to transform a facially neutral executive action into an Establishment Clause violation would, in any event, be unlikely to succeed on the merits.

The thrust of the plaintiffs' argument, which the majority adopts, is that the Order violates the Establishment Clause's requirement of religious neutrality because it was enacted "primarily for the purpose of targeting Muslims." To be sure, courts must ensure that government action is indeed motivated by a secular, rather than religious, purpose. *See Lemon v. Kurtz-*

man, 403 U.S. 602, 612 (1971). And while the government's "stated reasons" for an action "will generally get deference," it is true that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

But these generic standards are all of the doctrinal support that the plaintiffs and the majority can muster. For one, the Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs. And of the few government actions that the Supreme Court has invalidated based on a religious purpose, *McCreary*, 545 U.S. at 859 (remarking that the Court had "found government action motivated by an illegitimate purpose only four times since *Lemon*"), each is manifestly distinguishable from the Order here.

First, for all of the weight that the majority places on *McCreary*, it ignores that the Court there confronted a *facially religious* government action—the display of the Ten Commandments in two county courthouses. The Court in *McCreary* thus began with a *presumption* that the display was intended to promote religion. *See* 545 U.S. at 867-69. When it examined the legislative history surrounding the displays, it did so only to reject the government's attempt to overcome that presumption with a secular, pedagogical purpose—a purpose that the Court declined to accept because it was adopted "only as a litigating position," *id.* at 871, "without a new resolution or repeal of the old [and expressly religious] one," *id.* at 870; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963) (holding that schools' policy of required Bible study and recitation of the Lord's Prayer violated Establishment Clause). In stark contrast, the district court here concluded, and the majority agrees, that nothing on the face of the Executive Order speaks to religion. *Ante* at 59-60. Under *McCreary*, we should therefore begin with the presumption that the Order is neutral toward religion.

To be sure, the Supreme Court in "unusual cases" will find a religious purpose even where the government action contains no facial reference to religion. *McCreary*, 545 U.S. at 865. The majority, quoting selectively from these cases, invokes them to justify its searching inquiry into whether the Order's secular justifications were subordinate to a religious purpose that it has gleaned only from extrinsic statements. The majority's approach, however, in no way accords with what the Court actually *did* in those cases. In each case, the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins. *See Santa Fe*, 530 U.S. at 315-16 (invalidating school policy of allowing student-led "invocation" before football games because the policy's language and context showed that religious prayer was the "preferred message"); *Edwards v. Aguillard*, 482 U.S. 578, 585-86

(1987) (invalidating state law that required creationism to be taught with evolution because the law did nothing to accomplish its stated secular purpose of "protect[ing] academic freedom"); *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (invalidating state law that provided for one minute of "meditation or voluntary prayer" at the start of each school day because bill's sponsor stated that sole purpose was to encourage school prayer and prior statute already provided for student meditation).

The Executive Order in this case fits nowhere within this line. It is framed and enforced without reference to religion, and the government's proffered national security justifications, which are consistent with the stated purposes of the Order, withstand scrutiny. Conflicting extrinsic statements made prior to the Order's enactment surely cannot supplant its facially legitimate national security purpose. *See McCreary*, 545 U.S. at 865 ("[T]he Court often . . . accept[s] governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims"); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (referring to the Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute"). Indeed, to hold otherwise would fly in the face of the Court's decisions upholding government actions with connections to religion far more obvious than those here. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (city's inclusion of crèche in Christmas display justified by "legitimate secular purposes," namely "to celebrate the Holiday and to depict the origins of that Holiday"); *McGowan v.*

Maryland, 366 U.S. 420, 444-46 (1961) (upholding state's requirement that businesses be closed on Sundays because, while Sunday laws had obvious religious origins, their religious purpose had dissipated in favor of a secular one).

The decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), on which the majority also relies, is similarly inapposite. The state law at issue in that case "carved out" a new school district that included only "a religious enclave of Satmar Hasidism, practitioners of a strict form of Judaism." *Id.* at 690. In *Kiryas Joel*, however, the government did not dispute that the lines were drawn with religion in mind. *Id.* at 699. Rather than searching for extrinsic statements as evidence of a religious purpose, the Court took the government at its word and treated as corroborative of its religious purpose the fact that "the district's creation ran uniquely counter to state practice." *Id.* at 702; *see also id.* at 729 (Kennedy, J., concurring in the judgment) ("There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This *explicit* religious gerrymandering violates the First Amendment Establishment Clause" (emphasis added)).

The government here, by contrast, provides ample nonreligious justification for the Order and actively contests that it has any religious purpose. Far from running "counter" to typical national security practice, each of the Order's six affected countries was previously designated as "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Order § 1(d). And an Order that affects all nationals of six countries, irrespective of their religion, is not so precisely hewn to religious lines that we can infer, based on its operation alone, a predominantly religious purpose.

Undeterred, the majority, pursuing its objective despite the costs, opens *Lemon*'s already controversial purpose inquiry even wider.[4] It engages in its own review of the national security justifications supporting the Order and concludes that protecting national security could not be the President's "primary purpose." As evidence, the majority points to the President's level of consultation with national security agencies before issuing the Order; the content of internal Department of Homeland Security reports; the comments of former national security officials made in an *amicus* brief; and its own assessment of the national security threats described in the Order. *Ante* at 60-62.

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[4] While there is no question that it binds us, *Lemon*'s test, and particularly its inquiry into government purpose, has repeatedly been criticized as open-ended and manipulable. *See McCreary*, 545 U.S. at 902 (Scalia, J., dissenting) ("By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record"); *see also, e.g.*, *Santa Fe*, 530 U.S. at 319-20 (Rehnquist, C.J., dissenting); *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment); *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Should the majority not be wary of jumping when on thin ice?

This intense factual scrutiny of a facially legitimate purpose, of course, flies in the face of *Mandel*, *Fiallo*, and *Din*. But even within traditional Establishment Clause doctrine, it is an unprecedented overreach. It goes far beyond the Court's inquiry in *McCreary*, where the government offered a secular "litigating position" for a *facially religious* action, 545 U.S. at 871, or in *Wallace*, where the government's proffered secular purpose for a statute that provided for "meditation or voluntary prayer" was belied by the fact that a previous law already provided for a minute of meditation, 472 U.S. at 59-61 (finding that the bill's "sole purpose" was religious). In those cases, the Court concluded that the government's secular purpose did not hold up even on its own terms—that is, even accepting the *soundness* of the secular purpose, undisputed historical facts made clear that the secular purpose was not primary. The Court emphatically did not, however, question the *factual bases* underlying the government's proffered secular purpose.

The majority's intense factual inquiry is particularly inappropriate where the government's secular purpose is related to national security—a subject, as the majority recognizes, on which we owe the executive significant deference. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (explaining that, where the executive had concluded that material support to terrorist organizations "will ultimately inure to the benefit of their criminal, terrorist functions," "[t]hat evaluation of the facts by the Executive . . . is entitled to deference" because it "implicates sensitive and weighty interests of national security and foreign affairs").

Unless corrected by the Supreme Court, the majority's new approach, which is unsupported by any Supreme Court case, will become a sword for plaintiffs to challenge facially neutral government actions, particularly those affecting regions dominated by a single religion. Government officials will avoid speaking about religion, even privately, lest a court discover statements that could be used to ascribe a religious motivation to their future actions. And, in the more immediate future, our courts will be faced with the unworkable task of determining when this President's supposed religious motive has sufficiently dissipated so as to allow executive action toward these or other majority-Muslim countries. The Establishment Clause demands none of these unfortunate and unprecedented results.

* * *

For all of the foregoing reasons, I would reject the plaintiffs' and the district court's Establishment Clause arguments and vacate the district court's injunction.

SHEDD, Circuit Judge, with whom Judge NIEMEYER and Judge AGEE join, dissenting[1]:

National security is a complex business with potentially grave consequences for our country. Recognizing this fact, the Supreme Court has observed that "it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).[2] This observation is especially true in today's world, where we face threats from radical terrorists who seek to cross our borders for the purpose of harming us and destroying our way of life. Although we often are quick to forget the fact, "the real risks, the real threats, of terrorist attacks are constant and not likely soon to abate," *Boumediene v. Bush*, 553 U.S. 723, 793 (2008); therefore, "the Government's interest in combating terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Given the multitude of critical factors involved in protecting national security, including the delicacy of foreign relations and the worldwide intelligence information that is constantly generated, combined with the ever-changing threatening circumstances, "questions of national security . . . do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case," *Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012), and "they are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil," *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

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[1] Though I fully join Judge Niemeyer's and Judge Agee's well-reasoned dissenting opinions, I offer the following additional comments to explain why I believe the district court further abused its discretion in entering the preliminary injunction. Judge Niemeyer and Judge Agee have authorized me to state that they join in this dissenting opinion.

[2] I have omitted internal quotation marks, alterations, and citations here and throughout this opinion, unless otherwise noted.

Every President has the "constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces." *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007). In this role, a President and his national security advisors (unlike federal judges at all levels, lawyers, and commentators) have constant access to information "that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797. For these reasons and more, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dept. of Navy v. Egan*, 484 U.S. 518, 530 (1988).

This case involves the President's attempt to impose a *temporary pause* on the entry of nationals from six countries that indisputably present national security concerns. "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). Along this line, the Supreme Court has noted that "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), and has explained that the President is not obligated to disclose his reasons "for deeming nationals of a particular country a special threat . . . and even if [he] did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

One thing is certain: to whatever extent it is permissible to examine the President's national security decision in this case, where the President has acted "pursuant to an express or implied authorization from Congress," the President's decision is entitled to "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). This is especially true when, as here, plaintiffs seek preliminary injunctive relief to stop the President from executing a national security policy, for in even the most routine cases, which this certainly is not, a preliminary injunction "is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

The obvious rationale underlying these important principles has been discussed many times by the Supreme Court, this Court, and others, but the district court totally failed to respect them. Rather than giving any deference to the President (or his national security advisors) regarding his national security assessment, or imposing a heavy burden on the plaintiffs to overcome the President's decision, or showing any sense of restraint in wielding the extraordinary remedy of injunctive relief, the district court simply cast aside the President's decision as nothing more than a sham based on its own ideas concerning the wisdom of the Executive Order. In doing so, the district court made the extraordinary finding—based on a *preliminary* evidentiary record—that the President exercised his otherwise lawful authority to effect the temporary pause primarily because he bears animus towards Muslims and wants to impose a "Muslim ban." Remarkably, the district court made this finding while also acknowledging that the Executive Order is facially neutral, that there are heightened security risks with the countries listed in the Executive Order, and that national security interests would be served by the travel pause.

The shortcomings inherent in the district court's fact-finding are obvious. It is primarily based on the district court's selectively negative interpretation of political campaign statements made before the President swore his oath of office,[3] its acceptance of the national security assessment of *former* government officials (many of whom openly oppose this President), its failure to account for the national security assessment of the *current* Attorney General and Secretary of Homeland Security, its misplaced conclusion regarding the President's decision not to submit the Executive Order to the Executive bureaucracy for "inter-agency review," and the purported novelty of the temporary travel pause. Moreover, despite its express recognition of the dangers posed by the designated countries and the national security interests served by the temporary travel pause, the district court—with no access to intelligence information[4]—criticized the President for failing to identify any instances of individuals who came from the designated countries having engaged in terrorist activity in the United States, faulted the President for not explaining why the temporary travel pause is the necessary response to the existing risks, and ultimately found that the President failed to prove

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[3] Ironically, courts are sensitive in defending their own integrity and often use the judicial oath of office as a shield against claims of bias. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("There is a presumption of honesty and integrity in those serving as adjudicators. All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."). Certainly, the President, who takes a similar oath of office, should

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be accorded the same trust. *See, e.g., N.L.R.B. v. Enterprise Leas. Co. SE, LLC*, 722 F.3d 609, 671 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part) ("The majority also gives short shrift to the fact that the President too swears an oath to uphold the Constitution, and that when he acts under its express authority, his actions should be accorded a presumption of constitutionality.").

[4] In *Waterman S.S. Corp.*, 333 U.S. at 111, the Court made the following apt observation: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

that national security cannot be maintained without the temporary travel pause. As if all of this is not enough, the President's supposed goal of "banning Muslims" from the United States is not remotely served by the temporary travel pause, a fact that makes the district court's factual finding even more dubious.[5]

The district court's questionable fact-finding is sufficient (among other reasons) to vacate the injunction, but there is ultimately a more obvious fatal flaw in the injunction order: the court's complete failure to actually account for the public interest. In addition to the general restraint courts must show when considering injunctive relief, courts "should be particularly cautious when contemplating relief that implicates public interests." *Salazar v. Buono*, 559 U.S. 700, 714 (2010).[6] Although the public interest generally favors the protection of constitutional rights, that interest must sometimes yield to the public interest in national security, *see, e.g.*, *Defense Distrib. v. U.S. Dept. of State*, 838 F.3d 451, 458-60 (5th Cir. 2016), because "unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning," *Wayte v. United States*, 470 U.S. 598, 612 (1985). This is such a case.

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[5] The limited temporal and geographical scope of the Executive Order, coupled with the designated categorical exclusions and case-by-case waiver process, strongly supports the President's stated national security rationale rather than the district court's bias finding. Even without those exclusions and waivers, the temporary travel pause would only potentially affect approximately 10% of Muslims worldwide.

[6] To obtain a preliminary injunction, a plaintiff must establish: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Counc., Inc.*, 555 U.S. 7, 20 (2008).

The circumstances of this case are similar in material respects to those presented in *Winter*, and a straightforward application of that case warrants reversal here. The *Winter* plaintiffs complained that the United States Navy's sonar-training program harmed marine mammals and that the Navy should have prepared an environmental impact statement before conducting certain training exercises. The district court agreed and preliminarily enjoined the Navy from using sonar in certain circumstances during training exercises. The Ninth Circuit affirmed the injunction, but the Court reversed. Applying the standard four-part preliminary injunction test, the Court acknowledged the importance of plaintiff's ecological, scientific, and recreational interests in marine mammals and accepted for purposes of discussion that they had shown irreparable injury from the Navy's training exercises. However, the Court concluded that these factors were "outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 23. In the Court's view: "A proper consideration of these factors alone require[d] denial of the requested injunctive relief." *Id.*

The Court explained that the lower courts "significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense." *Id.* at 24. In reaching this conclusion, the Court noted that the case involved complex professional military decisions regarding training and control of a military force, to which "great deference" is ordinarily given, *id.*, and it observed that the record contained declarations from senior Navy officials that underscored the threat posed by enemy submarines and the need for extensive sonar training to counter the threat, as well as a declaration from the President that training with sonar was essential to national security. The Court emphasized that the lower courts "failed properly to defer" to senior Navy officers' judgment about the effect that a preliminary injunction would have on the effectiveness of the training. *Id.* at 27. Additionally, the Court pointed out that "despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion." *Id.* at 26. Ultimately, while acknowledging that "military interests do not always trump other considerations," the Court determined that "the proper determination of where the public interest lies does not strike us as a close question." *Id.*

As in *Winter*, the district court's public interest analysis misses the mark. Here, the facially neutral Executive Order explains in detail the President's underlying reasoning for the temporary travel pause. Additionally, the record contains a joint letter from the Attorney General and Secretary of Homeland Security in which they detail their concerns "about weaknesses in our immigration system that pose a risk to our

Nation's security," and in which they assert that "*it is imperative that we have a temporary pause on the entry of nationals from certain countries to allow this review to take place—a temporary pause that will immediately diminish the risk we face from application of our current vetting and screening programs for individuals seeking entry to the United States from these countries.*" To be sure, the district court found that the *President's* alleged bias is the primary reason for the temporary travel pause, but it found no such bias on the part of his Cabinet officials.[7] Moreover, the district court acknowledged that national security is in fact a secondary reason for the temporary travel pause, and it found that the countries designated in the Executive Order present heightened security risks and that national security interests would be served by the temporary travel pause.

Despite this record, the district court—with no meaningful analysis—simply dismissed the public's interest in national security with the specious conclusion that "Defendants . . . have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." *I.R.A.P. v. Trump*, 2017 Westlaw

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[7] Similarly, plaintiffs' counsel admitted during oral argument that he has no basis to challenge the integrity of the Attorney General and Secretary of Homeland Security. The apparent good-faith of these officials, which is an inconvenient fact for the plaintiffs, leads inexorably to the unanswered question of why the district court essentially ignored or rejected their detailed national security advice to the President.

1018235, *17 (D. Md. 2017). As noted, national security is the most compelling of public interests, and the question of how best to protect public safety in this area does not, as the district court implies, boil down to a least-restrictive means test, *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005) ("We believe that the district court ultimately accorded insufficient deference to that determination, effectively imposing upon the President the equivalent of a least-restrictive-means test. To subject to such exacting scrutiny the President's determination that criminal prosecution would not adequately protect the Nation's security at a very minimum fails to accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress."), or require a danger that satisfies the court's "independent foreign policy analysis," *Regan v. Wald*, 468 U.S. 222, 242 (1984). Therefore, the relevant point is not whether the temporary travel pause is the *only* way, or even the best way, to protect national security. The simple fact of the matter is that regardless of any ulterior motive one might ascribe to the President, the record still conclusively establishes that the temporary travel pause will in fact promote an important national security objective.

Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest. As we have explained, for example, in applying the state secrets doctrine, a plaintiff with a plausibly viable constitutional claim can be barred from pursuing it "not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security." *El-Masri*, 479 F.3d at 313. In my view, the very serious national security interest served by the temporary travel pause (as determined by those who are duly empowered to make the decision and who have access to current intelligence information) greatly outweighs the alleged temporary and relatively minor harm that will befall these few plaintiffs. The district court abused its discretion by failing to strike this balance. *See, e.g.*, *Sarsour v. Trump*, 2017 Westlaw 1113305, *15 (E.D.Va. 2017) ("Based on the record now before the Court, the parties' respective interests described above, the subject matter of EO-2, and the protections to the public that EO-2 is intended to provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.").

Today's decision may be celebrated by some as a victory for individual civil rights and justice, and by others as a political defeat for this President. Yet, it is shortsighted to ignore the larger ramifications of this decision. Regrettably, at the end of the day, the real losers in this case are the millions of individual Americans whose security is threatened on a daily basis by those who seek to do us harm. Even if the district court's instinct is correct and no tangible harm directly results from its order enjoining the President from attempting to protect American citizens, the injunction prohibits the government from addressing a serious risk identified by the Attorney General and Homeland Security Secretary; therefore, the security of our nation is indisputably lessened as a result of the injunction. Moreover, the President and his national security advisors (and perhaps future Presidents) will be seriously hampered in their ability to exercise their constitutional duty to protect this country.[8]

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[8] At oral argument, several judges (including myself) questioned when, if ever, the President could free himself from the stigma of bias that the district court has enshrined by its ***preliminary*** "fact-finding." Notably, no one has provided a satisfactory response.

AGEE, Circuit Judge, with whom Judge NIEMEYER and Judge SHEDD join, dissenting:

In their haste to reach the merits of the plaintiffs' Establishment Clause claim, my colleagues in the majority neglect to follow the longstanding and well-defined requirements of Article III of the United States Constitution. They err, as did the district court, in holding that the plaintiffs had standing to bring an Establishment Clause claim. For that reason, I respectfully dissent from the majority's decision to uphold the district court's preliminary injunction. The plaintiffs do not have standing to bring the current action.[1]

I.

A.

Article III limits the federal judiciary's authority to adjudicate only "cases" and "controversies." U.S. Const. art. III, § 2. "[S]tanding is an integral component of the case or controversy requirement." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").[2] A plaintiff must satisfy three elements to establish standing: (1) "the plaintiff must have suffered an injury in fact

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[1] I join the well-written dissents of Judge Niemeyer and Judge Shedd in full. But, for the reasons stated herein, I would find it unnecessary to reach the merits of the plaintiffs' Establishment Clause claim.

[2] I have omitted internal alterations, citations, and quotation marks here and throughout this dissent, unless otherwise noted.

—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

Due to the difficulty of determining injury in Establishment Clause cases, "rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see also Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) ("Many of the harms that Establishment Clause plaintiffs suffer are spiritual and value-laden, rather than tangible and economic."). However, "a mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Suhre*, 131 F.3d at 1086; *see also Moss*, 683 F.3d at 605 ("Nonetheless, we must guard against efforts to use this principle to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury."). For example, "a citizen of Omaha, Nebraska who finds a religious symbol in the Haywood County Courthouse [in North Carolina] to be offensive in the abstract would not have standing to challenge it. The injury to our hypothetical Omaha plaintiff partakes of a generalized grievance, based on nothing more than each citizen's shared individuated right to a government that shall make no law respecting the establishment of religion." *Suhre*, 131 F.3d at 1086; *accord Defenders of Wildlife*, 504 U.S. at 575 ("[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."). Conversely, "direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086.

B.

The district court determined that three of the individual plaintiffs (Meteab, John Doe #1, and John Doe #3) had sufficiently pleaded that they had suffered stigmatization due to the Executive Order. *See* J.A. 780 (finding that the plaintiffs claimed "the anti-Muslim animus underlying the Second Executive Order inflicts *stigmatizing injuries* on them all" (emphasis added)). Because Section 2(c) also allegedly prevents the family members of these plaintiffs from entering the country, the district court held that they had asserted injuries sufficient to confer standing to pursue their Establishment Clause claim.

Doe #1 is a lawful permanent resident and "non-practicing Muslim[]." J.A. 213, 305. His wife, also a non-practicing Muslim and Iranian national, has applied for an immigrant visa. She is currently awaiting an embassy interview, a condition precedent to the determination of whether to grant a visa. *See* 22 C.F.R. § 42.62(b) ("Every alien executing an immigrant visa application must be interviewed by a consular officer who shall determine on the basis of the applicant's representations and the visa application and other relevant documentation—(1) The proper immigrant classification, if any, of the visa applicant, and (2) The applicant's eligibility to receive a visa."). Doe #1 alleges that the Executive Order has caused him and his wife to experience "significant fear, anxiety and insecurity . . . regarding their future." J.A. 246. He argues that because he is afraid that he will not be allowed to reenter the United States if he travels to Iran, Section 2(c) "forces [him] to choose between [his] career and being with [his] wife." J.A. 306. Doe #1 maintains that "the anti-Muslim views that are driving the Executive Order, as well as the Order itself, have caused [him] significant stress and anxiety." J.A. 306. He is allegedly concerned for his safety.

Like Doe #1, Doe #3 is a lawful permanent resident, although nothing in the record indicates his religious preference.[3] In any event, Doe #3 applied for an immigrant visa on behalf of his wife, an Iranian national. In May 2016, the United States Embassy "informed [her] that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join her husband in two to three months." J.A. 246. With his wife in Iran, Doe #3 maintains that "[t]heir continued separation has placed extraordinary stress on John Doe #3 and his wife, and their relationship." J.A. 247. He "feel[s] as though they've been unable to start their lives together because of the delays and uncertainty caused by the Executive Order." J.A. 247. Doe #3 asserts that he and his wife "are being torn apart by this situation and the uncertainty and delay." J.A. 310. He believes that the anti-Muslim message of the Executive Order has caused him stress and anxiety and to feel like an outsider.

Meteab is also a lawful permanent resident and Muslim. His wife and children are here in the United States. However, Meteab has three brothers who wish to resettle in North America as refugees. Two of the three have received approval for resettlement in the United States but have not yet obtained travel documents. The remaining brother has been approved for resettlement in Canada. Meteab contends that, as a result of the Executive Order, he "and his wife have experienced anti-Muslim sentiment and felt very uncomfortable and insecure in their community, causing them acute mental stress." J.A. 250. The couple "ha[s] experienced hostility in public, with people staring at Mr. Meteab's wife, who wears a hijab, and refusing to stop for them at crosswalks." J.A. 250.

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[3] The pleadings make only one religious reference with respect to Doe #3: "The anti-Muslim attitudes that are driving this Executive Order have caused me stress and anxiety and made me question whether I even belong in this country despite everything I have sacrificed and invested in making a life here." J.A. 310.

C.

The district court held that, "where the [allegedly anti-Muslim] Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a personal injury as a consequence of the alleged Establishment Clause violation." J.A. 787. However, as the record reflects, the district court clearly erred in finding that Meteab had standing to challenge Section 2(c) of the Executive Order. Meteab's brothers are refugees, and Section 2(c) does not apply to refugees. The district court recognized in its opinion that "[t]he Plaintiffs' Establishment Clause . . . arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order." J.A. 809. The court elaborated that the plaintiffs had "not sufficiently develop[ed] . . . argument[s relating to refugees] to warrant an injunction on those sections at this time." J.A. 810. Therefore, Meteab cannot base standing to challenge Section 2(c) on any "prolonged separation" from his refugee brothers, who are covered by a different section of the Executive Order. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352

(2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, 134 S. Ct. 1377 (2014). Thus, Meteab can show Establishment Clause standing only if his alleged stigmatization is a cognizable injury for standing purposes.

As for Doe #3, his wife was granted a visa during the pendency of this appeal, so he, too, is left with only stigma to make his Establishment Clause claim of standing. For the reasons stated below, such a stigma claim alone is insufficient to confer standing under the record in this case.

Perhaps recognizing these deficits, the majority bases its affirmation of the district court's standing determination only on Doe #1. But Doe #1 does not have standing either because the stigma that he alleges to have suffered and the potential denial of a visa to his wife are two distinct harms, neither of which meet basic standing requirements. Setting aside Doe #1's allegation that he experienced stigmatization himself, the imagined future denial of a visa to his wife is simply too vague and speculative to meet the constitutional standard of a concrete and "actual or imminent, not conjectural or hypothetical" injury. *Defenders of Wildlife*, 504 U.S. at 560. The majority's conception of "injury-in-fact" by Doe #1 is conjectural and hypothetical; he had no reasonable expectation that his wife would join him in the United States at any particular time either prior to the drafting of the Executive Order or at any time during the suspension period.

1.

The plaintiffs' pleadings show that their alleged injuries consist solely of their personal perception of stigmatization. In the complaint, they allege, "The March 6 Order also contains language that associates Muslims with violence, terrorism, bigotry, and hatred, inflicting *stigmatic and dignitary harms*." J.A. 207 (emphasis added). Despite the majority's holding, the stigma that plaintiffs claim to have suffered is not a cognizable injury because it is simply a subjective disagreement with a government action. To allow these plaintiffs to pursue their claims based on an idiosyncratic projection of stigmatization is to grant every would-be Establishment Clause plaintiff who develops negative feelings in response to some action by the Government a court proceeding in which to vent his subjective reactions as a legal claim. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause."). Indeed, to find standing here is to find standing for not only all Muslims in America, but *any* American who may find the Executive Order (or any other Government action) personally disagreeable, which is "beyond all reason." *See Defenders of Wildlife*, 504 U.S. at 566.

The Supreme Court "ha[s] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.* at 573-74; *accord Valley Forge*, 454 U.S. at 482-83 (stating that the Supreme Court "repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law"). The Court has rejected a generalized finding of standing based on "the need for an available plaintiff, without whom the Establishment Clause would be rendered virtually unenforceable by the judiciary." *Valley Forge*, 454 U.S. at 470. The plaintiffs here "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The majority does not provide any principled instruction on how its sweeping standing ruling is cabined to this particular case, and thus its holding far oversteps the bounds of traditional judicial authority. *See id.* at 471 (stating that Article III is a limitation on "judicial power"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("'The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."), *abrogated on other grounds by Lexmark*, 134 S. Ct. 1377; *Defenders of Wildlife*, 504 U.S. at 576

("Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

The majority relies heavily on two Fourth Circuit cases, *Suhre* and *Moss*, but these cases are inapposite.[4] In *Suhre*, local officials displayed the Ten Commandments in the county courthouse where the plaintiff, a resident of the county, often visited. 131 F.3d at 1084-85. Suhre, an avowed atheist and serial litigant, took offense to the display and "aver[red] that contact with the display cause[d] him distress." *Id.* at 1085. We ultimately found that Suhre had alleged a "cognizable injury caused by personal contact with a public religious display." *Id.* at 1090.

In *Moss*, a school district "adopted a policy allowing public school students to receive two academic credits for off-campus religious instruction offered by private educators." 683 F.3d at 601. The plaintiffs, including two students and their parents, urged the Court to "adopt a per se rule that students and parents always have standing to bring suit against policies at their school when they allege a violation of the Establishment Clause, regardless of whether they allege or can prove personal injury." *Id.* at 605. We rejected that argument and held that, although injuries in such cases are often intangible, plaintiffs must have been "spiritually affronted as a result of direct and unwelcome contact with an alleged religious establishment within their community." *Id.* Because one student had no "personal exposure" to the policy other than mere awareness of its existence, we held that the student lacked standing, despite that student "feel[ing] like an outsider" in the school environment. *Id.* at 606. However, we found that the other student had standing to bring a claim because she actually received a solicitation letter from a religious institution that participated in the school's program and "changed [her] conduct in adverse ways as a result of [her] perceived outsider status." *Id.* at 607.

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[4] *Suhre* is a religious display case, a type of Establishment Clause claim that arguably belongs in its own category. *See* 131 F.3d at 1086 ("Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence.").

In both of these cases, local governments took direct actions in relation to their constituents in an immediate and concrete way. All residents who entered the courthouse in *Suhre* were personally exposed to the display of the Ten Commandments, while the academic policy in *Moss* was actually sent to the student. As a consequence, the plaintiffs in those cases did come into direct contact with the alleged Establishment Clause violations.[5]

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[5] The out-of-circuit cases on which the majority also relies are likewise inapposite for the same reasons that distinguish *Suhre* and *Moss*. *See Awad v. Ziriax*, 670 F.3d 1111, 1116, 1122 (10th Cir. 2012) (analyzing a "proposed constitutional amendment that would prevent Oklahoma state courts from considering or using Sharia law"); *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 624 F.3d 1043, 1048-53 (9th Cir. 2010) (reviewing standing in a case challenging a city resolution that ordered Catholics in San Francisco to cease discriminating against same-sex couples).

In contrast, the Executive Order here applies only to prospective immigrants. The order's focus faces outward towards the alien residents of the subject countries, not inward towards persons in the United States like the plaintiffs. That circumstance is in direct distinction to the religious display in *Suhre* or the academic policy in *Moss*. Section 2(c) of the facially-neutral Executive Order applies only to "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." Section 3(b)(i) explicitly exempts "any lawful permanent resident of the United States," like the plaintiffs, from the travel suspension, thus not applying to Does #1 and #3 and Meteab. The majority posits that, because the policy at issue came from the President himself that somehow metamorphosizes into the "direct contact" *Suhre* requires. Majority Op. 39. This distorts the standing inquiry as the source of the directive is irrelevant. What matters is whether the plaintiff came into direct contact with the religious establishment. And that is not the case here simply because the President is the party signing an order.

Despite the majority's giving short shrift to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), the case is directly on point. There, "[a] group of Protestant Navy chaplains sued the Navy, alleging that the Navy's operation of its retirement system discriminates in favor of Catholic chaplains in violation of the Establishment Clause." *Id.* at 758.[6] The plaintiffs "conceded that the Navy did not deny them any benefits or opportunities on account of their religion." *Id.* at 760. Rather, they maintained "that *other* chaplains suffered such discrimination." *Id.* The plaintiffs contended that they had standing because "they ha[d] been subjected to the Navy's message of religious preference as a result of the Navy's running a retirement system that favors Catholic chaplains." *Id.* The D.C. Circuit rejected this argument and found that they did not "have standing based on their exposure to the Navy's alleged message of religious preference." *Id.* at 761. Like the Protestant Navy chaplains, the plaintiffs here claim offense to a message directed at others, who happen to be nationals of other countries. The plaintiffs' claims of stress or stigmatization are subjective reactions, not direct contact with the Executive Order, and amount to disagreements with a government policy. *See Moss*, 683 F.3d at 604-05. As a result, the plaintiffs' claim of injury by way of stigma is a general grievance, insufficient to confer standing. *Suhre*, 131 F.3d at 1086.[7]

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[6] It is irrelevant that *In re Navy Chaplaincy* is a favoritism case as opposed to a condemnation case as alleged here, as they are two sides of the same Establishment Clause coin.

2.

Perhaps recognizing the problems posed by basing standing only on the subjective feelings of the plaintiffs, the majority also holds that the alleged stigma suffered by Doe #1, combined with prolonged separation from his wife, is enough to support standing, thereby creating a kind of "stigma plus" standard.[8] However, the majority's construct erroneously conflates Doe #1's Establishment Clause standing claim with his claim under the Immigration and Nationality Act ("INA"), which the Supreme Court has prohibited. *See DaimlerChrysler Corp.*, 547 U.S. at 352 ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). Plaintiffs are required to "demonstrate standing *separately* for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added). The majority haphazardly merges alleged injuries unique to two different claims, and personal to different people, to manufacture standing.[9]

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[7] Some of the plaintiffs, including Doe #1, have expressed fear that they will be denied reentry into the country if they travel to the subject countries to visit their family while the Executive Order is in effect. This fear is unfounded and contradicted by the plain terms of the Executive Order. Does #1 and 3 and Meteab are all lawful permanent residents. Section 3(b)(i) of the Executive Order exempts "any lawful permanent resident of the United States" from the temporary suspension of entry.

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[8] In its attempt to distinguish *In re Navy Chaplaincy*, the majority implicitly holds that stigma alone is not enough to support standing. The majority states that, "contrary to the Government's assertion, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it." Majority Op. 40 n.11. The majority avers that Doe #1 "is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." *Id.* at 40. The majority is right in that regard—stigma is not enough.

[9] Although not the focus of this dissent, I also would find that Doe #1 does not have standing to bring an INA claim; he lacks a concrete injury. It is pure speculation whether Doe #1's wife will receive a visa. Doe #1 has presented no evidence showing that his wife is likely to receive a visa, much less when, but for the operation of the executive order. Or that the executive order would

The majority reasons that Doe #1 has third-party standing to bring an Establishment Clause claim. Not so. Plaintiffs do not have standing to allege violations of the Establishment Clause on behalf of their immigrant relatives. *See Whitmore v. Arkansas*, 495 U.S. 149, 161 n.2 (1990) (restating the general rule "that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *cf. Defenders of Wildlife*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."). The rela-

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tangibly affect the processing of her application in any way. *See* Opening Br. 19-20 ("Likewise, Doe #1's wife did not have her visa interview scheduled before the Revoked Order took effect, and had already been waiting roughly six weeks, making it similarly speculative whether the 90-day pause will affect her."); *see also The Immigrant Visa Process: Interview*, U.S. Dep't of State, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview.html (last visited May 23, 2017) (saved as ECF opinion attachment) (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Nor has the Government denied the visa application of Doe #1's spouse.

Any injury caused by the Executive Order is not redressable because an injunction will not establish that Doe #1's wife will receive a visa, as exemplified by her current status. *See The Immigrant Visa Process: Interview*, *supra* ("Based on U.S. law, not everyone who applies for a visa will be found eligible to come to the United States."). Doe #1 does not have standing under the INA.

tives, in turn, do not have rights of entry or any Establishment Clause rights. *Kerry v. Din*, 576 U.S. __, 135 S. Ct. 2128, 2131 (2015) ("But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that "the people protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). Doe #1 is "seeking to vindicate, not [his] own rights, but the rights of others." *Moss*, 683 F.3d at 606.

Doe #1 has no right to, or even a reasonable expectation of, a time certain meeting with his wife in America. His alleged injury is based on a mere conjecture that his wife will have her embassy interview and obtain a discretionary visa within the ninety-day suspension period of the Executive Order when the State Department has cautioned, well before the Executive Order, that it may take an indefinite period to schedule interviews much less adjudicate visa applications. *See The Immigrant Visa Process: Interview*, *supra* note 9 (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Any effect of the Executive Order on that speculative possibility is simply not determinable and thus fails to meet the constitutional standard of an injury "actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560.

The majority underscores the fragility of its standing hypotheses when it avers, without any citation to precedent or evidence, that the Executive Order creates harm to the plaintiffs because "dedicating time and resources to a global review process[, for which Section 2(c) was designed to facilitate,] will further slow the adjudication of pending [visa] applications." Majority Op. 36. Nothing in the record supports this assertion or ties any nexus to Doe #1 or his spouse. Doe #1 simply fails to carry his burden as to standing under the standard required by the Supreme Court. No constitutionally cognizable "harm" which is "certainly impending" to Doe #1 or to him via his spouse has been proffered. *Defenders of Wildlife*, 504 U.S. at 564 n.2.[10]

For all these reasons, Doe #1 has no "legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560, and no standing to pursue his Establishment Clause claim.[11]

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[10] Similarly, there is no feasible way to determine, except by pure speculation, how or whether the Executive Order's visa waiver process might affect a particular visa application. Nothing in the record supports the majority's conclusion that pursuing a waiver would affect any plaintiff. Rather, the majority has arbitrarily substituted its conjecture for evidence. The visa waiver process could just as likely allow Doe #1's wife to obtain her visa as not during the temporary suspension period.

II.

As the plaintiffs lack standing to pursue their cause of action, I respectfully dissent and would vacate the grant of a preliminary injunction by the district court.

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[11] The district court did not determine whether other individual plaintiffs or the organizational plaintiffs have standing to bring the Establishment Clause claim. That would be a matter to be considered by the district court in the first instance in any further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

SECOND DECLARATION OF REBECCA HELLER, DIRECTOR OF IRAP, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

SECOND DECLARATION OF REBECCA HELLER

I, Rebecca Heller, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. §1746 and declare as follows:

1. I am the Director and co-founder of the International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc., a Plaintiff in the above-captioned case. I have been with IRAP since August 2008.

2. As IRAP's Director, I oversee all of IRAP's operations and activities, including programming and development. I am in constant, regular communication with my staff who provide legal representation to vulnerable individuals and consult with pro bono attorneys and law students working on IRAP cases. I also

represent a number of refugee and visa cases myself, consult with numerous attorneys working on related cases, monitor field conditions on the ground in the Middle East/North Africa Region, liaise with the U.S. government and the United Nations around refugee and visa processing issues, and coordinate partnerships with numerous NGOs working with and advocating for refugees and immigrants in the U.S. and abroad. Throughout my eight and a half years working on Middle East refugee issues, I have overseen, consulted on and/or represented thousands of cases.

3. I also teach a seminar on refugee law and practice at Yale Law School.

4. Founded in 2008, IRAP's mission is to provide and facilitate free legal services for vulnerable populations around the world, including refugees, who seek to escape persecution and find safety in the United States and other Western countries. IRAP has a staff of over 25 individuals based in offices in New York, Lebanon, and Jordan. IRAP works with 29 law school chapters and over 75 firms to provide pro bono assistance to persecuted individauls around the world. IRAP relies on the volunteer and pro bono assistance to meet the needs of its client base.

5. IRAP lawyers provide legal assistance to refugees and other immigrants to the United States throughout the resettlement process. IRAP also assists many individuals (including refugees, asylees, Lawful Permanent Residents and U.S. Citizens) inside the United States who need assistance filing family reunification petitions for family members overseas. IRAP has

provided legal counseling and assistance to nearly 20,000 individuals.

6. Since its inception, IRAP has helped to resettle over 3,200 individuals from 55 countries of origin, with the majority resettled to the United States.

7. IRAP's client base includes refugees from Iraq, Afghanistan, Egypt, Eritrea, Ethiopia, Iran, Jordan, Kuwait, Libya, Pakistan, Palestine, Somalia, Sudan, Syria, Turkey, and Yemen. Of IRAP's current 599 open cases, 402 families are from one of the six countries targeted in the new Executive Order or are refugees from other countries and therefore potentially affected by the Executive Order. The overwhelming majority of IRAP's clients, including clients abroad and those within the United States, identify as Muslim.

8. Implementation of the Executive Order has frustrated and will continue to frustrate IRAP's mission and imposes a significant burden on its work. By drastically reducing the number of resettlement slots available for this fiscal year and freezing the resettlement process for at least 120 days, the Executive Order will force IRAP to invest significant time and energy exploring alternative routes to safety for its clients (many of whom are in imminent and life-threatening danger) and educating its network of over 2,000 pro bono attorneys and law students about those alternate routes. IRAP attorneys must also counsel their own clients about the changes in law as well as pursue other resettlement options for them, even though many were already being processed in the U.S. Refugee Admissions Program ("USRAP"). The first Executive Order has already wasted significant resources (typically hun-

dreds of hours of legal representation over the course of many years navigating USRAP), forcing IRAP and our clients to make the Hobson's choice between starting the process over with another country, attempting to shelter in place in spite of life-threatening circumstances, or undertaking dangerous journeys to reach safety across other borders. Because the new Executive Order mirrors the first in terms of its effect on IRAP's refugee and immigrant clients, it too places IRAP and its clients at imminent risk of irreparable harm.[1]

9. Following the signing of the first Executive Order, on January 27, 2017 at 4:42 P.M. EST, two IRAP clients, Mr. Hameed Khalid Darweesh and Mr. Haider Sameer Abdulkhaleq Alshawi, were detained at John F. Kennedy Airport ("JFK") despite having valid entry documents. As a result, IRAP attorneys were present at JFK from 2 am to 6:30 pm on January 28, 2017 attempting to secure their lawful release. Furthermore, together with cocounsel, IRAP filed a habeas petition on behalf of those two clients, together with a motion for class certification (*Darweesh et al. v. Trump et al.*, No. 1:17-cv-480 (E.D.N.Y. filed Jan. 28, 2017)). That litigation is ongoing. These actions are not in the scope of normal IRAP legal assistance, as previous IRAP

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[1] Since I do not anticipate any material difference in the effect of the new Executive Order Section 6(b)'s reduction by more than half of the refugee resettlement allotment for fiscal year 2017, which follows verbatim the first Executive Order's Section 5(d), I incorporate by reference my declaration submitted in support of Plaintiffs' Motion for a Preliminary Injunction Against Section 5(d). *See* Declaration of Rebecca Heller, Dkt. No. 64-1 (J.R. 26-35).

clients were allowed to enter at U.S. Ports of Entry after receiving final approval to travel.

10 Both the first and the new Executive Order have also diverted IRAP resources as IRAP has become the focal point organization for volunteer attorneys all across the country who have gone to airports to attempt to secure the release of individuals detained pursuant to the first Executive Order. In addition to being the first organization to put out a call to volunteer attorneys, IRAP created and maintains a unique hotline email address (airport@refugeerights.org) to advise attorneys and affected individuals. Since the creation of this email address on January 28, 2017, IRAP has received and responded to nearly 800 email messages. IRAP has also developed templates and informational materials for attorneys, affected family members in the United States, and individuals overseas who have been denied travel pursuant to the Order. These actions are not in the normal scope of IRAP's work. I anticipate that this work will continue for IRAP under the new Executive Order as the need will continue to exist.

11. As a result of this Executive Order, our attorneys anticipate that their current caseload will take much longer to be resolved which has resulted in their limited capacity to take on the full representation of new clients. Thus, they now are providing limited representation in certain new cases, which prior to the Executive Order would have received full representation, given the likely exorbitant delays in USRAP processing. This both diverts resources and frustrates our core mission.

12. Furthermore, because of the drastic decrease in refugee admissions and freeze in refugee processing, IRAP has significantly limited ability to open new law school chapters or begin new relationships with law firms to place cases for direct representation. We also are unable to place new cases with existing chapters or law firms because there is no movement on any refugee cases. We risk losing hundreds of volunteers, and relationships with numerous law firms, because we are unable to provide them with a way to partner with us on cases.

13. Our law firm partners also provide financial support with us. If we no longer have cases to place at law firms, and thus have to decrease our number of law firm partners, it will significantly cut into the corporate funding we receive.

14. In 2016, IRAP had been designated as a Priority 1 non-governmental organization (NGO) with the ability to make referrals of vulnerable refugees to USRAP. This authorization will now not be of any benfit to our clients if the USRAP is frozen or individuals from particular countries are ineligible.

15. As less than 1% of refugees are referred to countries for resettlement by the United Nations High Commissioner for Refugees (UNHCR), IRAP has significantly limited ability to draft referrals for our clients currently in USRAP to be sent to other safe countries because of the limited resettlement slots worldwide.

16. As a result of the Executive Order, IRAP's Resettlement Deployment Scheme with UNHCR, which allows IRAP resettlement experts since early 2016 to

be deployed to UNHCR for assisting with their resettlement operations, may be terminated due to the drastic decrease in resettlement slots available in the US and worldwide. This would lead to the termination of three IRAP staff as well as a revenue loss of approximately $260,000.

17. IRAP provides safe housing for clients whose lives are in immediate danger while they await the outcomes of USRAP. Clients in urgent situations who face additional four-month delays on their applications (at a minimum) will require significant funding expenditures to ensure continued safe housing.

18. The new Executive Order will continue the significant backlog in the USRAP that resulted from the first Executive Order, delaying the processing of many of IRAP's clients' cases. This delay will force IRAP to exhaust more of its resources, as the average lifespan of a case now grows significantly. IRAP has a legal department composed of staff attorneys who advise and provide consultation to its network of pro bono legal volunteers on their casework. Because of delays in processing, IRAP's attorneys must spend significantly more time on each case, providing guidance about alternative routes to safety and possible exemptions. In addition to IRAP's staff attorneys' existing and ongoing responsibilities, they must now also draft and review additional submissions to State and to the Department of Homeland Security ("DHS"), such as waiver requests for admission to the United States for their clients, which will be reviewed by a case-by-case basis under the new Executive Order. Further, IRAP's field staff must largely give up their work on refugee

case processing and focus primarily on ensuring the local safety of refugees who thought their lives would be saved for resettlement, and who are now caught in life-threatening limbo.

19. The Executive Order puts IRAP's refugee and immigrant clients in grave danger, because the longer it takes for their cases to be decided, the longer they are in life-threatening environments. All of IRAP's clients are in limbo and irreparably harmed because their cases have been indefinitely stalled. Many are at imminent risk of persecution and death where they currently reside, and many others now face indefinite separation from family members already in the United States.

20. Many of IRAP's clients have been referred to the US for resettlement by the UN refugee agency, the United Nations High Commissioner for Refugees ("UNHCR"). UNHCR only refers the most vulnerable refugees for resettlement, such as unaccompanied minors, women-at-risk, and individuals with urgent medical or protection concerns. Less than 1% of refugees worldwide are referred for resettlement by UNHCR. If UNHCR refers an individual to USRAP, they are likely extremely vulnerable and have strong, pre-vetted refugee claims. Further, once UNHCR refers a refugee to USRAP, it precludes them from referring the refugee to another country until the USRAP process is completed.

21. IRAP works with some of the most vulnerable individuals in the world, including U.S.-affiliated refugees, LGBTI refugees, women who have survived trafficking, sexual and gender-based violence, and children

with emergency medical needs. We estimate that approximately 700 IRAP clients are now trapped in the limbo of a halted U.S. Refugee Admissions Program as a result of the first Executive Order. The cases will continue in their freezed state under the new Executive Order and their prospects of coming to the U.S. any time soon have evaporated.

22. Furthermore, while the revised Executive Order takes off Iraq from the list of barred countries, Iraqis are still part of the suspension of USRAP processing. Over 50,000 U.S.-affiliated Iraqis are negatively impacted by this new Executive Order, including interpreters for the U.S. Army and for U.S. media organizations, NGO workers, fixers, engineers, and physicians. These are Iraqis who supported the U.S. mission in Iraq and are now being targeted by militias and terrorist groups as a result.

23. Although the revised Executive Order allows for waivers in certain cases, these waivers will not be available to the vast majority of our clients. DHS interviews are currently only taking place in Vienna and Nauru. Based on my understanding of the refugee process and the language of the Executive Order, waivers will not be available for refugees who have not had DHS interviews. Therefore, hundreds of our clients (and thousands of refugees in the USRAP pipeline) throughout the Middle East and North Africa region (not to mention anyone who is not in Vienna or Naru) will be ineligible for a waiver regardless of circumstances.

24. While we have been told by some government officials that a waiver process will exist, we have yet to

receive any details about how to refer cases, how long waivers will take, or how many waivers are available. We have been told that waivers will only be considered on an individual basis and the Executive Order requires the designation of new personnel to review the waivers.

25. It is also my understanding based on my knowledge of refugee processing that at the end of the 120-day period, even if the refugee program reopens, under the terms of the Executive Order there will be a new security process that most of our clients must go through. In the past, security clearances typically take anywhere from one to five years. Thus, even *if* the refugee process goes back online following the Executive Order, under the terms of the order our clients are likely to be delayed for several additional years (even those already post-approval).

26. Both the first Executive Order and the new Executive Order that will replace it marginalize IRAP's Muslim clients and subject them to suspicion, scrutiny, and social isolation on account of their religious beliefs and national origin. Clients who are already inside the U.S. are afraid and fear they are not welcome. Some have been subjected to harassment by law enforcement agencies allegedly conducting "new" security checks. Others have been detained at airports, or rejected from flights multiple times even though they are presenting valid visas. Our clients in USRAP and our Special Immigrant Visa programs are seeking resettlement ot the U.S. as a safe haven but now feel threatened by the only safe option available to them.

27. Many of IRAP's clients, including those living in the United States are fearful of asserting their legal

rights through participation in lawsuits or otherwise. In addition to fears around possible retaliation from the government or private parties given the current anti-refugee and anti-Muslim climate in the United States, they face multiple barriers to doing so, including language barriers and unfamiliarity with American law and customs, including many customs we take for granted. For example, many of our clients have difficulty completing forms that seem basic and simple to Americans; a form that has a line for "address line two," for example, confuses our clients, who do not understand why the form is asking for a second address. Moreover, a significant number of our clients have suffered extreme trauma, often at the hands of government officials; this trauma has predictable and understandable consequences, often including a desire to avoid calling attention to themselves, particularly from government officials, both in the United States and in their home countries. Many also feel shame or stigma associated with what has happened to them in their home countries, and avoid situations where they may have to talk about it, such as through participation in a lawsuit.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at in Los Angeles, California, on March 10, 2017.

/s/ REBECCA HELLER
REBECCA HELLER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC., IN SUPPORT OF PLAINTIFFS' MOTION FOR TERMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION OF THE SECOND EXECUTIVE ORDER

DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC.

I, Mark Hetfield, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the President and Chief Executive Officer of HIAS, Inc., a Plaintiff in the above-captioned case.

2. HIAS was founded in 1881 as the Hebrew Immigrant Aid Society to assist Jews fleeing pogroms in Russia and Eastern Europe. It is the world's oldest —and only Jewish—refugee resettlement agency. Today, HIAS serves refugees and persecuted people of all faiths and nationalities around the globe. Since HIAS's founding, the organization has helped more

than 4.5 million refugees start new lives. In 2016 alone, HIAS provided services to more than 350,000 refugees and asylum seekers globally.

3. HIAS has offices in twelve countries worldwide, including its headquarters in Silver Spring, Maryland, its principal place of business, and additional domestic offices in New York City and Washington, D.C.

4. HIAS's refugee resettlement work is grounded in, and an expression of, the organization's sincere Jewish beliefs. The Torah, Judaism's central and most holy text, commands followers to welcome, love, and protect the stranger. The Jewish obligation to the stranger is repeated in various ways throughout the Torah, more than any other teaching or commandment. HIAS believes that this religious commandment demands concern for and protection of persecuted people of all faiths. The Torah also teaches that the Jewish people are to welcome, protect, and love the stranger because "we were strangers in the land of Egypt" (Leviticus 19:34). Throughout their history, violence and persecution have made the Jewish people a refugee people. Thus, both our history and our values lead HIAS to welcome all refugees in need of protection. A refusal to aid persecuted people of any one faith, because of stigma attached to that faith, violates HIAS's deeply held religious convictions.

5. HIAS's client base includes refugees and their families abroad and those located in the United States. Hundreds of these clients hail from the six countries singled out in Section 2(c) of the March 6 Executive Order, including Syria, Iran, Sudan, Somalia, and Yemen. Other clients, who will also be affected by the

120-day ban on refugees in Section 6(a) of the Order, hail from countries that include Iraq, Ukraine, Bhutan, the Democratic Republic of the Congo, Afghanistan, Eritrea, Tanzania, Ethiopia, Central African Republic, Burundi, South Sudan, Uganda, Russia, Belarus, Burma, and El Salvador. Its overseas clients are seeking refugee status, and do so precisely because they face a real risk of persecution at home. They remain in precarious situations often in third countries. HIAS also provides services to individuals entering the United States under the Special Immigrant Visa ("SIV") program available to persons who worked with the U.S. Armed Forces as a translator or interpreter in Iraq or Afghanistan.

6. HIAS is one of nine non-profit organizations, called "Resettlement Agencies," designated by the federal government to undertake this humanitarian work through cooperative agreements with the U.S. Department of State and the U.S. Department of Health and Human Services. To serve these refugees, HIAS currently holds sub-agreements with 18 local organizations ("affiliates") who operate and oversee 21 resettlement sites across the country. A resettlement site is an office of one of the Resettlement Agencies; it could be either an affiliate or a sub-office of an affiliate. There may be more than one resettlement site in a single city, depending on how many national agencies have offices there. HIAS itself also directly operates a resettlement site in New York City, and, before the Executive Order was signed, was on the verge of expanding to an additional resettlement site in West-

chester County, New York, which had been approved by the Department of State.

7. HIAS is assigned clients via the Department of State's allocation process, which determines which refugee clients will be resettled by HIAS. Other clients —already residing in the United States—connect with HIAS when they come to one of HIAS's local affiliates to file paperwork to initiate requests for refugee status for their relatives abroad.

8. HIAS's work with the federal government occurs pursuant to several different cooperative agreements, including a cooperative agreement with the Department of State that provides funding for the Reception and Placement program. In Federal Fiscal Year ("FFY") 2017, HIAS's approved budget through this agreement was $11.4 million, including funding for headquarters, affiliates, and direct assistance to refugees. Through headquarters staff, HIAS interfaces with the Department of State's contractor for refugee processing, places cases with local affiliates, monitors the refugees' travel to the United States and their final destination in the United States, monitors affiliates for ongoing compliance, and works with the affiliates to ensure effective and timely service delivery to the new arrivals. The total budget under the cooperative agreement is approved at the beginning of the fiscal year, although the Department of State allocates the funds in portions throughout the year, depending on the amount of funding approved by Congress.

9. The largest source of funding for refugee resettlement by HIAS and its affiliates is the funding for Reception and Placement services for new refugee

arrivals. These funds are provided by the government on a per capita basis, currently at the rate of $2,075 per refugee. That amount includes $1,125 of direct assistance per refugee and $950 for affiliate staff support per refugee. The funding provided by the Department of State through the Reception and Placement program is intended to cover expenses for the refugees' initial period of resettlement, up to three months after arrival. With this funding, HIAS and its affiliates must find housing for the refugees, provide them with money for rent and utilities for up to three months, and supply them with initial food and medical care before government-funded benefits begin. In addition, with this funding, the affiliates pay for case management services for the refugees, which include meeting the refugees at the airport and bringing them to their new homes, providing initial safety orientation followed by weeks of extensive cultural orientation to adjust them to life in America, and assisting them in enrolling in ESL classes, school, employment services, and benefits programs (including Medicare, food stamps and Supplemental Security Income for the elderly and disabled).

10. In FFY 2016, HIAS's cooperative agreement with the Department of State provided that HIAS and its affiliates would resettle 3,768 refugees and SIVs in the United States. However, as the number of refugees and SIV's approved for admission increased, HIAS eventually resettled 4,191 individuals that year. The Department of State, aware that it would significantly increase capacity for refugees in FFY 2017, then requested that HIAS apply for higher numbers of

arrivals as the refugee program expanded. As a result, in its cooperative agreement for FFY 2017, HIAS was engaged to resettle 4,794 refugees and SIVs.

11. The Presidential Determination on Refugee Admissions for Fiscal Year 2017, signed in September 2016, authorized the admission of up to 110,000 refugees. Under the March 6 Executive Order, however, that number will be drastically reduced by the 90-day and 120-day bans in Sections 2(c) and 6(a), respectively, and Section 6(b)'s extreme reduction in refugee admissions overall to 50,000. As a result, HIAS and its affiliates will not be able to resettle a significant portion of planned-for arrivals. Indeed, in February, the Department of State notified HIAS that, because of the reduction in refugee admission levels in Section 5(d) of the January 27 Executive Order, HIAS's resettlement obligation for FFY 2017 would be reduced by 39 percent to 2,912 refugees and SIVs. Attached hereto as Exhibits 1 and 2 are true and correct copies of two email communications sent to HIAS staff by the Department of State, dated February 16, 2017, and February 17, 2017, respectively, outlining the changes mandated as a result of Section 5(d) of the January 27 Executive Order. That reduction in the level of refugee admissions remains in Section 6(b) the Revised Executive Order, and thus HIAS will still experience a 39 percent reduction in planned refugee resettlement, and a reduction in funding for its program.

12. Because HIAS had already resettled 1,941 refugees and SIVs for this fiscal year by the end of February, it will be permitted to resettle only 971 additional refugees and SIVs for the remainder of the year.

The financial losses to HIAS and its affiliate network —up to $2.2 million—will be crippling, especially for many of HIAS's affiliates, which are heavily dependent on funding that flows through HIAS. And, those losses will be hastened by the 120-day ban on refugee admissions. On March 6, 2017, the Department of State informed HIAS that only refugees who are already booked for travel to the United States arriving at their port of entry through the end of March 15, 2017, i.e., before the March 6 Order's effective date of March 16, 2017 at 12:01 am, will be permitted to enter the United States. Defendant Department of State has indicated that no further bookings may be made. Attached hereto as Exhibit 3 is a true and correct copy of the pertinent email communication sent to HIAS staff by the Department of State, dated March 6, 2017. The email also informed HIAS that all DHS screening interviews will continue to be suspended until further notice, unless exceptions are arranged on an individual basis and that no new Interagency Checks (IAC) and Security Advisory Opinion (SAC) security checks may be requested.

13. The risk that the Executive Order poses to the viability of HIAS, its affiliates, and the vital services they provide to refugees is very real. World Relief, one of the other nine resettlement agencies that partners with the government, has already announced that it will be forced to lay off 140 staff members and close five of its offices due to the Executive Order. The Executive Order will likewise significantly impede HIAS's work for the government and the services provided to refugees, causing irreparable harm to

HIAS, its affiliates, and its clients. HIAS itself has already been precluded from refilling key positions. HIAS has been compelled by President Trump's two immigration executive orders to dedicate substantial resources to finding other sources of support for its work, and will likely find itself in the same position as World Relief vis-à-vis layoffs if the Executive Order is allowed to be implemented. These staff losses negatively impact the services that HIAS is able to provide to refugees.

14. Affiliates, who hold sub-agreements under HIAS, operate and oversee a number of resettlement sites and are an integral part of the resettlement process; indeed, without them, it would be nearly impossible to ensure that refugees are properly resettled and integrated into communities. However, as a result of the financial losses stemming from the 90-day and 120-day bans and the reduction in admission of refugees to 50,000, some of HIAS's affiliates may be forced to shut down permanently or significantly pare back their resettlement programs and sites. Affiliates have already laid off staff in response to the Executive Order. For example, HIAS's affiliate in Ohio—US Together—has already laid off more than six employees at just one resettlement site. Many of the staff who have lost their jobs or are likely to be laid off are staff who work directly with refugee clients, and are often former refugees themselves. HIAS also operates a direct resettlement site out of its New York office. If the Executive Order remains in place, it is likely that reductions in funding will require HIAS to lay off employees at its New York site.

15. When sites are shuttered or their capacity significantly decreased through staff layoffs and cut resources, the local expertise and relationships—developed by affiliate staff, often over years and years—is lost entirely or substantially diminished. Building a new resettlement site can take months or years of relationship-building, including cooperation with local government and elected officials, businesses who would be potential employers, landlords, and the refugee communities themselves.

16. In particular, in establishing and operating these sites, affiliates depend heavily on volunteer networks and support within interfaith religious communities to assist in carrying out resettlement; once sites close or are reduced in size, these volunteer networks will become disengaged and eventually dissipate. In Wilmington, Delaware, for example, a site that opened in FFY 2017, the Jewish Family Services office has developed a coalition of 28 organizations and faith communities. The coalition consists of large numbers of local churches, including Presbyterian, Mormon, and Methodist churches, as well as mosques and synagogues—all eager to support refugees. They have, in fact, already prepared to welcome newcomers to their communities. Building these relationships, which are key to a site's operation, took months of staff time and resources before the site even opened. Thus, once a resettlement program or site is shut down or reduced in capacity, reopening or re-expanding it could take months or years, if it is able to be done at all. And, if an influx of refugees were later allowed in, HIAS and

its affiliates would be left with a diminished ability to serve that influx of refugees all at once.

17. Moreover, the existence of fewer sites within HIAS's resettlement affiliate network limits the type of assistance refugees can receive because it results in less variety in terms of specialization by site and ability within the network to welcome different kinds of refugees with different vulnerabilities. For example, one of the affiliate sites with which HIAS currently works has been specially set up to address the unique challenges faced by LGBTI refugees. The Jewish Family and Community Services East Bay in Walnut Creek, California, has developed a specialization in serving this population by connecting them to appropriate, available community resources. As another example, the Jewish Family Services of Buffalo and Erie County operates a program to serve deaf refugees, offering services otherwise unavailable from other HIAS affiliates. And the US Together site in Toledo is managed by a Resettlement Director who is from the Syrian community, and the site has staff with language and cultural competency to specifically serve this population. If some of these sites are forced to close due to funding and arrival cuts, the quality and range of specialized services that HIAS can provide to refugees facing special challenges will be diminished.

18. For these reasons, and in reliance on the Department of State's representation that it needed HIAS to take on increased numbers of refugees, HIAS began developing a formal plan to add new resettlement sites to its network and to expand existing sites. HIAS secured private funding and allocated funding

from HIAS's private fundraising to support affiliate program expansion. For example, prior to securing any public funding for new sites, HIAS gave some affiliates grant funding of between $50,000 and $100,000 to build their capacity. These were typically matched by local fundraising, all through private fundraising dollars.

19. In addition, in reliance on the Department of State's representation that it needed HIAS to take on increased numbers of refugees, two staff members were hired to develop new partnerships and conduct a thorough review to identify and develop strong new resettlement sites. This process included developing an index to measure a locality for its strength as a potential resettlement site, including analyses of affordable housing, job growth, and involvement in welcoming community efforts. HIAS's staff then developed relationships with various local organizations to gauge interest in site development over a period of several months. The process culminated in the selection of six new sites in Wilmington, Delaware; Pittsfield, Massachusetts; Niagara Falls, New York; Tacoma, Washington; Westchester, New York; and Madison, Wisconsin—all of which were approved by the Department of State to host 50 refugees each. While timelines may vary, a typical site may require an initial investment of approximately 9-12 months of effort and then additional years to strengthen the site and cultivate additional resources and relationships, allowing the site to scale to accept greater numbers of refugee arrivals. In addition, HIAS's staff invests considerable time into training and coaching employees

and volunteers at new sites, which is necessary because the refugee program is complex, involving extensive, detailed requirements.

20. Because of the Executive Orders' directives to drastically cut refugee admissions, several of these sites, which took months or even years to develop, already have suspended operations and may be forced to close. The resources expended to identify and establish these new sites, as well to expand several other existing sites, are not recoverable. For example, the new site in Wilmington invested in new staff, built community and volunteer relationships, and established the infrastructure for the new program. The program had expected to receive 50 refugees but has received only nine refugees so far, and anticipates just fourteen more. These numbers are insufficient to justify a continuing staff, and the agency faces a loss of initial funding.

21. Because of the devastating toll that the Executive Order will take on HIAS, its affiliates, and the services they provide, the injury and harm that HIAS will suffer is irreparable, HIAS cannot be made whole by a payment of damages at the end of this litigation.

22. HIAS's clients will also suffer irreparable injury as a result of the Executive Order. Clients already in the United States and clients who are allowed to enter will received diminished and more limited services than would otherwise be available through HIAS and its affiliates. Meanwhile, if the Executive Order remains in place, many clients will be denied entry entirely or their entry will be substantially delayed, leaving them in precarious situations.

23. At the time that the new Executive Order was signed on March 6, 2017, there were 61,467 approved refugees in the U.S. pipeline. This included 13,302 Somalis, 9,886 Iraqis, 7,879 Syrians, 1,666 Sudanese, 597 Iranians, and 28 Yemenis. These refugees were spread across the nine Resettlement Agencies, including HIAS.

24. Specifically, HIAS has identified 1,395 clients worldwide who were allocated through the Department of State process, have been vetted, and have been approved for refugee status. These refugees have already been allocated and assured to one of HIAS's resettlement sites. Of these, 512 are nationals of one of the six banned countries. Thus, these individuals—the overwhelming majority of whom are Muslim—will likely be ineligible for the case-by-case exception to the 120-day ban on refugee applicants set forth in Section 6(c) of the March 6 Executive Order.

25. Of the 1,395 HIAS clients worldwide who have been vetted, approved for refugee status, and allocated and assured to a HIAS site, only 58 (including 3 refugees from the six banned countries) have been scheduled for travel. This also includes 99 individuals who were intended to be booked for travel, and 338 individuals who were cleared for departure but are not yet scheduled to travel. These individuals will be prevented from travel as a direct result of the Executive Order, leaving them in precarious situations.

26. Even after the 120-day suspension on refugee admissions expires, most of these individuals will still be prevented or delayed from entering the United States, despite the fact that they have been vetted and

determined to be refugees. Under the Executive Order, the earliest that refugee resettlement could resume would be early July 2017. This would leave Resettlement Agencies, at most, with only two-and-a-half months before the end of the fiscal year to resettle hundreds or thousands of refugees who were supposed to be resettled over a much longer period of time. Refugee processing would be impacted by the 120-day ban since security checks and processing would be suspended during that time. Because security and medical clearances have expiration dates, it is likely that some refugees would lose their readiness for travel during the suspension period and lengthy checks would need to be repeated. In addition, because of the recent notice that HIAS's resettlement commitment will be cut by 39 percent, some of these refugees will simply not be able to enter the country in FFY 2017. Every day that these individuals' entry is delayed, they remain in precarious situations.

27. Many of HIAS's clients abroad whose refugee status has been approved but have yet to be scheduled for travel, including clients from the six banned countries, have family members in the United States, also HIAS clients, who will suffer as a result of the delay in reuniting with their family members. Some of these U.S. ties are, in fact, individuals who petitioned, applied, or sponsored their family members for refugee status (often through HIAS). For example, some HIAS clients have been granted refugee status through the Central American Minors program, which permits U.S. relatives of persecuted children in Central America to petition for these children to immigrate here.

These children remain in vulnerable and dangerous situations in their home countries, despite having been approved for refugee status, and their U.S. family members are forced to endure continued separation from and concern for these children.

28. More than 1,300 refugee applications initiated through HIAS by family members residing in the United States remain pending for HIAS clients abroad. Many include individuals living in the six Muslim-majority countries subject to the order's 90-day ban. The adjudication of these applications has been or will be substantially delayed because of the Executive Orders. In fact, since the orders were signed, consideration of most refugee applicant cases in need of security checks have been suspended. This means that, for many refugees in the pipeline, security checks that typically lasted 18-24 months will now be paused and restarted, potentially adding years to their wait for stable resettlement. The delay in processing of these applications will subject these clients to further risk of persecution and abuse in their current situations, and their family members who petitioned for them to come to the United States will remain in limbo as to whether they will ever be reunited.

29. The refugees that HIAS assists in entering the country are well-vetted by the U.S. government. These are individuals and families who are granted refugee status because they have fled their own countries due to persecution. These refugees are selected for third-country resettlement precisely because they have vulnerabilities that make continued residence in first countries of asylum or repatriation to their home

countries unsafe. They are people who simply want to live a life in safety and freedom, and, to my knowledge, none who have been assisted by HIAS has ever been implicated in any terrorist act. I've set forth in the paragraphs below just a few examples of HIAS clients who have been affected by the Executive Order and will likely be harmed by the drastic cut in the number of refugees that will be allowed to enter the United States this year.

30. Fawzia[1] is a Muslim Somali refugee who fled her country in 2011 because of the ongoing persecution. Her sister was raped and her brother was shot by armed groups in Somalia. Her family originally fled Somalia to India where she met and married her husband, another refugee of the civil war in Somalia. Fawzia, however, was resettled to the United States without her husband and has not seen him for two years. She talks to him every day and finds it extremely hard to live without him. Her husband is not yet scheduled to enter the United States.

31. Yessenia is a Salvadoran woman who has been living in the United States since 1999. She left her daughter behind in El Salvador and has created a new life for herself in this country. Yessenia, who has lawful status here, expects to soon marry her U.S. citizen fiancé. Her daughter Maria, however, has faced increased risk from the gangs in El Salvador. They have targeted her because she has family in the

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[1] All refugee and family names in this affidavit have been changed to protect client identities. Declarations are on file in HIAS' headquarters in Silver Spring, Maryland.

United States and have been extorting her. The gangs are threatening to kill Maria, her older brother, her grandmother (Yessenia's mother), and the rest of the family living in El Salvador. Children like Maria are victims of gang violence every day in El Salvador. Maria has been approved as a refugee through the Central American Minors program but is not yet scheduled to travel to the United States.

32. Magan is an elderly refugee from Somalia who has been in the United States for more than a year. He is waiting for his daughter and her children, his grandchildren, to join him in the United States through the refugee program. He reports that he has not been able to sleep since learning of the January 27 Executive Order for fear that they will be blocked from finally finding safety in the United States. Magan's family was scheduled to travel to the United States in February but their flight was cancelled after the first Executive Order was signed. Magan worries that he will die without seeing his daughter again, and as a Muslim, he reads the Quran and makes extra prayers for his family's health and safety. Magan feels that he has already suffered enough as he lost his first wife in the conflict in Somalia. He is waiting in the hope that he will be reunited with his family.

33. Elias, his sister, and his sister's children are Muslim refugees in the United States who fled the conflict in Syria. Elias and his sister arrived here without their mother and father, who fled Syria to Jordan four years ago when their lives were endangered. It is illegal for Elias's parents to work in Jordan so they are struggling financially, and heartbroken

over being separated from their children and grandchildren. They are only able to pay rent for an apartment because Elias sends them money. Elias knows his parents have already been interviewed three times by the UNHCR and the U.S. government but is waiting for further information.

34. Sunam is a lawful permanent resident, originally from Nepal, whose brother remains in a refugee camp in Eastern Nepal. Sunam's brother has been in the camp his entire life. Sunam knows how difficult life is in the camp, which she left in 2014 after being resettled in the United States. Sunam and her brother talk on the phone nearly every week. Sunam understands that the basic rations being delivered to the refugee camp have been cut off. Sunam does not know when they will come in again. Sunam's brother was fully approved to enter the United States as a refugee and was supposed to travel in June of 2016, but his travel was delayed for medical reasons and has not been rescheduled. Sunam hopes that her brother is able to join her soon.

35. Eden is a lawful permanent resident who came to the United States from Eritrea in 2010. She taught herself English, attends nursing school and has just applied for citizenship. Eden recently had her first child, a joyful occasion that was tinged with sadness because her mother could not be with her. Eden's mother remains in a precarious situation in Ethiopia, where she has been waiting to come to the United States as a refugee. She had to flee from Eritrea after being harassed for her religion as a Pentecostal Christian. Eden's mother has been fully vetted and

approved as a refugee, but her travel was cancelled around the time of the Executive Order and has not been rescheduled. Eden has not seen her mother for seven years. She worries about her getting older, with worsening health, and is desperate for her son to meet his grandmother.

36. Maung is a legal permanent resident who came to the United States three years ago as a refugee from Burma. He now owns and operates his own sushi business. Maung is waiting for his wife to join him in the United States. He does not remember the last time he saw her. Maung is very worried that his wife's refugee status will be rejected and her departure from Malaysia will be delayed. Maung's wife's refugee status has been approved, and she was assigned to HIAS for resettlement in the United States; however she is still waiting for travel to be scheduled.

37. Like Fawzia, Magan, and Elias, many of HIAS's clients here in the U.S. and abroad are Muslim. The Executive Order has taken a particular toll on them because of its anti-Muslim motivation and message. HIAS's Muslim clients have been marginalized in their communities as a result of the Executive Order. Clients report feeling that everyone wants to fight with them, and describe rumors of various attacks on mosques and other Muslims. Fawzia. for example, reports that her niece and sister, who are both in middle school, were attacked at school. Other students harassed the girls, called them names, told them to go back where they came from, and even pulled off their headscarves. HIAS clients report feeling isolated and anxious about

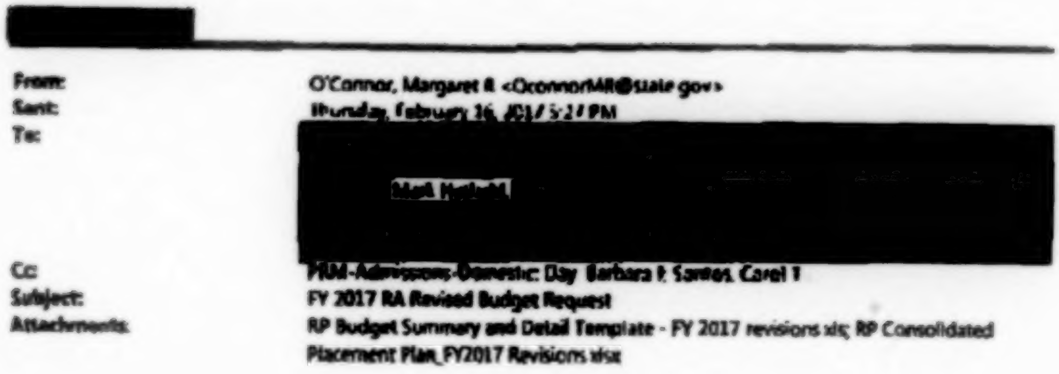
their situation and the future for their refugee relatives.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ MARK HETFIELD
MARK HETFIELD
Executed this 10th day Mar. 2017

EXHIBIT 1

to Hetfield Declaration



[redacted]

From: O'Connor, Margaret R <OconnorMR@state.gov>
Sent: Thursday, February 16, 2017 5:27 PM
To: [redacted]
Cc: PRM-Admissions-Domestic; Day, Barbara F; Santos, Carol T
Subject: FY 2017 RA Revised Budget Request
Attachments: RP Budget Summary and Detail Template - FY 2017 revisions.xls; RP Consolidated Placement Plan_FY2017 Revisions.xlsx

Dear colleagues,

With the adoption of Executive Order (EO) 13769, Protecting the Nation from Terrorist Activities by Foreign Nationals, PRM is implementing the revised target of 50,000 refugee arrivals and an estimated 15,000 SIVs for FY 2017.

Each agency's overall capacity will remain at the proportion of arrivals approved at the beginning of FY 2017 (for instance, if your agency was approved to resettle 10% of 107,000, you will now receive 10% of 65,000 arrivals). In order to issue funding for the remainder of FY 2017, PRM requires the submission of updated program and budget documents to reflect the revised ceiling of the U.S. Refugee Admissions Program. Your Program Officer will notify you of your revised approved network capacity for FY 2017.

We expect the updated Headquarters Management budget to reflect a careful assessment of the funding necessary to fulfill the revised workload expectations in a cost-efficient manner. It should be based on requirements to manage arrivals for the balance of FY 2017. Please consider if any currently planned program activities should be canceled or postponed. Proposals should include an outline of the specific actions being taken to adjust staffing, organizational structure and management, and other activities to appropriate levels. We understand that significant changes to affiliate networks, headquarters staffing, and other program requirements may have associated costs, however, we expect that revised full-year budgets will reflect savings from the significant reductions in estimated arrivals.

Please include the following documents by **Friday, March 3, 2017**:

- FY 2017 budget showing funds awarded to date (October 2016-March 2017), Q3 and Q4 projected needs, and full-year funding requirements
    - Please use the attached template and submit as an excel spreadsheet

- Revised budget narrative (with changes tracked) detailing any new or updated activities to right-size the network (e.g. travel costs associated with restructuring or closing a site)

- Updated consolidated placement plan (attached) reflecting your revised capacity
    - Include a narrative detailing the strategy used un determining the revised plan

- Executive Summary outlining all changes from the originally-approved proposal, including staffing and operational changes and their associated impact on the budget

- Signed completed SF-424 and SF-424A

- Most recent Negotiated Indirect Cost Rate Agreement (NICRA)

- Signed and dated cover letter

PRM plans to issue additional per capita awards in early March given the robust arrivals through February. We will provide additional details in the coming weeks. Quarter 3 Headquarters Management awards will be issued after the proposed program adjustments have been finalized.

Please contact your Program Officer with any questions. Send your revised proposals to me and your Program Officer by **March 3, 2017**.

Sincerely,
Margaret

Margaret O'Connor
Budget Analyst, Refugee Admissions · Bureau of Population, Refugees, and Migration · U.S. Department of State
2025 E Street NW, Washington, DC 20520 | phone: 202.453.9262| fax: 202.453.9393| email: oconnormr@state.gov
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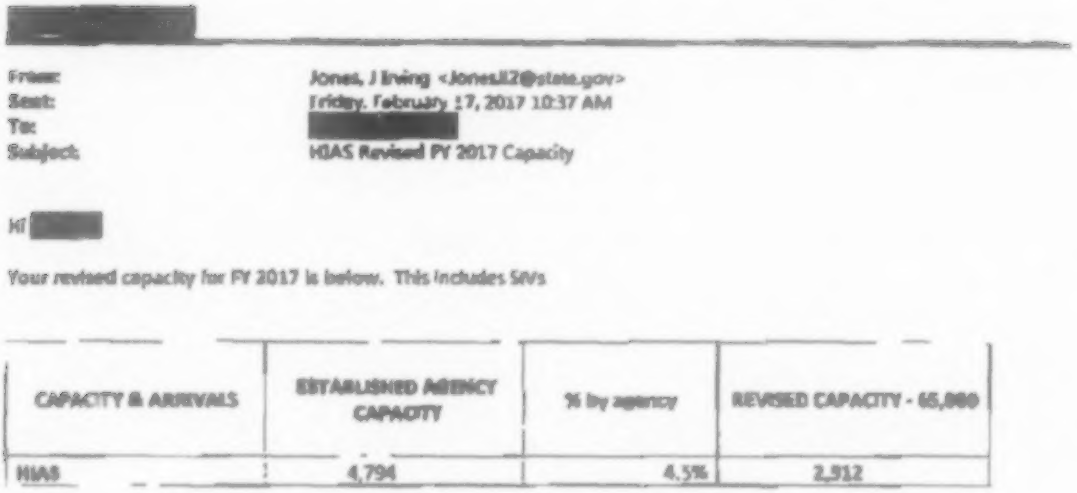
EXHIBIT 2

to Hetfield Declaration



[redacted]

From: Jones, J Irving <JonesJI2@state.gov>
Sent: Friday, February 17, 2017 10:37 AM
To: [redacted]
Subject: HIAS Revised FY 2017 Capacity

Hi [redacted]

Your revised capacity for FY 2017 is below. This includes SIVs

CAPACITY & ARRIVALS	ESTABLISHED AGENCY CAPACITY	% by agency	REVISED CAPACITY - 65,000
HIAS	4,794	4.5%	2,912

Let me know if you have any questions

Regards,
Irving

Irving Jones
Program Officer for Domestic Resettlement, Refugee Admissions · Bureau of Population, Refugees, and Migration U.S. Department of State
2025 E Street NW, Washington, DC 20520 | phone: 202.453.9248| fax: 202.453.9393| email: JonesJI2@state.gov

This email is UNCLASSIFIED.

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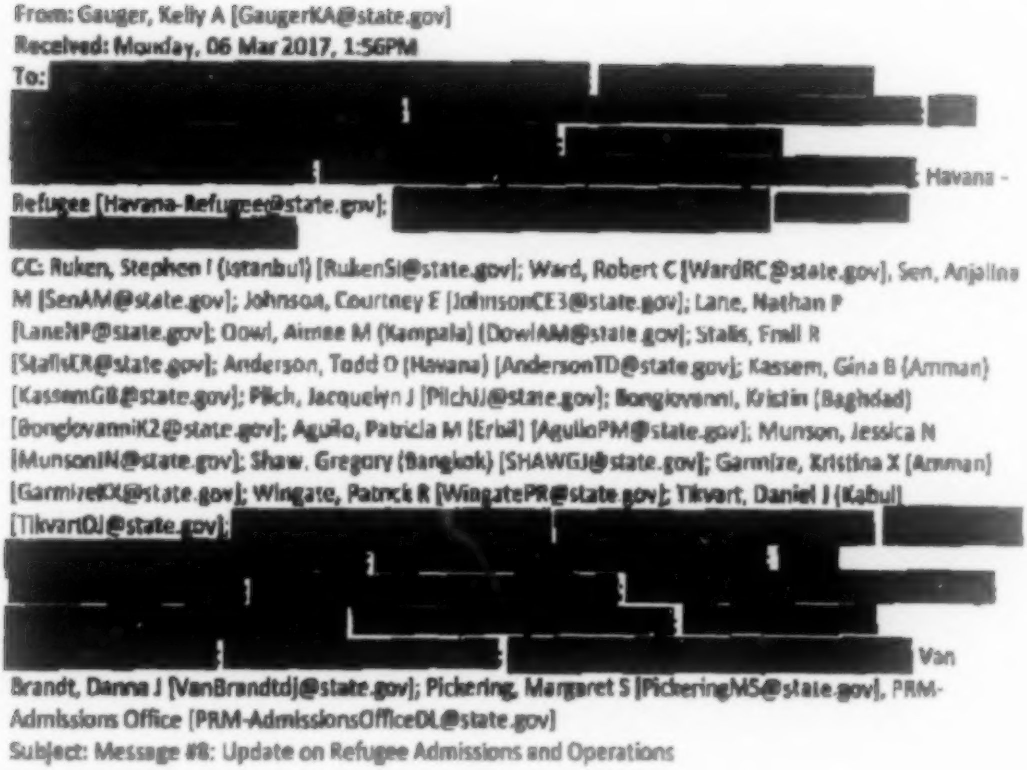
EXHIBIT 3

to Hetfield Declaration



From: Gauger, Kelly A [GaugerKA@state.gov]
Received: Monday, 06 Mar 2017, 1:56PM
To: [redacted] Havana - Refugee [Havana-Refugee@state.gov]; [redacted]
CC: Ruken, Stephen I (Istanbul) [RukenSI@state.gov]; Ward, Robert C [WardRC@state.gov], Sen, Anjalina M [SenAM@state.gov]; Johnson, Courtney E [JohnsonCE3@state.gov]; Lane, Nathan P [LaneNP@state.gov]; Dowl, Aimee M (Kampala) [DowlAM@state.gov]; Stalls, Enell R [StallsER@state.gov]; Anderson, Todd D (Havana) [AndersonTD@state.gov]; Kassem, Gina B (Amman) [KassemGB@state.gov]; Pilch, Jacquelyn J [PilchJJ@state.gov]; Bongiovanni, Kristin (Baghdad) [BongiovanniK2@state.gov]; Aguilo, Patricia M (Erbil) [AguiloPM@state.gov]; Munson, Jessica N [MunsonJN@state.gov]; Shaw, Gregory (Bangkok) [SHAWGJ@state.gov]; Garmize, Kristina X (Amman) [GarmizeKX@state.gov]; Wingate, Patrick R [WingatePR@state.gov]; Tikvart, Daniel J (Kabul) [TikvartDJ@state.gov]; [redacted] Van Brandt, Danna J [VanBrandtdj@state.gov]; Pickering, Margaret S [PickeringMS@state.gov], PRM-Admissions Office [PRM-AdmissionsOfficeDL@state.gov]
Subject: Message #8: Update on Refugee Admissions and Operations

Dear colleagues,

A new Executive Order was signed today calling for, among other things, a suspension of the USRAP program for 120 days, to take effect on March 16 at 12:01 am Eastern Daylight Time. All passengers (including refugees and visa 93 holders of all nationalities) already on ABN for arrival at their port of entry through the end of March 15 are permitted to travel as planned. No further bookings may be made.

Iraqi and Afghan SIVs are exempt from the Executive Order and may travel as usual.

In addition, RSCs should adhere to the following processing guidance.

-UNHCR has halted referrals, with several exceptions already agreed between PRM and individual RSCs. During the 120-day pause, RSCs are authorized to continue to pre-screen referrals that are already in the pipeline. RSCs may also accept urgent protection/ medical referral requests from UNHCR during the 120-day period, with the approval of their PRM Program Officer. These cases should mainly be those with U.S. ties.

-Direct application programs may continue accepting new applications during the 120-day pause. Employment verification and pre-screening activities may continue.

-DHS interviews continue to be suspended until further notice, unless exceptions are arranged with individual RSCs. When requesting DHS interviews for urgent protection/medical cases, please consult your PRM Program Officer first.

-No new IAC or SAO security checks may be requested, except for urgent protection/medical cases or other cases approved by PRM/A to travel on an exceptional basis during the 120-day period. IAC and SAO re-requests as a result of new/additional information (biodiffs) should not be requested unless cases are approved by PRM/A for travel. All CLASS checks (new or re-requests) can continue to be requested.

-RSCs should request new assurances only for cases that have been approved for travel during the 120-day period. No other new assurances should be requested at this time. Assurance requests already in process will continue.

-Until further guidance is provided, RSCs may continue the following processing activities:

-Employment verification

-Pre-screening

-Class requests

-Medicals, as required for cases that have been approved by PRM for travel (either before and after the EO implementation date)

-Cultural orientation, as required for cases that have been approved by PRM for travel (either before and after the EO implementation date)

-Communications/responses to case inquiries

-The freeze on all hiring and expansion activities remains in effect until further notice.

-Cleared messaging for all RSCs to use with refugees and USRAP partners regarding the suspension is below. Please continue to clear ALL media/press requests with PRM/Admissions and PRM/Press in Washington.

Message to all RSCs for posting on websites or in public areas:

- **As stated in the Executive Order signed by the President, the United States government has suspended all refugee admissions for 120 days, effective March 16 at 12:01 a.m., eastern daylight time. Certain limited exceptions when in the national interest and when admission of the applicant would not pose** a risk to U.S. security or welfare will be considered on a case-by-case basis.

- The suspension does not impact the cases of refugees already approved for refugee status who have been extensively screened, approved for admission to the United States, and scheduled for departure through March 15. Those individuals will continue to enter the United States through end of March 15.

- The Resettlement Support Center (RSC) is currently maintaining all case information and biodata on file for all refugees who have been referred for resettlement to the United States.

- For questions from refugees in XXX assisted by XXX, you may write to XXX@XX if you wish to provide information on emergency situations or update your contact information.

- As we receive additional guidance, we will update this website xxxxx.com.

Official

UNCLASSIFIED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF BETH BARON, PRESIDENT OF MIDDLE EAST STUDIES ASSOCIATION, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF BETH BARON, PRESIDENT OF MIDDLE EAST STUDIES ASSOCIATION

I, Beth Baron, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the President of the Middle East Studies Association ("MESA"), a Plaintiff in the above-captioned case. In this capacity, I chair the Board of Directors, act as chief executive officer of the association, and respond to the interests and concerns of MESA members.

2. I am also a Professor of History at the City College and Graduate Center of the City University of New York. I was the editor of the *International Journal of Middle East Studies* from 2009 to 2014 and

am the author of numerous books and articles in Middle Eastern history. I regularly supervise graduate students and am familiar with the normal research practices of MESA members and the importance of international travel for both students and professors.

3. MESA is a non-profit learned society that brings together scholars, educators, and those interested in the study of the Middle East from all over the world. From its inception in 1966 with 51 founding members, MESA has increased its membership to more than 2,400 and now serves as an umbrella organization for fifty-five institutional members. MESA's membership includes both graduate students and faculty working in the field of Middle East studies.

4. MESA and its members will be seriously harmed by the Executive Order issued on March 6, 2017 ("the Executive Order").

5. MESA has members who are from the six countries designated in the Executive Order and who are outside the United States. I understand that individuals in those circumstances who lack visas will not be able to obtain visas to travel to the United States under the terms of the Executive Order. This inability to come to the United States impacts MESA members' ability to attend academic conferences, including an annual meeting sponsored by MESA discussed below. For example, I am aware of an Iranian MESA member who is a doctoral student in Germany, who will not be able to travel to the United States for conferences, including the MESA conference which she firmly planned to attend, because the Executive Order will prevent her from obtaining a visa. Participation in

academic conferences is crucial to the professional success of both graduate students and professors, and to their ability to fully engage with the ideas and scholarship of the broader Middle East studies community. Many important conferences, including the MESA annual meeting, take place in the United States.

6. Graduate students who are MESA members or are studying under MESA members in the United States often leave the country to complete field work or library and archival research for advanced degrees. I am aware that many such students from the six designated countries fear exclusion from the United States because of the Executive Order if they leave the country. Students who do not leave the United States, because they lack an assurance they will be permitted to reenter, will miss out on opportunities to engage in research and participate in academic conferences. This is a serious hindrance to their academic careers, as research in this field is often best conducted abroad —and sometimes can only realistically be conducted abroad. Likewise, as noted above, participation in international conferences is a crucial part of the development of an academic career, and many major conferences in this field take place abroad.

7. Students in these circumstances will also lose their ability to visit family and friends abroad with an assurance they will be permitted to reenter. For example, I have learned of Iranian students affiliated with MESA who have cancelled plans to return home for Persian New Year, an important holiday that will occur on March 21, because of the Executive Order. Missing out on the chance to return home for Persian

New Year is for many Iranian students comparable to Americans missing the chance to return home for the Thanksgiving holiday.

8. MESA members who are U.S.-based faculty will be impacted by the Executive Order because potential students from the designated countries will be unable to obtain visas to study with them in the United States. Similarly, for the reasons explained above, their current U.S.-based students from the designated countries will not be able to travel abroad for field work with an assurance they will be permitted to reenter. Students' decisions to forego international travel will impact faculty members' ability to facilitate quality research and educational opportunities, which is both critically important to faculty members' pedagogical and academic mission and will impact their ability to attract students, obtain grants, and produce scholarship.

9. Likewise, U.S.-based MESA faculty members will forego opportunities to travel abroad for research and academic conferences for fear that they will not be readmitted, or will be subjected to harassment or discrimination upon application for reentry to the United States. MESA has already been in communication with a number of faculty members who plan to forego international travel for these reasons.

10. MESA members will also be precluded from traveling to the designated countries for research or academic conferences when those countries institute reciprocal actions in response to the Executive Order. Iran restricted the issuance of certain visas to U.S. citizens in response to the prior, January 27 version of the Executive Order. A meeting of a MESA affiliated

organization, the Association for the Study of Persianate Societies, planned for this month in Shiraz, Iran, was cancelled because of Iran's response to the prior version of the Executive Order. I am aware of at least one MESA member who was scheduled to present an academic paper at that conference but has now lost the opportunity to do so.

11. A large number of MESA members are Muslim or are institutional members whose officers, employees, or members are Muslim. I have heard from many Muslim members—colleagues, students, and friends—that they understand the message of the prior and current versions of the Order to be an attack on Islam. They have expressed the concern that the Orders marginalize them and they fear that they will be singled out for suspicion, interrogation, search, and discrimination because of the anti-Muslim message of these Orders.

12. MESA itself will also be harmed by the Executive Order. As part of its goal to advance learning, facilitate communication, and promote cooperation, MESA sponsors an annual meeting that is a leading international forum for scholarship, intellectual exchange, and pedagogical innovation. Approximately thirty percent of MESA members are based outside of the United States and must travel to the United States to attend MESA's annual meeting. At least 46 citizens of the six designated countries traveled to the United States to attend the last annual meeting. MESA expects that a substantial number of scholars will be unable to attend this year's meeting because of the restrictions imposed by the Executive Order.

13. MESA expects that, in part because of the stigmatic message of the Executive Order, many members based in Europe and the Middle East are likely to heed international calls to boycott academic conferences in the United States in protest of the Executive Order, including the MESA annual meeting. Academic conferences, and the MESA annual meeting in particular, are most successful when a variety of backgrounds and viewpoints are represented.

14. The absence of these scholars from the designated countries and from other countries will have a substantial negative effect on the meeting. These and other effects of the Executive Order will negatively impact MESA's mission of fostering the study and public understanding of the Middle East.

15. In addition, the Executive Order will cause serious financial harms to MESA. A large portion of MESA's annual budget is funded through annual membership dues and registration fees to attend the annual meeting. In 2016, annual meeting revenue was 47% of our overall revenue. This revenue represented the largest single source of income for MESA.

16. For each individual who cannot or will not attend the annual meeting, MESA will lose $90 to $250 in registration fees. We do not yet know how many individuals will forego registration and attendance at the meeting because of the travel ban. However, we anticipate significantly reduced registration and attendance, in part based on the reduction in the number of academic papers submitted for the meeting.

17. MESA's meetings held in Washington, DC, have had higher attendance and paper submission rates than our meetings held in other cities. MESA has consistently maintained and typically exceeded submission numbers in each successive DC meeting. In 2017, for the first time in 24 years, MESA has had a substantial decline in submissions from one DC meeting (2014) to another (2017). 133 fewer people submitted papers as part of pre-organized sessions in 2017 than in 2014. Applications for the 2017 meeting were due by February 15, 2017, shortly after the original Executive Order was signed.

18. Assuming based on this decline that, at a minimum, 133 people would have registered and attended the meeting but for the Executive Order, the loss of meeting registration would be approximately $18,000. However, MESA anticipates greater financial loss as people other than those who would have submitted papers but did not do so decide not to attend the meeting and thus do not pay the registration fee because of the Executive Order.

19. Likewise, I am aware that some individuals who cannot or will not attend the meeting will allow their MESA membership to lapse as a result. For each such lapsed membership, MESA will lose $25-300 in membership dues.

20. There are additional potential financial impacts if registration for the DC meeting is lower than it has been in previous years. MESA has a performance clause in its contract with the Marriott Wardman Park Hotel, the location of the 2017 meeting. MESA guarantees that it will fill a minimum number of room

nights and any shortfall must be paid by MESA. The penalty is equal to the single room rate for each night MESA falls short. MESA may be subject to this penalty because of the Executive Order.

21. MESA has already experienced a negative financial impact from the Executive Order, which is reflected in the lower submission numbers and loss of revenue. MESA anticipates that the decline in revenue it has already experienced because of the Executive Order will continue for the rest of the year if the Executive Order is in effect.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ BETH BARON
BETH BARON

Executed this 10th day Mar., 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF JOHN DOE # 1 IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF JOHN DOE #1

I, John Doe #1, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746, and declare as follows:

1. I am a Lawful Permanent Resident of Iranian origin, and I live in Silver Spring, Maryland.

2. I came to the United States in 2014 on a J1 visa. I am a scientist who studies atmospheric and natural hazards. In 2016, I obtained my lawful permanent resident (LPR) status through the National Interest Waiver program for people with extraordinary abilities.

3. In August 2016, while my application to become a lawful permanent resident was pending, I

married an Iranian national. My wife lives in Tehran. She has been alone in Tehran since her mother's unexpected death in 2013.

4. My wife and I are non-practicing Muslims, but under Iranian law, a child born to a Muslim father is automatically considered to be Muslim. Conversion from Islam is deemed apostasy and is punishable by death.

5. My wife and I applied for a spousal immigration visa so that she could join me in the United States. Her application was approved on November 3, 2016. As of January 9, 2017, we had submitted all requisite documentation, paid the processing fees, and were waiting for notification that an embassy interview was scheduled.

6. Based on the information published by the National Visa Center, I expected my wife's interview to be scheduled in no more than six weeks. At the time the first Executive Order went into effect, we were near this six-week mark. However, after the Executive Orders went into effect, I have been told by the National Visa Center that the processing time has been extended to eight weeks.

7. When the new Executive Order was announced, I called the National Visa Center again, in the hopes that my wife's interview can be scheduled before the new Order goes into effect. With each day that passes, that window closes. And, even if she does manage to get an interview, the new Executive Order will still halt any further processing, putting us back where we started.

8. I would like to visit my wife in Iran, but I am afraid to make any travel plans because I do not want to risk not being able to return to the United States, even as a legal permanent resident. The confusion surrounding the first Executive Order, the constantly changing landscape, and the fact that the revised Executive Order is so similar to the first makes me worry that leaving the country is too risky. I could be denied entry or detained and questioned.

9. This also affects my job. Sometimes my work requires me to travel internationally, for example to attend conferences, but I feel I cannot do that at this time because I may not be permitted to re-enter the United States.

10. The Executive Order's travel ban on Iranian nationals has created significant fear, anxiety, and insecurity for my wife and I regarding our future. We simply cannot know what will happen, and if the delays will go for months and months only to result in a denial. The government calls it temporary but the language of the ban, the statements that have been made about banning Muslims from entering, and the broader context suggests otherwise. The waiver for hardship provides us with no reassurance. What is a hardship? What is that process? And there is so much confusion. I read a news report from the BBC about the embassy in Afghanistan delaying processing even before the new Executive Order goes into effect.

11. The ban forces me to choose between my career and being with my wife, who remains in Tehran. Moreover, even though we are married, her day-to-day life is difficult because she is, in many practical

respects, living as a single woman. I can't be there for her to help her. Based on all the information that was out there about the process, we believed we would be together by this spring—or sooner. The more time passes, the harder and harder it is for us and the more pressure there is for me to give up my career here. But I do not know how to proceed because of the uncertainty—whether to keep working here, and keep hoping, while time passes, or whether to return, despite everything I would give up in doing so.

12. In addition, the anti-Muslim views that are driving the Executive Order, as well as the Order itself, have caused significant stress and anxiety for me. I worry that I may not be safe in this country, despite being invited to the U.S. by a university in order to contribute to the academic community in my initial visa.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at Silver Spring, Maryland, on March 10, 2017.

/s/ [REDACTED]
JOHN DOE #1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF JOHN DOE # 3 IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF JOHN DOE #3

I, John Doe #3, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a Lawful Permanent Resident of Iranian origin, and I live in Linthicum, Maryland.

2. I came to the United States in 2011 through the greencard lottery. I worked as a teacher in Iran and currently work in the engineering field.

3. I recently applied to become a naturalized citizen, and the petition remains pending with U.S. Citizenship and Immigration Services.

4. My wife, who is also an Iranian national, lives in Iran. She and I married in the summer of 2014. In

October 2014, I applied for an immigration visa on her behalf.

5. In May 2016, my wife had her interview at the U.S. Embassy. At the time, she was informed that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join me in two or three months. She therefore resigned from her job and began preparing to join me in the United States.

6. The Executive Order puts our future in peril, as it has delayed, and could prevent, my wife from obtaining her visa and joining me in the United States.

7. Moreover, the Executive Orders and the delays and uncertainty they have caused have placed extraordinary stress upon our relationship and my relationship with my in-laws. At this point, we have been forced to live apart from each other, without each other's companionship for more than two and a half years. We live in different time zones, eight hours apart, and thus even communicating by phone requires planning. The only way for us to see each other is for me to travel to Iran, at great expense. Moreover, I only have 15 days of leave per year at my job.

8. The effect of the Executive Order has been to convince my wife and her family that it will be impossible for us to live together in the United States because the process will just keep being delayed or denied. We are starting to feel desperate. We are young and our lives are passing. We are delayed in starting our lives together and building our family. My wife has been particularly devastated by the Executive Order,

feeling like her life is in total limbo and each day makes it worse.

9. In fact, we have gotten to the point where my father-in-law asked me to leave the United States and go back to Iran because the Executive Order means that there will be even more delay and may mean that my wife can never come to the U.S.. It has been difficult for me to be placed in a position of feeling like I may be forced to choose between staying in the U.S. and the life I have started building here, and my wife, who I love dearly and want here with me. My wife and I have never had a significant disagreement in our relationship until the Executive Orders. It has been exhausting for us. We are being torn apart by this situation and the uncertainty and delay.

10. Since moving to the United States, I have returned to Iran on several occasions to visit my wife. I had planned to visit her in February 2017, but I canceled these plans because of the Executive Order. I fear that if I leave the United States to see my wife, I will not be permitted to reenter the country or could be detained by immigration officials upon my return. I have no faith that the Executive Order won't be applied to me, or that a new Executive Order won't be issued, or that I won't be detained and interrogated upon my return, based on news reports of what has been happening to others and the total chaos of the first Executive Order.

11. Because of this fear, if I do end up needing to visit Iran for a family matter or to see my wife, I need to plan for what will happen to my apartment, my car, my savings, and the various pieces of my life here, if I

am detained or refused entry. But I am also afraid that anything I do will be regarded with suspicion.

12. The anti-Muslim attitudes that are driving this Executive Order have caused me stress and anxiety and made me question whether I even belong in this country despite everything I have sacrificed and invested in making a life here.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at Linthicum, Maryland, on March 10, 2017.

/s/ [REDACTED]
JOHN DOE #3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF MOHAMMED METEAB

I, Mohammed Meteab, upon my personal knowledge, hereby submit this declaration pursuant 28 U.S.C. § 1746 and declare as follows:

1. I am a lawful permanent resident of Iraqi origin, and I live in Springfield, Massachusetts.

2. I came to the United States in 2015 as a refugee, along with my wife and two children. All of us are now lawful permanent residents. My third child, who was born in the United States, is a U.S. citizen.

3. I am one of five brothers. We lived together with our families in Iraq. During and after the 2003 invasion of Iraq, my brothers and I all cooperated with the U.S. military, helping to establish the transitional government in the wake of the conflict in Najaf, Iraq.

4. Because of our cooperation with the U.S. government, we received threats and were shot at by armed militia groups in Iraq. In 2013, my brother

Abdullateef found a note for us from the League of the Righteous milita saying we had to leave Najaf or be killed.

5. I am a Sunni Muslim, as are my brothers. We lived in a Shi'a neighborhood in Najaf, Iraq.

6. In 2013, my family received death threats because we were Sunni. We were warned by neighbors and members of the community that we would be killed if we stayed. A few days after receiving death threats, my nephew was shot in the leg. On December 25, 2013, my older brother Shareef, his children, and two of our nephews (Abdullateef's sons, Walid and Mosad, who was shot, and their wives), fled to Jordan.

7. Eleven days later, on January 5, 2014, I fled to Jordan with my wife and our two children. My three other brothers, Ahmed, Abdullateef, and Ali, joined us in Jordan in 2014. Like my wife, children and I, my brothers applied for refugee status soon after arriving in Jordan.

8. My wife, two children, and I were approved as refugees in March 2014.

9. On August 20, 2015, my wife, children, and I came to the United States as refugees. My nephew Walid and his wife were also approved and came to the U.S. as a refugee in July 2015. My older brother Shareef and his children also came to the United States as refugees in August 2015. Shareef's daughter and her husband, Mosad (who had been shot in Iraq) came to the United States in December 2015.

10. My remaining three brothers, Ahmed, Abdullateef, and Ali, had also applied for refugee status in 2014. Ahmed and Ali were approved for resettlement in the United States in 2016. In April 2015, Abdullateef was approved for resettlement in Canada. He is still in Jordan, awaiting final clearance to go to Canada.

11. In November 2016, Ahmed and Ali, who were still in Jordan, were informed by the International Organization for Migration that while their refugee applications had been approved, my brothers and their families still did not have travel documents to come to the United States. Jewish Family Services gave me this update at the same time.

12. I expected that my brothers and their families would arrive in the United States in early 2017. However, when I learned from the news about the Executive Order in January, I realized my brothers would not be able to join us in the United States.

13. My brothers are living as refugees in Jordan. Like me, they fled threats to their lives in Iraq and were looking forward to starting a new life and sending their children to school here in the United States. Because of the January and now the updated Executive Order, they continue to live in insecurity as refugees awaiting resettlement.

14. Because of the Executive Order and official anti-Muslim sentiment motivating it, I have felt isolated and disparaged in my community. It is causing me and my wife a lot of mental stress. Particularly when my wife, who wears a hijab, and I are in public, I sense a lot of hostility from people around me. For example,

at crosswalks, people refuse to stop their cars for us, and I see people staring at us. My wife doesn't not want to go outside the house except for doctors' appointments. My nieces, who wear hijab to school, say that people make mean comments and stare at them for being Muslim. One day, a student pulled the hijab off of my niece's head in class. On another occasion, as my niece was getting off the school bus, an older woman came up to her and pushed her to the ground.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed in Springfield, Massachusetts, on March 10, 2017

/s/ MOHAMMED METEAB
MOHAMMED METEAB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF JANE DOE #2

DECLARATION OF JANE DOE #2

I, Jane Doe #2, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a United States Citizen of Syrian origin, and I live in Mecklenburg County, North Carolina.

2. I am currently enrolled in college and studying to become a healthcare technician.

3. My sister was born in Damascus, Syria, where she grew up and spent most of her life. She is married and has two young boys, aged 7 and 2. In 2012, government planes bombed her neighborhood in Damascus and destroyed her house. She and her family fled to the home of her parents-in-law with nothing but their passports and the clothes on their backs. After remaining with her in-laws for several weeks, my sister and

her family eventually moved to a home about two hours outside of Damascus, but shelling eventually reached that town, too.

4. While internally displaced within Syria, my sister and her husband heard rumors that the Syrian government's selective service would eventually be expanded to include men over the age of 30. After my sister's husband saw some of his friends taken for the selective service, she told him to flee to Yemen, because only Yemen and Sudan accept Syrian refugees without visas. She stayed behind in Syria with their first child, pregnant with their second, because as a teacher, she was a government employee and was required to apply for government approval to stop working and leave the country. She remained in Syria, enduring constant shelling of their town, until she received permission from the government to leave work, at which point she fled to Yemen with her child to join her husband.

5. In Yemen, my sister's family registered with the United Nations High Commissioner for Refugees and received a temporary protection certificate explaining that they should be protected from forcible return to Syria. They remained in Yemen for approximately a year and a half, but war broke out in the country six or seven months after they arrived and the capitol, where they were staying, was soon besieged. They had no electricity, fuel, clean water, or food. Her husband had to risk his life to leave the city every day to find food and clean water for them because no trucks could enter the city to deliver supplies.

6. War engulfed the capitol and at one point, the house where my sister's family was staying was taken over by insurgents as a site for launching shells. She and her children, including her newborn baby, were locked into a room for three to four days while insurgent militiamen used their house to fire rockets. In the meantime, her husband, who had left to find food, was prevented from entering. After the insurgents finally left, my sister and her husband fled that same day for the Saudi Arabian border.

7. My sister's family is now in a refugee hotel on the Saudi Arabia-Yemen border and living in terrible, life-threatening conditions. They endure regular shelling from the Yemeni side of the border; where they live is shelled so often that the local school is open only one or two days a week, if at all. The building in which they live is infested with bugs; human refuse from the bathroom of the unit above them leaks into their room. They are constantly sick and their children are throwing up all the time. The Saudi Arabian government often turns off the power to the building in an attempt to make the living conditions there so intolerable that the refugees will leave.

8. Discrimination against Syrian refugees in Saudi Arabia is severe. My sister's husband searches for work every day, but is often cheated out of his wages and kicked out of jobs without payment because he is Syrian. Because her husband is gone during the day, my sister must remain inside with her children; if she went out in public by herself, it is unquestionable that she would be abducted because she is a woman and a Syrian. The only time she and her children are able to

leave the room where they are staying is at night, when her husband returns home and can accompany them outside. For this reason, their children did not believe that the sun rose and set in Saudi Arabia for the first year they were in the country because they room where they were staying had no windows. Her children never have the opportunity to play outside, but instead remain in their room for most of the day. During the rare times that they are able to emerge from the building at night, my sister's younger son cries and tries to run away whenever they have to return to the hotel.

9. My sister's older son always asks her, "When am I going to have friends?" He has not been able to make any friends because he is rarely able to go to school or to interact with other children and his entire life has been a continual experience of displacement.

10. I am very worried that my participation in this lawsuit against federal government officials could jeopardize my sister's visa application. My I-130 petition for her is currently pending. Once approved for an I-130 visa, she will be able to access the U.S. Refugee Admissions Program (USRAP) through the Priority-2 Direct Access Program for Iraqi and Syrian Beneficiaries of Form I-130 Petition for Alien Relatives. I do not want my participation in this lawsuit to adversely impact either her visa or refugee applications and delay or prevent her from joining me in the United States.

11. I fear that whether or not my sister's visa and refugee application are denied, my participation in this case could result in harassment of me and my sister. Persecution of Syrian refugees in Saudi Arabia is rampant, and the Saudi Arabian government tries to

make conditions difficult for Syrian refugees in the country. I fear that if my identity is made public, it would be easy to identify her as well, making her susceptible to harassment or further persecution.

12. While participating in this lawsuit is important to me, I am also fearful that my participation may lead to me and my family being targeted for harassment if my identity were made public.

13. Even as a United States citizen, I am fearful of leaving the United States because I am afraid the Executive Order may result in difficulty or harassment upon my return to the United States.

14. I am aware of the reports indicating that harassment and violence targeting Muslims has been on the rise recently. In fact several of my friends have experienced such harassment on account of their perceived or actual religious affiliation. I am aware of the shooting at the mosque in Quebec and the bombings of mosques here in the United States.

15. For these reasons, I feel that my personal security and that of my family necessitates that I be allowed to proceed under a pseudonym.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at Mecklenburg County, North Carolina, on March 10, 2017.

/s/ [REDACTED]
JANE DOE #2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF IBRAHIM ADMED MOHOMED

I, Ibrahim Ahmed Mohomed, upon my personal knowledge, hereby submit this declaration pursuant 28 U.S.C. § 1746 and declare as follows:

1. I am a citizen of the United States, and I live in Columbus, Ohio. I came to the United States as a refugee in 2009. I am Muslim.

2. I applied for refugee protection because I am a member of a minority claim in Somalia. When I lived in Mogadishu, where I worked as a street vendor, I was targeted and threatened by majority clans who knew I did not have protection.

3. In 2011, I petitioned for my wife and nine children to join me in the United States. In 2013, they were all approved to come to the United States as refugees. They are currently in Ethiopia waiting for authorization to travel to the United States.

4. After the January 27 Executive Order was signed, my family and I learned on the news that they would not be able to come to the United States as they are awaiting refugee resettlement and Somali nationals.

5. I was preparing to welcome my wife and children to the United States. I am worried that my children are not receiving adequate medical care or education in Ethiopia. Because they speak a different language in Ethiopia, my children are unable to go to school in Ethiopia.

6. My wife and children rely on me for financial support. I have not been able to see them since 2015. Because of this order, my family will not be able to join me, we continue to be separated, and my family's lives are in limbo.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed in Columbus, Ohio on March 10, 2017

/s/ IBRAHIM 03-10-17
IBRAHIM AHMED MOHOMED

RECORD
AND
BRIEF

FILED
AUG 10 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

JOINT APPENDIX
(VOLUME 2)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF DAVID HAUSMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTARAINING ORDER AND PRELIMINARY INJUNCTION

I, David Hausman, upon my personal knowledge and in accordance with 28 U.S.C. § 1746, hereby declare as follows:

1. I am a Skadden Fellow with the American Civil Liberties Union Immigrants' Rights Project. As a witness, I could and would testify competently as to the matters set forth below.
2. A true and correct copy of the February 16, 2017 CNN article by Laura Jarrett, Allie Malloy and Dan Merica entitled "Trump promises new immigration order as DOJ holds off appeals court," is attached hereto as Exhibit A. The article can also be found at http://www.cnn.com/

2017/02/16/politics/donald-trump-travel-ban-executive-order/.

3. A true and correct copy of the February 21, 2017 Politico article by Matthew Nussbaum, Josh Gerstein, and Cristiano Lima entitled "White House creates confusion about future of Trump's travel ban," is attached hereto as Exhibit B. The article can also be found at http://www.politico.com/story/2017/02/trump-travel-ban-confusion-235241.

4. A true and correct copy of the December 7, 2015 Washington Post article by Jenna Johnson entitled *"Trump calls for 'total and complete shutdown of Muslims entering the United States,"* is attached hereto as Exhibit D. The article can also be found at https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.b6d478b253a6.

5. A true and correct copy of the December 7, 2015 statement posted to Donald J. Trump's official campaign website entitled *"Donald J. Trump Statement On Preventing Muslim Immigration,"* is attached hereto as Exhibit E. The statement can also be found at https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

6. A true and correct copy of the February 17, 2017 CNN article entitled *"Full Transcript: President Donald Trump's News Conference,"*

is attached hereto as Exhibit G. The article can also be found at http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript/.

7. A true and correct copy of the March 6, 2017 VOA News article by William Gallo and Victoria Macchi entitled *"Trump Signs New Travel Ban Order,"* is attached hereto as Exhibit H. The article can also be found at http://www.voanews.com/a/trump-signs-new-travel-ban-order/3751526.html.

8. A true and correct copy of the January 30, 2017 CNN article by Evan Perez, Pamela Brown and Kevin Liptak entitled *"Inside the confusion of the Trump Executive Order and travel ban,"* is attached hereto as Exhibit I. The article can also be found at http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html.

9. A true and correct copy of the January 28, 2017 New York Times article by Michael D. Shear, Nicholas Kulish, and Alan Feuer entitled *"Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide,"* is attached hereto as Exhibit J. The article can also be found at https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html.

10. A true and correct copy of the January 28, 2017 Law Fare article by Benjamin Wittes entitled *"Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refu-*

gees and Visas," is attached hereto as Exhibit K. The article can also be found at https://lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas.

11. A true and correct copy of the March 7, 2017 CNN article by Daniella Diaz entitled *"Kelly: There are "13 or 14" more countries with questionable vetting procedures,"* is attached hereto as Exhibit L. The article can also be found at http://www.cnn.com/2017/03/06/politics/john-kelly-travel-ban-muslim-countries/ index.html.

12. A true and correct copy of the March 26, 2011 New York Times article by Charlie Savage entitled *"F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Show,"* is attached hereto as Exhibit M. The article can also be found at http://www.nytimes.com/2011/03/27/us/27fbi.html.

13. A true and correct copy of the February 25, 2017 N.Y. Times article by Ron Nixon entitled *"People From 7 Travel-Ban Nations Pose No Increased Terror Risk, Report Says,"* is attached hereto as Exhibit N. The article can also be found at https://www.nytimes.com/2017/02/25/us/politics/travel-ban-nations-terror-risk.html.

14. A true and correct copy of the March 2, 2017 MSNBC article by The Maddow Blog, entitled *"TRMS Exclusive: DHS document undermines Trump case for travel ban,"* is attached hereto as Exhibit O. The article can also be

found at http://www.msnbc.com/rachel-maddow-show/trms-exclusive-dhs-document-undermines-trump-case-travel-ban.

15. A true and correct copy of the February 3, 2017 Washington Post article by Justin Jouvenal, Rachel Weiner, and Ann E. Marimow entitled *"Justice Dept. Lawyer Says 100,000 Visas Revoked Under Travel ban; State Dept. says About 60,000,"* is attached hereto as Exhibit P. The article can also be found at https://www.washingtonpost.com/local/public-safety/government-reveals-over-100000-visas-revoked-due-to-travel-ban/2017/02/03/7d529eec-ea2c-11e6-b82f-687d6e6a3e7c_story.html?utm_term=e5ded8f0c284.

16. A true and correct copy of a draft Executive Order entitled *"Protecting the Nation from Terrorist Attacks by Foreign Nationals,"* is attached hereto as Exhibit Q. The draft can also be found at https://apps.washingtonpost.com/g/documents/world/read-the-draft-of-the-executive-order-on-immigration-and-refugees/2289/.

17. A true and correct copy of the Central Intelligence Agency's World Listing Factbook website providing countries' population percentage by religious affiliation is attached hereto as Exhibit R. This demographic information can also be found at https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html#sy.

18. A true and correct copy of the January 27, 2017 CBN News article by The Brody File entitled

"Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees," is attached hereto as Exhibit S. The article can also be found at http://wwwl.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees.

19. A true and correct copy of the January 31, 2017 Washington Post article by Sarah Pulliam Bailey entitled *"Trump signs order limiting refugee entry, says he will prioritize Christian refugees,"* is attached hereto as Exhibit T. The article can also be found at https://www.washingtonpost.com/news/acts-of-faith/wp/2017/01/27/we-dont-want-them-there-trump-signs-order-limiting-refugee-entry/?utm_term=.1238bc7f1081.

20. A true and correct copy of the December 7, 2015 statement posted to Donald J. Trump's official campaign website entitled *"Donald J. Trump Statement on Preventing Muslim Immigration,"* is attached hereto as Exhibit U. The speech can also be found at https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

21. A true and correct copy of the 1:47pm December 7, 2015 tweet by Donald J. Trump @realDonaldTrump is attached hereto as Exhibit V. The tweet can also be found at https://twitter.com/realdonaldtrump/status/673982228163072000?lang=en.

22. A true and accurate copy of the December 7, 2015 Washington Post article by Jenna Johnson entitled *"Trump calls for 'total and complete shutdown of Muslims entering the United States'"* is attached hereto as Exhibit W. The article can also be found at https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.b6d478b253a6.

23. A true and correct copy of the transcript of the July 24, 2016 NBC interview of Donald Trump by Chuck Todd on *"Meet the Press"* is attached hereto as Exhibit X. The transcript can also be found at http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706.

24. A true and correct copy of the December 21, 2016 Time article by Katie Reilly entitled *"Donald Trump on Proposed Muslim Ban: 'You Know My Plans,'"* is attached hereto as Exhibit Y. The article can also be found at http://time.com/4611229/donaldtrumpberlinattack/.

25. A true and correct copy of the January 29, 2017 Washington Post article by Amy B. Wang entitled *"Trump asked for a 'Muslim ban,' Guiliani says-and ordered a commission to do it 'legally,'"* is attached hereto as Exhibit Z. The article can also be found at https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.2f88f830c54c.

26. A true and correct copy of the December 8, 2015 Washington Post article by Jenna Johnson entitled *"Donald Trump says he is not bothered by comparisons to Hitler"* is attached hereto as Exhibit AA. The article can also be found at https://www.washingtonpost.com/news/post-politics/wp/2015/12/08/donald-trump-says-he-is-not-bothered-by-comparisons-to-hitler/?utm_term=.97e412919c27.

27. A true and correct copy of the March 10, 2016 CNN article by Theodore Schliefer, entitled *"Donald Trump: 'I think Islam hates us,'"* is attached hereto as Exhibit BB. The article can also be found at http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/.

28. A true and correct copy of the March 22, 2016 Mediate article by Alex Griswold entitled *"Trump Responds to Brussels Attacks: 'We're Having Problems With the Muslims'"* is attached hereto as Exhibit CC. The article can also be found at http://www.mediaite.com/tv/trump-responds-to-brussels-attack-were-having-problems-with-the-muslims/.

29. A true and correct copy of the February 6, 2017 Declaration of Reema Khaled Dahman, *Ali v. Trump*, No. 17-0135 (W.D. Wash.) is attached hereto as Exhibit DD. The Declaration can also be found at *Ali v. Trump*, No. 17-0135 (W.D. Wash.), Dkt. No. 14.

30. A true and correct copy of the January 29, 2017 New York Times article by Benjamin Mueller

and Matthew Rosenberg entitled *"Disorder at Airports as Travelers Are Detained Without Lawyers,"* is attached hereto as Exhibit EE. The article can also be found at https://nyti.ms/2jHM3ba.

31. A true and correct copy of the March 1, 2017 CNN article by Laura Jarrett, Ariane de Vogue, and Jeremy Diamond entitled *"Trump delays new travel ban after well-reviewed speech,"* is attached hereto as Exhibit FF. The article can also be found at http://www.cnn.com/2017/02/28/politics/trump-travel-ban-visa-holders.

32. A true and correct copy of the February 24, 2017 New York Times article by Mark Landler and Eric Schmitt entitled *"H.R. McMaster Breaks with Administration on Views of Islam,"* is attached hereto as Exhibit GG. The article can also be found at https://www.nytimes.com/2017/02/24/us/politics/hr-mcmaster-trump-islam.html?.

33. A true and correct copy of the November 15, 2015 Buzzfeed article by Nicolas Medina Mora and Mike Hayes entitled *"The Big (Imaginary) Black Friday Bombing,"* is attached hereto as Exhibit HH. The article can also be found at https://www.buzzfeed.com/nicolasmedinamora/did-the-fbi-transform-this-teenager-into-a-terrorist?utm_term=.yfEDJ2zy#qkLW8Gg1.

34. A true and correct copy of the February 22, 2017 Washington Post article by Matt Zapo-

tosky entitled, *"A new travel ban with 'mostly minor technical differences'? That probably won't cut it analysts, say,"* is attached hereto as Exhibit II. The article can also be found at https://www.washingtonpost.com/world/national-security/a-new-travel-ban-with-mostly-minor-technical-differences-that-probably-wont-cut-it-analysts-say/2017/02/22/8ae9d7e6-f918-11e6-bf01-d47f8cf9b643_story.html?utm_term=.c318a2ad6c8b.

35. A true and correct copy of the September 1, 2016 New York Times article entitled *"Transcript of Donald Trump's Immigration Speech,"* is attached hereto as Exhibit JJ. The article can also be found at https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?_r=0.

36. A true and correct copy of the January 30, 2017 Pew Research Center article by Jens Manuel Krogstand and Jynnah Radford entitled *"Key facts about refugees to the U.S.,"* is attached hereto as Exhibit KK. The article can also be found at http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/.

37. A true and correct copy of the February 16, 2017 Amicus Brief of Former National Security Officials, *Darweesh v. Trump,* No 17-00480 (E.D.N.Y.) is attached hereto as Exhibit LL. The brief can also be found at *Darweesh v. Trump,* No. 17-00480 (E.D.N.Y.), Dkt. No. 137.

38. A true and correct copy of the February 5, 2017 Joint Declaration of Madeleine K. Albright, et al., *Darweesh v. Trump*, No 17-00480 (E.D.N.Y.) is attached hereto as Exhibit MM. The declaration can also be found at *Darweesh v. Trump*, No. 17-00480 (E.D.N.Y.), Dkt. No. 28.

39. A true and correct copy of the March 6, 2017 Breitbart News article by Katie McHugh entitled "Trump's Executive Order Mandates Government Reports on Honor Killings Committed by Migrants," is attached hereto as Exhibit NN. The article can also be found at http: www.breitbart.com/big-government/2017/03/06/trumps-executive-order-mandates-government-reports-on-honor-killings-committed-by-migrants/.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, based on my personal knowledge. Executed at New York, NY on March 10, 2017.

/s/ DAVID HAUSMAN
DAVID HAUSMAN
AMERICAN CIVIL LIBERTIES UNION
IMMIGRANTS' RIGHTS PROJECT
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Exhibit A

Trump promises new immigration order as DOJ holds off appeals court

New travel ban will be based on court decision 01:14

Story highlights

Trump said Thursday that his administration will issue "a new and very comprehensive order to protect our people" next week

The original three-judge panel retains control of the case and the travel ban remains on hold

Trump press conference

- Amazing moment in history
- Most memorable lines
- To Jewish reporter: 'Sit down'

- To black reporter: 'Set up a meeting'
- Treatment of first lady 'unfair'
- OPINION: Performance fuels worry
- OPINION: Trump voters applaud presser
- Full transcript

Washington (CNN)—President Donald Trump vowed Thursday to roll out a new immigration executive order next week that will be tailored to the federal court decision that paused his travel ban.

"The new order is going to be very much tailored to what I consider to be a very bad decision," said Trump during a news conference, referring to a decision by the Ninth Circuit Court of Appeals that blocked his travel ban earlier this month.

Meanwhile, the Justice Department told the Ninth Circuit Court of Appeals that it did not need a larger panel of judges to rehear its failed emergency challenge to a lower court's temporary suspension of Trump's executive order on immigration at this time, because a new order is on the way. The Ninth Circuit agreed Thursday evening to put any rehearing of the matter on hold for now.

The Justice Department wrote at length in a 47-page about the "seriously flawed" Ninth Circuit ruling from last week, but neverthless said: "(r)ather than continuing this litigation, the President intends in the near future to rescind the order and replace it with a new, substantially revised executive order to

> eliminate what the panel erroneously thought were constitutional concerns."
>
> "In so doing, the President will clear the way for immediately protecting the country rather than pursuing further, potentially time-consuming litigation," it added.
>
> Questions have swirled over what the Trump administration would do this week after a three-judge panel on the Ninth Circuit refused to lift a federal judge's temporary restraining order on Trump's executive order barring foreign nationals from Iran, Sudan, Libya, Somalia, Syria, Iraq and Yemen from entering the country for 90 days, all refugees for 120 days and all refugees from Syria indefinitely.
>
> Last Friday, an unidentified judge on the Ninth Circuit requested that the full court vote on whether to rehear the decision reached by the three-judge panel. Such requests are not uncommon, but the call for a vote came at time when the Justice Department's position on pursuing the appeal was uncertain.
>
> The states that brought the lawsuit—Washington and Minnesota—said in their court filing on Thursday that there is no basis for rehearing the case, as the opinion from the three-judge panel is "firmly grounded in precedent."

And while the nation waits on a new or modified executive order on immigration from the Trump administration, at least one federal court is barreling ahead on litigation over the original one.

US District Court Judge James Robart in Seattle—the judge who originally halted the key provisions of the travel ban—denied a request from the Trump administration earlier this week to postpone any further proceedings in his court, which means the parties will now proceed to the discovery phase of the case.

Exhibit B

POLITICO

White House creates confusion about future of Trump's travel ban

By **MATTHEW NUSSBAUM, JOSH GERSTEIN** and **CRISTIANO LIMA** | 02/21/17 05:06 PM EST | Updated 02/21/17 08:15 PM EST

The White House is sending mixed signals as to whether or not it will rescind President Donald Trump's controversial travel ban even as officials seek to craft a new order that will be less vulnerable to legal challenge.

The Justice Department told the 9th Circuit Court of Appeals last week that Trump will "rescind . . . and replace" the original order, which remains largely on hold after an appeals court panel upheld a lower court's broad injunction.

But White House press secretary Sean Spicer said at the conclusion of his daily briefing Tuesday that Trump will not rescind the original order. Instead, the first order is being updated, Spicer insisted.

The contradictory statements sowed further confusion about the fate of Trump's original order, which bars immigrants from seven Muslim-majority countries and halts the entry of refugees.

"The new order is going to be very much tailored to what I consider to be a very bad decision," Trump said last week.

White House creates confusion about future of Trump's travel ban

An excerpt of Sean Spicer's remarks on Tuesday

02/21/17 05:30 PM EST

Spicer said the administration remains confident in the legality of its original order, but is also working with Cabinet agencies to prepare a new one.

His statements seemed to leave open the possibility that there could be two orders in effect at once—a situation that could complicate efforts to defend the new order in court.

The White House said Tuesday afternoon it intended to issue a clarification about the conflicting statements.

But a statement from the administration—released on Tuesday evening—did little to clear up any confusion.

"The administration continues to defend the President's national security Executive Order in court, and though we believe it to be fully lawful, we are simultaneously finalizing a revised policy tailored to the Ninth Circuit's ruling," White House spokesman Michael Short said in a written statement.

During an appearance on Fox News Tuesday, White House aide Stephen Miller similarly left the door open for the initial order to remain in place, adding only that the new policy would be "responsive" to recent court rulings.

"These are mostly minor technical differences, fundamentally," he said of the forthcoming revised order. "You are still going to have the same basic policy outcome for the country but you are going to have a lot of technical issues brought up by the court."

Miller added that the administration would be rolling out the details of the revised order "in the next few days."

He also stood by the original executive order's constitutionality, despite the flurry of legal challenges to it.

"The president's actions were clearly legal and constitutional and consistent with the longstanding traditions of presidents in the past to exercise the authority in the Immigration and Nationality Act to suspend immigration when it poses a threat to our security," he said.

Exhibit D

The Washington Post

Post Politics

Trump calls for 'total and complete shutdown of Muslims entering the United States'

By Jenna Johnson December 7, 2015

Updated at 7:43 p.m.

Donald Trump called Monday for a "total and complete shutdown" of the entry of Muslims to the United States "until our country's representatives can figure out what is going on."

In a statement released by his campaign Monday afternoon, Trump included recent poll findings that he says show that a sizable segment of the Muslim population has "great hatred towards Americans."

"Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension," Trump is quoted as saying in the statement. "Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."

At a rally in Mount Pleasant, South Carolina on Monday evening, Trump pointed to the statement he released earlier in the day.

"Should I read you the statement?" he asked.

The crowd enthusiastically agreed that he should.

"Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on," he said, adding the word "hell" for emphasis this time.

Supporters erupted in applause.

"We have no choice. We have no choice," Trump said. "We have no choice."

Earlier in the rally, which was interrupted by protests, Trump said, "I have friends that are Muslims. They are great people—but they know we have a problem."

Trump campaign manager Corey Lewandowski told the Associated Press that the ban would apply to "everybody," including both immigrants and tourists. Soon after the statement was released, Trump tweeted that he had "just put out a very important policy statement on the extraordinary influx of hatred and danger coming into our country." He added in the tweet: "We must be vigilant!"

In an interview on Fox News Channel shortly ahead of his campaign rally, Trump was asked whether his policy would apply to Muslim military personnel stationed overseas who want to come home.

"They will come home. We have to be vigilant," he responded. "We have to take care of the Muslims that are living here. But we have to be vigilant."

He later added: "Anybody here stays, but we have to be very vigilant . . . This does not apply to people living in the country except that we have to be vigilant."

In the past month, particularly following the recent mass shooting in Southern California that is believed to have been inspired by the Islamic State terrorist group, Trump has called for greater scrutiny of Muslims—including Muslim Americans who are legal residents of the country. He has said he would support heavy surveillance of mosques, bar Syrian refugees of all religions from entering the country and would consider establishing a database to track all Muslims in the country. But Trump's statement on Monday was his most controversial proposal yet.

Trump typically announces major positions like this in media interviews or at rallies, rarely issuing formal statements. The statement immediately sparked rounds of questions about how such a policy would work, along with strong criticism.

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"Oh, my goodness," said Ibrahim Hooper, national communications director at the Council on American-

Islamic Relations. "One has to wonder what Donald Trump will say next as he ramps up his anti-Muslim bigotry. Where is there left for him to go? Are we talking internment camps? Are we talking the final solution to the Muslim question? I feel like I'm back in the 1930s."

What worried Hooper, he said, was the premeditated nature of Trump's statement.

"He feels perfectly okay saying this," said Hooper. "It's not an open mic moment, where he has to walk something back. This was a statement from his campaign. They had to believe that this would be well received by his supporters. We've always had anti-Muslim bigots, but they've always been at the fringes of society. Now they want to lead it. In saner times, his campaign would be over. In insane times, his campaign can gain support. And that's why he put it out."

David Weigel and Sean Sullivan contributed to this report.

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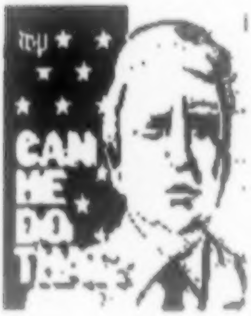

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Analysis

Stephen Miller's Fox News interview is coming back to haunt President Trump

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Analysis

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Exhibit E (Omitted)

Exhibit G

Full transcript: President Donald Trump's news conference

BREAKING NEWS
TRUMP ANNOUNCING LABOR SECY PICK
CNN

President Trump's full press conference 01:16:56

PRESIDENT DONALD TRUMP HOLDS A NEWS CONFERENCE TO ANNOUNCE HIS NEW NOMINEE FOR SECRETARY OF LABOR FEBRUARY 16, 2017

SPEAKER: PRESIDENT DONALD TRUMP

[*]

TRUMP: Thank you very much.

I just wanted to begin by mentioning that the nominee for secretary of the Department of Labor will be Mr. Alex Acosta. He has a law degree from Harvard Law School, was a great student; former clerk for Justice Samuel Alito. And he has had a tremendous career.

He's a member and has been a member of the National Labor Relations Board, and has been through Senate confirmation three times, confirmed; did very, very well.

And so Alex, I've wished him the best. We just spoke. And he's going to be—I think he'll be a tremendous secretary of labor.

And also as you probably heard just a little while ago, Mick Mulvaney, former congressman, has just been approved weeks late, I have to say that, weeks, weeks late, Office of Management and Budget. And he will be I think a fantastic addition.

Paul Singer just left. As you know, Paul was very much involved with the anti-Trump or as they say, "never Trump." And Paul just left and he's given us his total support. And it's all about unification. We're unifying the party and hopefully we're going to be able to unify the country. It's very important to me. I've been talking about that for a long time. It's very, very important to me.

So I want to thank Paul Singer for being here and for coming up to the office. He was a very strong opponent, and now he's a very strong ally. And I appreciate that.

I think I'll say a few words, and then we'll take some questions. And I had this time. We've been negotiating a lot of different transactions to save money on contracts that were terrible, including airplane contracts that were out of control and late and terrible; just absolutely catastrophic in terms of what was happening. And we've done some really good work. We're very proud of that.

And then right after that, you prepare yourselves, we'll do some questions, unless you have enough questions. That's always a possibility.

I'm here today to update the American people on the incredible progress that has been made in the last four weeks since my inauguration. We have made incredible progress. I don't think there's ever been a president elected who in this short period of time has done what we've done.

Trump press conference

- Amazing moment in history
- Most memorable lines
- To Jewish reporter: 'Sit down'
- To black reporter: 'Set up a meeting'
- Treatment of first lady 'unfair'
- OPINION: Performance fuels worry
- OPINION: Trump voters applaud presser
- Full transcript

A new Rasmussen poll, in fact—because the people get it—much of the media doesn't get it. They actually get it, but they don't write it. Let's put it that way. But a new Rasmussen poll just came out just a very short while ago, and it has our approval rating at 55 percent and going up. The stock market has hit record numbers, as you know. And there has been a tremendous surge of optimism in the business world, which is—to me means something much different than it used to. It used to mean, "Oh, that's good." Now it means, "That's good for jobs." Very different.

Plants and factories are already starting to move back into the United States, and big league—Ford, General Motors, so many of them. I'm making this presentation directly to the American people, with the media present, which is an honor to have you. This morning, because many of our nation's reporters and folks will not tell you the truth, and will not treat the wonderful people of our country with the respect that they deserve. And I hope going forward we can be a little bit—a little bit different, and maybe get along a little bit better, if that's possible. Maybe it's not, and that's OK, too.

TRUMP: Unfortunately, much of the media in Washington, D.C., along with New York, Los Angeles in particular, speaks not for the people, but for the special interests and for those profiting off a very, very obviously broken system. The press has become so dishonest that if we don't talk about, we are doing a tremendous disservice to the American people. Tremendous disservice. We have to talk to find out what's going on, because the press honestly is out of control. The level of dishonesty is out of control.

I ran for president to present the citizens of our country. I am here to change the broken system so it serves their families and their communities well. I am talking—and really talking on this very entrenched power structure, and what we're doing is we're talking about the power structure; we're talking about its entrenchment. As a result, the media is going through what they have to go through too often times distort—not all the time—and some of the media is fantastic, I have to say—they're honest and fantastic.

But much of it is not a—the distortion—and we'll talk about it, you'll be able to ask me questions about it. But we're not going to let it happen, because I'm here again, to take my message straight to the people. As you know, our administration inherited many problems across government and across the economy. To be honest, I inherited a mess. It's a mess. At home and abroad, a mess. Jobs are pouring out of the country; you see what's going on with all of the companies leaving our country, going to Mexico and other places, low pay, low wages, mass instability overseas, no matter where you look. The middle east is a disaster. North Korea—we'll take care of it folks; we're going to take care of it all. I just want to let you know, I inherited a mess.

Beginning on day one, our administration went to work to tackle these challenges. On foreign affairs, we've already begun enormously productive talks with many foreign leaders, much of it you've covered, to move forward towards stability, security and peace in the most troubled regions of the world, which there are many. We have had great conversations with the United Kingdom, and meetings. Israel, Mexico, Japan, China and Canada, really, really productive conversations. I would say far more productive than you would understand.

We've even developed a new council with Canada to promote women's business leaders and entrepreneurs.

It's very important to me, very important to my daughter Ivanka. I have directed our defense community headed by our great general, now Secretary Mattis. He's over there now working very hard to submit a plan for the defeat of ISIS, a group that celebrates the murder and torture of innocent people in large sections of the world. It used to be a small group, now it's in large sections of the world.

They've spread like cancer. ISIS has spread like cancer—another mess I inherited. And we have imposed new sanctions on the nation of Iran, whose totally taken advantage of our previous administration, and they're the world's top sponsor of terrorism, and we're not going to stop until that problem is properly solved. And it's not properly solved now, it's one of the worst agreements I've ever seen drawn by anybody. I've ordered plan to begin building for the massive rebuilding of the United States military. Had great support from the Senate, I've had great from Congress, generally.

We've pursued this rebuilding in the hopes that we will never have to use this military, and I will tell you that is my—I would be so happy if we never had to use it. But our country will never have had a military like the military we're about to build and rebuild. We have the greatest people on earth in our military, but they don't have the right equipment and their equipment is old. I used it; I talked about it at every stop. Depleted, it's depleted—it won't be depleted for long. And I think one of the reason I'm standing here instead of other people is that frankly, I talked about we have to have a strong military.

We have to have a strong law enforcement also. So we do not go abroad in the search of war, we really are searching for peace, but its peace through strength. At home, we have begun the monumental task of returning the government back to the people on a scale not seen in many, many years. In each of these actions, I'm keeping my promises to the American people. These are campaign promises. Some people are so surprised that we're having strong borders.

Well, that's what I've been talking about for a year and a half, strong borders. They're so surprised, oh, he having strong borders, well that's what I've been talking about to the press and to everybody else. One promise after another after years of politicians lying to you to get elected. They lied to the American people in order to get elected. Some of the things I'm doing probably aren't popular but they're necessary for security and for other reasons.

And then coming to Washington and pursuing their own interests which is more important to many politicians. I'm here following through on what I pledged to do. That's all I'm doing. I put it out before the American people, got 306 electoral college votes. I wasn't supposed to get 222. They said there's no way to get 222, 230's impossible.

270 which you need, that was laughable. We got 306 because people came out and voted like they've never seen before so that's the way it goes. I guess it was the biggest electoral college win since Ronald Reagan. In other words, the media's trying to attack our administration because they know we are following through

on pledges that we made and they're not happy about it for whatever reason.

And—but a lot of people are happy about it. In fact, I'll be in Melbourne, Florida five o'clock on Saturday and I heard—just heard that the crowds are massive that want to be there. I turn on the T.V., open the newspapers and I see stories of chaos. Chaos. Yet it is the exact opposite. This administration is running like a fine- tuned machine, despite the fact that I can't get my cabinet approved.

And they're outstanding people like Senator Dan Coats who's there, one of the most respected men of the Senate. He can't get approved. How do you not approve him? He's been a colleague—highly respected. Brilliant guy, great guy, everybody knows it. We're waiting for approval. So we have a wonderful group of people that's working very hard, that's being very much misrepresented about and we can't let that happen.

So, if the Democrats who have—all you have to do is look at where they are right now. The only thing they can do is delay because they screwed things up royally, believe me. Let me list to you some of the things that we've done in just a short period of time. I just got here. And I got here with no cabinet. Again, each of these actions is a promise I made to the American people.

I'll go over just some of them and we have a lot happening next week and in the weeks—in the weeks coming. We've withdrawn from the job-killing disaster known as Trans Pacific Partnership. We're going to make trade deals but we're going to have one on one deals, bilateral. We're going to have one on one deals.

We've directed the elimination of regulations that undermine manufacturing and call for expedited approval of the permits needed for America and American infrastructure and that means plant, equipment, roads, bridges, factories. People take 10, 15, 20 years to get disapproved for a factory. They go in for a permit, it's many, many years. And then at the end of the process —they spend 10s of millions of dollars on nonsense and at the end of the process, they get rejected.

Now, they may be rejected with me but it's going to be a quick rejection. Not going to take years. But mostly it's going to be an acceptance. We want plants built and we want factories built and we want the jobs. We don't want the jobs going to other countries. We've imposed a hiring freeze on nonessential federal workers. We've imposed a temporary moratorium on new federal regulations.

We've issued a game-changing new rule that says for each one new regulation, two old regulations must be eliminated. Makes sense. Nobody's ever seen regulations like we have. You go to other countries and you look at indexes (ph) they have and you say "let me see your regulations" and they're fraction, just a tiny fraction of what we have. And I want regulations because I want safety, I want environmental—all environmental situations to be taken properly care of. It's very important to me. But you don't need four or five or six regulations to take care of the same thing.

We've stood up for the men and women of law enforcement, directing federal agencies to ensure they are protected from crimes of violence. We've directed the creation of a task force for reducing violent crime in America, including the horrendous situation—take a look at Chicago and others, taking place right now in our inner cities. Horrible.

We've ordered the Department of Homeland Security and Justice to coordinate on a plan to destroy criminal cartels coming into the United States with drugs. We're becoming a drug infested nation. Drugs are becoming cheaper than candy bars. We are not going to let it happen any longer.

We've undertaken the most substantial border security measures in a generation to keep our nation and our tax dollars safe. And are now in the process of beginning to build a promised wall on the southern border, met with general—now Secretary Kelly yesterday and we're starting that process. And the wall is going to be a great wall and it's going to be a wall negotiated by me. The price is going to come down just like it has on everything else I've negotiated for the government. And we are going to have a wall that works, not gonna have a wall like they have now which is either nonexistent or a joke.

We've ordered a crackdown on sanctuary cities that refuse to comply with federal law and that harbor criminal aliens, and we have ordered an end to the policy of catch and release on the border. No more release. No matter who you are, release. We have begun a nationwide effort to remove criminal aliens, gang members, drug dealers and others who pose a threat to public safety. We are saving American lives every single day.

The court system has not made it easy for us. And are even creating a new office in Homeland Security dedicated to the forgotten American victims of illegal immigrant violence, which there are many. We have taken decisive action to keep radical Islamic terrorists out of our country. No parts are necessary and constitutional actions were blocked by judges, in my opinion, incorrect, and unsafe ruling. Our administration is working night and day to keep you safe, including reporters safe. And is vigorously defending this lawful order.

I will not back down from defending our country. I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result. They already are, I can tell you that. Extreme vetting will be put in place and it already is in place in many places.

In fact, we had to go quicker than we thought because of the bad decision we received from a circuit that has been overturned at a record number. I have heard 80 percent, I find that hard to believe, that is just a number I heard, that they are overturned 80 percent of the time. I think that circuit is—that circuit is in chaos and that circuit is frankly in turmoil. But we are appealing that, and we are going further.

We're issuing a new executive action next week that will comprehensively protect our country. So we'll be going along the one path and hopefully winning that, at the same time we will be issuing a new and very comprehensive order to protect our people. That will be done sometime next week, toward the beginning or middle at the latest part. We have also taken steps to begin construction of the Keystone Pipeline and Dakota Access Pipelines. Thousands and thousands of jobs, and put new buy American measures in place to require American steel for American pipelines. In other words, they build a pipeline in this country, and we use the powers of government to make that pipeline happen, we want them to use American steel. And they are willing to do that, but nobody ever asked before I came along. Even this order was drawn and they didn't say that.

TRUMP: And I'm reading the order, I'm saying, why aren't we using American steel? And they said, that's a good idea, we put it in. To drain the swamp of corruption in Washington, D.C., I've started by imposing a five-year lobbying ban on White House officials and a lifetime ban on lobbying for a foreign government.

We've begun preparing to repeal and replace Obamacare. Obamacare is a disaster, folks. It is's disaster. I know you can say, oh, Obamacare. I mean, they fill up our alleys with people that you wonder how they get there, but they are not the Republican people our that representatives are representing.

So we've begun preparing to repeal and replace Obamacare, and are deep in the midst of negotiations on a very historic tax reform to bring our jobs back, to bring our jobs back to this country. Big league. It's already happening. But big league.

I've also worked to install a cabinet over the delays and obstruction of Senate Democrats. You've seen what they've done over the last long number of years. That will be one of the great cabinets ever assembled in American history.

You look at Rex Tillerson. He's out there negotiating right now. General Mattis I mentioned before, General Kelly. We have great, great people. Mick is with us now. We have great people.

Among their responsibilities will be ending the bleeding of jobs from our country and negotiating fair trade deals for our citizens.

Now look, fair trade. Not free, fair. If a country is taking advantage of us, not going to let that happen anymore. Every country takes advantage of us almost. I may be able to find a couple that don't. But for the most part, that would be a very tough job for me to do.

Jobs have already started to surge. Since my election, Ford announced it will abandon its plans to build a new factory in Mexico, and will instead invest $700 million in Michigan, creating many, many jobs.

Fiat Chrysler announced it will invest $1 billion in Ohio and Michigan, creating 2,000 new American jobs. They were with me a week ago. You know you were here.

General Motors likewise committed to invest billions of dollars in its American manufacturing operation, keeping many jobs here that were going to leave. And if I didn't get elected, believe me, they would have left. And these jobs and these things that I'm announcing would never have come here.

Intel just announced that it will move ahead with a new plant in Arizona that probably was never going to move ahead with. And that will result in at least 10,000 American jobs.

Walmart announced it will create 10,000 jobs in the United States just this year because of our various plans and initiatives. There will be many, many more, many more, these are a few that we're naming.

Other countries have been taking advantage of us for decades—decades, and decades, and decades, folks. And we're not going to let that happen anymore. Not going to let it happen.

And one more thing, I have kept my promise to the American people by nominating a justice of the United States Supreme Court, Judge Neil Gorsuch, who is from my list of 20, and who will be a true defender of our laws and our Constitution, highly respected, should get the votes from the Democrats. You may not see that. But he'll get there one way or the other. But he should get there the oldfashioned way, and he should get those votes.

This last month has represented an unprecedented degree of action on behalf of the great citizens of our country. Again, I say it. There has never been a presidency that's done so much in such a short period of time. And we have not even started the big work yet. That starts early next week.

Some very big things are going to be announced next week. So we are just getting started. We will be giving a speech, as I said, in Melbourne, Florida, at 5:00 p.m. I hope to see you there.

And with that, I just say, God bless America, and let's take some questions.

Mara (ph), Mara (ph), go ahead. You were cut off pretty violently at our last news conference.

QUESTION: (OFF-MIKE)

TRUMP: Mike Flynn is a fine person, and I asked for his resignation. He respectfully gave it. He is a man who there was a certain amount of information given to Vice President Pence, who is with us today. And I was not happy with the way that information was given.

He didn't have to do that, because what he did wasn't wrong—what he did in terms of the information he saw. What was wrong was the way that other people, including yourselves in this room, were given that information, because that was classified information that was given illegally. That's the real problem.

And, you know, you can talk all you want about Russia, which was all a, you know, fake news, fabricated deal, to try and make up for the loss of the Democrats and the press plays right into it. In fact, I saw a couple of the people that were supposedly involved with all of this—that they know nothing about it; they weren't in Russia; they never made a phone call to Russia; they never received a phone call.

It's all fake news. It's all fake news. The nice thing is, I see it starting to turn, where people are now looking at the illegal—I think it's very important—the illegal, giving out classified information. It was—and let me just tell you, it was given out like so much.

I'll give you an example. I called, as you know, Mexico. It was a very, very confidential, classified call. But I called Mexico. And in calling Mexico, I figured, oh, well that's—I spoke to the president of Mexico; I had a good call. All of a sudden, it's out there for the world to see. It's supposed to be secret. It's supposed to be either confidential or classified, in that case.

Same thing with Australia. All of a sudden, people are finding out exactly what took place. The same thing happened with respect to General Flynn. Everybody saw this. And I'm saying—the first thing I thought of when I heard about it is: How does the press get this information that's classified? How do they do it?

You know why? Because it's an illegal process and the press should be ashamed of themselves. But more importantly, the people that gave out the information to the press should be ashamed of themselves, really ashamed.

Yes, go ahead.

QUESTION: (OFF-MIKE)

TRUMP: Because when I looked at the information, I said, "I don't think he did anything wrong; if anything, he did something right." He was coming into office. He looked at the information. He said, "Huh, that's fine." That's what they're supposed to do. They're supposed to—he didn't just call Russia. He called and spoke to both ways, I think there were 30-some-odd countries. He's doing the job.

You know, he was doing his job. The thing is, he didn't tell our vice president properly, and then he said he didn't remember. So either way, it wasn't very satisfactory to me. And I have somebody that I think will be outstanding for the position. And that also helps, I think, in the making of my decision.

But he didn't tell the vice president of the United States the facts. And then he didn't remember. And that just wasn't acceptable to me.

Yes?

QUESTION: (inaudible) clarification here. During your campaign, did anyone from your team (inaudible) Russian government or Russian intelligence? And if so, what was the nature of those conversations (inaudible)? TRUMP: The failing New York Times wrote a big, long front-page story yesterday. And it was very much discredited, as you know. It was—it's a joke. And the people mentioned in the story, I notice they were on television today saying they never even spoke to Russia. They weren't even a part, really—I mean, they were such a minor part. They—I hadn't spoken to them.

I think the one person—I don't think I've ever spoken to him. I don't think I've ever met him. And he actually said he was a very low-level member of I think a committee for a short period of time. I don't think I ever met him. Now, it's possible that I walked into a room and he was sitting there, but I don't think I ever met him. I didn't talk to him ever. And he thought it was a joke.

The other person said he never spoke to Russia; never received a call. Look at his phone records, et cetera, et cetera. And the other person, people knew that he represented various countries, but I don't think he represented Russia, but knew that he represented various countries. That's what he does. I mean, people know that.

That's Mr. Manafort, who's—by the way, who's by the way a respected man. He's a respected man. But I think he represented the Ukraine or Ukraine government or somebody, but everybody—people knew that. Everybody knew that.

So, these people—and he said that he has absolutely nothing to do and never has with Russia. And he said that very forcefully. I saw his statement. He said it very forcefully. Most of the papers don't print it because that's not good for their stories.

TRUMP: So the three people that they talked about all totally deny it. And I can tell you, speaking for myself, I own nothing in Russia. I have no loans in Russia. I don't have any deals in Russia. President Putin called me up very nicely to congratulate me on the win of the election.

He then, called me up extremely nicely to congratulate me on the inauguration, which was terrific. But so did many other leaders, almost all other leaders from almost all of the country. So that's the extent.

Russia is fake news. Russia—this is fake news put out by the media. The real news is the fact that people, probably from the Obama administration because they're there, because we have our new people going in place, right now.

As you know, Mike Pompeo has—has now taken control of the CIA, James Comey at FBI, Dan Coats is waiting to be approved, I mean he is a senator and a highly respected one and he's still waiting to be approved. But our new people are going in.

And just while you're at it, because you mentioned this, Wall Street Journal did a story today that was almost as disgraceful as the failing New York Time's story, yesterday. And it talked about—these are (ph) front page.

So director of national intelligence just put out, acting a statement, any suggestion that the United States intelligence community, this was just given to us, is withholding information and not providing the best possible intelligence to the president and his national security team is not true.

So they took this front page story out of The Wall Street Journal top and they just wrote the story that its not true. And I'll tell you something, I'll be honest, because I sort of enjoy this back and forth that I guess I have all my life but I've never seen more dishonest media than frankly, the political media. I thought the financial media was much better, much more honest.

But I will say that, I never get phone calls from the media. How did they write a story like that in The Wall Street Journal without asking me or how did they write a story in The New York Times, put it on front page?

That was like the story they wrote about the women and me, front page, big massive story. And it was nasty and then they called, they said we never said that, we like Mr. Trump. They called up my office, we like Mr. Trump, we never said that.

And it was totally—they totally misrepresented those very wonderful women, I have to tell you, totally misrepresented. I said give us the retraction. They never gave us a retraction and frankly, I then went on to other things.

OK, go ahead.

QUESTION: (OFF-MIKE) said today that you have big intellectual margins (inaudible) 300 or more (ph), or 350 (ph) electoral (ph) votes. President Obama about 365 (OFF-MIKE).

(CROSSTALK)

TRUMP: Yeah.

QUESTION: Obama (OFF-MIKE) 426 on (OFF-MIKE). So why should Americans . . .

(CROSSTALK)

TRUMP: . . . I'm skipping that information, I don't know, I was just given (ph) we had a very, very big margin.

QUESTION: (OFF-MIKE) why should Americans trust you (OFF-MIKE) the information (OFF-MIKE)?

TRUMP: Well, I don't know, I was given that information. I was given—I actually, I've seen that information around. But it was a very substantial victory, do you agree with that? OK thank you, that's. . .

(CROSSTALK)

TRUMP: Go ahead Sir, yes?

QUESTION: Can you tell us in determining that Lieutenant General Flynn did—whether there was no wrongdoing in your mind, what evidence was weighed? Did you ask for transcripts of these telephone intercepts with Russian officials, particularly the Ambassador Sergey Kislyak, who he was communicating with?

What—what evidence did you weigh to determine that there was no wrongdoing? Further to that, Sir, you said on a couple of locations this morning, you are going to aggressively pursue the source of these leaks.

TRUMP: We are.

QUESTION: Can we ask what you're going to do and also, we've heard about a—a review of the intelligence community headed up by Steven Feinberg, what can you tell us about that?

TRUMP: Well, first of all about that, we now have Dan Coats, hopefully soon, Mike Pompeo and James Comey and they're in position so I hope that we'll be able to straighten that out without using anybody else.

The gentleman you mentioned is a very talented man, very successful man and he's offered his services and you know, it's something we may take advantage of. But I don't think we're need that at all because of the fact that you know, I think that we are gonna be able to straighten it out very easily on its own.

As far as the general's concerned, when I first heard about it, I said huh, that doesn't sound wrong. My counsel came, Don McGahn, White House Counsel, and he told me and I asked him, he can speak very well for himself. He said he doesn't think anything is wrong, you know, really didn't think.

It was really, what happened after that but he didn't think anything was done wrong. I didn't either because I waited a period of time and I started to think about it, I said "well I don't see"—to me, he was doing the job.

The information was provided by—who I don't know, Sally Yates. And I was a little surprised because I said "doesn't sound like he did anything wrong there." But he did something wrong with respect to the vice president and I thought that was not acceptable. As far as—as far as the actual making the call, fact I've watched various programs and I've read various articles where he was just doing his job.

That was very normal. You know, first everybody got excited because they thought he did something wrong. After they thought about it, it turned out he was just doing his job. So—and I do. And by the way, with all of that being said, I do think he's a fine man.

QUESTION: Sir, if I could, on the leaks—on the leaks, sir . . .

TRUMP: . . .Go ahead. Finish off then I'll get you.

QUESTION: I'm sorry. What will you do on the leaks? You've said twice today . . .

TRUMP: . . .Yes, we're looking at them very—very, very serious. I've gone to all of the folks in charge of the various agencies and we're—I've actually called the Justice Department to look into the leaks. Those are criminal leaks. They're put out by people either in agencies—I think you'll see it stopping because now we have our people in. You know, again, we don't have our people in because we can't get them approved by the Senate.

We just had Jeff Sessions approved. Injustice, as an example (ph). So, we are looking into that very seriously. It's a criminal act. You know what I say, when I—when I was called out on Mexico, I was shocked because all this equipment, all this incredible phone equipment—when I was called out on Mexico, I was—honestly, I was really, really surprised.

But I said "you know, it doesn't make sense. That won't happen" but that wasn't that important a call, it was fine, I could show it to the world and he could show it to the world, the president who's a very fine man, by the way. Same thing with Australia. I said "that's terrible that it was leaked" but it wasn't that important. But then I said to myself "what happens when I'm dealing with the problem of North Korea?"

What happens when I'm dealing with the problems in the Middle East? Are you folks going to be reporting all of that very, very confidential information, very important, very—you know, I mean at the highest level? Are you going to be reporting about that too? So, I don't want classified information getting out to the public and in a way that was almost a test.

So I'm dealing with Mexico, I'm dealing with Argentina, we were dealing on this case with Mike Flynn. All this information gets put into the "Washington Post" and gets put into the "New York Times" and I'm saying "what's going to happen when I'm dealing on the Middle East? What's going to happen when I'm dealing with really, really important subjects like North Korea?

We got to stop it. That's why it's a criminal penalty.

QUESTION: I just want to get you to clarify this very important point. Can you say definitively that nobody on your campaign had any contacts with the Russians during the campaign? And on the leaks, is it fake news or are these real leaks?

TRUMP: Well the leaks are real. You're the one that wrote about them and reported them, I mean the leaks are real. You know what they said, you saw it and the leaks are absolutely real. The news is fake because so much of the news is fake. So one thing that I felt it was very important to do—and I hope we can correct it. Because there's nobody I have more respect for—well, maybe a little bit but the reporters, good reporters.

It's very important to me and especially in this position. It's very important. I don't mind bad stories. I can handle a bad story better than anybody as long as it's true and, you know, over a course of time, I'll make mistakes and you'll write badly and I'm OK with that. But I'm not OK when it is fake. I mean, I watch CNN, it's so much anger and hatred and just the hatred.

I don't watch it any more because it's very good—he's saying no. It's OK, Jim (ph). It's OK, Jim (ph), you'll have your chance. But I watch others too. You're not the only one so don't feel badly. But I think it should be straight. I think it should be—I think it would be frankly more interesting. I know how good everybody's ratings are right now but I think that actually—I think that'd actually be better.

People—I mean, you have a lower approval rate than Congress. I think that's right. I don't know, Peter (ph), is that one right? Because you know I think they have lower—I heard lower than Congress. But honestly, the public would appreciate it, I'd appreciate it—again, I don't mind bad stories when it's true but we have an administration where the Democrats are making it very difficult.

TRUMP: I think we're setting a record or close to a record in the time of approval of a cabinet. I mean, the numbers are crazy. When I'm looking, some of them had them approved immediately.

I'm going forever and I still have a lot of people that we're waiting for. And that's all they're doing, is delaying. And you look at Schumer and the mess that he's got over there and they have nothing going. The only thing they can do is delay. And, you know, I think that they'd be better served by, you know, approving and making sure that they're happy and everybody's good.

And sometimes—I mean, I know President Obama lost three or four, and you lose them on the way, and that's OK. That's fine. But I think it would—I think they would be much better served, John, if they just went through the process quickly. This is pure delay tactics.

And they say it, and everybody understands it. Yeah, go ahead, Jimmy.

QUESTION: (OFF-MIKE)

TRUMP: Well, I had nothing to do with it. I have nothing to do with Russia. I told you, I have no deals there, I have no anything. Now, when WikiLeaks, which I had nothing to do with, comes out and happens to give, they're not giving classified information. They're giving stuff—what was said at an office about Hillary cheating on the debates.

Which, by the way, nobody mentions. Nobody mentions that Hillary received the questions to the debates. Can you imagine—seriously—can you imagine if I received the questions? It would be the electric chair. OK, he should be put in the electric—you would even call for the reinstitution of the death penalty, OK. Maybe not you John. Yes? We'll do you next Jim, I do you next(ph).

QUESTION: (OFF-MIKE) clarify—

TRUMP: Yes, yes, sure

QUESTION: Did you direct Mike Flynn to discuss sanctions with the Russian ambassador—

TRUMP: No, I didn't.

QUESTION: —prior to your—TRUMP: No, I didn't.

QUESTION: —inauguration.

TRUMP: No, I didn't.

QUESTION: And then fired him—

TRUMP: Excuse me.

QUESTION: (OFF-MIKE)

TRUMP: No, I fired him because of what he said to Mike Pence. Very simple. Mike was doing his job. He was calling countries and his counterparts. So, it certainly would have been OK with me if he did it. I would have directed him to do it if I thought he wasn't doing it.

I didn't direct him, but I would have directed him because that's his job. And it came out that way—and in all fairness, I watched Dr. Charles Krauthammer the other night say he was doing his job and I agreed with him. And since then, I've watched many other people say that.

No, I didn't direct him, but I would have directed him if he didn't do it. OK? Jim?

QUESTION: Thank you very much, and just for the record, we don't hate you. I don't hate you.

TRUMP: OK.

QUESTION: So, pass that along—

TRUMP: Ask—ask Jeff Zucker how he got his job. OK?

QUESTION: If I may follow up on some of the questions that have taken place so far here, sir—

TRUMP: Well, that's—well, you know, we do have other people. You do have other people and your ratings aren't as good as some of the other people that are waiting.

QUESTION: It's pretty good right now, actually.

TRUMP: OK, go ahead, John.

QUESTION: If I may ask, sir, you said earlier that WikiLeaks was revealing information about the Hillary Clinton campaign during the election cycle. You welcomed that. At one time—

TRUMP: I was OK with it.

QUESTION: —you said—you said that you loved WikiLeaks. At another campaign press conference you called on the Russians to find the missing 30,000 e-mails. I'm wondering, sir, if you—TRUMP: Well, she was actually missing 33 and then that got extended with a pile after that.

QUESTION: Then(ph), your(ph) numbers(ph) were off too.

TRUMP: No—no, but I did say 30. But it was actually higher than that.

QUESTION: If—if I may ask you, sir, it—it sounds as though you do not have much credibility here when it comes to leaking if that is something that you encouraged during(ph) the campaign—

TRUMP: OK, fair question. Ready?

QUESTION: Well, if I may ask you that—

TRUMP: No—no, but let me do one at a time.

QUESTION: If I may as a follow up?

TRUMP: Do you mind?

QUESTION: Yes, sir.

TRUMP: All right. So, in one case, you're talking about highly classified information. In the other case, you're talking about John Podesta saying bad things about the boss. I will say this, if John Podesta said that about me and he was working for me, I would have fired him so fast your head would have spun.

He said terrible things about her. But it wasn't classified information. But in one case, you're talking about classified—regardless, if you look at the RNC, we had a very strong—at my suggestion—and I give Reince great credit for this—at my suggestion, because I know something about this world, I said I want a very strong defensive mechanism.

I don't want to be hacked. And we did that. And you have seen that they tried to hack us and they failed. The DNC did not do that. And if they did it, they could not have been hacked. But they were hacked and terrible things came in. And, you know, the only thing that I do think is unfair is some of the things were so—they were—when I heard some of those things I picked up the papers the next morning and said, oh, this is going to be front page, it wasn't even in the papers.

Again, if I had that happen to me, it would be the biggest story in the history of publishing or the head of newspapers. I would have been headline in every newspaper. I mean, think of it. They gave her the questions to a debate and she—and she should have reported herself.

Why did Hillary Clinton announce that, "I'm sorry, but I have been given the questions to a debate or a town hall, and I feel that it's inappropriate, and I want to turn in CNN for not doing a good job."

QUESTION: And if I may follow up on that, just something that Jonathan Karl (ph) was asking you about. You said that the leaks are real, but the news is fake. I guess I don't understand. It seems that there's a disconnect there. If the information coming from those leaks is real, then how can the stories be fake?

TRUMP: The reporting is fake. Look, look. . .

(CROSSTALK)

TRUMP: You know what it is? Here's the thing. The public isn't—you know, they read newspapers, they see television, they watch. They don't know if it's true or false because they're not involved. I'm involved. I've been involved with this stuff all my life. But I'm involved. So I know when you're telling the truth or when you're not. I just see many, many untruthful things.

And I'll tell you what else I see. I see tone. You know the word "tone." The tone is such hatred. I'm really not a bad person, by the way. No, but the tone is such—I do get good ratings, you have to admit that —the tone is such hatred.

I watched this morning a couple of the networks. And I have to say, Fox & Friends in the morning, they're very honorable people. They're very—not because they're good, because they hit me also when I do something wrong. But they have the most honest morning show. That's all I can say. It's the most honest.

But the tone, Jim. If you look—the hatred. The, I mean, sometimes—sometimes somebody gets. . .

(CROSSTALK)

TRUMP: Well, you look at your show that goes on at 10 o'clock in the evening. You just take a look at that show. That is a constant hit. The panel is almost always exclusive anti-Trump. The good news is he doesn't have good ratings. But the panel is almost exclusive anti-Trump. And the hatred and venom coming from his mouth; the hatred coming from other people on your network.

Now, I will say this. I watch it. I see it. I'm amazed by it. And I just think you'd be a lot better off, I honestly do. The public gets it, you know. Look, when I go to rallies, they turn around, they start screaming at CNN. They want to throw their placards at CNN. You know.

I—I think you would do much better by being different. But you just take a look. Take a look at some of your shows in the morning and the evening. If a guest comes out and says something positive about me, it's—it's brutal.

Now, they'll take this news conference—I'm actually having a very good time, OK? But they'll take this news conference—don't forget, that's the way I won. Remember, I used to give you a news conference every time I made a speech, which was like every day. OK?

(CROSSTALK)

TRUMP: No, that's how I won. I won with news conferences and probably speeches. I certainly didn't win by people listening to you people. That's for sure. But I'm having a good time.

Tomorrow, they will say, "Donald Trump rants and raves at the press." I'm not ranting and raving. I'm just telling you. You know, you're dishonest people. But—but I'm not ranting and raving. I love this. I'm having a good time doing it.

But tomorrow, the headlines are going to be, "Donald Trump rants and raves." I'm not ranting and raving.

Go ahead.

QUESTION: If I may, just one more followup. . .

TRUMP: Should I let him have a little bit more? What do you think, Peter? Peter, should I have—let him have a little bit more?

Sit down. Sit down. We'll. . .

(CROSSTALK)

QUESTION: Just because of the attack of fake news and attacking our network, I just want to ask you, sir. . .

TRUMP: I'm changing it from fake news, though.

QUESTION: Doesn't that under. . .

TRUMP: Very fake news.

QUESTION: . . . I know, but aren't you. . .

(LAUGHTER)

TRUMP: Go ahead.

QUESTION: Real news, Mr. President, real news.

TRUMP: And you're not related to our new. . .

QUESTION: I am not related, sir. No. I do like the sound of Secretary Acosta, I must say.

TRUMP: I looked—you know, I looked at that name. I said, wait a minute, is there any relation there? Alex Acosta.

QUESTION: I'm sure you checked that out, sir.

TRUMP: OK. Now I checked it—I said—they said, "No, sir." I said, "Do me a favor, go back and check the family tree."

QUESTION: But aren't you—aren't you concerned, sir, that you are undermining the people's faith in the First Amendment, freedom of the press, the press in this country, when you call stories you don't like "fake news"? Why not just say it's a story I don't like.

TRUMP: I do that.

QUESTION: When you call it "fake news," you're undermining confidence in our news media (inaudible) important.

TRUMP: No, no. I do that. Here's the thing. OK. I understand what you're—and you're right about that, except this. See, I know when I should get good and when I should get bad. And sometimes I'll say, "Wow, that's going to be a great story." And I'll get killed.

I know what's good and bad. I'd be a pretty good reporter, not as good as you. But I know what's good. I know what's bad. And when they change it and make it really bad, something that should be positive—sometimes something that should be very positive, they'll make OK. They'll even make it negative.

So I understand it. So, because I'm there. I know what was said. I know who's saying it. I'm there. So it's very important to me.

Look, I want to see an honest press. When I started off today by saying that it's so important to the public to get an honest press. The press—the public doesn't believe you people anymore. Now, maybe I had something to do with that. I don't know. But they don't believe you. If you were straight and really told it like it is, as Howard Cosell used to say, right?

Of course, he had some questions also. But if you were straight, I would be your biggest booster. I would be your biggest fan in the world, including bad stories about me. But if you go—as an example, you're CNN, I mean it's story after story after story is bad. I won. I won. And the other thing, chaos because zero chaos. We are running—this is a fine-tuned machine and Reince happens to be doing a good job but half of his job is putting out lies by the press (ph).

You know, I said to him yesterday this whole Russia scam that you guys are building so that you don't talk about the real subject which is illegal leaks, but I watched him yesterday working so hard to try and get that story proper. And I'm saying "here's my chief of staff," a really good guy, did a phenomenal job at RNC. I mean, he won the election, right?

We won the presidency. We got some senators, we got some—all over the country, you take a look, he's done a great job. And I said to myself, you know—and I said to somebody that was in the room, I said "you take a look at Reince, he's working so hard just putting out fires that are fake fires." I mean, they're fake. They're not true. And isn't that a shame because he'd rather be working on healthcare, he'd rather be working on tax reform, Jim (ph).

I mean that. I would be your biggest fan in the world if you treated me right. I sort of understand there's a certain bias maybe by Jeff (ph) or somebody, you know —you know, whatever reason. But—and I understand that. But you've got to be at least a little bit fair and that's why the public sees it. They see it. They see it's not fair. You take a look at some of your shows and you see the bias and the hatred.

And the public is smart, they understand it. Go ahead.

QUESTION: (inaudible) . . .for those who believe that there is something to it, is there anything that you have learned over the last few weeks that you might be able to reveal that might ease their concerns that this isn't fake news? And second. . .

TRUMP: . . .I think they don't believe it. I don't think the public—that's why the Rasmussen poll just has me through the roof. I don't think they believe it. Well, I guess one of the reasons I'm here today is to tell you the whole Russian thing, that's a ruse. That's a ruse. And by the way, it would be great if we could get along with Russia, just so you understand that.

Now tomorrow, you'll say "Donald Trump wants to get along with Russia, this is terrible." It's not terrible. It's good. We had Hillary Clinton try and do a reset. We had Hillary Clinton give Russia 20 percent of the uranium in our country. You know what uranium is, right? This thing called nuclear weapons like lots of things are done with uranium including some bad things.

Nobody talks about that. I didn't do anything for Russia. I've done nothing for Russia. Hillary Clinton gave them 20 percent of our uranium. Hillary Clinton did a reset, remember? With the stupid plastic button that made us all look like a bunch of jerks. Here, take a look. He looked at her like, what the hell is she doing with that cheap plastic button?

Hillary Clinton—that was the reset, remember it said reset? Now if I do that, oh, I'm a bad guy. If we could get along with Russia, that's a positive thing. We have a very talented man, Rex Tillerson, who's going to be meeting with them shortly and I told him. I said "I know politically it's probably not good for me." The greatest thing I could do is shoot that ship that's 30 miles off shore right out of the water.

Everyone in this country's going to say "oh, it's so great." That's not great. That's not great. I would love to be able to get along with Russia. Now, you've had a lot of presidents that haven't taken that tack. Look where we are now. Look where we are now. So, if I can—now, I love to negotiate things, I do it really well, and all that stuff. But—but it's possible I won't be able to get along with Putin.

Maybe it is. But I want to just tell you, the false reporting by the media, by you people, the false, horrible, fake reporting makes it much harder to make a deal with Russia. And probably Putin said "you know." He's sitting behind his desk and he's saying "you know, I see what's going on in the United States, I follow it closely. It's going to be impossible for President Trump to ever get along with Russia because of all the pressure he's got with this fake story." OK?

And that's a shame because if we could get along with Russia—and by the way, China and Japan and everyone. If we could get along, it would be a positive thing, not a negative thing.

QUESTION: Is tax reform on the line (ph)?

QUESTION: Mr. President? Mr. President? Mr. President, since you. . .

TRUMP: Tax reform is going to happen fairly quickly. We're doing Obamacare. We're in final stages. We should be submitting the initial plan in March, early March, I would say. And we have to, as you know, statutorily and for reasons of budget, we have to go first. It's not like, frankly, the tax would be easier, in my opinion, but for statutory reasons and for budgetary reasons, we have to submit the healthcare sooner.

So we'll be submitting healthcare sometime in early March, mid-March. And after that, we're going to come up, and we're doing very well on tax reform.

Yes?

QUESTION: Mr. President, you mentioned Russia. Let's talk about some serious issues that have come up in the last week that you have had to deal with as president of the United States.

TRUMP: OK.

QUESTION: You mentioned the vessel—the spy vessel off the coast of the United States.

TRUMP: Not good.

QUESTION: There was a ballistic missile test that many interpret as a violation of an agreement between the two countries; and a Russian plane buzzed a U.S. destroyer.

TRUMP: Not good.

QUESTION: I listened to you during the campaign . . .

TRUMP: Excuse me, excuse me. When did it happen? It happened when, if you were Putin right now, you would say, "Hey, we're back to the old games with the United States; there's no way Trump can ever do a deal with us." Because the—you have to understand. If I was just brutal on Russia right now, just brutal, people would say, you would say, "Oh, isn't that wonderful." But I know you well enough.

Then you would say, "Oh, he was too tough; he shouldn't have done that." Look, all of the...

(CROSSTALK)

QUESTION: I'm just trying to find out your orientation to those. . .

(CROSSTALK)

TRUMP: Wait a minute. Wait, wait. Excuse me just one second.

(CROSSTALK)

TRUMP: All of those things that you mentioned are very recent, because probably Putin assumes that he's not going to be able to make a deal with me because it's politically not popular for me to make a deal. So Hillary Clinton tries a re-set. It failed. They all tried. But I'm different than those people.

Go ahead.

QUESTION: How are you interpreting those moves? And what do you intend to do about them? Have you given Rex Tillerson any advice or counsel on how to deal?

TRUMP: I have. I have. And I'm so beautifully represented. I'm so honored that the Senate approved him. He's going to be fantastic.

Yes, I think that I've already. . .

QUESTION: Is Putin testing you, do you believe, sir?

TRUMP: No, I don't think so. I think Putin probably assumes that he can't make a deal with me anymore because politically it would be unpopular for a politician to make a deal. I can't believe I'm saying I'm a politician, but I guess that's what I am now.

Because, look, it would be much easier for me to be tough on Russia, but then we're not going to make a deal.

Now, I don't know that we're going to make a deal. I don't know. We might. We might not. But it would be much easier for me to be so tough—the tougher I am on Russia, the better. But you know what? I want to do the right thing for the American people. And to be honest, secondarily, I want to do the right thing for the world.

If Russia and the United States actually got together and got along—and don't forget, we're a very powerful nuclear country and so are they. There's no up-side. We're a very powerful nuclear country and so are they. I have been briefed. And I can tell you one thing about a briefing that we're allowed to say because anybody that ever read the most basic book can say it, nuclear holocaust would be like no other.

They're a very powerful nuclear country and so are we. If we have a good relationship with Russia, believe me, that's a good thing, not a bad thing.

QUESTION: So when you say they're not good, do you mean that they are. . .

TRUMP: Who did I say is not good?

QUESTION: No, I read off the three things that have recently happened. Each one of them you said they're not good.

(CROSSTALK)

TRUMP: No, it's not good, but they happened.

QUESTION: But do they damage the relationship? Do they undermine. . .

TRUMP: They all happened recently.

No. . .

(CROSSTALK)

QUESTION: . . . this country's ability to work with Russia?

TRUMP: They all happened recently. And I understand what they're doing because they're doing the same thing.

Now, again, maybe I'm not going to be able to do a deal with Russia, but at least I will have tried. And if I don't, does anybody really think that Hillary Clinton would be tougher on Russia than Donald Trump? Does anybody in this room really believe that? OK?

But I tell you one thing, she tried to make a deal. She had the re-set. She gave all that valuable uranium away. She did other things. You know, they say I'm close to Russia. Hillary Clinton gave away 20 percent of the uranium in the United States. She's close to Russia.

QUESTION: Can we. . .

TRUMP: I gave—you know what I gave to Russia? You know what I gave? Nothing.

QUESTION: Can we conclude there will be no response to these particular provocations?

TRUMP: I'm not going to tell you anything about what response I do. I don't talk about military response.

I don't say I'm going into Mosul in four months. "We are going to attack Mosul in four months." Then three months later, "We are going to attack Mosul in one month." "Next week, we are going to attack Mosul."

In the meantime, Mosul is very, very difficult. Do you know why? Because I don't talk about military, and I don't talk about certain other things, you're going to be surprised to hear that. And by the way, my whole campaign, I'd say that. So I don't have to tell you. I don't want to be one of these guys that say, "Yes, here's what we're going to do." I don't have to do that. I don't have to tell you what I'm going to do in North Korea.

(CROSSTALK)

TRUMP: Wait a minute. I don't have to tell you what I'm going to do in North Korea. And I don't have to tell you what I'm going to do with Iran. You know why? Because they shouldn't know. And eventually, you guys are going to get tired of asking that question.

TRUMP: So when you ask me what am I going to do with a ship, the Russian ship as an example, I'm not going to tell you. But hopefully, I won't have to do anything, but I'm not going to tell you.

OK.

QUESTION: Could I just ask you—thank you very much, Mr. President. The trouble. . .

TRUMP: Where are you from?

QUESTION: BBC.

TRUMP: Here's another beauty.

QUESTION: That's a good line. Impartial, free and fair.

TRUMP: Yeah. Sure.

QUESTION: Mr. President. . .

TRUMP: Just like CNN right?

QUESTION: On the travel ban—we could banter back and forth. On the travel ban would you accept that that was a good example of the smooth running of government. . .

TRUMP: Yeah, I do. I do. Let me tell you about this government. . .

QUESTION: Were there any mistakes. . .

TRUMP: Wait. Wait. I know who you are. Just wait.

Let me tell you about the travel ban. We had a very smooth rollout of the travel ban. But we had a bad court. Got a bad decision. We had a court that's been overturned. Again, may be wrong. But I think it's 80 percent of the time, a lot.

We had a bad decision. We're going to keep going with that decision. We're going to put in a new executive order next week some time. But we had a bad decision.

That's the other thing that was wrong with the travel ban. You had Delta with a massive problem with their computer system at the airports. You had some people that were put out there, brought by very nice busses, and they were put out at various locations.

Despite that the only problem that we had is we had a bad court. We had a court that gave us what I consider to be, with great respect, a very bad decision.

Very bad for the safety and security of our country. The rollout was perfect.

Now, what I wanted to do was do the exact same executive order, but said one thing. I said this to my people. Give them a one-month period of time. But Gen. Kelly, now Sec. Kelly, said if you do that, all these people will come in and (inaudible) the bad ones.

You do agree there are bad people out there, right? That not everybody that's like you. You have some bad people out there.

Kelly said you can't do that. And he was right. As soon as he said it I said wow, never thought of it. I said how about one week? He said no good. You got to do it immediately because if you do it immediately they don't have time to come in.

Now nobody ever reports that. But that's why we did it quickly.

Now, if I would've done it a month, everything would've been perfect. The problem is we would've wasted a lot of time, and maybe a lot of lives because a lot of bad people would've come into our country.

Now in the meantime, we're vetting very, very strongly. Very, very strongly. But we need help. And we need help by getting that executive order passed.

QUESTION: Just a brief follow-up. But if it's so urgent, why not introduce. . .

TRUMP: Yes? Go ahead.

QUESTION: Thank you. I was just hoping that we could get a yes or no answer on one of these questions involving Russia. Can you say whether you are aware that anyone who advised your campaign had contacts with Russia during the course of the election?

TRUMP: Well I told you, Gen. Flynn obviously was dealing. So that's one person. But he was dealing, as he should have been.

QUESTION: During the election?

TRUMP: No. Nobody that I know of. Nobody. . .

QUESTION: So you're not aware of any contact during the course. .

TRUMP: Look, look, look. . .

QUESTION: . . . of the election?

TRUMP: How many times do I have to answer this question?

QUESTION: Can you just say yes or no? TRUMP: Russia is a ruse.

I know you have to get up and ask a question. It's so important.

Russia is a ruse. I have nothing to do with Russia. Haven't made a phone call to Russia in years. Don't speak to people from Russia. Not that I wouldn't. I just have nobody to speak to.

I spoke to Putin twice. He called me on the election. I told you this. And he called me on the inauguration, a few days ago.

We had a very good talk, especially the second one, lasted for a pretty long period of time. I'm sure you probably get it because it was classified. So I'm sure everybody in this room perhaps has it. But we had a very, very good talk.

I have nothing to do with Russia. To the best of my knowledge no person that I deal with does.

Now, Manafort has totally denied it. He denied it. Now people knew that he was a consultant over in that part of the world for a while, but not for Russia. I think he represented Ukraine or people having to do with Ukraine, or people that—whoever. But people knew that. Everybody knew that.

QUESTION: But in his capacity as your campaign manager, was he in touch with Russian officials during the election?

TRUMP: You know what? He said no. I could only tell you what he—now he was replaced long before the election. You know that, right?

He was replaced long before the election. When all of this stuff started coming out, it came out during the election. But Paul Manafort, who's a good man also by the way, Paul Manfort was replaced long before the election took place. He was only there for a short period of time.

QUESTION: Mr. President. . .

TRUMP: How much longer should we stay here, folks?

QUESTION: Mr. President. . .

TRUMP: Five more minutes. Is that OK? Five?

QUESTION: Mr. President, on national. . .

TRUMP: Wait. Let's see. Who's—I want to find a friendly reporter.

QUESTION: Mr. . . .

TRUMP: Are you a friendly reporter? Watch how friendly he is. Wait. Wait. Watch how friendly he is. Go ahead.

QUESTION: (OFF-MIKE). . .

TRUMP: Go ahead.

QUESTION: So first of all, my name is (Inaudible) from (Inaudible) Magazine. I (inaudible). I haven't seen anybody in my community, including yourself or any of the—anyone on your staff of being (OFF-MIKE).

Because (OFF-MIKE). However, what we've already heard about and what we (OFF-MIKE) is (OFF-MIKE) so you're general forecast (ph) like 48 (OFF-MIKE). There are people who are everything (ph) happens through their packs (ph) is one of the (OFF-MIKE). . .

(CROSSTALK)

TRUMP:. . .he said he was gonna ask a very simple, easy question. And it's not, its not, not—not a simple question, not a fair question. OK sit down, I understand the rest of your question.

So here's the story, folks. Number one, I am the least anti-Semitic person that you've ever seen in your entire life. Number two, racism, the least racist person. In fact, we did very well relative to other people running as a Republican—quiet, quiet, quiet.

See, he lied about—he was gonna get up and ask a very straight, simple question, so you know, welcome to the world of the media. But let me just tell you something, that I hate the charge, I find it repulsive.

I hate even the question because people that know me and you heard the prime minister, you heard Ben Netanyahu (ph) yesterday, did you hear him, Bibi? He said, I've known Donald Trump for a long time and then he said, forget it.

So you should take that instead of having to get up and ask a very insulting question like that.

(CROSSTALK)

TRUMP: Yeah, go ahead. Go ahead.

QUESTION: Thank you, I'm Lisa (ph) from the. . .

(CROSSTALK)

TRUMP: See, it just shows you about the press, but that's the way the press is.

QUESTION: Thank you, Mr. President. Lisa Dejardown (ph) from the PBS News Hour. On national security and immigration, can you give us more details on the executive order you plan for next week? Even its broad outlines?

TRUMP: Yeah.

QUESTION: Will it be focused on specific. . .

TRUMP: It's a very fair question.

QUESTION: . . .countries? And in addition, on the DACA program for immigration.

TRUMP: Right.

QUESTION: What is your plan, do you plan to continue that program or to end it?

TRUMP: We're gonna show great heart, DACA is a very, very difficult subject for me, I will tell you. To me, it's one of the most difficult subjects I have because you have these incredible kids.

In many cases, not in all cases. And some of the cases, having DACA and they're gang members and they're drug dealers, too. But you have some absolutely, incredible kids, I would say mostly. They were brought here in such a way—it's a very—it's a very, very tough subject.

We're gonna deal with DACA with heart. I have to deal with a lot of politicians, don't forget and I have to convince them that what I'm saying is—is right. And I appreciate your understanding on that.

But the DACA situation is a very, very—it's a very difficult thing for me because you know, I love these kids, I love kids, I have kids and grandkids. And I find it very, very hard doing what the law says exactly to do and you know, the law is rough.

I'm not talking about new laws, I'm talking the existing law, is very rough, it's very, very rough. As far as the new order, the new order is going to be very much tailored to the what I consider to be a very bad decision.

But we can tailor the order to that decision and get just about everything, in some ways, more. But we're tailoring it now to the decision, we have some of the best lawyers in the country working on it.

And the new executive order, is being tailored to the decision we got down from the court. OK?

QUESTION: Mr. President. . .

(CROSSTALK) QUESTION: . . .reopening of the White House Visitors Office?

TRUMP: Yes.

QUESTION: And she does a lot of great work for the country as well (ph). Can you talk a little bit about what's first for (ph) Melania Trump does for the country and (inaudible) so opening White House Visitors Office, what does that mean. . .

TRUMP: Now, that's what I call a nice question. That is very—who are you with?

QUESTION: (OFF-MIKE)

TRUMP: Good, I'm gonna start watching, all right? Thank you very much. Melania's terrific, she was here last night, we had dinner with Senator Rubio and his wife who is by the way, lovely.

And we had a really good discussion about Cuba because we have very similar views on Cuba. And Cuba was very good to me in the Florida election, as you know the Cuban Americans. And I think that Melania's gonna be outstanding, that's right, she just opened up the visitors center, in other words, touring of the White House.

She, like others that she's working with, feel very, very strongly about women's issue, women's difficulties.

Very, very strongly, she's a very, very strong advocate. I think she's a great representative for this country.

And a funny thing happens, because she gets—she gets so unfairly—Melania, the things they say. I've known her for a long time, she was a very successful person, she was a very successful model. She did really well.

She would go home at night and didn't even want to go out with people. She was a very private person. She was always the highest quality that you'll ever find. And the things they say—I've known her for a long time—the things they say are so unfair. And actually, she's been apologized to, as you know, by various media because they said things that were lies.

I'll just tell you this. I think she's going to be a fantastic first lady. She's going to be a tremendous representative of women and of the people. And helping her and working her will be Ivanka, who is a fabulous person and a fabulous, fabulous woman. And they're not doing this for money.

They're not doing this for pay, they're doing this because they feel it; both of them. And Melania goes back and forth and after Barron finishes school—because it's hard to take a child out of school with a few months left—she and Barron will be moving over to the White House. OK, thank you, that's a very nice question.

(CROSSTALK)

TRUMP: Go ahead. QUESTION: Mr. Trump?

TRUMP: Yes, oh, this is going to be a bad question, but that's OK.

QUESTION: It doesn't(ph) have(ph) to be a bad question.

TRUMP: Good, because I enjoy watching you on television. Go ahead.

QUESTION: Well, thank you so much. Mr. President, I need to find out from you, you said something as it relates to inner cities. That was one of your platforms during your campaign. Now you're—

TRUMP: Fix the inner cities.

QUESTION: —president. Fixing the inner cities.

TRUMP: Yep.

QUESTION: What will be that fix and your urban agenda as well as your HBCU Executive Order that's coming out this afternoon? See, it wasn't bad, was it?

TRUMP: That was very professional and very good.

QUESTION: I'm very professional.

TRUMP: We'll be announcing the order in a little while and I'd rather let the order speak for itself. But it could be something that I think that will be very good for everybody concerned. But we'll talk to you about that after we do the announcement. As far as the inner cities, as you know, I was very strong on the inner cities during the campaign.

I think it's probably what got me a much higher percentage of the African American vote than a lot of people thought I was going to get. We did, you know, much higher than people thought I was going to get. And I was honored by that, including the Hispanic vote, which was also much higher.

And by the way, if I might add, including the women's vote, which was much higher than people thought I was going to get. So, we are going to be working very hard on the inner cities, having to do with education, having to do with crime. We're going to try and fix as quickly as possible—you know, it takes a long time.

It's taken more a hundred years and more for some of these places to evolve and they evolved, many of them, very badly. But we're going to be working very hard on health and healthcare, very, very hard on education, and also we're going to be working in a stringent way, in a very good way, on crime.

You go to some of these inner city places and it's so sad when you look at the crime. You have people—and I've seen this, and I've sort of witnessed it—in fact, in two cases I have actually witnessed it. They lock themselves into apartments, petrified to even leave, in the middle of the day.

They're living in hell. We can't let that happen. So, we're going to be very, very strong. That's a great question and—and it's a—it's a very difficult situation because it's been many, many years. It's been festering for many, many years. But we have places in this country that we have to fix.

We have to help African American people that, for the most part, are stuck there. Hispanic American people. We have Hispanic American people that are in the inner cities and their living in hell. I mean, you look at the numbers in Chicago. There are two Chicagos, as you know.

There's one Chicago that's incredible, luxurious and all —and safe. There's another Chicago that's worse than almost any of the places in the Middle East that we talk, and that you talk about, every night on the newscasts. So, we're going to do a lot of work on the inner cities.

I have great people lined up to help with the inner cities. OK?

QUESTION: Well, when you say the inner cities, are you going—are you going to include the CBC, Mr. President, in your conversations with your—your urban agenda, your inner city agenda, as well as—

TRUMP: Am I going to include who?

QUESTION: Are you going to include the Congressional Black Caucus and the Congressional—

TRUMP: Well, I would. I tell you what, do you want to set up the meeting?

QUESTION: —Hispanic Caucus—

TRUMP: Do you want to set up the meeting?

QUESTION: No—no—no. I'm not—

TRUMP: Are they friends of yours?

QUESTION: I'm just a reporter.

TRUMP: Well, then(ph) set up the meeting.

QUESTION: I know some of them, but I'm sure they're watching right now.

TRUMP: Let's go set up a meeting. I would love to meet with the Black Caucus. I think it's great, the

Congressional Black Caucus. I think it's great. I actually thought I had a meeting with Congressman Cummings and he was all excited. And then he said, well, I can't move, it might be bad for me politically. I can't have that meeting.

I was all set to have the meeting. You know, we called him and called him. And he was all set. I spoke to him on the phone, very nice guy.

QUESTION: I hear he wanted that meeting with you as well.

TRUMP: He wanted it, but we called, called, called and can't make a meeting with him. Every day I walk and say I would like to meet with him because I do want to solve the problem. But he probably was told by Schumer or somebody like that, some other lightweight. He was probably told—he was probably told "don't meet with Trump. It's bad politics."

And that's part of the problem in this country. OK, one more.

QUESTION: (inaudible)

TRUMP: No, no, one question. Two we can't handle. This room can't handle two. Go ahead, give me the better of your two.

QUESTION: (inaudible) . . .not about your personality or your beliefs, talking about (inaudible), some of it by supporters in your name. What do you. . .

TRUMP: . . .And some of it—can I be honest with you? And this has to do with racism and horrible things that are put up. Some of it written by our opponents. You do know that. Do you understand that? You don't think anybody would do a thing like that. Some of the signs you'll see are not put up by the people that love or like Donald Trump, they're put up by the other side and you think it's like playing it straight?

No. But you have some of those signs and some of that anger is caused by the other side. They'll do signs and they'll do drawings that are inappropriate. It won't be my people. It will be the people on the other side to anger people like you. OK.

(CROSSTALK)

TRUMP: Go ahead, go ahead.

QUESTION: You're the president now. What are you going to do about it?

TRUMP: Who is that? Where is that?

QUESTION: What are you going to do about—what are you going to do about (inaudible).

TRUMP: Oh, I'm working on it. I'm working on it very—no, no, look. Hey, just so you understand, we had a totally divided country for eight years and long before that. In all fairness to President Obama, long before President Obama we have had a very divided—I didn't come along and divide this country. This country was seriously divided before I got here.

We're going to work on it very hard. One of the questions I was asked, I thought it was a very good question was about the inner cities. I mean, that's part of it. But we're going to work on education, we're going to work on—you know, we're going to stop—we're going to try and stop the crime. We have great law enforcement officials, we're going to try and stop crime.

We're not going to try and stop, we're going to stop crime. But it's very important to me—but this isn't Donald Trump that divided a nation. We went eight years with President Obama and we went many years before President Obama. We lived in a divided nation. And I am going to try—I will do everything within my power to fix that. I want to thank everybody very much.

It's a great honor to be with you. Thank you. Thank you very much, thanks.

Trump vs. Obama: A rocky relationship

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Exhibit H

USA

Trump Signs New Travel Ban Order

Last Updated: March 06, 2017 11:35 PM William Gallo Victoria Macchi

WASHINGTON—U.S. President Donald Trump signed a new executive order Monday, barring travelers from six countries to the United States for three months, and all refugees for four months, after federal appeals judges blocked a similar order last month.

The new ban includes a grace period and will take effect on March 16. It will not affect legal permanent residents—those with green cards—or travelers who already had valid visas as of Jan. 27, 2017.

"This executive order is a vital measure for strengthening our national security," Secretary of State Rex Tillerson said at press conference announcing the new ban. "It is the president's solemn duty to protect the American people."

The rollout of the new security measures amounts to an acknowledgement by the Trump administration that its original travel ban, issued January 27, was flawed.

But critics immediately assailed the new order as merely making "cosmetic changes" to the original ban and argued that it still creates a religious test for entering the United States and will therefore not stand up to judicial scrutiny.

WATCH: Related video report by Steve Herman

In an attempt to ensure a smoother rollout of the travel ban and protect it from legal scrutiny, the new executive order differs from the old version in several key aspects.

Among the most notable changes is the exclusion of Iraqis from the list of suspended travelers. The new order bans nationals and citizens from Iran, Libya, Somalia, Sudan, Syria, and Yemen.

Monday's order also removes a provision indefinitely barring Syrian refugees from the U.S. Also removed is language giving preference to "religious minorities," a provision that had been widely seen as an attempt to follow through on Trump's promise to prioritize Christian refugees.

Iraq promises more cooperation

Iraq was removed from the list after officials there promised increased cooperation with U.S. officials regarding the vetting process, according to a senior official with the Department of Homeland Security (DHS), who spoke to reporters on a conference call.

Baghdad, a key ally in the U.S. fight against Islamic State militants, had complained when Iraq was included in the original travel ban.

"The close cooperative relationship between the United States and the democratically-elected Iraqi government, the strong U.S. diplomatic presence in Iraq, the significant presence of U.S. forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment," said a Q&A sheet distributed by the Trump administration. ISIS is an acronym for Islamic State.

WATCH: Tillerson on removal of Iraq

Critics of the original order questioned whether the seven countries affected—all majority-Muslim—were targeted for religious reasons. The DHS official on Monday again denied those accusations, saying: "This is not a Muslim ban in any way, shape or form."

White House officials also stressed the temporary nature of the order, but suggested that the travel ban may be expanded after the 90 days expire and that other countries could be added to the list.

Reaction

Even with the changes, the bill is still likely to face legal challenges by groups that view the order as a partial fulfillment of Trump's campaign call for a "total and complete shutdown of Muslims entering the United States."

"Nothing substantive has changed," said Lavinia Limon, who heads the U.S. Committee for Refugees and Immigrants (USCRI). "It's around the edges, right? If this had come out a month ago, we would be outraged."

The American Civil Liberties Union, or ACLU, which filed successful legal challenges against the original order, also said the revised ban "has the same fatal flaws" as the original.

"These are again, simply cosmetic changes," said Ed Yohnka, the ACLU's Director of Communications and Public Policy. "This is still unconstitutional, this remains a religious test to enter the United States of America. This is something fundamentally that our nation has never permitted. And we will not permit it again."

"The only way to actually fix the Muslim ban is not to have a Muslim ban. Instead, President Trump has recommitted himself to religious discrimination, and he can expect continued disapproval from both the courts and the people," said Omar Jadwat, director of the ACLU's Immigrant Rights Project. "What's more, the changes the Trump administration has made, and everything we've learned since the original ban rolled out, completely undermine the bogus national security justifications the president has tried to hide behind and only strengthen the case against his unconstitutional executive orders."

White House: Ban needed to mitigate refugee risk

Administration officials, meanwhile, were walking a fine line between insisting the new order was different enough from the old measure to withstand legal challenges but similar enough so that it would still be effective.

"The principles of the executive order remain the same," said White House press secretary Sean Spicer, adding, "We continue to maintain the [original travel ban] order was fully lawful."

The Trump administration leans heavily on the rationale that refugees, as well as immigrants and travelers from certain countries, are a security risk to the United States; however, it has proffered little evidence of that risk.

White House officials on Monday released a memorandum saying that the FBI is carrying out "terrorism-related investigations" into approximately 300 individuals across the U.S. who were admitted as refugees. It is not clear whether those being investigated came from the list of banned countries, or how many have been charged with a crime.

When pushed for details, the senior DHS official declined further comment, saying only that the 300 people were being investigated for "potential terrorism-related activities" and that it was "truly an alarming number from all our perspectives."

Filippo Grandi, who heads the U.N.'s refugee agency, said the U.S. has long been a partner in finding solutions for refugees, but expressed concern about how the order will affect those fleeing violence and persecution.

"The imperative remains to provide protection from people fleeing deadly violence, and we are concerned that this decision, though temporary, may compound the anguish for those it affects," Grandi said.

*** Differences in executive orders restricting travel (click here to see)**

Smoother rollout?

Administration officials are promising a smoother rollout this time, insisting the White House has cooperated with DHS, the State Department, and the Justice Department on drafting and implementing the new executive order.

"We're going to have a very smooth implementation period," the senior DHS officials told reporters in a press call, adding that there will not be any "chaos, or alleged chaos" at airports.

WATCH: **Kelly on vetting of refugees seeking to enter US**

The original order was announced early on the evening of Jan. 27—a Friday right when most federal employees were finishing their first full week of work under the new administration—creating confusion at international airports across the country.

Travelers from the seven countries—including legal permanent residents of the United States—were detained by U.S. Customs and Border Protection agents. Law enforcement didn't know what to do with the refugees mid-flight when the order came down that banned them, as well.

Still others were turned away at airports abroad, denied by airline officials who questioned the validity of their already-issued visas.

DHS Secretary John Kelly, who was confirmed by the Senate a week before the original executive order was issued, shouldered the blame for the bungled implementation of the original order.

"The thinking was to get it out quick so that potentially people that might be coming here to harm us would not take advantage of some period of time they could jump on an airplane and get here," he testified at a hearing of the House Homeland Security Committee on Feb. 7.

More than a dozen lawsuits were filed across the country challenging the January order. Federal appeals court judges ruled in February to suspend the order in support of the "free flow of travel," as well as "in avoiding separation of families, and in freedom from discrimination."

Trump's travel restrictions have not received broad public support. A poll released in late February by Pew Research Center showed that 59 percent of those surveyed opposed the ban, while 38 percent approved.

A CNN poll released Monday suggested that 55 percent of Americans disapprove of the way Trump has handled immigration issues, compared to 44 percent who approve. On national security issues, Americans were split, the poll found, with 50 percent approving and 49 percent disapproving.

WATCH: History of US Immigration Restrictions

Exhibit I

Inside the confusion of the Trump executive order and travel ban

By Evan Perez, Pamela Brown and Kevin Liptak, CNN

Updated 11:29 AM ET, Mon January 30, 2017

Story highlights

Trump's unilateral moves reflect the President's desire to quickly make good on his campaign promises

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But they also encapsulate the pitfalls of an administration largely operated by officials with scant federal experience

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The White House overruled DHS regarding allowing green card holders to enter the country

Trump's immigration order: Which countries are affected?

- Iran
- Iraq
- Syria
- Sudan
- Libya
- Yemen
- Somalia

Washington (CNN)—When President Donald Trump declared at the Pentagon Friday he was enacting strict new measures to prevent domestic terror attacks, there were few within his government who knew exactly what he meant.

Administration officials weren't immediately sure which countries' citizens would be barred from entering the United States. The Department of Homeland Security was left making a legal analysis on the order after Trump signed it. A Border Patrol agent, confronted with arriving refugees, referred questions only to the President himself, according to court filings.

Saturday night, a federal judge granted an emergency stay for citizens of the affected countries who had already arrived in the US and those who are in transit and hold valid visas, ruling they can legally enter the US.

Trump's unilateral moves, which have drawn the ire of human rights groups and prompted protests at US airports, reflect the President's desire to quickly make good on his campaign promises. But they also encapsulate the pitfalls of an administration largely operated by officials with scant federal experience.

It wasn't until Friday—the day Trump signed the order banning travel from seven Muslim-majority countries for 90 days and suspending all refugee admission for 120 days—that career homeland security staff were allowed to see the final details of the order, a person familiar with the matter said.

The result was widespread confusion across the country on Saturday as airports struggled to adjust to the new directives. In New York, two Iraqi nationals sued the federal government after they were detained at John F. Kennedy International Airport, and 10 others were detained as well.

In Philadelphia, a Syrian family of six who had a visa through a family connection in the US was placed on a return flight to Doha, Qatar, and Department of Homeland Security officials said others who were in the air would be detained upon arrival and put back on a plane to their home country.

Asked during a photo opportunity in the Oval Office Saturday afternoon about the rollout, Trump said his government was "totally prepared."

"It's working out very nicely," Trump told reporters. "You see it at the airports. You see it all over. It's working out very nicely and we're going to have a very, very strict ban, and we're going to have extreme vetting, which we should have had in this country for many years."

The policy team at the White House developed the executive order on refugees and visas, and largely avoided the traditional interagency process that would have allowed the Justice Department and homeland security agencies to provide operational guidance, according to numerous officials who spoke to CNN on Saturday.

Homeland Security Secretary John Kelly and Department of Homeland Security leadership saw the final details shortly before the order was finalized, government officials said.

Friday night, DHS arrived at the legal interpretation that the executive order restrictions applying to seven countries—Iran, Iraq, Libya, Somalia, Syria, Sudan and Yemen—did not apply to people with lawful permanent residence, generally referred to as green card holders.

The White House overruled that guidance overnight, according to officials familiar with the rollout. That order came from the President's inner circle, led by Stephen Miller and Steve Bannon.

Related Article: More protests against Trump's immigration policies

The ban and its impact

- What we know so far
- What it's like in the 7 impacted countries
- How the countries were chosen
- What the ban says: The full text
- What to know about the restrictions

- Is the ban legal?
- These are the people directly impacted
- The ban's Christian focus
- A family's plight just got more complicated
- Bergen: Trump's big mistake
- All of Trump's executive orders, memos and proclamations
- Comparing Trump to previous presidents

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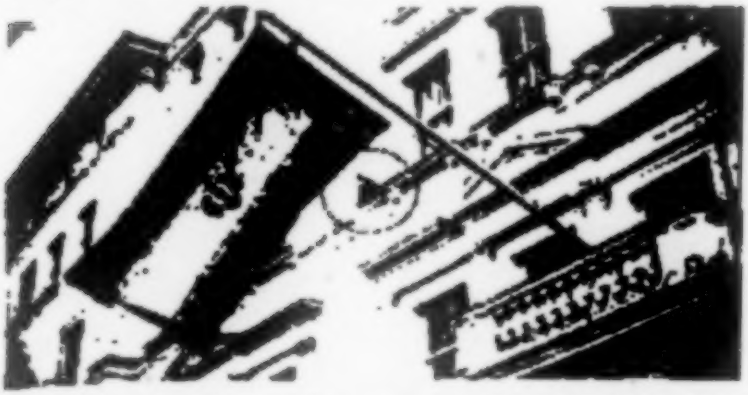
Related Video: Travel ban affects citizens of 7 Muslim-majority nations 02:26



Related Video: Iran says it will ban US citizens 02:16

Their decision held that, on a case by case basis, DHS could allow green card holders to enter the US.

There had been some debate whether green card holders should be even allowed to board international flights. It was decided by the Department of Homeland Security they could fly to the US and would be considered on a case-bycase basis after passing a secondary screening.

But the guidance sent to airlines on Friday night, obtained by CNN, said clearly, "lawful permanent residents are not included and may continue to travel to the USA."

As of Saturday afternoon, Customs and Border Protection continued to issue the same guidance to airlines as it did Friday, telling airlines that fly to the US that green card holders can board planes to the US but they may get extra scrutiny on arrival, according to an airline official.

Before the President issued the order, the White House did not seek the legal guidance of the Office of Legal Counsel, the Justice Department office that interprets the law for the executive branch, according to a source familiar with the process.

White House officials disputed that Sunday morning, saying that OLC signed off and agency review was performed.

Related Video: Trump: Travel ban working out very nicely 01:07

Executive orders: Read more

- All of Trump's executive orders, memos and proclamations
- Will the orders and actions stick?
- How Trump's actions stack up against previous presidents
- What Trump can and cannot do
- What's the difference between and order and action?

Separately, a person familiar with the matter said career officials in charge of enforcing the executive order were not fully briefed on the specifics until Friday. The officials were caught off guard by some of the specifics and raised questions about how to handle the new banned passengers on US-bound planes.

Regarding the green card holders and some of the confusion about whether they were impacted, the person familiar with the matter said if career officials had known more about the executive order earlier, some of the confusion could have been avoided and a better plan could be in place.

Administration officials also defended the process Saturday. They said the people who needed to be briefed ahead of time on the plane were briefed and that people at the State Department and DHS who were involved in the process were able to make decisions about who to talk and inform about this.

Bannon and Miller were running point on this order and giving directives regarding green cards, according to a Republican close to the White House.

But even after the Friday afternoon announcement, administration officials at the White House took several hours to produce text of the action until several hours after it was signed. Adviser Kellyanne Conway even said at one point it was not going to be released before eventually it did get sent out.

Administration officials also seemed unsure at first who was covered in the action, and a list of impacted countries was only produced later on Friday night, hours after the President signed the document at the Pentagon.

This story has been updated to include the White House's response on the issue of Justice Department review.

CNN's Rene Marsh and Athena Jones contributed to this report.

Trump vs Obama: A rocky relationship

[illegible]

Exhibit J

U.S.

Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide

By MICHAEL D. SHEAR, NICHOLAS KULISH and ALAN FEUER JAN. 28, 2017

WASHINGTON—A federal judge in Brooklyn came to the aid of scores of refugees and others who were trapped at airports across the United States on Saturday after an executive order signed by President Trump, which sought to keep many foreigners from entering the country, led to chaotic scenes across the globe.

The judge's ruling blocked part of the president's actions, preventing the government from deporting some arrivals who found themselves ensnared by the presidential order. But it stopped short of letting them into the country or issuing a broader ruling on the constitutionality of Mr. Trump's actions.

The high-stakes legal case played out on Saturday amid global turmoil, as the executive order signed by the president slammed shut the borders of the United States for an Iranian scientist headed to a lab in Massachusetts, a Syrian refugee family headed to a new life in Ohio and countless others across the world.

The president's order, enacted with the stroke of a pen at 4:42 p.m. Friday, suspended entry of all refugees to the United States for 120 days, barred Syrian refugees indefinitely, and blocked entry into the United

States for 90 days for citizens of seven predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.

The Department of Homeland Security said that the order also barred green card holders from those countries from re-entering the United States. In a briefing for reporters, White House officials said that green card holders from the seven affected countries who are outside the United States would need a case-by-case waiver to return.

Mr. Trump—in office just a week—found himself accused of constitutional and legal overreach by two Iraqi immigrants, defended by the American Civil Liberties Union. Meanwhile, large crowds of protesters turned out at airports around the country to denounce Mr. Trump's ban on the entry of refugees and people from seven predominantly Muslim countries.

Lawyers who sued the government to block the White House order said the judge's decision could affect an estimated 100 to 200 people who were detained upon arrival at American airports.

Judge Ann M. Donnelly of Federal District Court in Brooklyn, who was nominated by former President Barack Obama, ruled just before 9 p.m. that implementing Mr. Trump's order by sending the travelers home could cause them "irreparable harm." She said the government was "enjoined and restrained from, in any manner and by any means, removing individuals" who had arrived in the United States with valid visas or refugee status.

The ruling does not appear to force the administration to let in people otherwise blocked by Mr. Trump's order who have not yet traveled to the United States.

The judge's one-page ruling came swiftly after lawyers for the A.C.L.U. testified in her courtroom that one of the people detained at an airport was being put on a plane to be deported back to Syria at that very moment. A government lawyer, Gisela A. Westwater, who spoke to the court by phone from Washington, said she simply did not know.

Hundreds of people waited outside of the courthouse chanting, "Set them free!" as lawyers made their case. When the crowd learned that Judge Donnelly had ruled in favor of the plaintiffs, a rousing cheer went up in the crowd.

Minutes after the judge's ruling in New York City, another judge, Leonie M. Brinkema of Federal District Court in Virginia, issued a temporary restraining order for a week to block the removal of any green card holders being detained at Dulles International Airport.

In a statement released early Sunday morning, the Department of Homeland Security said it would continue to enforce all of the president's executive orders, even while complying with judicial decisions. "Prohibited travel will remain prohibited," the department said in a statement, adding that the directive was "a first step towards re-establishing control over America's borders and national security."

Around the nation, security personnel at major international airports had new rules to follow, though the application of the order appeared chaotic and uneven. Humanitarian organizations delivered the bad news to overseas families that had overcome the bureaucratic hurdles previously in place and were set to travel. And refugees already on flights when the order was signed on Friday found themselves detained upon arrival.

"We've gotten reports of people being detained all over the country," said Becca Heller, the director of the International Refugee Assistance Project. "They're literally pouring in by the minute."

Earlier in the day, at the White House, Mr. Trump shrugged off the sense of anxiety and disarray, suggesting that there had been an orderly rollout. "It's not a Muslim ban, but we were totally prepared," he said. "It's working out very nicely. You see it at the airports, you see it all over."

But to many, the government hardly seemed prepared for the upheaval that Mr. Trump's actions put into motion.

There were numerous reports of students attending American universities who were blocked from returning to the United States from visits abroad. One student said in a Twitter post that he would be unable to study at Yale. Another who attends the Massachusetts Institute of Technology was refused permission to board a plane. A Sudanese graduate student at Stanford University was blocked for hours from entering the country.

Human rights groups reported that legal permanent residents of the United States who hold green cards were being stopped in foreign airports as they sought to return from funerals, vacations or study abroad. There was widespread condemnation of the order, from religious leaders, business executives, academics, political leaders and others. Mr. Trump's supporters offered praise, calling it a necessary step on behalf of the nation's security.

Homeland Security officials said on Saturday night that 109 people who were already in transit to the United States when the order was signed were denied access; 173 were stopped before boarding planes heading to America. Eighty-one people who were stopped were eventually given waivers to enter the United States, officials said.

Legal residents who have a green card and are currently in the United States should meet with a consular officer before leaving the country, a White House official, who spoke on the condition of anonymity, told reporters. Officials did not clarify the criteria that would qualify someone for a waiver, other than that it would be granted "in the national interest."

But the week-old administration appeared to be implementing the order chaotically, with agencies and officials around the globe interpreting it in different ways.

The Stanford student, Nisrin Omer, a legal permanent resident, said she was held at Kennedy International Airport in New York for about five hours but was eventually allowed to leave the airport. Others who were detained appeared to be still in custody or sent back to their home countries.

White House aides claimed on Saturday that there had been consultations with State Department and homeland security officials about carrying out the order. "Everyone who needed to know was informed," one aide said.

But that assertion was denied by multiple officials with knowledge of the interactions, including two officials at the State Department. Leaders of Customs and Border Protection and of Citizenship and Immigration Services—the two agencies most directly affected by the order—were on a telephone briefing on the new policy even as Mr. Trump signed it on Friday, two officials said.

The A.C.L.U.'s legal case began with two Iraqis detained at Kennedy Airport, the named plaintiffs in the case. One was en route to reunite with his wife and son in Texas. The other had served alongside Americans in Iraq for a decade.

Shortly after noon on Saturday, Hameed Khalid Darweesh, an interpreter who worked for more than a decade on behalf of the United States government in Iraq, was released. After nearly 19 hours of detention, Mr. Darweesh began to cry as he spoke to reporters, putting his hands behind his back and miming handcuffs.

"What I do for this country? They put the cuffs on," Mr. Darweesh said. "You know how many soldiers I touch by this hand?"

The other man the lawyers are representing, Haider Sameer Abdulkhaleq Alshawi, who was en route to Houston, was released Saturday night.

Before the two men were released, one of the lawyers, Mark Doss, a supervising attorney at the International Refugee Assistance Project, asked an official, "Who is the person we need to talk to?"

"Call Mr. Trump," said the official, who declined to identify himself.

While the judge's ruling means that none of the detainees will be sent back immediately, lawyers for the plaintiffs in the case expressed concern that all those at the airports would now be put in detention, pending a resolution of the case.

The White House said the restrictions would protect "the United States from foreign nationals entering from countries compromised by terrorism" and allow the administration time to put in place "a more rigorous vetting process." But critics condemned Mr. Trump over the collateral damage on people who had no sinister intentions in trying to come to the United States.

Peaceful protests began forming Saturday afternoon at Kennedy Airport, where nine travelers had been detained upon arrival at Terminal 7 and two others at Terminal 4, an airport official said. Similar scenes were playing out at other airports across the nation.

An official message to all American diplomatic posts around the world provided instructions about how to treat people from the countries affected: "Effective immediately, halt interviewing and cease issuance and printing" of visas to the United States.

Internationally, confusion turned to panic as travelers found themselves unable to board flights bound for the United States. In Dubai and Istanbul, airport and immigration officials turned passengers away at boarding gates and, in at least one case, ejected a family from a flight it had boarded.

Seyed Soheil Saeedi Saravi, a promising young Iranian scientist, had been scheduled to travel in the coming days to Boston, where he had been awarded a fellowship to study cardiovascular medicine at Harvard, according to Thomas Michel, the professor who was to supervise the research fellowship.

But Professor Michel said the visas for the student and his wife had been indefinitely suspended.

"This outstanding young scientist has enormous potential to make contributions that will improve our understanding of heart disease, and he has already been thoroughly vetted," Professor Michel wrote to The New York Times.

A Syrian family of six who have been living in a Turkish refugee camp since fleeing their home in 2014 had been scheduled to arrive on Tuesday in Cleveland. Instead, the family's trip has been called off.

"Everyone is just so heartbroken, so angry, so sad," said Danielle Drake, the community manager for US Together, an agency that resettles refugees.

A Christian family of six from Syria said in an email to Representative Charlie Dent, Republican of Pennsylvania, that they were being detained on Saturday morning at Philadelphia International Airport despite having legal paperwork, green cards and visas that had been approved.

In the case of the two Iraqis held at Kennedy Airport, the legal filings by his lawyers say that Mr. Darweesh was granted a special immigrant visa on Jan. 20, the same day Mr. Trump was sworn in as president.

A husband and father of three, Mr. Darweesh arrived at Kennedy Airport with his family. Mr. Darweesh's wife and children made it through passport control and customs, but agents of Customs and Border Protection detained him.

In Istanbul, during a stopover on Saturday, passengers reported that security officers had entered a plane after everyone had boarded and ordered a young Iranian woman and her family to leave the aircraft.

Iranian green card holders who live in the United States were blindsided by the decree while on vacation in Iran, finding themselves in a legal limbo and unsure whether they would be able to return to America.

"How do I get back home now?" said Daria Zeynalia, a green card holder who was visiting family in Iran. He had rented a house and leased a car, and would be eligible for citizenship in November. "What about my job? If I can't go back soon, I'll lose everything."

Michael D. Shear reported from Washington, and Nicholas Kulish and Alan Feuer from New York. Reporting was contributed by Mark Mazzetti, Matthew Rosenberg, Ron Nixon and Adam Liptak from Washington; Thomas Erdbrink from Tehran; Manny Fernandez from Houston; Julie Bosman from Chicago; and

Liam Stack, Russell Goldman, Joe Goldstein, Liz Robbins, Stephanie Saul and Sean Piccoli from New York.

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Exhibit K

MENU LAWFARE

REFUGEES

Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas

By Benjamin Wittes Saturday, January 28, 2017, 10:58 PM

Omphalos: Middle East Conflict in Perspective

The malevolence of President Trump's Executive Order on visas and refugees is mitigated chiefly—and perhaps only—by the astonishing incompetence of its drafting and construction.

NBC is reporting that the document was not reviewed by DHS, the Justice Department, the State Department, or the Department of Defense, and that National Security Council lawyers were prevented from evaluating it. Moreover, the New York Times writes that Customs and Border Protection and U.S. Citizen and Immigration Services, the agencies tasked with carrying out the policy, were only given a briefing call while Trump was actually signing the order itself. Yesterday, the Department of Justice gave a "no comment" when asked whether the Office of Legal Counsel had reviewed Trump's executive orders—including the order at hand. (OLC normally reviews every executive order.)

This order reads to me, frankly, as though it was not reviewed by competent counsel at all.

CNN offers extraordinary details:

> Administration officials weren't immediately sure which countries' citizens would be barred from entering the United States. The Department of Homeland Security was left making a legal analysis on the order after Trump signed it. A Border Patrol agent, confronted with arriving refugees, referred questions only to the President himself, according to court filings.
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> . . .
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> It wasn't until Friday—the day Trump signed the order banning travel from seven Muslim-majority countries for 90 days and suspending all refugee admission for 120 days—that career homeland security staff were allowed to see the final details of the order, a person with the familiar the matter said.
>
> . . .
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> The policy team at the White House developed the executive order on refugees and visas, and largely avoided the traditional interagency process that would have allowed the Justice Department and homeland security agencies to provide operational guidance, according to numerous officials who spoke to CNN on Saturday.
>
> Homeland Security Secretary John Kelly and Department of Homeland Security leadership saw the final details shortly before the order was finalized, government officials said.
>
> Friday night, DHS arrived at the legal interpretation that the executive order restrictions applying to

> seven countries—Iran, Iraq, Libya, Somalia, Syria, Sudan and Yemen—did not apply to people who with lawful permanent residence, generally referred to as green card holders.
>
> The White House overruled that guidance overnight, according to officials familiar with the rollout. That order came from the President's inner circle, led by Stephen Miller and Steve Bannon. Their decision held that, on a case by case basis, DHS could allow green card holders to enter the US.

As I shall explain, in the short term, the incompetence is actually good news for people who believe in visa and refugee policies based on criteria other than—let's not be coy about this—bigotry and religious discrimination. The President has created a target-rich environment for litigation that will make his policies, I suspect, less effective than they would have been had he subjected his order to vetting one percent as extreme as the vetting to which he proposes to subject refugees from Bashar al-Assad and the bombing raids of Vladimir Putin.

Indeed, even as I write these words, the ACLU has already succeeded in petitioning a federal court for a class-wide stay of deportations of immigrants and refugees trapped in airports by Trump's order. And a federal judge in Virginia has issued a temporary restraining order preventing the removal of green card holders detained in Dulles International Airport and requiring that these legal residents of the United States have access to counsel.

In the broader sense, however, it is most emphatically not good news to have a White House that just makes decisions with no serious thought or interagency input into what those decisions might mean. In fact, it's really dangerous.

Let's start with the malevolence of the document, which Amira Mikhail summarized and Adham Sahloul analyzed earlier today. I don't use the word "malevolence" here lightly. As readers of my work know, I believe in strong counterterrorism powers. I defend non-criminal detention. I've got no problem with drone strikes. I'm positively enthusiastic about American surveillance policies. I was much less offended than others were by the CIA's interrogations in the years after September 11. I have defended military commissions.

Some of these policies were effective; some were not. Some worked out better than others. And I don't mean to relitigate any of those questions here. My sole point is that all of these policies were conceptualized and designed and implemented by people who were earnestly trying to protect the country from very real threats. And the policies were, to a one, proximately related to important goals in the effort. While some of these policies proved tragically misguided and caused great harm to innocent people, *none of them was designed or intended to be cruel to vulnerable, concededly innocent people.* Even the CIA's interrogation program, after all, was deployed against people the agency believed (mostly correctly) to be senior terrorists of the most dangerous sort and to garner information from them that would prevent attacks.

I actually cannot say that about Trump's new executive order—and neither can anyone else.

Here's how the order describes its purpose:

> Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.
>
> Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Color me skeptical that this is the real purpose. After all, if this is the real purpose, then the document is both wildly over-inclusive and wildly under-inclusive. On the over-inclusive side, it will keep tens of thousands of innocent refugees who have been subject to unspeakable violence outside of the protection of the United States on the vanishingly small chance that these people might be terrorists—indeed, to make it impossible for them *even to apply* for refugee admission if they are Syrian. It will prevent untold numbers of people about whom there is no whiff of suspicion from coming here as students, as professionals, as tourists. It overtly treats members of a particular religion differently from other people.

On the underinclusive side, the order wouldn't have blocked the entry of many of the people responsible for the worst recent terrorist attacks. There is, in fact, simply no rational relationship between cutting off visits from the particular countries that Trump targets

(Muslim countries that don't happen to be close U.S. allies) and any expected counterterrorism goods. The 9/11 hijackers, after all, didn't come from Somalia or Syria or Iran; they came from Saudi Arabia and Egypt and a few other countries not affected by the order. Of the San Bernardino attackers (both of Pakistani origin, one a U.S. citizen and the other a lawful permanent resident), the Orlando shooter (a U.S. citizen whose parents were born in Afghanistan), and the Boston marathon bombers (one a naturalized U.S. citizen, one a green card holder who arrived in Massachusetts from Kyrgyzstan), none came from countries listed in the order. One might argue, I suppose, that the document is tied to current threats. But come now, how could Pakistan *not* be on a list guided by current threat perception?

What's more, the document also takes steps that strike me as utterly orthogonal to any relevant security interest. If the purpose of the order is the one it describes, for example, I can think of no good reason to burden the lives of students individually suspected of nothing who are here lawfully and just happen to be temporarily overseas, or to detain tourists and refugees who were mid-flight when the order came down. I have trouble imagining any reason to raise questions about whether green card holders who have lived here for years can leave the country and then return. Yes, it's temporary, and that may lessen the costs (or it may not, depending on the outcome of the policy review the order mandates), but temporarily irrational is still irrational.

Put simply, I don't believe that the stated purpose is the real purpose. This is the first policy the United States has adopted in the post-9/11 era about which I have ever said this. It's a grave charge, I know, and I'm not making it lightly. But in the rational pursuit of security objectives, you don't marginalize your expert security agencies and fail to vet your ideas through a normal interagency process. You don't target the wrong people in nutty ways when you're rationally pursuing real security objectives.

When do you do these things? You do these things when you're elevating the symbolic politics of bashing Islam over any actual security interest. You do them when you've made a deliberate decision to burden human lives to make a public point. In other words, this is not a document that will cause hardship and misery because of regrettable incidental impacts on people injured in the pursuit of a public good. It will cause hardship and misery for tens or hundreds of thousands of people *because that is precisely what it is intended to do.*

To be sure, the executive order does not say anything as crass as: "Sec. 14. Burdening Muslim Lives to Make Political Point." It doesn't need to. There's simply no reason in reading it to ignore everything Trump said during the campaign, during which he repeatedly called for a ban on Muslims entering the United States.

Even while he was preparing to sign the order itself, he declared, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." Indeed, we do. This document is the implementation of a campaign promise to keep out Muslims moderated only by the fact that certain allied Muslim countries are left out because the diplomatic repercussions of including them would be too detrimental.

Many years ago, the great constitutional law scholar Charles Black Jr., contemplating the separate but equal doctrine, asked:

> does segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

I think we can, without drawing any kind of equivalence between this order and Jim Crow, make a similar point here: Is this document a reasonable security measure? There are many areas in which security policy affects innocent lives but within which we do not presumptively say that the fact that some group of people faces disproportionate burdens renders that policy illegitimate. But if an entire religious grouping finds itself irrationally excluded from the country for no discernible security benefit following a lengthy campaign that overtly promised precisely such discrimination and exactly this sort of exclusion, if the relevant security agencies are excluded from the policy process, and if the question is then solemnly propounded whether the reasonable pursuit of security is the purpose, I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

So yes, the order is malevolent. But here's the thing: Many of these malevolent objectives were certainly achievable within the president's lawful authority. The president's power over refugee admissions is vast. His power to restrict visa issuances and entry of aliens to the United States is almost as wide. If the National Security Council had run a process of minimal competence, it could certainly have done a lot of stuff that folks like me, who care about refugees, would have gnashed our teeth over but which would have been solidly within the President's authority. It could have all been implemented in a fashion that didn't create endless litigation opportunities and didn't cause enormous diplomatic friction.

How incompetent is this order? An immigration lawyer who works for the federal government wrote me today describing the quality of the work as "look[ing] like what an intern came up with over a lunch hour. . . . My take is that it is so poorly written that it's hard to tell the impact." One of the reasons there's so much chaos going on right now, in fact, is that nobody really knows what the order means on important points.

Some examples:

- Sec. 3(c) bans "entry"—which to the best of my knowledge has had no meaning in the Immigration and Nationality Act (INA) since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. Pre-IIRIRA law did use the term "entry," but that is no longer the case.

- Section 3(g) talks of waivers on a case-by-case basis for people who are otherwise denied visas or other benefits under the immigration laws pursuant to the order. If a person needs a waiver to obtain "other benefits," does that mean that nationals of the seven countries are denied *any* benefit under the INA without a waiver, benefits such as naturalization, adjustment of status, or temporary protected status, even if they are already in the US?

- On its face, the order bars entry of both immigrants and non-immigrants. Again, as entry is not defined, and no one was given any time to draft implementing guidance or to clarify any points, it's no surprise that Customs and Border Protection doesn't seem to know how to apply it to lawful permanent residents (LPRs). The INA, at section 101(a)(13)(C), says that green card holders will not be deemed as seeking admission absent the factors enumerated therein —factors that do not include an executive order banning entry. Yet Reuters and *The Guardian* are both reporting quotations from a DHS public relations official, stating that the order *does* apply to LPRs. If that interpretation lasts, look for DHS to get its ass handed to it on a platter in federal court—a defeat it will richly deserve.

- Another big mystery is how the order will apply to asylees. Will people even be allowed to apply?

> On the one hand, the right to seek asylum is right there in the INA. But to apply for asylum, you have to be interviewed by a U.S. Citizen and Immigration Services officer to determine if you have a credible fear of persecution. Is that interview a benefit under the act? And if so, is it barred? From what I hear, right now anyway, Customs and Border Protection is not allowing anyone to claim asylum and have a credible fear interview.

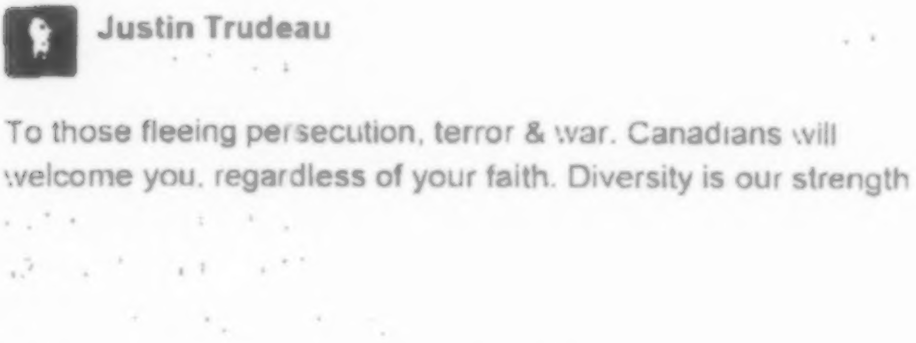
I could go on, but you get the point. This order is a giant birthday present to the ACLU and other immigration litigators. And godspeed to them in going after it—which, as I noted above, they are already succeeding in doing.

But the incompetence actually does not stop at running a process that causes legal chaos and probable manhandling by the federal courts.

Consider, for example, the likely diplomatic fallout. In his first week in office, Trump has managed to create a major rift with Mexico, our peaceable neighbor to the south with whom we have no earthly reason to be spatting and haven't had bilateral problem this serious since Pancho Villa. Trump's new order seems certain to raise tensions with other countries too—and not just the countries whose nationals it targets (Iran, for example, which today restricted travel by U.S. nationals in retaliation; a great many U.S. citizens have family in Iran and now can't visit them).

Because the order applies to dual nationals, where a person is a citizen of one restricted country and one non-restricted country, it appears to bar entry to hundreds of thousands of citizens of the U.K. and Canada —including a British Member of Parliament and a Canadian-Iranian consultant who lives in the United States but now can no longer safely travel to her business's headquarters in Toronto without being blocked from reentry. British Prime Minister Theresa May wasn't showing a lot of spine today over the matter, but what happens when she starts getting political blowback at home for the not standing up to the U.S. over its treatment of her nationals?

And Canadian Prime Minister Justin Trudeau is already making noise. He tweeted today:



Justin Trudeau

To those fleeing persecution, terror & war. Canadians will welcome you, regardless of your faith. Diversity is our strength

In some ways, the most stunning incompetence in the document appears in one of the least discussed sections: The section at the end that mandates reporting on the nefarious terrorist activities of foreigners in the United States. This section requires regular reports from DHS on terrorism-related offenses by foreign nationals, and gender-based violence and honor killings by foreign nationals (because remember, Mexico sends us their rapists and Muslims all kill their daughters when they date Americans).

The White House appears to have included this section because the Trumpists think it will show that large numbers of foreigners are coming to the United States and committing acts of terrorism here. But that is delusional, and the data will not show that—as I suspect someone at DHS would have pointed out had they had the chance. Here's *Politifact* summarizing the extant data on the citizenship status of the authors of terrorist attacks in the United States:

> The New America Foundation, a Washington think tank that promotes datadriven research for social and economic policy, did an analysis of "homegrown extremism" since 2000. The foundation compiled data on 499 extremists, who either adhered to jihadist ideology inspired by al-Qaida or were motivated by right- or left-wing political beliefs. This database includes attacks as well as those accused of terrorism-related offenses, such as plotting attacks or fundraising.
>
> New America found that about 64 percent of the extremists were U.S.-born citizens and 80 percent were either American-born or naturalized citizens. The database shows eight out of 499 extremists were illegal residents; all eight were jihadists.
>
> A *New York Times* analysis cited by many experts we interviewed found that half of the jihadist attacks since 2001 were committed by men born in the United States. Many others were naturalized citizens. Some were noncitizens but were traveling

> legally, such as Richard Reid, the attempted shoe bomber in Miami in 2001, who didn't need a visa because he was from Britain.
>
> Overall, databases of terrorist acts in the United States show that many were committed by Americans or naturalized citizens, though some high-profile incidents have involved legal immigrants.
>
> "Empirically, domestic terrorism is carried out by citizens—not immigrants—with right-wing terrorism, racial hate crimes, and the sovereign-citizen movement making up a majority of domestic terrorist incidents," said Joel Day, assistant professor of security and global studies at the University of Massachusetts Lowell. "Other domestic incidents have indeed been carried out by those who came here through legal channels."

In other words, the executive order sets up a reporting mechanism that will almost certainly falsify its own premise.

I would wax triumphant about the mitigating effect of incompetence on this document, but alas, I can't do it. The president's powers in this area are vast, as I say, and while the incompetence is likely to buy the administration a world of hurt in court and in diplomacy in the short term, this order is still going take more than a few pounds of flesh out of a lot of innocent people.

Moreover, it's a very dangerous thing to have a White House that can't with the remotest pretense of competence and governance put together a major policy document on a crucial set of national security issues without inducing an avalanche of litigation and wide diplomatic fallout. If the incompetence mitigates the malevolence in this case, that'll be a blessing. But given the nature of the federal immigration powers, the mitigation may be small and the blessing short-lived; the implications of having an executive this inept are not small and won't be shortlived.

Topics: Donald Trump, Omphalos, Refugees

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Exhibit L

Kelly: There are '13 or 14' more countries with questionable vetting procedures

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Trump signed a new executive order that bans immigration from six Muslim-majority countries

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Washington (CNN)—Secretary of Homeland Security John Kelly said that apart from the six countries listed on Monday's travel ban, there are "13 or 14" other countries that also have questionable vetting procedures.

Kelly didn't name any of the additional countries the administration is concerned about and acknowledged he doesn't expect the list of countries subject to the travel ban will grow.

"There will probably be other countries we will look at," he told CNN's Wolf Blitzer on "The Situation Room." "I don't believe the list will be expanded, but there are countries out there that we will ask, like Iraq has done . . . to cooperate with us better, to get us the information we need to safeguard the country."

> He continued: "There's a number of them out there, I don't want to speculate. There's probably 13 or 14 countries, not all of them Muslim countries, not all of them in the Middle East, that have questionable vetting procedures we can rely on. And if we overlay additional vetting procedures, the chances are these countries will be minimum citizens from those countries that visit our country."

President Donald Trump on Monday signed a new executive order that bans immigration from six Muslim-majority countries, dropping Iraq from January's previous order and reinstates a temporary blanket ban on all refugees. Iraq was removed from a revised version of an executive order banning travel from certain Muslim-majority countries after intensive lobbying from the Iraqi government at the highest levels, a senior US official told CNN Monday.

President Donald Trump signs new travel ban, exempts Iraq

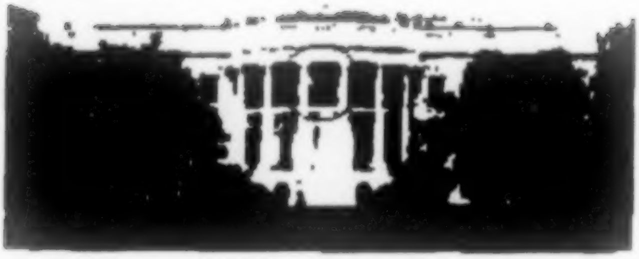
The new measures will block citizens of Syria, Iran, Libya, Somalia, Sudan and Yemen from obtaining visas for at least 90 days.

The new ban, which will be implemented March 16, comes six weeks after Trump's original executive order caused chaos at airports nationwide before it was blocked by federal courts.

The ban removes language in the original order that indefinitely banned Syrian refugees and called for prioritizing the admission of refugees who are religious minorities in their home countries.

Kelly told Blitzer that the ban is not a "Muslim ban," which is what it's being called by critics of the executive order.

"Three of the six (countries in the travel ban) now are designated as terrorism supporters," Kelly said. "We can't rely on those governments . . . It's not a Muslim ban . . . there are 51 overwhelmingly Muslim countries."



Related Video: [illegible]

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Exhibit M

The New York Times |

U.S.

F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Show

By CHARLIE SAVAGE MARCH 26, 2011

WASHINGTON—Within months after the Bush administration relaxed limits on domestic-intelligence gathering in late 2008, the F.B.I. assessed thousands of people and groups in search of evidence that they might be criminals or terrorists, a newly disclosed Justice Department document shows.

In a vast majority of those cases, F.B.I. agents did not find suspicious information that could justify more intensive investigations. The New York Times obtained the data, which the F.B.I. had tried to keep secret, after filing a lawsuit under the Freedom of Information Act.

The document, which covers the four months from December 2008 to March 2009, says the F.B.I. initiated 11,667 "assessments" of people and groups. Of those, 8,605 were completed. And based on the information developed in those low-level inquiries, agents opened 427 more intensive investigations, it says.

The statistics shed new light on the F.B.I.'s activities in the post-Sept. 11 era, as the bureau's focus has shifted from investigating crimes to trying to detect and disrupt potential criminal and terrorist activity.

It is not clear, though, whether any charges resulted from the inquiries. And because the F.B.I. provided no comparable figures for a period before the rules change, it is impossible to determine whether the numbers represent an increase in investigations.

Still, privacy advocates contend that the large number of assessments that turned up no sign of wrongdoing show that the rules adopted by the Bush administration have created too low a threshold for starting an inquiry. Attorney General Eric H. Holder Jr. has left those rules in place.

Michael German, a former F.B.I. agent who is now a policy counsel for the American Civil Liberties Union, argued that the volume of fruitless assessments showed that the Obama administration should tighten the rules.

"These are investigations against completely innocent people that are now bound up within the F.B.I.'s intelligence system forever," Mr. German said. "Is that the best way for the F.B.I. to use its resources?"

But Valerie E. Caproni, the bureau's general counsel, said the numbers showed that agents were running down any hint of a potential problem—including vigilantly checking out potential leads that might have been ignored before the Sept. 11 attacks.

"Recognize that the F.B.I.'s policy—that I think the American people would support—is that any terrorism lead has to be followed up," Ms. Caproni said. "That means, on a practical level, that things that 10 years ago might just have been ignored now have to be followed up."

F.B.I. investigations are controlled by guidelines first put in place by Attorney General Edward H. Levi during the Ford administration, after the disclosure that the bureau had engaged in illegal domestic spying for decades. After the Sept. 11 attacks, those rules were loosened by Attorney General John Ashcroft and then again by Attorney General Michael B. Mukasey.

Some Democrats and civil liberties groups protested the Mukasey guidelines, contending that the new rules could open the door to racial or religious profiling and to fishing expeditions against Americans.

In 2006, The New York Times reported that the National Security Agency had each month been flooding the bureau with thousands of names, phone numbers and e-mail addresses that its surveillance and data-mining programs had deemed suspicious. But frustrated agents found that virtually all of the tips led to dead ends or innocent Americans.

When the Mukasey guidelines went into effect in December 2008, they allowed the F.B.I. to use a new category of investigation called an "assessment." It permits an agent, "proactively or based on investigative leads," to scrutinize a person or a group for signs of a criminal or national security threat, according to the F.B.I. manual.

The manual also says agents need "no particular factual predication" about a target to open an assessment, although the basis "cannot be arbitrary or groundless speculation." And in selecting subjects for such scrutiny, agents are allowed to use ethnicity, religion or speech protected by the First Amendment as a factor—as long as it is not the only one.

An assessment is less intensive than a more traditional "preliminary" inquiry or a "full" investigation, which requires greater reason to suspect wrongdoing but also allows agents to use more intrusive information-gathering techniques, like wiretapping.

Still, in conducting an assessment, agents are allowed to use other techniques—searching databases, interviewing the subjects or people who know them, sending confidential informers to infiltrate an organization, attending a public meeting like a political rally or a religious service, and following and photographing people in public places.

In March 2009, Russ Feingold, then a Democratic senator from Wisconsin, asked the F.B.I. how many assessments it had initiated under the new guidelines and how many regular investigations had been opened based on information developed by those assessments.

In November 2010, the Justice Department sent a classified letter to the Senate Judiciary Committee answering Mr. Feingold's question. This month, it provided an uncensored copy of the same answer to The Times as a result of its Freedom of Information Act lawsuit.

F.B.I. officials said in an interview that the statistics represented a snapshot as of late March 2009, so the 11,667 assessment files were generated over a roughly four-month period. But they said they believed that agents had continued to open assessments at roughly the same pace since then.

Some aspects of the statistics are hazy, officials cautioned.

For example, even before the December 2008 changes, the bureau routinely followed up on low-grade tips and leads under different rules. But that activity was not formally tracked as an "assessment" that could be easily counted and compared.

F.B.I. officials also said about 30 percent of the 11,667 assessments were just vague tips—like a report of a suspicious car that included no license plate number. Such tips are entered into its computer system even if there is no way to follow up on them.

Finally, they said, it is impossible to know precisely how many assessments turned up suspicious facts. A single assessment may have spun off more than one higher investigation, and some agents may have neglected to record when such an investigation started as an assessment.

Ms. Caproni also said that even though the F.B.I. manual says agents can open assessments "proactively," they still must always have a valid reason—like a tip that is not solid enough to justify a more intensive level of investigation but should still be checked out.

But Mr. German, of the A.C.L.U., said that allowing agents to initiate investigations without a factual basis "seems ripe for abuse." He added, "What they should be doing is working within stricter guidelines that help them focus on real threats rather than spending time chasing shadows."

A version of this article appears in print on March 27, 2011, on Page A19 of the New York edition with the headline: F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Show.

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Exhibit N

The New York Times https://nyti.ms/2mpqNX1

POLITICS

People From 7 Travel-Ban Nations Pose No Increased Terror Risk, Report Says

By RON NIXON FEB. 25, 2017

When President Trump signed an executive order last month temporarily barring visitors from seven mostly Muslim countries, he said he was moving to protect the United States from terrorist attacks. The Homeland Security secretary, John F. Kelly, echoed the president, saying the travel ban was necessary because vetting procedures "in those seven countries are suspect."

But an internal report written by intelligence analysts at Mr. Kelly's department appears to undercut the assessment that people from the seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen—pose a heightened threat of terrorism. The three-page report found that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."

The report adds to the difficulties the Trump administration has faced in carrying out the travel ban. Federal judges have suspended the order, and the administration has said it will redo it to withstand legal scrutiny, but has not given a timetable.

The Department of Homeland Security assessment, first reported by The Associated Press, found that only a small number of people from the seven countries had been involved in terrorism-related activities in the

United States since the Syrian civil war began in 2011. In addition, the report noted, while terrorist groups in Iraq, Syria and Yemen pose a threat to the United States, militant groups in the other four countries have a more regional focus.

The report also found that in the past six years, the terrorism threat reached much more widely than the seven countries listed—individuals from 26 countries had been "inspired" to carry out attacks in the United States.

Furthermore, few individuals from the seven countries affected by the ban have access to the United States, the report said, noting the small numbers of visas granted by the State Department to citizens of those nations.

The White House and the Department of Homeland Security sought to play down the significance of the report. The White House said that it was politically motivated and disregarded information that would have provided support for the travel ban. The Department of Homeland Security said the report was just a draft and "not a final comprehensive review of the government's intelligence."

Stephen Miller, a senior aide to Mr. Trump, told Fox News on Tuesday that the redrawn executive order would "have the same basic policy outcome."

The Trump administration on Friday also took the first steps toward following through on the president's plan to build a wall along the border with Mexico.

Customs and Border Protection, an agency within the Department of Homeland Security, announced that it would begin accepting design proposals for a wall. The agency said it would need the proposals by March 10. After it chooses a list of potential vendors, full proposals would be required a few weeks later.

The agency said it could make a final decision by the middle of April.

A version of this article appears in print on February 26, 2017, on Page A20 of the New York edition with the headline: Homeland Security Report Undercuts Travel-Ban Logic.

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Exhibit O

MSNBC

The Rachel Maddow Show / The MaddowBlog

>> BREAKING NEWS
EXCLUSIVE: TRMS OBTAINS DHS INTEL DOCUMENT
MS
UTHORITIES ARREST A 22-YEAR-OLD WOMAN BROUGHT TO THE U.S. ILLEG

TRMS Exclusive: DHS document undermines Trump case for travel ban

03/02/17 09:15 PM—UPDATED 03/03/17 12:14 AM

The Rachel Maddow Show has obtained, exclusively, a Department of Homeland Security intelligence assessment document. The document, from the Office of Intelligence and Analysis, makes the case that most foreign-born, U.S.-based violent extremists are likely not radicalized when they come to the U.S., but rather become radicalized after living in the U.S. for a number of years.

The document follows another piece of research (pdf) from Homeland Security that undercut President Trump's rationale for a travel ban as a means of keeping violent extremists out. On Friday, the Associated Press published an analysis from Homeland Security that said citizenship in any given country—including the seven countries listed in the executive order—is likely an unreliable indicator of whether someone poses a terrorist threat.

The new assessment, obtained by the Rachel Maddow Show and dated March 1, tracks 88 violent, foreign-born extremists in the United States. More than half of them had been in the U.S. more than 10 years before they were indicted or killed.

Homeland Security tonight has confirmed the authenticity of the document. The department says production of it began in August 2016, and that it likely would have reached the White House. We have asked the White House for comment tonight. They have not responded.

Read the document below:

(Scribd pdf link here)

(*Intelligence Assessment* Omitted. See J.A. 1057)

Exhibit P

2/3/17 WashingtonPost.com (Pg. Unavail. Online)
2017 WLNR 3564726
WashingtonPost.com

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February 3, 2017
Section: /local/public-safety

Justice Dept. lawyer says 100,000 visas revoked under travel ban; State Dept. says about 60,000

The revelation, disputed by another agency, came in a court case involving Yemeni brothers turned away from Dulles Airport in Virginia.

Justin Jouvenal;Rachel Weiner; Ann E. Marimow

More than 100,000 visas have been revoked as a result of President Trump's ban on travel from seven predominantly Muslim countries, an attorney for the government asserted Friday in federal court in Alexandria, Va.

The number came out during a hearing in a lawsuit by two Yemeni brothers who arrived at Dulles International Airport last Saturday and were quickly put on a return flight to Ethiopia because of the new restrictions. While the government is working to resolve that case and return the brothers to the United States, lawyers at the hearing addressed the broader impact of the ban.

The 100,000 figure was immediately disputed by the State Department, which said the number of visas revoked was roughly 60,000. A spokeswoman said the revocations have no impact on the legal status of people already in the United States. If those people leave the United States, though, their visas will no longer be valid.

Immigrant advocates, attorneys and the media have been pushing the Trump administration to offer an accounting of how many people were affected by the controversial executive order.

In response to a question from a judge, Erez Reuveni, of the Justice Department's Office of Immigration Litigation, told the U.S. District Court that there were tens of thousands abroad holding visas when Trump signed his order a week ago.

"Over 100,000 visas were revoked on Friday at 6:30 p.m.," Reuveni told the court, speaking of Jan. 27.

Reuveni offered no other details about the group of people. He said that he did not know how many people had been detained at the nation's airports because of the order but that it could be 100 to 200. It was not immediately clear how the Justice Department and State Department arrived at such different tallies for the broader number of people affected.

"The number 100,000 sucked the air out of my lungs," said Simon Sandoval-Moshenberg of the Legal Aid Justice Center, who represents the Yemeni brothers.

During the hearing, U.S. District Court Judge Leonie M. Brinkema said she was heartened to see that the government was working to return the brothers, Tareq and Ammar Aqel Mohammed Aziz, to the United States and reinstate their visas in exchange for dropping their case. The government appears to be attempting similar case-by-case reprieves across the nation.

But Brinkema offered a stern rebuke to the Trump administration in its overall handling of the travel ban. Brinkema said the case had drawn an even larger public outpouring than another high profile one she handled: the trial of 9/11 conspirator Zacarias Moussaoui.

"This order was issued quite quickly. It's quite clear that not all the thought went into it that should have gone into it," Brinkema said. "It was chaos."

She said people had relied on their visas as valid and families had expected to be reunited with loved ones. Brinkema said there was no evidence that the travel restrictions were necessary.

She urged the government to work "globally" to resolve all the cases of those affected by the travel ban. Lawsuits have been playing out over individual cases in at least 10 courts across the country.

The Trump administration has argued that the travel ban is necessary to keep Americans safe from terrorism as it institutes more restrictive vetting of visitors and refugees, but it has drawn protests at airport's nationwide and condemnation from Democrats, many of whom call the executive action a "Muslim ban."

Brinkema on Friday extended a temporary restraining order she had issued blocking the removal of any green-card holders being detained at Dulles and requiring that people held there because of the ban have access to lawyers.

The judge also allowed the state of Virginia to join the lawsuit. State officials argued in court that more than 350 students from a handful of state universities had been affected by the travel ban, along with professors and other workers.

The officials said they include a Libyan woman from George Mason University who was stuck in Turkey and an Iranian doctoral student who is unable to travel to the United States to defend his dissertation. In addition, Brinkema ordered the government to turn over a list of the state's lawful permanent residents and visa holders who were affected by the ban.

Outside the courthouse, Virginia Attorney General Mark R. Herring (D) said he was "really pleased the judge recognized real harm is happening in Virginia."

Herring's office had also been seeking to hold government officials in contempt for the way they handled travelers from the seven countries over the weekend, but Brinkema declined, saying she did not know enough Friday to make that determination.

Virginia officials had cited news reports and affidavits from lawmakers saying that, contrary to the order Brinkema issued last weekend, Customs and Border Patrol officers had denied immigrants access to lawyers.

"There were so many lawyers there willing to help, and not a single one got access," Virginia Solicitor General Stuart A. Raphael said during the hearing.

Reuveni said that security at Dulles bars lawyers from anything but telephone access to people who are in screening. Separately, affiliates of the American Civil Liberties Union in all 50 states have filed freedom-of-information requests to gain a greater understanding of how customs officials are implementing Trump's order.

Brinkema also allowed a Sudanese woman to join the lawsuit. Sahar Kamal Ahmed Fadul was traveling on the same flight as the Aziz brothers and was sent on a return flight to Ethiopia by customs officials. She had plans to meet her fiance in Colorado and get married.

"Too suddenly, at the stroke of a pen, that dream was dashed," said her attorney, Timothy Heaphy. "It's tremendously traumatic.

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—— **Index References** ——

News Subject: (Government Litigation (1GO18); Immigration & Naturalization (1IM88); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05))

Industry: (Air Transportation (1AI53); Airports (1AI61); Transportation (1TR48))

Region: (Americas (1AM92); Arab States (1AR46); Middle East (1MI23); North America (1NO39); Yemen (1YE36))

Language: EN

Other Indexing: (Virginia Attorney General Mark R.) (Virginia Solicitor; Tareq Aqel Mohammed Aziz; Trump; Stuart Raphael; Simon Sandoval-Moshenberg; Ammar Aqel Mohammed Aziz; Leonie Brinkema; Timothy Heaphy; Sahar Kamal Ahmed Fadul; Erez Reuveni; Zacarias Moussaoui)

Word Count: 954

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Exhibit Q

Executive Order—Protecting the Nation from Terrorist Attacks by Foreign Nationals

EXECUTIVE ORDER

- - - - - -

PROTECTING THE NATION FROM TERRORIST ATTACKS BY FOREIGN NATIONALS

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (8 U.S.C. 1001 et seq.) (INA), and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Purpose.* The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than with the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Hundreds of foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after claiming asylum; after receiving visitor, student, or employment visas; or through the U.S. refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter our country. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, we must ensure that those admitted to this country do not bear hostile attitudes toward our country and its founding principles. We cannot, and should not, admit into our country those who do not support the U.S. Constitution, or those who would place violent religious edicts over American law. In addition, the United States should not admit those who engage in acts of bigotry and hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice other religions) or those who would oppress members of one race, one gender, or sexual orientation.

Sec. 2. *Policy*. It is the policy of the United States to: (a) protect our citizens from foreign nationals who intend to commit terrorist attacks in the United States; and (b) prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country for adjudication of any visa, admission, or other benefit under the INA (adjudications) adequate to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National intelligence, shall submit to the President a report on the results of the review described in subsection (a), including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, and C-2 visas for travel to the United Nations). The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and Director of National Intelligence.

(c) To temporarily reduce investigative burdens to relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent the terrorist or criminal infiltration of foreign nationals, pursuant to section 212(f) of the INA I hereby find that the immigrant and nonimmigrant entry into the United States of aliens from countries designated pursuant to Division O, Title II, Section 203 of the 2016 consolidated

Appropriations Act (H.R. 2029, P.L. 114-113), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 30 days from the date of this order.

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, and C-2 visas for travel to the United Nations) from countries that do not provide the information requested pursuant to subsection (d) of this order until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. *Implementing Uniform Screening Standards for all Immigration Programs.* (a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program during the adjudication process for immigration benefits to identify individuals seeking to enter the United States on a fraudulent basis, with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of uniform screening standards and procedures, such as in-person interviews; the creation of a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positive contributing member of society, and the applicant's ability to make contributions to the national interest; and, a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security, shall review the USRAP application and adjudication process to determine what additional procedures can be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for whom the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence have jointly determined that sufficient safeguards are in place to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President to assist with such prioritization.

(c) The Secretaries of State and Homeland Security, as appropriate, shall cease refugee processing of and the admittance of nationals of Syria as refugees until such time as I have determined that sufficient changes have been made to the USRAP to ensure its alignment with the national interest.

(d) Notwithstanding any previous Presidential determination regarding the number of refugee admissions for Fiscal Year 2017, the Secretaries of State and Homeland Security may only process and admit a total of 50,000 refugees during Fiscal Year 2017. During the 120-day suspension provided by section 5(a), the Secretary of State and the Secretary of Homeland Security shall initiate appropriate consultations in connection with this determination, including with respect to the allocation among refugees of special humanitarian concern to the United States.

(f) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may admit individuals to the United States as refugees on a case-by-case basis when in the national interest. Further, during the temporary suspension period described in subsection (a), the Secretaries of State and Homeland Security may continue to process as refugees those refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality.

(g) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

Sec. 6. *Establishment of Safe Zones to Protect Vulnerable Syrian Populations.* Pursuant to the cessation of refugee processing for Syrian nationals, the Secretary of State, in conjunction with the Secretary of Defense, is directed within 90 days of the date of this order to produce a plan to provide safe areas in Syria and in the surrounding region in which Syrian nationals displaced from their homeland can await firm settlement, such as repatriation or potential third-country resettlement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda..

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, which requires that all individuals seeking a nonimmigrant visa, undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as urged by sections 221(c) and 281 of the INA, and other treatment. If a country does not treat U.S. nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of U.S. nationals by the foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* To be more transparent with the American people, and in order to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security shall, consistent with applicable law, collect and make publicly available within 180 days, and every 180 days thereafter:

(a) information regarding the number of foreign-born individuals in the United States who have been charged with terrorism-related offenses; convicted of terrorism-related offenses; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons;

(b) information regarding the number of foreign-born individuals in the United States who have been radicalized after entry into the United States and engaged in terrorismrelated acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States; and

(c) information regarding the number and types of acts of gender-based violence against women or honor killings by foreign-born individuals in the United States.

Sec. 12. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

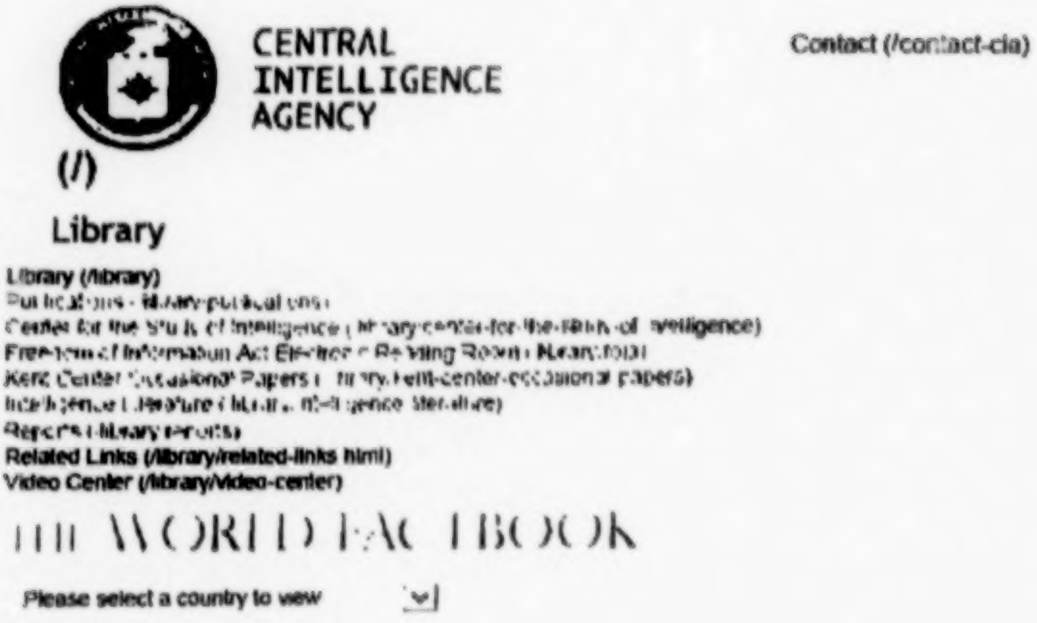
(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Exhibit R



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THE WORLD FACTBOOK

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FIELD LISTING :: **RELIGIONS**

Country	**Religions (%)**
Afghanistan (../geos/af.html)	Muslim 99.7% (Sunni 84.7-89.7%, Shia 10-15%), other 0.3% (2009 est.)
Albania (../geos/al.html)	Muslim 56.7%, Roman Catholic 10%, Orthodox 6.8%, atheist 2.5%, Bektashi (a Sufi order) 2.1%, other 5.7%, unspecified 16.2% note: all mosques and churches were closed in 1967 and religious observances prohibited; in November 1990, Albania began allowing private religious practice (2011 est.)
Algeria (../geos/ag.html)	Muslim (official; predominantly Sunni) 99%, other (includes Christian and Jewish) <1% (2012 est.)

American Samoa (../geos/aq.html)	Christian 98.3%, other 1%, unaffiliated 0.7% (2010 est.)
Andorra (../geos/an.html)	Roman Catholic (predominant)
Angola (../geos/ao.html)	Roman Catholic 41.1%, Protestant 38.1%, other 8.6%, none 12.3% (2014 est.)
Anguilla (../geos/av.html)	Protestant 73.2% (includes Anglican 22.7%, Methodist 19.4%, Pentecostal 10.5%, Seventh Day Adventist 8.3%, Baptist 7.1%, Church of God 4.9%, Presbytarian 0.2%, Brethren 0.1%), Roman Catholic 6.8%, Jehovah's Witness 1.1%, other Christian 10.9%, other 3.2%, unspecified 0.3%, none 4.5% (2011 est.)
Antigua and Barbuda (../geos/ac.html)	Protestant 68.3% (Anglican 17.6%, Seventh Day Adventist 12.4%, Pentecostal 12.2%, Moravian 8.3%, Methodist 5.6%, Wesleyan Holiness 4.5%, Church of God 4.1%, Baptist 3.6%), Roman Catholic 8.2%, other 12.2%, unspecified 5.5%, none 5.9% (2011 est.)
Argentina (../geos/ar.html)	nominally Roman Catholic 92% (less than 20% practicing), Protestant 2%, Jewish 2%, other 4%
Armenia (../geos/am.html)	Armenian Apostolic 92.6%, Evangelical 1%, other 2.4%, none 1.1%, unspecified 2.9% (2011 est.)
Aruba	Roman Catholic 75.3%, Protestant

(../geos/aa.html)	4.9% (includes Methodist 0.9%, Adventist 0.9%, Anglican 0.4%, other Protestant 2.7%), Jehovah's Witness 1.7%, other 12%, none 5.5%, unspecified 0.5% (2010 est.)
Australia (../geos/as.html)	Protestant 30.1% (Anglican 17.1%, Uniting Church 5.0%, Presbyterian and Reformed 2.8%, Baptist, 1.6%, Lutheran 1.2%, Pentecostal 1.1%, other Protestant 1.3%), Catholic 25.3% (Roman Catholic 25.1%, other Catholic 0.2%), other Christian 2.9%, Orthodox 2.8%, Buddhist 2.5%, Muslim 2.2%, Hindu 1.3%, other 1.3%, none 22.3%, unspecified 9.3% (2011 est.)
Austria (../geos/au.html)	Catholic 73.8% (includes Roman Catholic 73.6%, other Catholic 0.2%), Protestant 4.9%, Muslim 4.2%, Orthodox 2.2%, other 0.8% (includes other Christian), none 12%, unspecified 2% (2001 est.)
Azerbaijan (../geos/aj.html)	Muslim 96.9% (predominantly Shia), Christian 3%, other <0.1, unaffiliated <0.1 (2010 est.) **note:** religious affiliation is still nominal in Azerbaijan; percentages for actual practicing adherents are much lower
Bahamas, The (../geos/bf.html)	Protestant 69.9% (includes Baptist 34.9%, Anglican 13.7%, Pentecostal

	8.9% Seventh Day Adventist 4.4%, Methodist 3.6%, Church of God 1.9%, Brethren 1.6%), Roman Catholic 12%, other Christian 13% (includes Jehovah's Witness 1.1%), other 0.6%, none 1.9%, unspecified 2.6% (2010 est.)
Bahrain (../geos/ba.html)	Muslim 70.3%, Christian 14.5%, Hindu 9.8%, Buddhist 2.5%, Jewish 0.6%, folk religion <.1, unaffiliated 1.9%, other 0.2% (2010 est.)
Bangladesh (../geos/bg.html)	Muslim 89.1%, Hindu 10%, other 0.9% (includes Buddhist, Christian) (2013 est.)
Barbados (../geos/bb.html)	Protestant 66.4% (includes Anglican 23.9%, other Pentecostal 19.5%, Adventist 5.9%, Methodist 4.2%, Wesleyan 3.4%, Nazarene 3.2%, Church of God 2.4%, Baptist 1.8%, Moravian 1.2%, other Protestant 0.9%), Roman Catholic 3.8%, other Christian 5.4% (includes Jehovah's Witness 2.0%, other 3.4%), Rastafarian 1%, other 1.5%, none 20.6%, unspecified 1.2% (2010 est.)
Belarus (../geos/bo.html)	Orthodox 48.3%, Catholic 7.1%, other 3.5%, non-believers 41.1% (2011 est.)
Belgium (../geos/be.html)	Roman Catholic 75%, other (includes Protestant) 25%
Belize	Roman Catholic 40.1%, Protestant

(../geos/bh.html)	31.5% (includes Pentecostal 8.4%, Seventh Day Adventist 5.4%, Anglican 4.7%, Mennonite 3.7%, Baptist 3.6%, Methodist 2.9%, Nazarene 2.8%), Jehovah's Witness 1.7%, other 10.5% (includes Baha'i, Buddhist, Hindu, Morman, Muslim, Rastafarian), unknown 0.6%, none 15.5% (2010 est.)
Benin **(../geos/bn.html)**	Muslim 27.7%, Catholic 25.5%, Protestant 13.5% (Celestial 6.7%, Methodist 3.4%, other Protestant 3.4%), Vodoun 11.6%, other Christian 9.5%, other traditional religions 2.6%, other 2.6%, none 5.8% (2013 est.)
Bermuda **(../geos/bd.html)**	Protestant 46.2% (includes Anglican 15.8%, African Methodist Episcopal 8.6%, Seventh Day Adventist 6.7, Pentecostal 3.5%, Methodist 2.7%, Presbyterian 2.0 %, Church of God 1.6%, Baptist 1.2%, Salvation Army 1.1%, Brethren 1.0%, other Protestant 2.0%), Roman Catholic 14.5%, Jehovah's Witness 1.3%, other Christian 9.1%, Muslim 1%, other 3.9%, none 17.8%, unspecified 6.2% (2010 est.)
Bhutan **(../geos/bt.html)**	Lamaistic Buddhist 75.3%, Indian- and Nepalese-influenced Hinduism 22.1%, other 2.6% (2005 est.)

Bolivia (../geos/bl.html)	Roman Catholic 76.8%, Evangelical and Pentecostal 8.1%, Protestant 7.9%, other 1.7%, none 5.5% (2012 est.)
Bosnia and Herzegovina (../geos/bk.html)	Muslim 50.7%, Orthodox 30.7%, Roman Catholic 15.2%, atheist 0.8%, agnostic 0.3%, other 1.2%, undeclared/no answer 1.1% (2013 est.)
Botswana (../geos/bc.html)	Christian 79.1%, Badimo 4.1%, other 1.4% (includes Baha'i, Hindu, Muslim, Rastafarian), none 15.2%, unspecified 0.3% (2011 est.)
Brazil (../geos/br.html)	Roman Catholic 64.6%, other Catholic 0.4%, Protestant 22.2% (includes Adventist 6.5%, Assembly of God 2.0%, Christian Congregation of Brazil 1.2%, Universal Kingdom of God 1.0%, other Protestant 11.5%), other Christian 0.7%, Spiritist 2.2%, other 1.4%, none 8%, unspecified 0.4% (2010 est.)
British Virgin Islands (../geos/vi.html)	Protestant 70.2% (Methodist 17.6%, Church of God 10.4%, Anglican 9.5%, Seventh Day Adventist 9.0%, Pentecostal 8.2%, Baptist 7.4%, New Testament Church of God 6.9%, other Protestant 1.2%), Roman Catholic 8.9%, Jehovah's Witness 2.5%, Hindu 1.9%, other 6.2%, none 7.9%, unspecified 2.4% (2010 est.)

Brunei **(../geos/bx.html)**	Muslim (official) 78.8%, Christian 8.7%, Buddhist 7.8%, other (includes indigenous beliefs) 4.7% (2011 est.)
Bulgaria **(../geos/bu.html)**	Eastern Orthodox 59.4%, Muslim 7.8%, other (including Catholic, Protestant, Armenian Apostolic Orthodox, and Jewish) 1.7%, none 3.7%, unspecified 27.4% (2011 est.)
Burkina Faso **(../geos/uv.html)**	Muslim 61.6%, Catholic 23.2%, traditional/animist 7.3%, Protestant 6.7%, other/no answer 0.2%, none 0.9% (2010 est.)
Burma **(../geos/bm.html)**	Buddhist 87.9%, Christian 6.2%, Muslim 4.3%, Animist 0.8%, Hindu 0.5%, other 0.2%, none 0.1% **note:** religion estimate is based on the 2014 national census, including an estimate for the non-enumerated population of Rakhine State, which is assumed to mainly affiliate with the Islamic faith (2014 est.)
Burundi **(../geos/by.html)**	Catholic 62.1%, Protestant 23.9% (includes Adventist 2.3% and other Protestant 21.6%), Muslim 2.5%, other 3.6%, unspecified 7.9% (2008 est.)
Cabo Verde **(../geos/cv.html)**	Roman Catholic 77.3%, Protestant 4.6% (includes Church of the Nazarene 1.7%, Adventist 1.5%, Assembly of God 0.9%, Universal Kingdom of God 0.4%, and God and Love

	0.1%), other Christian 3.4% (includes Christian Rationalism 1.9%, Jehovah's Witness 1%, and New Apostolic 0.5%), Muslim 1.8%, other 1.3%, none 10.8%, unspecified 0.7% (2010 est.)
Cambodia (../geos/cb.html)	Buddhist (official) 96.9%, Muslim 1.9%, Christian 0.4%, other 0.8% (2008 est.)
Cameroon (../geos/cm.html)	Catholic 38.4%, Protestant 26.3%, other Christian 4.5%, Muslim 20.9%, animist 5.6%, other 1%, non-believer 3.2% (2005 est.)
Canada (../geos/ca.html)	Catholic 39% (includes Roman Catholic 38.8%, other Catholic .2%), Protestant 20.3% (includes United Church 6.1%, Anglican 5%, Baptist 1.9%, Lutheran 1.5%, Pentecostal 1.5%, Presbyterian 1.4%, other Protestant 2.9%), Orthodox 1.6%, other Christian 6.3%, Muslim 3.2%, Hindu 1.5%, Sikh 1.4%, Buddhist 1.1%, Jewish 1%, other 0.6%, none 23.9% (2011 est.)
Cayman Islands (../geos/cj.html)	Protestant 67.8% (includes Church of God 22.6%, Seventh Day Adventist 9.4%, Presbyterian/United Church 8.6%, Baptist 8.3%, Pentecostal 7.1%, nondenominational 5.3%, Anglican 4.1%, Wesleyan Holiness 2.4%), Roman Catholic 14.1%, Jehovah's

	Witness 1.1%, other 7%, none 9.3%, unspecified 0.7% (2010 est.)
Central African Republic (../geos/ct.html)	indigenous beliefs 35%, Protestant 25%, Roman Catholic 25%, Muslim 15% **note:** animistic beliefs and practices strongly influence the Christian majority
Chad (../geos/cd.html)	Muslim 58.4%, Catholic 18.5%, Protestant 16.1%, animist 4%, other 0.5%, none 2.4% (2009 est.)
Chile (../geos/ci.html)	Roman Catholic 66.7%, Evangelical or Protestant 16.4%, Jehovah's Witnesses 1%, other 3.4%, none 11.5%, unspecified 1.1% (2012 est.)
China (../geos/ch.html)	Buddhist 18.2%, Christian 5.1%, Muslim 1.8%, folk religion 21.9%, Hindu < 0.1%, Jewish < 0.1%, other 0.7% (includes Daoist (Taoist)), unaffiliated 52.2% **note:** officially atheist (2010 est.)
Christmas Island (../geos/kt.html)	Buddhist 16.9%, Christian 16.4%, Muslim 14.8%, other 1.3%, none 9.2%, unspecified 41.5% (2011 est.)
Cocos (Keeling) Islands (../geos/ck.html)	Sunni Muslim 80%, other 20% (2002 est.)
Colombia (../geos/co.html)	Roman Catholic 90%, other 10%
Comoros (../geos/cn.html)	Sunni Muslim 98%, Roman Catholic

	2% **note:** Islam is the state religion
Congo, Democratic Republic of the (../geos/cg.html)	Roman Catholic 50%, Protestant 20%, Kimbanguist 10%, Muslim 10%, other (includes syncretic sects and indigenous beliefs) 10%
Congo, Republic of the (../geos/cf.html)	Roman Catholic 33.1%, Awakening Churches/Christian Revival 22.3%, Protestant 19.9%, Salutiste 2.2%, Muslim 1.6%, Kimbanguiste 1.5%, other 8.1%, none 11.3% (2010 est.)
Cook Islands (../geos/cw.html)	Protestant 62.8% (Cook Islands Christian Church 49.1%, Seventh Day Adventist 7.9%, Assemblies of God 3.7%, Apostolic Church 2.1%), Roman Catholic 17%, Mormon 4.4%, other 8%, none 5.6%, no response 2.2% (2011 est.)
Costa Rica (../geos/cs.html)	Roman Catholic 76.3%, Evangelical 13.7%, Jehovah's Witness 1.3%, other Protestant 0.7%, other 4.8%, none 3.2%
Cote d'Ivoire (../geos/iv.html)	Muslim 40.2%, Catholic 19.4%, Evangelical 19.3%, Methodist 2.5%, other Christian 4.5%, animist or no religion 12.8%, other religion/ unspecified 1.4% (2011-12 est.) **note:** the majority of foreign migrant workers are Muslim (72%) and Christian (18%) (2014 est.)
Croatia	Roman Catholic 86.3%, Orthodox

(../geos/hr.html)	4.4%, Muslim 1.5%, other 1.5%, unspecified 2.5%, not religious or atheist 3.8% (2011 est.)
Cuba (../geos/cu.html)	nominally Roman Catholic 85%, Protestant, Jehovah's Witnesses, Jewish, Santeria **note:** prior to CASTRO assuming power
Curacao (../geos/cc.html)	Roman Catholic 72.8%, Pentecostal 6.6%, Protestant 3.2%, Adventist 3%, Jehovah's Witness 2%, Evangelical 1.9%, other 3.8%, none 6%, unspecified 0.6% (2011 est.)
Cyprus (../geos/cy.html)	Orthodox Christian 89.1%, Roman Catholic 2.9%, Protestant/Anglican 2%, Muslim 1.8%, Buddhist 1%, other (includes Maronite, Armenian Church, Hindu) 1.4%, unknown 1.1%, none/atheist 0.6% **note:** data represent only the government-controlled area of Cyprus (2011 est.)
Czechia (../geos/ez.html)	Roman Catholic 10.4%, Protestant (includes Czech Brethren and Hussite) 1.1%, other and unspecified 54%, none 34.5% (2011 est.)
Denmark (../geos/da.html)	Evangelical Lutheran (official) 80%, Muslim 4%, other (denominations of less than 1% each, includes Roman Catholic, Jehovah's Witness, Serbian Orthodox Christian, Jewish, Baptist,

	and Buddhist) 16% (2012 est.)
Djibouti (../geos/dj.html)	Muslim 94%, Christian 6%
Dominica (../geos/do.html)	Roman Catholic 61.4%, Protestant 28.6% (includes Evangelical 6.7%, Seventh Day Adventist 6.1%, Pentecostal 5.6%, Baptist 4.1%, Methodist 3.7%, Church of God 1.2%, other 1.2%), Rastafarian 1.3%, Jehovah's Witness 1.2%, other 0.3%, none 6.1%, unspecified 1.1% (2001 est.)
Dominican Republic (../geos/dr.html)	Roman Catholic 95%, other 5%
Ecuador (../geos/ec.html)	Roman Catholic 74%, Evangelical 10.4%, Jehovah's Witness 1.2%, other 6.4% (includes Mormon Buddhist, Jewish, Spiritualist, Muslim, Hindu, indigenous religions, African American religions, Pentecostal), atheist 7.9%, agnostic 0.1% **note:** data represents persons at least 16 years of age from five Ecuadoran cities (2012 est.)
Egypt (../geos/eg.html)	Muslim (predominantly Sunni) 90%, Christian (majority Coptic Orthodox, other Christians include Armenian Apostolic, Catholic, Maronite, Orthodox, and Anglican) 10% (2012 est.)

El Salvador **(../geos/es.html)**	Roman Catholic 57.1%, Protestant 21.2%, Jehovah's Witnesses 1.9%, Mormon 0.7%, other religions 2.3%, none 16.8% (2003 est.)
Equatorial Guinea **(../geos/ek.html)**	nominally Christian and predominantly Roman Catholic, pagan practices
Eritrea **(../geos/er.html)**	Muslim, Coptic Christian, Roman Catholic, Protestant
Estonia **(../geos/en.html)**	Lutheran 9.9%, Orthodox 16.2%, other Christian (including Methodist, Seventh- Day Adventist, Roman Catholic, Pentecostal) 2.2%, other 0.9%, none 54.1%, unspecified 16.7% (2011 est.)
Ethiopia **(../geos/et.html)**	Ethiopian Orthodox 43.5%, Muslim 33.9%, Protestant 18.5%, traditional 2.7%, Catholic 0.7%, other 0.6% (2007 est.)
European Union **(../geos/ee.html)**	Roman Catholic 48%, Protestant 12%, Orthodox 8%, other Christian 4%, Muslim 2%, other 1% (includes Jewish, Sikh, Buddhist, Hindu), atheist 7%, nonbeliever/agnostic 16%, unspecified 2% (2012 est.)
Falkland Islands (Islas Malvinas) **(../geos/fk.html)**	Christian 66%, none 32%, other 2% (2012 est.)
Faroe Islands **(../geos/fo.html)**	Christian 89.3% (predominantly Evangelical Lutheran), other 0.7%, more than one religion 0.2%, none

	3.8%, unspecified 6% (2011 est.)
Fiji (../geos/fj.html)	Protestant 45% (Methodist 34.6%, Assembly of God 5.7%, Seventh Day Adventist 3.9%, and Anglican 0.8%), Hindu 27.9%, other Christian 10.4%, Roman Catholic 9.1%, Muslim 6.3%, Sikh 0.3%, other 0.3%, none 0.8% (2007 est.)
Finland (../geos/fi.html)	Lutheran 73.8%, Orthodox 1.1%, other or none 25.1% (2014 est.)
France (../geos/fr.html)	Christian (overwhelmingly Roman Catholic) 63-66%, Muslim 7-9%, Buddhist 0.5-0.75%, Jewish 0.5-0.75%, other 0.5-1.0%, none 23-28% **note:** France maintains a tradition of secularism and has not officially collected data on religious affiliation since the 1872 national census, which complicates assessments of France's religious composition; an 1872 law prohibiting state authorities from collecting data on individuals' ethnicity or religious beliefs was reaffirmed by a 1978 law emphasizing the prohibition of the collection or exploitation of personal data revealing an individual's race, ethnicity, or political, philosophical, or religious opinions; a 1905 law codified France's separation of church and state (2015 est.)

French Polynesia (../geos/fp.html)	Protestant 54%, Roman Catholic 30%, other 10%, no religion 6%
Gabon (../geos/gb.html)	Catholic 41.9%, Protestant 13.7%, other Christian 32.4%, Muslim 6.4%, animist 0.3%, other 0.3%, none/no answer 5% (2012 est.)
Gambia, The (../geos/ga.html)	Muslim 95.7%, Christian 4.2%, none 0.1%, no answer 0.1% (2013 est.)
Gaza Strip (../geos/gz.html)	Muslim 98.0-99.0% (predominantly Sunni), Christian <1.0%, other, unaffiliated, unspecified <1.0% **note:** dismantlement of Israeli settlements was completed in September 2005; Gaza has had no Jewish population since then (2012 est.)
Georgia (../geos/gg.html)	Orthodox (official) 83.4%, Muslim 10.7%, Armenian Apostolic 2.9%, other 1.2% (includes Catholic, Jehovah's Witness, Yazidi, Protestant, Jewish), none 0.5%, unspecified/no answer 1.2% (2014 est.)
Germany (../geos/gm.html)	Protestant 34%, Roman Catholic 34%, Muslim 3.7%, unaffiliated or other 28.3%
Ghana (../geos/gh.html)	Christian 71.2% (Pentecostal/ Charismatic 28.3%, Protestant 18.4%, Catholic 13.1%, other 11.4%), Muslim 17.6%, traditional 5.2%, other 0.8%, none 5.2% (2010 est.)

Gibraltar (../geos/gi.html)	Roman Catholic 78.1%, Church of England 7%, Muslim 4%, other Christian 3.2%, Jewish 2.1%, Hindu 1.8%, other 0.9%, none 2.9% (2001 est.)
Greece (../geos/gr.html)	Greek Orthodox (official) 98%, Muslim 1.3%, other 0.7%
Greenland (../geos/gl.html)	Evangelical Lutheran, traditional Inuit spiritual beliefs
Grenada (../geos/gj.html)	Roman Catholic 44.6%, Protestant 43.5% (includes Anglican 11.5%, Pentecostal 11.3%, Seventh Day Adventist 10.5%, Baptist 2.9%, Church of God 2.6%, Methodist 1.8%, Evangelical 1.6%, other 1.3%), Jehovah's Witness 1.1%, Rastafarian 1.1%, other 6.2%, none 3.6%
Guam (../geos/gq.html)	Roman Catholic 85%, other 15% (1999 est.)
Guatemala (../geos/gt.html)	Roman Catholic, Protestant, indigenous Mayan beliefs
Guernsey (../geos/gk.html)	Protestant (Anglican, Presbyterian, Baptist, Congregational, Methodist), Roman Catholic
Guinea-Bissau (../geos/pu.html)	Muslim 45.1%, Christian 22.1%, animist 14.9%, none 2%, unspecified 15.9% (2008 est.)
Guinea (../geos/gv.html)	Muslim 86.7%, Christian 8.9%, animist/other/none 4.4% (2012 est.)
Guyana	Protestant 30.5% (Pentecostal 16.9%,

(../geos/gy.html)	Anglican 6.9%, Seventh Day Adventist 5%, Methodist 1.7%), Hindu 28.4%, Roman Catholic 8.1%, Muslim 7.2%, Jehovah's Witness 1.1%, other Christian 17.7%, other 1.9%, none 4.3%, unspecified 0.9% (2002 est.)
Haiti **(../geos/ha.html)**	Roman Catholic (official) 54.7%, Protestant 28.5% (Baptist 15.4%, Pentecostal 7.9%, Adventist 3%, Methodist 1.5%, other 0.7%), voodoo (official) 2.1%, other 4.6%, none 10.2% **note:** many Haitians practice elements of voodoo in addition to another religion, most often Roman Catholicism; voodoo was recognized as an official religion in 2003
Holy See (Vatican City) **(../geos/vt.html)**	Roman Catholic
Honduras **(../geos/ho.html)**	Roman Catholic 97%, Protestant 3%
Hong Kong **(../geos/hk.html)**	eclectic mixture of local religions 90%, Christian 10%
Hungary **(../geos/hu.html)**	Roman Catholic 37.2%, Calvinist 11.6%, Lutheran 2.2%, Greek Catholic 1.8%, other 1.9%, none 18.2%, unspecified 27.2% (2011 est.)
Iceland **(../geos/ic.html)**	Evangelical Lutheran Church of Iceland (official) 73.8%, Roman

	Catholic 3.6%, Reykjavik Free Church 2.9%, Hafnarfjorour Free Church 2%, The Independent Congregation 1%, other religions 3.9% (includes Pentecostal and Asatru Association), none 5.6%, other or unspecified 7.2% (2015 est.)
India **(../geos/in.html)**	Hindu 79.8%, Muslim 14.2%, Christian 2.3%, Sikh 1.7%, other and unspecified 2% (2011 est.)
Indonesia **(../geos/id.html)**	Muslim 87.2%, Christian 7%, Roman Catholic 2.9%, Hindu 1.7%, other 0.9% (includes Buddhist and Confucian), unspecified 0.4% (2010 est.)
Iran **(../geos/ir.html)**	Muslim (official) 99.4% (Shia 90-95%, Sunni 5-10%), other (includes Zoroastrian, Jewish, and Christian) 0.3%, unspecified 0.4% (2011 est.)
Iraq **(../geos/iz.html)**	Muslim (official) 99% (Shia 60%-65%, Sunni 32%-37%), Christian 0.8%, Hindu <0.1, Buddhist <0.1, Jewish <0.1, folk religion <0.1, unafilliated 0.1, other <0.1 note: while there has been voluntary relocation of many Christian families to northern Iraq, recent reporting indicates that the overall Christian population may have dropped by as much as 50 percent since the fall of the SADDAM

	Husayn regime in 2003, with many fleeing to Syria, Jordan, and Lebanon (2010 est.)
Ireland **(../geos/ei.html)**	Roman Catholic 84.7%, Church of Ireland 2.7%, other Christian 2.7%, Muslim 1.1%, other 1.7%, unspecified 1.5%, none 5.7% (2011 est.)
Isle of Man **(../geos/im.html)**	Protestant (Anglican, Methodist, Baptist, Presbyterian, Society of Friends), Roman Catholic
Israel **(../geos/is.html)**	Jewish 74.8%, Muslim 17.6%, Christian 2%, Druze 1.6%, other 4% (2015 est.)
Italy **(../geos/it.html)**	Christian 80% (overwhelmingly Roman Catholic with very small groups of Jehovah's Witnesses and Protestants), Muslim (about 800,000 to 1 million), atheist and agnostic 20%
Jamaica **(../geos/jm.html)**	Protestant 64.8% (includes Seventh Day Adventist 12.0%, Pentecostal 11.0%, Other Church of God 9.2%, New Testament Church of God 7.2%, Baptist 6.7%, Church of God in Jamaica 4.8%, Church of God of Prophecy 4.5%, Anglican 2.8%, United Church 2.1%, Methodist 1.6%, Revived 1.4%, Brethren 0.9%, and Moravian 0.7%), Roman Catholic 2.2%, Jehovah's Witness 1.9%, Rastafarian 1.1%, other 6.5%, none

	21.3%, unspecified 2.3% (2011 est.)
Japan **(../geos/ja.html)**	Shintoism 79.2%, Buddhism 66.8%, Christianity 1.5%, other 7.1% **note:** total adherents exceeds 100% because many people practice both Shintoism and Buddhism (2012 est.)
Jersey **(../geos/je.html)**	Protestant (Anglican, Baptist, Congregational New Church, Methodist, Presbyterian), Roman Catholic
Jordan **(../geos/jo.html)**	Muslim 97.2% (official; predominantly Sunni), Christian 2.2% (majority Greek Orthodox, but some Greek and Roman Catholics, Syrian Orthodox, Coptic Orthodox, Armenian Orthodox, and Protestant denominations), Buddhist 0.4%, Hindu 0.1%, Jewish <0.1, folk religionist <0.1, unaffiliated <0.1, other <0.1 (2010 est.)
Kazakhstan **(../geos/kz.html)**	Muslim 70.2%, Christian 26.2% (mainly Russian Orthodox), other 0.2%, atheist 2.8%, unspecified 0.5% (2009 est.)
Kenya **(../geos/ke.html)**	Christian 83% (Protestant 47.7%, Catholic 23.4%, other Christian 11.9%), Muslim 11.2%, Traditionalists 1.7%, other 1.6%, none 2.4%, unspecified 0.2% (2009 est.)
Kiribati **(../geos/kr.html)**	Roman Catholic 55.8%, Kempsville Presbyterian Church 33.5%, Mormon 4.7%, Baha'i 2.3%, Seventh Day

	Adventist 2%, other 1.5%, none 0.2%, unspecified 0.05% (2010 est.)
Korea, North (../geos/kn.html)	traditionally Buddhist and Confucianist, some Christian and syncretic Chondogyo (Religion of the Heavenly Way) **note:** autonomous religious activities now almost nonexistent; governmentsponsored religious groups exist to provide illusion of religious freedom
Korea, South (../geos/ks.html)	Christian 31.6% (Protestant 24.0%, Catholic 7.6%), Buddhist 24.2%, other or unknown 0.9%, none 43.3% (2010 est.)
Kosovo (../geos/kv.html)	Muslim 95.6%, Roman Catholic 2.2%, Orthodox 1.5%, other 0.07%, none 0.07%, unspecified 0.6% (2011 est.)
Kuwait (../geos/ku.html)	Muslim (official) 76.7%, Christian 17.3%, other and unspecified 5.9% **note:** represents the total population; about 69% of the population consists of immigrants (2013 est.)
Kyrgyzstan (../geos/kg.html)	Muslim 75%, Russian Orthodox 20%, other 5%
Laos (../geos/la.html)	Buddhist 66.8%, Christian 1.5%, other 31%, unspecified 0.7% (2005 est.)
Latvia (../geos/lg.html)	Lutheran 19.6%, Orthodox 15.3%, other Christian 1%, other 0.4%,

	unspecified 63.7% (2006)
Lebanon (../geos/le.html)	Muslim 54% (27% Sunni, 27% Shia), Christian 40.5% (includes 21% Maronite Catholic, 8% Greek Orthodox, 5% Greek Catholic, 6.5% other Christian), Druze 5.6%, very small numbers of Jews, Baha'is, Buddhists, Hindus, and Mormons **note:** 18 religious sects recognized (2012 est.)
Lesotho (../geos/lt.html)	Christian 80%, indigenous beliefs 20%
Liberia (../geos/li.html)	Christian 85.6%, Muslim 12.2%, Traditional 0.6%, other 0.2%, none 1.4% (2008 Census)
Libya (../geos/ly.html)	Muslim (official; virtually all Sunni) 96.6%, Christian 2.7%, Buddhist 0.3%, Hindu <0.1, Jewish <0.1, folk religion <0.1, unafilliated 0.2%, other <0.1 **note:** non-Sunni Muslims include native Ibadhi Muslims (<1% of the population) and foreign Muslims (2010 est.)
Liechtenstein (../geos/ls.html)	Roman Catholic (official) 75.9%, Protestant Reformed 6.5%, Muslim 5.4%, Lutheran 1.3%, other 2.9%, none 5.4%, unspecified 2.6% (2010 est.)
Lithuania	Roman Catholic 77.2%, Russian

(../geos/lh.html)	Orthodox 4.1%, Old Believer 0.8%, Evangelical Lutheran 0.6%, Evangelical Reformist 0.2%, other (including Sunni Muslim, Jewish, Greek Catholic, and Karaite) 0.8%, none 6.1%, unspecified 10.1% (2011 est.)
Luxembourg **(../geos/lu.html)**	Roman Catholic 87%, other (includes Protestant, Jewish, and Muslim) 13% (2000)
Macau **(../geos/mc.html)**	Buddhist 50%, Roman Catholic 15%, none or other 35% (1997 est.)
Macedonia **(../geos/mk.html)**	Macedonian Orthodox 64.8%, Muslim 33.3%, other Christian 0.4%, other and unspecified 1.5% (2002 est.)
Madagascar **(../geos/ma.html)**	Christian, indigenous believer, Muslim **note:** population largely practices Christianity or an indigenous religion; small share of population is Muslim
Malawi **(../geos/mi.html)**	Christian 82.6%, Muslim 13%, other 1.9%, none 2.5% (2008 est.)
Malaysia **(../geos/my.html)**	Muslim (official) 61.3%, Buddhist 19.8%, Christian 9.2%, Hindu 6.3%, Confucianism, Taoism, other traditional Chinese religions 1.3%, other 0.4%, none 0.8%, unspecified 1% (2010 est.)

Maldives (../geos/mv.html)	Sunni Muslim (official)
Mali (../geos/ml.html)	Muslim 94.8%, Christian 2.4%, Animist 2%, none 0.5%, unspecified 0.3% (2009 est.)
Malta (../geos/mt.html)	Roman Catholic (official) more than 90% (2011 est.)
Marshall Islands (../geos/rm.html)	Protestant 54.8%, Assembly of God 25.8%, Roman Catholic 8.4%, Bukot nan Jesus 2.8%, Mormon 2.1%, other Christian 3.6%, other 1%, none 1.5% (1999 census)
Mauritania (../geos/mr.html)	Muslim (official) 100%
Mauritius (../geos/mp.html)	Hindu 48.5%, Roman Catholic 26.3%, Muslim 17.3%, other Christian 6.4%, other 0.6%, none 0.7%, unspecified 0.1% (2011 est.)
Mexico (../geos/mx.html)	Roman Catholic 82.7%, Pentecostal 1.6%, Jehovah's Witness 1.4%, other Evangelical Churches 5%, other 1.9%, none 4.7%, unspecified 2.7% (2010 est.)
Micronesia, Federated States of (../geos/fm.html)	Roman Catholic 54.7%, Protestant 41.1% (includes Congregational 38.5%, Baptist 1.1%, Seventh Day Adventist 0.8%, Assembly of God 0.7%), Mormon 1.5%, other 1.9%, none 0.7%, unspecified 0.1% (2010 est.)
Moldova	Orthodox 93.3%, Baptist 1%, other

(../geos/md.html)	Christian 1.2%, other 0.9%, atheist 0.4%, none 1%, unspecified 2.2% (2004 est.)
Monaco (../geos/mn.html)	Roman Catholic 90% (official), other 10%
Mongolia (../geos/mg.html)	Buddhist 53%, Muslim 3%, Christian 2.2%, Shamanist 2.9%, other 0.4%, none 38.6% (2010 est.)
Montenegro (../geos/mj.html)	Orthodox 72.1%, Muslim 19.1%, Catholic 3.4%, atheist 1.2%, other 1.5%, unspecified 2.6% (2011 est.)
Montserrat (../geos/mh.html)	Protestant 67.1% (includes Anglican 21.8%, Methodist 17%, Pentecostal 14.1%, Seventh Day Adventist 10.5%, and Church of God 3.7%), Roman Catholic 11.6%, Rastafarian 1.4%, other 6.5%, none 2.6%, unspecified 10.8% (2001 est.)
Morocco (../geos/mo.html)	Muslim 99% (official; virtually all Sunni, <0.1% Shia), other 1% (includes Christian, Jewish, and Baha'i); note—Jewish about 6,000 (2010 est.)
Mozambique (../geos/mz.html)	Roman Catholic 28.4%, Muslim 17.9%, Zionist Christian 15.5%, Protestant 12.2% (includes Pentecostal 10.9% and Anglican 1.3%), other 6.7%, none 18.7%, unspecified 0.7% (2007 est.)
Namibia (../geos/wa.html)	Christian 80% to 90% (at least 50% Lutheran), indigenous beliefs 10% to

	20%
Nauru (../geos/nr.html)	Protestant 60.4% (includes Nauru Congregational 35.7%, Assembly of God 13%, Nauru Independent Church 9.5%, Baptist 1.5%, and Seventh Day Adventist 0.7%), Roman Catholic 33%, other 3.7%, none 1.8%, unspecified 1.1% (2011 est.)
Nepal (../geos/np.html)	Hindu 81.3%, Buddhist 9%, Muslim 4.4%, Kirant 3.1%, Christian 1.4%, other 0.5%, unspecifed 0.2% (2011 est.)
Netherlands (../geos/nl.html)	Roman Catholic 28%, Protestant 19% (includes Dutch Reformed 9%, Protestant Church of The Netherlands, 7%, Calvinist 3%), other 11% (includes about 5% Muslim and fewer numbers of Hindu, Buddhist, Jehovah's Witness, and Orthodox), none 42% (2009 est.)
New Caledonia (../geos/nc.html)	Roman Catholic 60%, Protestant 30%, other 10%
New Zealand (../geos/nz.html)	Christian 44.3% (Catholic 11.6%, Anglican 10.8%, Presbyterian and Congregational 7.8%, Methodist, 2.4%, Pentecostal 1.8%, other 9.9%), Hindu 2.1%, Buddhist 1.4%, Maori Christian 1.3%, Islam 1.1%, other religion 1.4% (includes Judaism, Spiritualism and New Age religions, Baha'i, Asian religions other than

	Buddhism), no religion 38.5%, not stated or unidentified 8.2%,objected to answering 4.1% **note:** based on the 2013 census of the usually resident population; percentages add up to more than 100% because people were able to identify more than one religion (2013 est.)
Nicaragua **(../geos/nu.html)**	Roman Catholic 58.5%, Protestant 23.2% (Evangelical 21.6%, Moravian 1.6%), Jehovah's Witnesses 0.9%, other 1.6%, none 15.7% (2005 est.)
Nigeria **(../geos/ni.html)**	Muslim 50%, Christian 40%, indigenous beliefs 10%
Niger **(../geos/ng.html)**	Muslim 80%, other (includes indigenous beliefs and Christian) 20%
Niue **(../geos/ne.html)**	Ekalesia Niue (Congregational Christian Church of Niue—a Protestant church founded by missionaries from the London Missionary Society) 67%, other Protestant 3% (includes Seventh Day Adventist 1%, Presbyterian 1%, and Methodist 1%), Mormon 10%, Roman Catholic 10%, Jehovah's Witnesses 2%, other 6%, none 2% (2011 est.)
Norfolk Island **(../geos/nf.html)**	Protestant 49.6% (Anglican 31.8%, Uniting Church in Australia 10.6%, Seventh Day Adventist 3.2%), Roman Catholic 11.7%, other 8.6%, none 23.5%, unspecified 6.6% (2011

	est.)
Northern Mariana Islands (../geos/cq.html)	Christian (Roman Catholic majority, although traditional beliefs and taboos may still be found)
Norway (../geos/no.html)	Church of Norway (Evangelical Lutheran—official) 82.1%, other Christian 3.9%, Muslim 2.3%, Roman Catholic 1.8%, other 2.4%, unspecified 7.5% (2011 est.)
Oman (../geos/mu.html)	Muslim (official; majority are Ibadhi, lesser numbers of Sunni and Shia) 85.9%, Christian 6.5%, Hindu 5.5%, Buddhist 0.8%, Jewish <0.1%, other 1%, unaffiliated 0.2% (2010 est.) **note:** approximately 75% of Omani citizens, who compose almost 70% of the country's total population, are Ibadhi Muslims; the Omani government does not keep statistics on religious affiliation (2013)
Pakistan (../geos/pk.html)	Muslim (official) 96.4% (Sunni 85-90%, Shia 10-15%), other (includes Christian and Hindu) 3.6% (2010 est.)
Palau (../geos/ps.html)	Roman Catholic 49.4%, Protestant 30.9% (includes Protestant (general) 23.1%, Seventh Day Adventist 5.3%, and other Protestant 2.5%), Modekngei 8.7% (indigenous to Palau), Jehovah's Witnesses 1.1%, other

	8.8%, none or unspecified 1.1% (2005 est.)
Panama (../geos/pm.html)	Roman Catholic 85%, Protestant 15%
Papua New Guinea (../geos/pp.html)	Roman Catholic 27%, Protestant 69.4% (Evangelical Lutheran 19.5%, United Church 11.5%, Seventh-Day Adventist 10%, Pentecostal 8.6%, Evangelical Alliance 5.2%, Anglican 3.2%, Baptist 2.5%, other Protestant 8.9%), Baha'i 0.3%, indigenous beliefs and other 3.3% (2000 census)
Paraguay (../geos/pa.html)	Roman Catholic 89.6%, Protestant 6.2%, other Christian 1.1%, other or unspecified 1.9%, none 1.1% (2002 census)
Peru (../geos/pe.html)	Roman Catholic 81.3%, Evangelical 12.5%, other 3.3%, none 2.9% (2007 est.)
Philippines (../geos/rp.html)	Catholic 82.9% (Roman Catholic 80.9%, Aglipayan 2%), Muslim 5%, Evangelical 2.8%, Iglesia ni Kristo 2.3%, other Christian 4.5%, other 1.8%, unspecified 0.6%, none 0.1% (2000 census)
Pitcairn Islands (../geos/pc.html)	Seventh-Day Adventist 100%
Poland (../geos/pl.html)	Catholic 87.2% (includes Roman Catholic 86.9% and Greek Catholic, Armenian Catholic, and Byzantine-Slavic Catholic .3%), Orthodox 1.3%

	(almost all are Polish Autocephalous Orthodox), Protestant 0.4% (mainly Augsburg Evangelical and Pentacostal), other 0.4% (includes Jehovah's Witness, Buddhist, Hare Krishna, Gaudiya Vaishnavism, Muslim, Jewish, Mormon), unspecified 10.8% (2012 est.)
Portugal **(../geos/po.html)**	Roman Catholic 81%, other Christian 3.3%, other (includes Jewish, Muslim, other) 0.6%, none 6.8%, unspecified 8.3% **note:** represents population 15 years of age and older (2011 est.)
Puerto Rico **(../geos/rq.html)**	Roman Catholic 85%, Protestant and other 15%
Qatar **(../geos/qa.html)**	Muslim 77.5%, Christian 8.5%, other (includes mainly Hindu and other Indian religions) 14% (2004 est.)
Romania **(../geos/ro.html)**	Eastern Orthodox (including all subdenominations) 81.9%, Protestant (various denominations including Reformed and Pentecostal) 6.4%, Roman Catholic 4.3%, other (includes Muslim) 0.9%, none or atheist 0.2%, unspecified 6.3% (2011 est.)
Russia **(../geos/rs.html)**	Russian Orthodox 15-20%, Muslim 10-15%, other Christian 2% (2006 est.) **note:** estimates are of practicing

	worshipers; Russia has large populations of non-practicing believers and non-believers, a legacy of over seven decades of Soviet rule; Russia officially recognizes Orthodox Christianity, Islam, Judaism, and Buddhism as traditional religions
Rwanda (../geos/rw.html)	Roman Catholic 49.5%, Protestant 39.4% (includes Adventist 12.2% and other Protestant 27.2%), other Christian 4.5%, Muslim 1.8%, animist 0.1%, other 0.6%, none 3.6% (2001), unspecified 0.5% (2002 est.)
Saint Barthelemy (../geos/tb.html)	Roman Catholic, Protestant, Jehovah's Witnesses
Saint Helena, Ascension, and Tristan da Cunha (../geos/sh.html)	Protestant 75.9% (includes Anglican 68.9, Baptist 2.1%, Seventh Day Adventist 1.8%, Salvation Army 1.7%, New Apostolic 1.4%), Jehovah's Witness 4.1%, Roman Catholic 1.2%, other 2.5% (includes Baha'i), unspecified 0.8%, none 6.1%, no response 9.4% **note:** data represent Saint Helena only (2016 est.)
Saint Kitts and Nevis (../geos/sc.html)	Anglican, other Protestant, Roman Catholic
Saint Lucia (../geos/st.html)	Roman Catholic 61.5%, Protestant 25.5% (includes Seventh Day Adventist 10.4%, Pentecostal 8.9%,

	Baptist 2.2%, Anglican 1.6%, Church of God 1.5%, other Protestant 0.9%), other Christian 3.4% (includes Evangelical 2.3% and Jehovah's Witness 1.1%), Rastafarian 1.9%, other 0.4%, none 5.9%, unspecified 1.4% (2010 est.)
Saint Martin (../geos/rn.html)	Roman Catholic, Jehovah's Witnesses, Protestant, Hindu
Saint Pierre and Miquelon (../geos/sb.html)	Roman Catholic 99%, other 1%
Saint Vincent and the Grenadines (../geos/vc.html)	Protestant 75% (Anglican 47%, Methodist 28%), Roman Catholic 13%, other (includes Hindu, Seventh-Day Adventist, other Protestant) 12%
Samoa (../geos/ws.html)	Protestant 57.4% (Congregationalist 31.8%, Methodist 13.7%, Assembly of God 8%, Seventh-Day Adventist 3.9%), Roman Catholic 19.4%, Mormon 15.2%, Worship Centre 1.7%, other Christian 5.5%, other 0.7%, none 0.1%, unspecified 0.1 % (2011 est.)
San Marino (../geos/sm.html)	Roman Catholic
Sao Tome and Principe (../geos/tp.html)	Catholic 55.7%, Adventist 4.1%, Assembly of God 3.4%, New Apostolic 2.9%, Mana 2.3%, Universal Kingdom of God 2%, Jehovah's

	Witness 1.2%, other 6.2%, none 21.2%, unspecified 1% (2012 est.)
Saudi Arabia (../geos/sa.html)	Muslim (official; citizens are 85-90% Sunni and 10-15% Shia), other (includes Eastern Orthodox, Protestant, Roman Catholic, Jewish, Hindu, Buddhist, and Sikh) (2012 est.) **note:** despite having a large expatriate community of various faiths (more than 30% of the population), most forms of public religious expression inconsistent with the government-sanctioned interpretation of Sunni Islam are restricted; non-Muslims are not allowed to have Saudi citizenship and non-Muslim places of worship are not permitted (2013)
Senegal (../geos/sg.html)	Muslim 95.4% (most adhere to one of the four main Sufi brotherhoods), Christian 4.2% (mostly Roman Catholic), animist 0.4% (2010-11 est.)
Serbia (../geos/ri.html)	Serbian Orthodox 84.6%, Catholic 5%, Muslim 3.1%, Protestant 1%, atheist 1.1%, other 0.8%, undeclared or unknown 4.5% (2011 est.)
Seychelles (../geos/se.html)	Roman Catholic 76.2%, Protestant 10.6% (Anglican 6.1%, Pentecoastal Assembly 1.5%, Seventh-Day Adventist 1.2%, other Protestant

	1.6), other Christian 2.4%, Hindu 2.4%, Muslim 1.6%, other non-Christian 1.1%, unspecified 4.8%, none 0.9% (2010 est.)
Sierra Leone (../geos/sl.html)	Muslim 60%, Christian 10%, indigenous beliefs 30%
Singapore (../geos/sn.html)	Buddhist 33.9%, Muslim 14.3%, Taoist 11.3%, Catholic 7.1%, Hindu 5.2%, other Christian 11%, other 0.7%, none 16.4% (2010 est.)
Sint Maarten (../geos/sk.html)	Protestant 41.9% (Pentecostal 14.7%, Methodist 10.0%, Seventh Day Adventist 6.6%, Baptist 4.7%, Anglican 3.1%, other Protestant 2.8%), Roman Catholic 33.1%, Hindu 5.2%, Christian 4.1%, Jehovah's Witness 1.7%, Evangelical 1.4%, Muslim/Jewish 1.1%, other 1.3% (includes Buddhist, Sikh, Rastafarian), none 7.9%, no response 2.4% (2011 est.)
Slovakia (../geos/lo.html)	Roman Catholic 62%, Protestant 8.2%, Greek Catholic 3.8%, other or unspecified 12.5%, none 13.4% (2011 est.)
Slovenia (../geos/si.html)	Catholic 57.8%, Muslim 2.4%, Orthodox 2.3%, other Christian 0.9%, unaffiliated 3.5%, other or unspecified 23%, none 10.1% (2002 census)
Solomon Islands (../geos/bp.html)	Protestant 73.4% (Church of Melanesia 31.9%, South Sea Evangelical

	17.1%, Seventh Day Adventist 11.7%, United Church 10.1%, Christian Fellowship Church 2.5%), Roman Catholic 19.6%, other Christian 2.9%, other 4%, none 0.03%, unspecified 0.1% (2009 est.)
Somalia **(../geos/so.html)**	Sunni Muslim (Islam) (official, according to the Transitional Federal Charter)
South Africa **(../geos/sf.html)**	Protestant 36.6% (Zionist Christian 11.1%, Pentecostal/ Charismatic 8.2%, Methodist 6.8%, Dutch Reformed 6.7%, Anglican 3.8%), Catholic 7.1%, Muslim 1.5%, other Christian 36%, other 2.3%, unspecified 1.4%, none 15.1% (2001 census)
South Sudan **(../geos/od.html)**	animist, Christian
Spain **(../geos/sp.html)**	Roman Catholic 94%, other 6%
Sri Lanka **(../geos/ce.html)**	Buddhist (official) 70.2%, Hindu 12.6%, Muslim 9.7%, Roman Catholic 6.1%, other Christian 1.3%, other 0.05% (2012 est.)
Sudan **(../geos/su.html)**	Sunni Muslim, small Christian minority
Suriname **(../geos/ns.html)**	Hindu 27.4%, Protestant 25.2% (predominantly Moravian), Roman Catholic 22.8%, Muslim 19.6%, indigenous beliefs 5%
Swaziland	Zionist 40% (a blend of Christianity

(../geos/wz.html)	and indigenous ancestral worship), Roman Catholic 20%, Muslim 10%, other 30% (includes Anglican, Baha'i, Methodist, Mormon, Jewish)
Sweden (../geos/sw.html)	Lutheran 87%, other (includes Roman Catholic, Orthodox, Baptist, Muslim, Jewish, and Buddhist) 13%
Switzerland (../geos/sz.html)	Roman Catholic 38.2%, Protestant 26.9%, other Christian 5.6%, Muslim 5%, other 1.6%, none 21.4%, unspecified 1.3% (2013 est.)
Syria (../geos/sy.html)	Muslim 87% (official; includes Sunni 74% and Alawi, Ismaili, and Shia 13%), Christian 10% (includes Orthodox, Uniate, and Nestorian), Druze 3%, Jewish (few remaining in Damascus and Aleppo)
Taiwan (../geos/tw.html)	mixture of Buddhist and Taoist 93%, Christian 4.5%, other 2.5%
Tajikistan (../geos/ti.html)	Sunni Muslim 85%, Shia Muslim 5%, other 10% (2003 est.)
Tanzania (../geos/tz.html)	Christian 61.4%, Muslim 35.2%, folk religion 1.8%, other 0.2%, unaffiliated 1.4% **note:** Zanzibar is almost entirely Muslim (2010 est.)
Thailand (../geos/th.html)	Buddhist (official) 93.6%, Muslim 4.9%, Christian 1.2%, other 0.2%, none 0.1% (2010 est.)
Timor-Leste	Roman Catholic 96.9%, Protestant/

(../geos/tt.html)	Evangelical 2.2%, Muslim 0.3%, other 0.6% (2005)
Togo **(../geos/to.html)**	Christian 29%, Muslim 20%, indigenous beliefs 51%
Tokelau **(../geos/tl.html)**	Congregational Christian Church 58.2%, Roman Catholic 36.6%, Presbyterian 1.8%, other Christian 2.8%, Spiritualism and New Age 0.1%, unspecified 0.5% (2011 est.)
Tonga **(../geos/tn.html)**	Protestant 64.9% (includes Free Wesleyan Church 37.3%, Free Church of Tonga 11.4%, Church of Tonga 7.2%, Tokaikolo Christian Church 2.6%, Assembly of God 2.3%, Seventh Day Adventist 2.2%, Constitutional Church of Tonga 0.9%, Anglican 0.8% and Full Gospel Church 0.2%), Mormon 16.8%, Roman Catholic 15.6%, other 1.1%, none 0.03%, unspecified 1.7% (2006 est.)
Trinidad and Tobago **(../geos/td.html)**	Protestant 32.1% (Pentecostal/ Evangelical/Full Gospel 12%, Baptist 6.9%, Anglican 5.7%, Seventh-Day Adventist 4.1%, Presbyterian/ Congretational 2.5%, other Protestant 0.9%), Roman Catholic 21.6%, Hindu 18.2%, Muslim 5%, Jehovah's Witness 1.5%, other 8.4%, none 2.2%, unspecified 11.1% (2011 est.)
Tunisia	Muslim (official; Sunni) 99.1%, other

(../geos/ts.html)	(includes Christian, Jewish, Shia Muslim, and Baha'i) 1%
Turkey (../geos/tu.html)	Muslim 99.8% (mostly Sunni), other 0.2% (mostly Christians and Jews)
Turkmenistan (../geos/tx.html)	Muslim 89%, Eastern Orthodox 9%, unknown 2%
Turks and Caicos Islands (../geos/tk.html)	Protestant 72.8% (Baptist 35.8%, Church of God 11.7%, Anglican 10%, Methodist 9.3%, Seventh-Day Adventist 6%), Roman Catholic 11.4%, Jehovah's Witnesses 1.8%, other 14%
Tuvalu (../geos/tv.html)	Protestant 98.4% (Church of Tuvalu (Congregationalist) 97%, Seventh-Day Adventist 1.4%), Baha'i 1%, other 0.6%
Uganda (../geos/ug.html)	Protestant 45.1% (Anglican 32.0%, Pentecostal/Born Again/Evangelical 11.1%, Seventh Day Adventist 1.7%, Baptist .3%), Roman Catholic 39.3%, Muslim 13.7%, other 1.6%, none 0.2% (2014 est.)
Ukraine (../geos/up.html)	Orthodox (includes Ukrainian Autocephalous Orthodox (UAOC), Ukrainian Orthodox—Kyiv Patriarchate (UOC-KP), Ukrainian Orthodox—Moscow Patriarchate (UOC-MP), Ukrainian Greek Catholic, Roman Catholic, Protestant, Muslim, Jewish **note:** Ukraine's population is overwhelmingly Christian; the vast

	majority—up to two—identify themselves as Orthodox, but many do not specify a particular branch; the UOC-KP and the UOC-MP each represent less than a quarter of the country's population, the Ukrainian Greek Catholic Church accounts for 8-10%, and the UAOC accounts for 1-2%; Muslim and Jewish adherents each compose less than 1% of the total population (2013 est.)
United Arab Emirates (../geos/ae.html)	Muslim (official) 76%, Christian 9%, other (primarily Hindu and Buddhist, less than 5% of the population consists of Parsi, Baha'i, Druze, Sikh, Ahmadi, Ismaili, Dawoodi Bohra Muslim, and Jewish) 15% note: represents the total population; about 85% of the population consists of noncitizens (2005 est.)
United Kingdom (../geos/uk.html)	Christian (includes Anglican, Roman Catholic, Presbyterian, Methodist) 59.5%, Muslim 4.4%, Hindu 1.3%, other 2%, unspecified 7.2%, none 25.7% (2011 est.)
United States (../geos/us.html)	Protestant 46.5%, Roman Catholic 20.8%, Mormon 1.6%, Jehovah's Witness 0.8%, other Christian 0.9%, Jewish 1.9%, Muslim 0.9%, Buddhist 0.7%, Hindu 0.7%, other 1.8%, unaffiliated 22.8%, don't know/refused

	0.6% (2014 est.)
Uruguay **(../geos/uy.html)**	Roman Catholic 47.1%, non-Catholic Christians 11.1%, nondenominational 23.2%, Jewish 0.3%, atheist or agnostic 17.2%, other 1.1% (2006)
Uzbekistan **(../geos/uz.html)**	Muslim 88% (mostly Sunni), Eastern Orthodox 9%, other 3%
Vanuatu **(../geos/nh.html)**	Protestant 70% (includes Presbyterian 27.9%, Anglican 15.1%, Seventh Day Adventist 12.5%, Assemblies of God 4.7%, Church of Christ 4.5%, Neil Thomas Ministry 3.1%, and Apostolic 2.2%), Roman Catholic 12.4%, customary beliefs 3.7% (including Jon Frum cargo cult), other 12.6%, none 1.1%, unspecified 0.2% (2009 est.)
Venezuela **(../geos/ve.html)**	nominally Roman Catholic 96%, Protestant 2%, other 2%
Vietnam **(../geos/vm.html)**	Buddhist 7.9%, Catholic 6.6%, Hoa Hao 1.7%, Cao Dai 0.9%, Protestant 0.9%, Muslim 0.1%, none 81.8% (2009 est.)
Virgin Islands **(../geos/vq.html)**	Protestant 59% (Baptist 42%, Episcopalian 17%), Roman Catholic 34%, other 7%
Wallis and Futuna **(../geos/wf.html)**	Roman Catholic 99%, other 1%
West Bank **(../geos/we.html)**	Muslim 80-85% (predominantly Sunni), Jewish 12-14%, Christian 1-2.5% (mainly Greek Orthodox),

	other, unaffiliated, unspecified <1% **note:** the proportion of Christians continues to fall mainly as a result of the growth of the Muslim population but also because of migration and the declining birth rate of the Christian population (2012 est.)
Western Sahara (../geos/wi.html)	Muslim
World (../geos/xx.html)	Christian 31.4%, Muslim 23.2%, Hindu 15%, Buddhist 7.1%, folk religions 5.9%, Jewish 0.2%, other 0.8%, unaffiliated 16.4% (2010 est.)
Yemen (../geos/ym.html)	Muslim 99.1% (official; virtually all are citizens, an estimated 65% are Sunni and 35% are Shia), other 0.9% (includes Jewish, Baha'i, Hindu, and Christian; many are refugees or temporary foreign residents) (2010 est.)
Zambia (../geos/za.html)	Protestant 75.3%, Roman Catholic 20.2%, other 2.7% (includes Muslim Buddhist, Hindu, and Baha'i), none 1.8% (2010 est.)
Zimbabwe (../geos/zi.html)	Protestant 75.9% (includes Apostolic 38%, Pentecostal 21.1%, other 16.8%), Roman Catholic 8.4%, other Christian 8.4%, other 1.2% (includes traditional, Muslim), none 6.1% (2011 est.)

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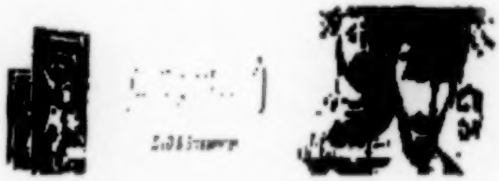
Exhibit S

CBN NEWS

Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees



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Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees

In an exclusive interview with The Brody File, President Donald Trump says persecuted Christians will be given priority when it comes to applying for refugee status in the United States. "We are going to help them," President Trump tells CBN News. "They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair."

The Brody File conducted the interview Friday morning in the Blue Room at The White House. More newsworthy clips are coming soon. The entire interview can be seen this Sunday at 11pm on Freeform (cable TV, formerly ABC Family Channel) during our special CBN News show. This is just the third interview President Trump has done from The White House and it will be the only interview that will air in its' entirety this weekend.

MANDATORY VIDEO AND COURTESY: CBN NEWS/ THE BRODY FILE

DAVID BRODY: *"Persecuted Christians, we've talked about this, the refugees overseas. The refugee program, or the refugee changes you're looking to make. As it relates to persecuted Christians, do you see them as kind of a priority here?"*

PRESIDENT TRUMP: *"Yes."*

DAVID BRODY: *"You do?"*

PRESIDENT TRUMP: *"They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."*

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Steve 12 days ago

Christian persecution is running at about 100 000 deaths per month. I'm so glad that our President is cognizant of this and willing to alleviate some of the pain and suffering of these people

Like Reply Share 0

Israel Friend DI 13 days ago

Our President Donald Trump is doing his Christian duty by banning terrorists Muslims and illegals into the USA that want to promote Sharia laws upon us and terrorize this country. Isis and Hamas chop off the heads of their own people if they are found to be worshipping the GOD OF ISRAEL, our GOD, KING JESUS. This has to be stopped before they completely destroy the entire USA and all Christians and Jews, including ISRAEL. The Muslim religion is a hate religion unlike our Judea, Christianity. We love all people of every race and don't kill to please our GOD. Our GOD died, shed HIS innocent blood as the final Lamb of GOD sacrifice, and was resurrected to save us from our sins.

Exhibit T

The Washington Post

Acts of Faith

Trumps signs order limiting refugee entry, says he will prioritize Christian refugees

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By Sarah Pulliam Bailey January 27

President Trump signed an executive order Friday instituting "extreme vetting" of refugees, aimed at keeping out "radical Islamic terrorists."

"I'm establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," Trump said during his signing of the order. "We don't want them here. We want to make sure we are not admitting into our country the very threats our soldiers are fighting overseas."

According to drafts of the executive action, the order bars people from the Muslim-majority countries of Iraq, Syria, Iran, Sudan, Libya, Somalia or Yemen from entering the United States for 30 days and suspends the U.S. Refugee Admissions Program for 120 days. The program will be reinstated "only for nationals of countries for whom" members are vetted by Trump's administration.

In an interview Friday with the Christian Broadcast Network, Trump said he plans to help persecuted Christians.

"Do you know if you were a Christian in Syria it was impossible, at least very tough, to get into the United States?" Trump said. "If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair."

In a statement, the American Civil Liberties Union declared Trump's action "just a euphemism for discrimination against Muslims."

From both legal and historical perspectives, the plan to ban refugees from specific countries is within the powers granted to the president under current law and historical precedent, according to Charles Haynes, vice president of the Newseum Institute's Religious Freedom Center. However, whether the president can limit the ban to one religious group is another question.

Many Muslims, especially Shiites, are among the religious minorities under attack, Haynes said. This "raises moral and humanitarian concerns about excluding them from entrance to the U.S. while permitting people of other faiths," he said. "Whether this policy rises to the level of a constitutional violation is uncertain and will be debated by constitutional scholars in the coming weeks."

Issues related to the Constitution and religion are usually associated with matters of sex, such as contraceptives and LGBT discrimination, but some observers said they expect Trump's actions on immigration to raise new challenges for religious freedom, according to Chelsea Langston Bombino of the Institutional Religious Freedom Alliance at the Center for Public Justice. Several organizations, she noted, are speaking out against orders that "will hurt the very people that their organizations were established, out of a religious calling, to serve," she said.

Trump's actions have been decried by several religious groups this week. "The expected cutbacks to U.S. refugee programs and funding will compromise our ability to do this work and the infrastructure needed to serve refugees in the years to come," evangelical ministry World Relief said in a statement.

Acts of Faith newsletter **Sign up**

Conversations about faith and values.

And in a strongly worded statement, Rabbi Jack Moline, the Interfaith Alliance president, noted that this decision was announced on International Holocaust Remembrance Day.

"For decades, the United States has prided itself as a safe bastion for refugees around the globe escaping war and persecution," he said. "President Trump is poised to trample upon that great legacy with a de facto Muslim ban."

The Council on American-Islamic Relations will on Monday announce a federal lawsuit on behalf of more than 20 people challenging the constitutionality of the executive order.

"There is no evidence that refugees—the most thoroughly vetted of all people entering our nation—are a threat to national security," said CAIR national litigation director Lena F. Masri. "This is an order that is based on bigotry, not reality."

This post has been updated

Sarah Pulliam Bailey is a religion reporter, covering how faith intersects with politics, culture and ...everything. Follow @spulliam

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An 'America first' philosophy? During May's visit, it's more like 'Trump first.'

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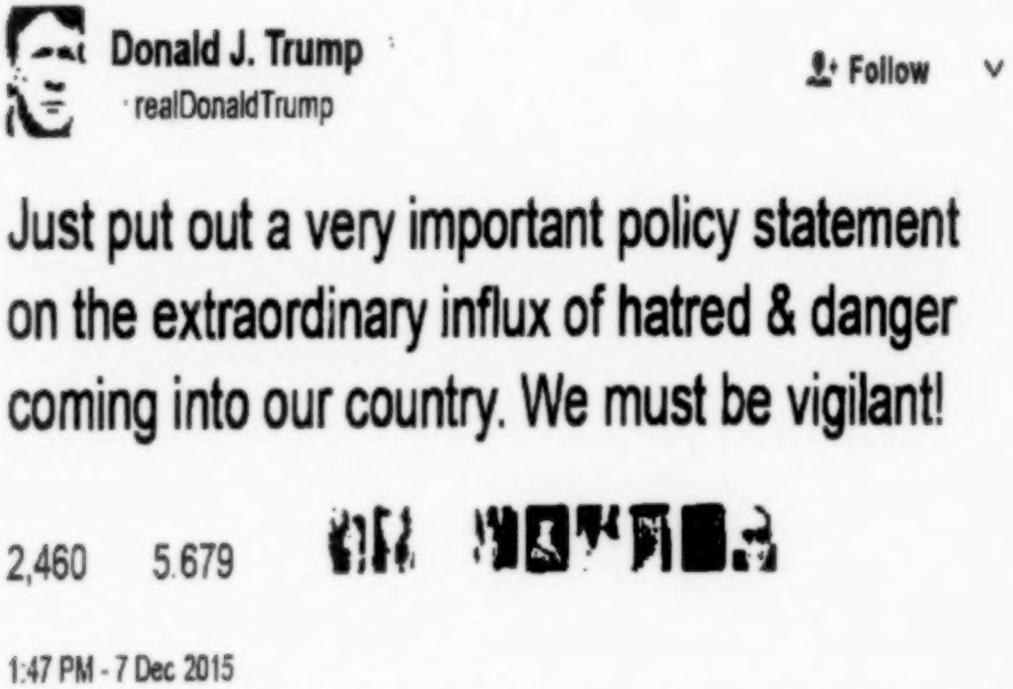
Trump orders Pentagon to draft ISIS strategy, restructuring of security council

New rules concerning lobbying are also among executive orders signed Saturday.

PAID PROMOTED STORIES

Exhibit U (Omitted)

Exhibit V



Donald J. Trump
·realDonaldTrump

Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!

2,460 5.679

1:47 PM - 7 Dec 2015

Exhibit W

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December 7, 2015

Section: post-politics

Trump calls for 'total and complete shutdown of Muslims entering the United States'

"We have no choice. We have no choice," Trump said Monday. "We have no choice."

Jenna Johnson

Updated at 7:43 p.m.

Donald Trump called Monday for a "total and complete shutdown" of the entry of Muslims to the United States "until our country's representatives can figure out what is going on."

In a statement released by his campaign Monday afternoon, Trump included recent poll findings that he says show that a sizable segment of the Muslim population has "great hatred towards Americans."

"Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension," Trump is quoted as saying in the statement. "Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."

At a rally in Mount Pleasant, South Carolina on Monday evening, Trump pointed to the statement he released earlier in the day.

"Should I read you the statement?" he asked.

The crowd enthusiastically agreed that he should.

"Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on," he said, adding the word "hell" for emphasis this time.

Supporters erupted in applause.

"We have no choice. We have no choice," Trump said. "We have no choice."

Earlier in the rally, which was interrupted by protests, Trump said, "I have friends that are Muslims. They are great people—but they know we have a problem."

Trump campaign manager Corey Lewandowski told the Associated Press that the ban would apply to "everybody," including both immigrants and tourists. Soon after the statement was released, Trump tweeted that he had "just put out a very important policy statement on the extraordinary influx of hatred and danger coming into our country." He added in the tweet: "We must be vigilant!"

In an interview on Fox News Channel shortly ahead of his campaign rally, Trump was asked whether his policy would apply to Muslim military personnel stationed overseas who want to come home.

"They will come home. We have to be vigilant," he responded. "We have to take care of the Muslims that are living here. But we have to be vigilant."

He later added: "Anybody here stays, but we have to be very vigilant. . . This does not apply to people living in the country except that we have to be vigilant."

In the past month, particularly following the recent mass shooting in Southern California that is believed to have been inspired by the Islamic State terrorist group, Trump has called for greater scrutiny of Muslims—including Muslim Americans who are legal residents of the country. He has said he would support heavy surveillance of mosques, bar Syrian refugees of all religions from entering the country and would consider establishing a database to track all Muslims in the country. But Trump's statement on Monday was his most controversial proposal yet.

Trump typically announces major positions like this in media interviews or at rallies, rarely issuing formal statements. The statement immediately sparked rounds of questions about how such a policy would work, along with strong criticism.

"Oh, my goodness," said Ibrahim Hooper, national communications director at the Council on American-Islamic Relations. "One has to wonder what Donald Trump will say next as he ramps up his anti-Muslim bigotry. Where is there left for him to go? Are we talking internment camps? Are we talking the final solution to the Muslim question? I feel like I'm back in the 1930s."

What worried Hooper, he said, was the premeditated nature of Trump's statement.

"He feels perfectly okay saying this," said Hooper. "It's not an open mic moment, where he has to walk something back. This was a statement from his campaign. They had to believe that this would be well received by his supporters. We've always had anti-Muslim bigots, but they've always been at the fringes of society. Now they want to lead it. In saner times, his campaign would be over. In insane times, his campaign can gain support. And that's why he put it out."

David Weigel and Sean Sullivan contributed to this report.

—— **Index References** ——

News Subject: (Civil Rights Law (1CI34); Intellectual Freedoms & Civil Liberties (1IN08); International Terrorism (1IN37); Legal (1LE33); Minority & Ethnic Groups (1MI43); Race Relations (1RA49); Social Issues (1SO05); Top World News (1WO62))

Industry: (Celebrities (1CE65); Entertainment (1EN08))

Region: (Americas (1AM92); North America (1NO39))

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Exhibit X

MEET THE PRESS JUL 24 2016, 11:47 AM ET

Meet the Press—July 24, 2016

Meet the Press—July 24, 2016

CHUCK TODD:

This Sunday, the Democratic National Convention gets underway here in Philadelphia, after a raucous and unpredictable Republican convention. That ended with the nomination of Donald Trump.

DONALD TRUMP:

I am with you, I will fight for you, and I will win for you.

CHUCK TODD:

This morning, my sit-down with Donald Trump on his convention speech.

DONALD TRUMP:

The only negative reviews were a little dark.

CHUCK TODD:

On whether he's backing off on his Muslim band.

DONALD TRUMP:

I actually don't think it's a pull-back. In fact, you could say it's an expansion.

CHUCK TODD:

And on Hillary Clinton's choice of Tim Kaine.

DONALD TRUMP:

Tim Kaine was a slap in the face to Bernie Sanders.

CHUCK TODD:

Plus Hillary Clinton and Tim Kaine hit the road in Florida.

HILLARY CLINTON:

Tim Kaine is everything Donald Trump and Mike Pence are not.

CHUCK TODD:

But some Bernie Sanders supporters are criticizing the Kaine pick as a sellout to moderates. I'll talk to Sanders and get his reaction to that and to the DNC Wikileaks e-mail release. Joining me for insight and analysis are MSNBC's Rachel Maddow, former chairman of the RNC, Michael Steele, NBC News Chief Foreign Affairs Correspondent, Andrea Mitchell, and host of Hardball and Philadelphia hometown boy, Chris Matthews. Trump, Sanders and reactions to the new Democratic ticket. Welcome to Sunday, in a special edition of Meet the Press at the Democratic National Convention.

CHUCK TODD:

Good Sunday morning. We are at the Wells Fargo Center here in South Philadelphia, home of the NBA 76ers and the NHL Broad Street Bullies, the Fliers. Democrats have begun to arrive, along with a pretty bad heat wave. And beginning tomorrow, they will gather to officially nominate Hillary Clinton as their presidential candidate.

Yesterday in Miami, Clinton was joined by her new running mate, Senator Tim Kaine of Virginia, in an upbeat event that was notable simply by the contrast to the disorganized rollout of Donald Trump's running mate a week earlier, Mike Pence.

(BEGIN TAPE)

SEN. TIM KAINE:

Hillary Clinton, she doesn't insult people, she listens to them. What a novel concept, right? She doesn't trash our allies, she respects them. And she'll always have our backs, that is something I am rock solid sure of.

(END TAPE)

CHUCK TODD:

We will get to reaction to the new Democratic ticket later in the show, including my interview with Senator Bernie Sanders of Vermont in a moment. But first, we're going to talk also about Sanders, about those Wikileaks emails and what they may say about DNC favoritism towards Hillary Clinton. But we begin with the man who has now taken control of the Republican Party. It's nominee Donald Trump.

I traveled to Trump National Golf Club in Bedminster, New Jersey, sort of his weekend getaway, last night for a face-to-face interview since dropping the word "presumptive," it's his first one, from the nominee title. We touched on so much: Tim Kaine, Trump's tax returns, his proposed restrictions on Muslim immigration and why he says he alone can fix the country's problems. But I began by asking him how it feels to be the Republican nominee for president of the United States.

(BEGIN TAPE)

DONALD TRUMP:

Well, it really feels great. And we really have a very unified party, other than a very small group of people that, frankly, lost. And we have a very unified party. You saw that the other night with the love in the room, and the enthusiasm in the room. The enthusiasm, there are people that say they have never seen anything like what was going on in that room, especially Thursday night.

CHUCK TODD:

Let me tell you, you bring up Thursday night, I've got to ask you about your entrance. Before we get serious here. That Monday night entrance was something else. I know you've gotten a lot of feedback on it. How'd you come up with it?

DONALD TRUMP:

I think I'm a little bit lucky, and a couple of people had that idea and I went along with the idea. And everything just worked right. And it was so good that they wanted to do it on Thursday night. I said, "Never in a million years, because you'll never get it that way again."

CHUCK TODD:

I don't think I've seen that even on WWE.

DONALD TRUMP:

Yeah, I know. Well, Vince is a good friend of mine. He called me, he said, "That was a very, very good entrance." But I didn't want to do it a second time, because, you know, it never works out the second time.

CHUCK TODD:

All right, let's go into the speech. I want to put some meat on the bones. But first, let's talk about, you've seen some of the positive reviews, some of the negative reviews. Some of the negative has been that it was a little dark—

DONALD TRUMP:

That's the only thing that—

CHUCK TODD:

—that there wasn't enough optimism in it. What would you say? It's not Morning in America.

DONALD TRUMP:

Yeah.

CHUCK TODD:

What would you say to that?

DONALD TRUMP:

Well, I think the only negativity, and, you know, the hate, I call them the haters, and that's fine. But the only negative reviews were, "A little dark." And the following day, they had another attack, and then today you see what happened in Afghanistan with many, many people killed.

They have no idea how many, so many killed. Yesterday it was Munich. And you know, I know they're saying, "Maybe it wasn't terrorism. Maybe it was just a crazy guy." But in the meantime he's screaming, "Allahu Akbar," as he's shooting people, so, you know, we'll see how that turns out. And all of a sudden people are saying, "Maybe it wasn't dark at all." But the only thing that some people said, "It was a little dark. It was a little bit tough."

CHUCK TODD:

Do you think it was a little dark?

DONALD TRUMP:

No, oh, I thought it was very optimistic. To me, it was an optimistic speech, because—

CHUCK TODD:

What makes it optimistic in your view?

DONALD TRUMP:

Because we're going to stop the problems. We're going to stop the problems. In other words, sure, I talk about the problems, but we're going to solve the problems.

CHUCK TODD:

One of the phrases you used, "I alone can fix it." And to some people, that sounded almost too strong-mannish for them. Do you understand that criticism and what do you make of it?

DONALD TRUMP:

I'll tell you, part of it was I'm comparing myself to Hillary. And we know Hillary, and we look at her record. Her record has been a disaster. And I am running against Hillary. It's not like I'm running against the rest of the world. I know people that are very, very capable that could do a very good job, but they could never get elected.

I can tell you right now. I can give you ten names of people that would do an extraordinary job, but there's no way they could ever get elected. They wouldn't know where to begin. It wouldn't be for them. But for governing, they would be good. I'm running and, you know, against one person.

CHUCK TODD:

You said there would be consequences for any company that tried to move a factory out. What—

DONALD TRUMP:

Absolutely, so simple—

CHUCK TODD:

—what is the consequence? Let's start with, you bring up Carrier a lot.

DONALD TRUMP:

It's so simple—

(OVERTALK)

CHUCK TODD:

Right, I understand that. But explain the consequences—

DONALD TRUMP:

Okay, here's the consequence—

CHUCK TODD:

What would it be?

DONALD TRUMP:

So Carrier comes in, they announce they're moving to Mexico, they fire all their people in Indiana, and they say, "Hi, well, here we are in Mexico, you know, enjoy your plant, enjoy the rest of your life," and you hire people from Mexico, okay? Now they make their product and they put it into the United States.

Well, we will have a very strong border, by the way, but they put it into the United States and we don't charge them tax. There will be a tax to be paid. If they're going to fire all their people, move their plant to Mexico, build air conditioners, and think they're going to sell those air conditioners to the United States, there's going to be a tax.

CHUCK TODD:

What kind of tax are you thinking?

DONALD TRUMP:

It could be 25 percent. It could be 35 percent. It could be 15 percent. I haven't determined. And it could be different for different companies. We have been working on trying to stop this government, because we don't know what we're doing. And not only Obama, they've been trying to stop this from before Obama. But they don't know. You know, they've done, they've tried lower interest loans, they've tried zero interest loans, these guys—

CHUCK TODD:

Well, some of these things aren't going to get through the World Trade Organization. There's—

DONALD TRUMP:

It doesn't matter. Then we're going to renegotiate or we're going to pull out. These trade deals are a disaster, Chuck. World Trade Organization is a disaster.

CHUCK TODD:

You know the concern on some of this—

DONALD TRUMP:

NAFTA is a disaster—

CHUCK TODD:

—is that it would rattle the world economy. Look what Brexit did to the world economy. Investors got rattled.

DONALD TRUMP:

What did it do? What did it do?

CHUCK TODD:

Now you—

DONALD TRUMP:

The stock market's higher now than it was when it happened. And by the way, I'm the only one of all of these people at the higher level of the wonderful world of politics, I'm the only one that said, "Brexit's going to happen." Remember, I was asked the question. I said, "Yeah, I think they're going to approve it. I think they want independence. I don't think they want people pouring into their country." And

I was—

CHUCK TODD:

You're not worried about, you think a fractured Europe is good for America?

DONALD TRUMP:

No, no. But we're spending a lot of money on Europe. Don't forget, Europe got together, why, primarily did they get together? So that they could beat the United States when it comes to making money, in other words, foreign trade—

CHUCK TODD:

Economic—

DONALD TRUMP:

Okay? And now we talk about Europe like it's so wonderful. Hey, I love Europe, I have property in Europe. I'm just saying, the reason that it got together was like a consortium so that it could compete with the United States—

CHUCK TODD:

So what you're saying is all this stuff is good for America, even if it's not good for Europe?

DONALD TRUMP:

Look, you take a look at Airbus. They make more planes now than Boeing, okay? They got together, all of these countries got together so that they could beat the United States. Okay, so we're in competition. So you know, we're in competition in one way, we're helping them in another way. It is so messed up.

CHUCK TODD:

The Muslim ban. I think you've pulled back from it, but you tell me.

(BEGIN TAPE)

DONALD TRUMP:

We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place.

(END TAPE)

CHUCK TODD:

This feels like a slight rollback—

DONALD TRUMP:

I don't think that's—

CHUCK TODD:

Should it be interpreted—

DONALD TRUMP:

I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim.

But just remember this: Our Constitution is great. But it doesn't necessarily give us the right to commit suicide, okay? Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently.

Why are we committing suicide? Why are we doing that? But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. We're making it territorial. We have nations and we'll come out, I'm going to be coming out over the next few weeks with a number of the places. And it's very complex—

CHUCK TODD:

Well I was just going to say—

DONALD TRUMP:

—we have problems in Germany and we have problems with France—

CHUCK TODD:

I was just going to ask that. Will this limit—

DONALD TRUMP:

You know, so it's not just the countries with—

CHUCK TODD:

—would this limit immigration from France?

DONALD TRUMP:

What we're going to have is a thing called—

CHUCK TODD:

They've been compromised by terrorism.

DONALD TRUMP:

They have totally been. And you know why? It's their own fault. Because they allowed people to come into their territory—

CHUCK TODD:

So you would toughen up. You're basically saying, "Hey, if the French want to come over here, you've got to go through an extra check."

DONALD TRUMP:

It's their own fault, because they've allowed people over years to come into their territory. And that's why Brexit happened, okay? Because the U.K. is saying, "We're tired of this stuff, what's going on, we're tired of." But listen to this—

CHUCK TODD:

You could get to the point where you're not allowing a lot of people to come into this country from a lot of places.

DONALD TRUMP:

Maybe we get to that point. Chuck, look what's happening. Look at what just took place in Afghanistan, where they blow up a whole shopping center with people, they have no idea how many people were even killed. Happened today. So we have to be smart and we have to be vigilant and we have to be strong. We can't be the stupid people—

CHUCK TODD:

So France, Germany, Spain—

DONALD TRUMP:

Here's my plan—

CHUCK TODD:

—places that have been compromised?

DONALD TRUMP:

—here is what I want: Extreme vetting. Tough word. Extreme vetting.

CHUCK TODD:

What does that look like?

DONALD TRUMP:

Tough. We're going to have tough standards. And if a person can't prove—

CHUCK TODD:

Give me one.

DONALD TRUMP:

—that they're from an area, and if a person can't prove what they have to be able to prove, they're not coming into this country. And I would stop the Syrian migration and the Syrian from coming into this country in two seconds. Hillary Clinton wants to take 550 percent more people coming in from that area than Barack

Obama. I think she's crazy. I think she's crazy. We have no idea who these people are for the most part, and you know, because I've seen them on different shows—

CHUCK TODD:

All right.

DONALD TRUMP:

—but more importantly, I've read about it. I study it. There is no way that you can vet some of these people. There is no way. Law enforcement officials, I've had them in my office. I've talked to them.

CHUCK TODD:

You realize some of these folks have nowhere to go? They're truly victims of this civil war, what do you do with them?

DONALD TRUMP:

We will help them and we will build safe havens over in Syria, and we will get Gulf States—

CHUCK TODD:

We, the United States are going to build these safe havens?

DONALD TRUMP:

We, the United States, we'll get Gulf States to pay for it, because we right now, we're going to have $21 trillion very soon, trillion, in debt. We will do safe havens and safe zones in Syria and we will get nations that are so wealthy that are not doing anything. They're not doing much. They have nothing but money. And you know who I'm talking about, the Gulf States. And we will get them to pay for it. We would lead it. I don't want to pay because our country is going down the tubes. We owe too much money.

CHUCK TODD:

All right. Let me move to something with NATO. Mitch McConnell said this about your NATO remarks in the New York Times. He said it was a rookie mistake, and that once you, let me finish the comment here. "It's a rookie mistake, and it proves that Trump needs people like us around to help steer him in the right direction on some basic things."

DONALD TRUMP:

He's 100 percent wrong. Okay? He's 100 percent wrong if he said that. I didn't hear he said that—

CHUCK TODD:

He did say it.

DONALD TRUMP:

Okay, fine, fine—

CHUCK TODD:

New York Times—

DONALD TRUMP:

If he said that, he's 100 percent wrong. And frankly it's sad. We have NATO, and we have many countries that aren't paying for what they're supposed to be paying, which is already too little, but they're not paying anyway. And we're giving them a free ride or giving them a ride where they owe us tremendous amounts of money. And they have the money. But they're not paying it. You know why?

Because they think we're stupid—

CHUCK TODD:

So Estonia is paying, and if they get invaded by Russia, you're there?

DONALD TRUMP:

I feel differently. I feel very differently—

CHUCK TODD:

But if a country's not doing—Britain hasn't done the two percent.

DONALD TRUMP:

We have countries that aren't paying. Now, this goes beyond NATO, because we take care of—we take care of Japan, we take care of Germany, we take care of South Korea, we take care of Saudi Arabia, and we lose on everything. We lose on everything. If Mitch McConnell says that, then he's wrong.

So all I'm saying is they have to pay. Now, a country gets invaded, they haven't paid, everyone says, "Oh, but we have a treaty." Well, they have a treaty too. They're supposed to be paying. We have countries within NATO that are taking advantage of us. With me, I believe they're going to pay. And when they pay, I'm a big believer in NATO.

But if they don't pay, we don't have, you know, Chuck, this isn't 40 years ago. This isn't 50 years ago. It's not 30 years ago. We're a different country today.

We're much weaker, our military is depleted, we owe tremendous amounts of money. We have to be reimbursed. We can no longer be the stupid country.

(END TAPE)

CHUCK TODD:

When we come back, what Donald Trump says about David Duke, Bernie Sanders, and whether he really plans to spend millions for the sole purpose of defeating Ted Cruz and John Kasich. Sanders about Trump and about his reaction to Tim Kaine becoming Hillary Clinton's running mate. We're in Philadelphia, site of the Democratic National Convention. Stay with us.

COMMERCIAL BREAK

CHUCK TODD:

Such a beautiful city here. Welcome back. More now of my interview with Donald Trump at The Trump National Golf Club in Bedminster, New Jersey. And since we had a limited amount of time, I ended up speeding things up by asking Trump for some quick reaction to simply some very prominent names in the news.

(BEGIN TAPE)

CHUCK TODD:

I'm just going to literally throw out a name and you'll know the question I'm asking. Bernie Sanders.

DONALD TRUMP:

Great respect for what he's done. He is being taken advantage of, and frankly, the system was rigged, and

I'm the first one to say it was rigged against him. And by the way—

CHUCK TODD:

You took after him. You took after him. You said for supporting Hillary Clinton, you think he needs to—

DONALD TRUMP:

Well, I'm not a fan of Bernie Sanders. But I am a fan of one thing that he talks about: Trade. He is the only one on that side that understands trade. Now, he can't do anything about it because that's not his thing. But he has been gamed. He has been, it's a rigged system against him. And what happened with the choice of Tim Kaine was a slap in the face to Bernie Sanders and everybody. I was shocked. I love it from my standpoint, I love—

CHUCK TODD:

Why do you love the Kaine pick?

DONALD TRUMP:

Well, first of all, he took over $160,000 of gifts. And they said, "Well, they weren't really gifts, they were suits and trips and lots of different things," all for 160—

CHUCK TODD:

Legal, legal in the state of Virginia.

DONALD TRUMP:

Bob McDonnell—I believe it was Bob McDonnell, in the meantime, he had to go to the United States Supreme Court to get out of going to jail—

CHUCK TODD:

Well, they proved to quid pro quo—

DONALD TRUMP:

—for taking a fraction of what—

CHUCK TODD:

They proved quid pro quo on that one.

DONALD TRUMP:

Excuse me, Bob McDonnell took a fraction of what Kaine took. And I think, to me, it's a big problem. Now, how do you take all these gifts? Hundreds of thousands of dollars. The other thing about him, he's bought and owned by the banks. And the third thing, he's in favor of TPP and every other trade deal that he's ever looked at. And that means he wants people not to work.

Now, he's going to change his tune. And I understand he's now going to say, "I'm against TPP." Hillary Clinton was totally in favor of TPP, which is the job killer, right? So was he. When she watched me on your show and other shows, all of a sudden she changed, because she knows she can't win that in a debate.

CHUCK TODD:

All right. Ted Cruz, I'm going to amend it, are you really going to fund a super PAC to help defeat him—

DONALD TRUMP:

Well, it's not the number one thing on my mind. Look, what's on my mind is beating Hillary Clinton. What's on my mind is winning for the Republican Party. With that being said, yeah, I'll probably do a super PAC, you know, when they run against Kasich, for $10 million to $20 million, against Ted Cruz. And maybe one other person that I'm thinking about—

CHUCK TODD:

Who's that other one person?

DONALD TRUMP:

—but I won't tell you that. I mean, he's actually such a small person, I hate to give him the publicity. But yes, I will probably do that at the appropriate at time. But I'm not going to do that until—

CHUCK TODD:

Oh, give me the small person here.

DONALD TRUMP:

No, no, don't worry about it. We'll give it to you another time.

CHUCK TODD:

All right, let me ask you about this one. David Duke announced his Senate candidacy claiming your agenda for his own, or essentially saying, "Glad that you spoke out."

DONALD TRUMP:

Are you ready, before you ask the question?

CHUCK TODD:

Newt Gingrich said, "Every Republican should repudiate this guy no matter what it takes"—

DONALD TRUMP:

I did. And I do. Are you ready? I want—

CHUCK TODD:

Would you support a Democrat over David Duke if that was what was necessary to defeat him?

DONALD TRUMP:

I guess, depending on who the Democrat, but the answer would be yes. Look, the answer is, as quick as you can say it. In fact, I went to answer you before you—

DONALD TRUMP:

Because last time with another person in your position, I did it very quickly. And they said, "He didn't do it fast enough." Rebuked. Is that okay? Rebuked, done—

CHUCK TODD:

Rebuked, done. Okay. Tax returns. A lot of conspiracy theories are being out there about why—what's in your tax returns. You would get rid of all these conspiracy theories tomorrow—

DONALD TRUMP:

Let me tell you—

CHUCK TODD:

Probably make people look silly—

DONALD TRUMP:

Let me tell you. Let me give you a little lesson on tax returns. First of all, you don't learn very much from a tax return. I put in to the federal elections group 100 and some-odd pages of my financials. It showed, as you know, that I'm much wealthier than anybody even understood, okay? Tremendous cash, tremendous assets, tremendous all that stuff. Okay, that's it. I'm going through a routine audit. Just a routine audit, and I've had it for I think 14 years, 13 years—

CHUCK TODD:

Why?

DONALD TRUMP:

Every year they audit me. It's routine government. I would never give my tax returns until the audit's finished. But remember this: Mitt Romney, four years ago, was under tremendous pressure to give his tax returns. And he held it and held it and held it, and he fought it, and he, you know, he didn't do too well, okay? But he didn't do anything wrong on his taxes. When he gave his tax returns, people forget, not now. He gave them in September, before the election—

CHUCK TODD:

So you still might release them—

DONALD TRUMP:

No, wait a minute, wait a minute. When he did, and his tax returns are a tiny peanut compared to mine, they went through his tax returns. And they found one little sentence, another little—there was nothing wrong. And they made him look bad. In fact I think he lost his election because of that.

CHUCK TODD:

Because of the tax returns?

DONALD TRUMP:

I think he lost. And I'll tell you why: He didn't do anything wrong. Mitt Romney did nothing wrong. But they would take out of, his weren't too big. Have you ever seen mine with the picture, they're like this high?

CHUCK TODD:

I have seen that picture, yes.

DONALD TRUMP:

Okay, so they took his tax return and they found a couple of little things. Nothing wrong, just standard. And they made him look very bad, very unfair. But with all that said, I'd love to give them, but I'm under audit. When the audit's finished I'll give them.

CHUCK TODD:

Finally, Roger Ailes. Is he helping you? Is he advising you?

DONALD TRUMP:

Well, I don't want to comment. But he's been a friend of mine for a long time, and I can tell you that some of the women that are complaining, I know how much he's helped them. And even recently, and when they write books that are fairly recently released, and they say wonderful things about him.

And now all of a sudden they're saying these horrible things about him. It's very sad. Because he's a very good person. I've always found him to be just a very, very good person. And by the way, a very, very talented person. Look what he's done. So I feel very badly. But a lot of people are thinking he's going to run my campaign.

CHUCK TODD:

Yeah, well—

DONALD TRUMP:

My campaign's doing pretty well.

CHUCK TODD:

Mr. Trump, until we meet again.

DONALD TRUMP:

Thank you very much—

CHUCK TODD:

Thank you for your time, sir, appreciate it.

(END TAPE)

CHUCK TODD:

Up next, the man who had hoped to be the candidate being nominated by Democrats right here in Philadelphia this week, Senator Bernie Sanders of Vermont. What does he think of those leaked DNC e-mails? We'll get his first comments since it happened. We're going to be right back in just a minute.

COMMERCIAL BREAK

(BEGIN TAPE)

CHUCK TODD:

Tremendous shots there of a beautiful city. Welcome back. It's not the kind of thing you want happening days before your convention. This weekend, Wikileaks released nearly 20,000 emails sent and received by members of the Democratic National Committee, some of which seem to confirm what a lot of people had suspected, that the DNC was playing favorites with Hillary Clinton over Bernie Sanders.

It appears Wikileaks either stole these emails or got them from a source. Remember, the DNC was hacked a few months ago. Among the emails was one from the DNC's Chief Financial Officer Brad Marshall that was looking ahead to the contests in Kentucky and West Virginia in early May. While not mentioning Sanders specifically by name, the email appeared to question Sanders' faith.

He wrote this, quote: "Does he believe in a god? I think I read he is an atheist. This could make several points difference with my peeps. My Southern Baptist peeps would draw a big difference between a Jew and an atheist." Well, Sanders has long believed that DNC Chair Debbie Wasserman Schultz was in Clinton's corner the whole campaign. Well, he joins me now. Senator Sanders, welcome back to Meet the Press.

And I should note that you talked about your belief in God last fall in an interview, I think, with your hometown paper there, so want to get that out of the way. So let me start with this question questioning your faith. Brad Marshall apologized on Facebook. Has anyone apologized to you personally? And what is your response to this entire discussion?

BERNIE SANDERS:

Well, no, nobody has apologized to me. And as you just mentioned, this really does not come as a shock to me or my supporters. There is no question but the DNC was on Secretary Clinton's side from day one. We all know that. And I think, as I have said a long time ago, that the time is now for Debbie Wasserman Schultz to step aside, not only for these issues.

We need a Democratic Party that is open, that's going to bring young people and working people into it, that is going to stand up and take on the big money interests and fight for working families. I don't think Debbie has been that type of leader. So I would hope, and I said this many months ago, that she would—

CHUCK TODD:

Right.

BERNIE SANDERS:

—step aside, we would have new leadership.

CHUCK TODD:

And do you think it needs to happen now, today, before the start of the convention?

BERNIE SANDERS:

Well—

CHUCK TODD:

Would that help calm some of your supporters down?

BERNIE SANDERS:

Well, I think what is already happening is that it's clear she is not going to be speaking to the convention. That is the right thing. I think right now what we have got to focus on as Democrats is defeating perhaps the worst Republican candidate that I have seen in my lifetime. Donald Trump would be a disaster for this country. He must be defeated.

We've got to elect Secretary Clinton on every single issue: fighting for the middle class on health care, on climate change, is a far, far superior candidate to Trump. That's where I think the focus has got to be.

CHUCK TODD:

Do you believe that the DNC's apparent favoritism cost you this race?

BERNIE SANDERS:

Well, I think you—there are a lot of reasons why one loses. We started off 50 points behind Secretary Clinton. We had the opposition of virtually the entire Democratic leadership in every state in this country. And by the way, in terms of media, we did not get the kind of media attention that somebody like a Donald Trump got, because media is not necessarily interested in the issues facing the middle class, more interested in attacks in personality. So I think there were a lot of reasons.

But I will tell you this, Chuck, from the bottom of my heart, I am extraordinarily proud of the campaign that we ran. The issues that we raised, the fact that we got 13 million Americans to vote for a political revolution.

People who know the economy is rigged in favor of big money, people who know that our middle class continues to decline and we have to go outside of establishment politics and economics, people who know that we need to reform a broken criminal justice system and we need comprehensive immigration reform.

The people—what we did in our campaign is bring people together to say, "You know what? This country, our government, belongs to all of us and not just a few." So I am very proud of the campaign we ran and the supporters that came on board.

CHUCK TODD:

So just to sum up here, these leaks, these emails, it hasn't given you any pause about your support for Hillary Clinton?

BERNIE SANDERS:

No, no, no. We are going to do everything that we can to protect working families in this country. And again, Chuck, I know media is not necessarily focused on these things. But what a campaign is about is not Hillary Clinton, it's not Donald Trump. It is the people of this country, people who are working longer hours for lower wages, people who do not have health care or are underinsured.

Hillary Clinton and I have worked together on a higher education proposal which will guarantee free tuition in public colleges and universities for every family in this country making $125,000 a year or less. We're going to fight for paid family and medical leave. Those are the issues that the American people want to hear discussed, and I'm going to go around the country discussing them and making sure that Hillary Clinton is elected president.

CHUCK TODD:

You know, The Green Party presumptive nominee, Jill Stein, put out a release yesterday about the emails. And she said this: "Democratic Party elites have been caught red-handed, sabotaging a grassroots campaign that tried to bring huge numbers of young people, independents and non-voters into their party. Instead, they have shown exactly why America needs a new major party, a truly democratic party for the people." Are you going to urge your supporters not to support Jill Stein and try to thwart her efforts to recruit your supporters?

BERNIE SANDERS:

Well, you know, let me just say this. As the longest serving Independent in the history of the United States Congress, as somebody who came into office by defeating an incumbent Democratic mayor in Burlington, Vermont, I know something about third party politics. And I respect Jill.

But right now, the focus, to my mind, is to make sure that Donald Trump does not become president of the United States. I think by temperament he is unqualified to be president. I think his views—you have a guy who's running for president who rejects science, doesn't even believe climate change is real, let alone wants to do something about it, wants to give hundreds of billions of dollars in tax breaks to the top two-tenths of one percent.

CHUCK TODD:

Let me ask you—

BERNIE SANDERS:

So my job right now is to see that Donald Trump is defeated, Hillary Clinton is elected.

CHUCK TODD:

You know, he makes a big deal out of the fact that you and he agree on one big issue, and that is trade deals, that these trade deals have been bad for the country. And he basically says that Clinton and Kaine, as a ticket, aren't—that their opposition, for instance, the TPP as sort of Johnny-come-lately, that it can't be trusted, and that Sanders supporters should support Trump if they care about trade.

What do you say to that?

BERNIE SANDERS:

Well, I think in terms of who can be trusted, I think the evidence is clear that there has been no candidate that I have ever seen who lies more often than does Donald Trump. I mean and that's just not me saying it, that's what any independent media analysis has shown. So in terms of trust, you really can't trust a word, I think, that Mr. Trump has to say.

In terms of the TPP, it is no secret. I think our trade policies, for many, many years, have been a disaster. They have benefited corporate America at the expense of working people. Secretary Clinton has come out in opposition to the TPP, does not want to see it—

CHUCK TODD:

Right.

BERNIE SANDERS:

—appear in the lame duck Congress. That's my view, as well.

CHUCK TODD:

You know, some of your supporters are disappointed in the pick of Tim Kaine, that he's not progressive enough. I know Tim Kaine called you after he was picked. Do you consider Tim Kaine a progressive? And are you happy with this pick?

BERNIE SANDERS:

Look, you know, the pick is Secretary Clinton's. I've known Tim Kaine for a number of years. We've served in the Senate together, obviously. Tim is a very, very smart guy. He's a very nice guy. His political views are not my political views. He is more conservative than I am. Would I have preferred to see somebody like an Elizabeth Warren selected by Secretary Clinton? Yes, I would have.

CHUCK TODD:

And then finally, do you feel as if, that you, when you got Glass-Steagall, I wanted to ask about this, because it looks like the one thing that both parties may agree on in their platforms is putting—is being in favor of reinstating Glass-Steagall. Does this mean we will see that happen in the next Congress?

BERNIE SANDERS:

Well, I'm going to do everything that I can to make it happen. You know, when we talk about our campaign, one of the things that we have been able to do, Chuck, is create the most progressive Democratic platform in the history of the Democratic Party, and that includes breaking up the large Wall Street banks and reestablishing Glass-Steagall.

I think the American people understand that we cannot continue to have a handful of reckless, irresponsible banks often acting illegally, that something has to happen. They have to be broken up.

CHUCK TODD:

All right, Senator Bernie Sanders. The big speech is tomorrow night. We'll be waiting for you here in a very, very hot Philadelphia, over 100 degrees.

BERNIE SANDERS:

Okay.

CHUCK TODD:

Senator Sanders, thanks for coming on. Good to see you, sir.

BERNIE SANDERS:

Thank you very much.

CHUCK TODD:

When we come back, reaction to Hillary Clinton's choice of Tim Kaine as a running mate, who showed why he might have appeal, unique appeal, to a very important voting bloc.

(BEGIN TAPE)

SEN. TIM KAINE:

Aprendilo valores de mi pueblo—faith, familia, y trabajo.

(END TAPE)

CHUCK TODD

And we'll be back in a moment from Philadelphia with this great panel. Rachel Maddow, Michael Steele, Andrea Mitchell, and Chris Matthews. Stay tuned.

(END TAPE)

CHUCK TODD:

And we'll be back in a moment from Philadelphia with this great panel, Rachel Maddow, Michael Steele, Andrea Mitchell, and Chris Matthews. Stay tuned.

COMMERCIAL TAPE

CHUCK TODD:

We are back. So much to talk about already. Our panel is here, Rachel Maddow, host of The Rachel Maddow Show on MSNBC, former chairman of the Republican National Committee, Michael Steele, he's sort of the fish out of water here in Philadelphia. Andrea Mitchell, NBC News, Chief Foreign Affairs Correspondent, host, of course, of Andrea Mitchell Reports on MSNBC. And a Philadelphia native himself, Mr. Brotherly Love Chris Matthews, host of Hardball—

RACHEL MADDOW:

Mr. Brotherly Love?

CHRIS MATTHEWS:

And sisterly affection.

CHUCK TODD:

—Sisterly affection here for the Penn grad.

CHUCK TODD:

And—this morning by the way we have new pictures of Tim Kaine walking into church this morning in Richmond, Virginia. He now realizes, and now his parish is realizing, what it's like to have Secret Service following around a member of the parish there. All right.

RACHEL MADDOW:

Know what his Secret Service name is going to be yet?

CHUCK TODD:

What do we think the code name should be?

ANDREA MITCHELL:

But we're not sure—

RACHEL MADDOW:

Well, the big joke was that if you're boring enough, your Secret Service name is Tim Kaine.

CHUCK TODD:

Ooh.

RACHEL MADDOW:

Right? That—

CHUCK TODD:

Those are old Johnny Carson and Jay Leno, Al Gore jokes—

CHUCK TODD:

All right, you guys are having already too much fun.

RACHEL MADDOW:

Sorry, sorry.

CHUCK TODD:

Let me just throw it out here. We heard what Bernie Sanders said about Tim Kaine. It was, that was tougher than I expected.

RACHEL MADDOW:

"His politics are not my politics."

ANDREA MITCHELL:

That's really—

RACHEL MADDOW:

"He does not share my political views." That's an aggressive take from Bernie. I'm not surprised. Bernie's an aggressive politician. And I think when Senator Sanders speaks at the DNC, I think everybody's going to be on the edge of their seat. I think that he is not going to pull a Ted Cruz because he's already made an endorsement.

CHUCK TODD:

Well, he said, "I'm for Hillary," and he was tough on Trump.

RACHEL MADDOW:

Yeah. And but he doesn't relish going after Trump. He likes going after the Democratic Party to try to move the Democratic Party. That's his target, always has been.

MICHAEL STEELE:

It's still obvious, he's not 'Feeling the Bern' for Hillary. And that was very obvious. And when you asked about the trust question, he didn't say he trusted Hillary Clinton. He said he didn't trust Donald Trump. So the reality of it is there's still some tension there that Bernie is reflecting among his supporters. And it was evident there. I mean—

RACHEL MADDOW:

He's got a mission that's bigger than one election. He always has.

MICHAEL STEELE:

That's true.

ANDREA MITCHELL:

And in fact, he could quiet the march that is planned to go from the center of Center City, and Rittenhouse Square all the way down at Independence Hall. This march is going to disrupt the city today, no matter how peaceful, because this is a city, in 100-degree heat, that is planning for a convention. And it's going to be a very large outpouring. He also said—

CHUCK TODD:

And by the way, the hotter it is, the crankier people will be.

ANDREA MITCHELL:

Yeah. And he also says that Tim Kaine doesn't share his politics, not only that, but that he would have preferred Elizabeth Warren. He made it very clear; Tim Kaine is a nice guy, but he's not endorsing or embracing someone who Hillary Clinton—

CHUCK TODD:

There's a painful look in your face, Chris.

ANDREA MITCHELL:

—called Tim Kaine a progressive.

CHRIS MATTHEWS:

He didn't get to pick. Hillary Clinton did. And I've watched Hillary Clinton. I've watched a lot of politicians over the years. You can tell when they're actually happy, not when they fake the laugh or anything else. She looked delighted during his speech yesterday. And I haven't seen her that delighted in a long time. She had found her guy to be her running mate. I think she loved it.

And I think one thing we're getting all excited about, I understand why the progressives are upset. But one thing historically we all know is the selection of a vice president is a poor predictor of the direction of that administration.

RACHEL MADDOW:

Yeah.

CHRIS MATTHEWS:

FDR picked John Nance Garner—

RACHEL MADDOW:

It's not a policy pick.

CHRIS MATTHEWS:

Kennedy picked another conservative from the south, Lyndon Johnson, relatively conservative. And then we got the New Deal out of that and we got the Great Society we got the New Frontier. It's a poor predictor. Now, if this is about spoils, they've got an argument. They wanted a piece of the action. But there's differences between spoils and direction.

CHUCK TODD:

I want to throw out the one thing that Trump's trying to hit Kaine on, well, two things. But the one big one is the gifts in Virginia.

RACHEL MADDOW:

Yeah.

CHUCK TODD:

I only throw it out there is that I heard Ed Rendell ask to defend it. And he struggled, Andrea. He said, "Well, it's illegal in Pennsylvania."

ANDREA MITCHELL:

Virginia—

CHUCK TODD:

Okay. And it's legal in Virginia. That wasn't exactly a resounding defense.

ANDREA MITCHELL:

Yeah. Virginia has a very strange, let's face it, strange gift law. The difference with Bob McDonnell, who was convicted, and then the Supreme Court overturned it, is there was no quid pro quo. He declared it. That was the main thing. He declared everything, put it down, in fact, computed higher numbers to staying in friends' houses. He put everything down. He was meticulous about it.

So they don't think there's a big ethics thing. Just on his progressivity or lack of it, he has this civil rights background. I mean I was in the room. And what you saw on T.V. yesterday in Miami, in that largely Hispanic campus, that wonderful campus in Miami, it was extraordinary. The enthusiasm for him and the affection. And having watched her all of these years, you're absolutely right, Chris—

CHUCK TODD:

You know—

ANDREA MITCHELL:

—she found her guy. She was a happy camper.

RACHEL MADDOW:

He's not a progressive, but they will tell a very progressive story about his history. The party has moved to the left while he sort of always been a solid liberal.

CHUCK TODD:

Both of them are trying to—

ANDREA MITCHELL:

Yeah.

CHUCK TODD:

I feel like both Clinton and Kaine are trying to catch up to the party's movement.

CHRIS MATTHEWS:

That's so true.

ANDREA MITCHELL:

Well, on guns he was always there. He was heroic in Virginia on gun laws.

CHUCK TODD:

That they're moving—and Michael, let me ask you this. The Trump camping says, "We love the Kaine pick." And here's their reasoning. They love the Kaine pick because it reinforces that they're the political professionals, that here's Tim Kaine, and all he's done in life, is been in office for the last 25 years.

MICHAEL STEELE:

Right.

CHUCK TODD:

And the whole point of Trump is Trump's Mr. "I'm the total outsider." If they want to double down on that, fine, go ahead. What do you say?

RACHEL MADDOW:

Except Mike Pence

MICHAEL STEELE:

Right, right, right.

CHUCK TODD:

They pay no attention to that. I brought that brought to them. I said, "What about Pence?" And they're like, "Well, it's the top of the ticket."

MICHAEL STEELE:

"Ignore that man behind the curtain."

CHUCK TODD:

What do you say to that? Did they have a point or not?

MICHAEL STEELE:

Well, they'll have a—I think the broader point, is an interesting one. Because what he's comparing himself—he's comparing himself, Trump, to Kaine—

CHUCK TODD:

Right.

MICHAEL STEELE:

—and Clinton. So it's me and against them.

CHUCK TODD:

Yeah.

MICHAEL STEELE:

Pence is not a part of that equation, necessarily.

RACHEL MADDOW:

Yeah.

MICHAEL STEELE:

So when he's talking about the maverick, the outsider, he's—he's assuming his ticket is total that.

ANDREA MITCHELL:

Well, Pence wasn't even a part of his own rollout.

MICHAEL STEELE:

Right.

ANDREA MITCHELL:

If you remember. And that was—

RACHEL MADDOW:

He couldn't get a word in edgewise.

ANDREA MITCHELL:

Hillary Clinton spoke about Tim Kaine—

MICHAEL STEELE:

I think their strength, Chuck, is gonna be on the argument—this notion that Tim Kaine is progressive is just not believable. And for a whole host of reasons. I think that's an opening for a lot of folks on Trump's side.

RACHEL MADDOW:

You can, there are element of his record that are not progressive, but on balance, I would argue that he is.

ANDREA MITCHELL:

I would argue that too.

CHRIS MATTHEWS:

But one thing, the guy's two doors from you, if you're president. Look at the structure of the West Wing now. It's not some guy that goes back to Maine like Lincoln's first vice president. He or she is right with you.

MICHAEL STEELE:

Right.

CHRIS MATTHEWS:

You want a good person two doors for you, somebody who has values. And it's not just smart politics. I think what Hillary Clinton's going to love having is a guy who's a true blue good guy. And I think he is a progressive on all the moral issues—

CHUCK TODD:

Let's sneak in a break here. When we come back, I want to get into the DNC e-mail situation. And I also want to get your guys' reaction to some interesting comments from Donald Trump. Yeah, you know that guy that was at the start of the show. We'll be right back.

COMMERCIAL BREAK

CHUCK TODD:

Welcome back, panelists here. Before we jump to Trump, the DNC email leaks, Cleveland, we expected rowdiness, Never Trumpsters, and all that stuff. We expect order here. But I wonder, Rachel, if—look, I'm hearing from the Bernie bros. I'm in one of the emails just—I'm the complaint department here sometimes at NBC. Somebody was complaining about coverage. And I said, "Okay, let's talk on the phone," or whatever. But we didn't do anything about it, because I get complaints about coverage every hour, every day.

RACHEL MADDOW:

Yeah.

CHUCK TODD:

But I think Bernie supporters may like this place, at least outside. They may be upset, and they may do something about it.

RACHEL MADDOW:

Yeah. I mean and, you know, there will be that big protest that Andrea was talking about today, to start things off. And there will be a lot, there will be hundreds of Bernie delegates insides the room. Now honestly, from the top, down, he said, "We've got to elect Hillary Clinton." He's been unequivocal about that, that's the most important thing.

It'll be interesting to see whether the rules fights and the platform fights end up, in the end, when there's need to get nailed down with those votes, there is some dissent and chaos there. There might be.

CHRIS MATTHEWS:

One thing is—

CHUCK TODD:

Do you think Debbie Wasserman Schultz needs to get out now?

CHRIS MATTHEWS:

Well, look—

CHUCK TODD:

Not even gavel it in?

CHRIS MATTHEWS:

This is not a mystery story. This isn't Colombo.

CHUCK TODD:

Yeah.

CHRIS MATTHEWS:

We knew from the beginning, watching the debate schedule, put together by the DNC—

CHUCK TODD:

Sure.

CHRIS MATTHEWS:

—that they were tilting the scales to Hillary Clinton. Middle of the night debates, Sunday morning—it was an absurd debate schedule. And it just said, "We're for Hillary, we don't want the new guy to get all the attention."

ANDREA MITCHELL:

And what Bernie said to you is that she's not going to be giving a speech. When does the party chair not give a speech at the convention? And apparently that is the case.

CHUCK TODD:

And then right now, though, they will gavel in.

RACHEL MADDOW:

Thank god we haven't—her quitting right now before —I mean, the DNC's gonna be running a big part of the ground game for the whole—

CHRIS MATTHEWS:

Yeah.

RACHEL MADDOW:

You know, you don't—

CHUCK TODD:

But I tell you, this—

RACHEL MADDOW:

It would be suicide for the chair to jump out now—

CHUCK TODD:

This doesn't help her own fight for reelection, which I still think she's going to be okay.

RACHEL MADDOW:

No, but—

CHUCK TODD:

It's a district that she knows very well. But—

ANDREA MITCHELL:

But Bernie endorsed her opponent.

RACHEL MADDOW:

But her reelection fight is in her district.

CHRIS MATTHEWS:

Right.

RACHEL MADDOW:

It's not to be the chair of the DNC, that's next year.

CHUCK TODD:

All right. Michael Steele, what'd you hear from Donald Trump? Did it make you feel better or worse about his chances?

MICHAEL STEELE:

Well, I think Donald Trump did a couple of things he needed to do. One was, and you could see it in the room that night, people began to say, "Okay, I can get there." The speech that he gave, when you read it, seemed a lot darker and harsher than when he delivered it. He delivered it in a way—

RACHEL MADDOW:

I thought the opposite.

MICHAEL STEELE:

Yeah, yeah.

RACHEL MADDOW:

When reading it, I wasn't freaked out.

MICHAEL STEELE:

Yeah.

RACHEL MADDOW:

And then, when I saw him give it, I pulled the covers up.

MICHAEL STEELE:

No, for me, it was the reverse. Because the reaction. I'm sitting in the room and I'm getting the reaction from the crowd.

RACHEL MADDOW:

Mmm.

MICHAEL STEELE:

And the reaction from the crowd was, "This guy is going to be a fighter." And I think that's a strong message for him coming out of this convention.

CHRIS MATTHEWS:

Rachel, you have never pulled the covers up.

RACHEL MADDOW: Oh no, I meant proverbially

CHUCK TODD: There's a lot of personal information here. Woah, it's Sunday morning, guys.

MICHAEL STEELE:

I thought he did what he needed to do, Chuck. I do.

RACHEL MADDOW:

Standing under those 15-foot-tall letters with Trump, and then his head comes up there. And then he spent 76 minutes screaming, red faced, about terrorism and death and destruction and "I'm the only one who can fix it"—

CHRIS MATTHEWS:

I think that was technical. I don't think he knew how to read a script like that. I don't think he had the ability to—his daughter knew how to do it. It's tough to read a script in a conversational manner. So you end up doing this sort of scream thing.

RACHEL MADDOW:

But it takes an ego to turn a 30 minute script into a 78 minute rant.

ANDREA MITCHELL:

But he said that he was the person who would fix everything. And they're focusing on that. But, you know, Kaine was focusing on that. You know, it is the "we" not the I. They're comparing him to a dictator.

MICHAEL STEELE:

But the—

ANDREA MITCHELL:

It is the language and the delivery, Michael—

MICHAEL STEELE:

Don't lose sight of the fact that a lot of Americans out there are saying it is the "we" who screwed us up to this point.

CHRIS MATTHEWS:

Yeah.

MICHAEL STEELE:

It is the we who've gotten us into this mess.

ANDREA MITCHELL:

It's a different way of defining democracy, Michael.

MICHAEL STEELE:

So they're looking for the I, someone who's going to step forward as a leader, to get us through this mess. This is the bifurcation of the of the population, the voting population right now. And it's going to be interesting to see which one of these arguments win—

RACHEL MADDOW:

Is this about the hunger for a strong man, is that what you're talking about?

MICHAEL STEELE: Yeah no, there really is Rachel.

RACHEL MADDOW: We've seen this around the world, it's not supposed to be us.

CHRIS MATTHEWS:

I've heard Bernie make your point.

MICHAEL STEELE:

Yes!

CHRIS MATTHEWS:

It's that we have to reach outside the establishment to get the solution to these really bad economic problems affecting the working people of this country.

MICHAEL STEELE:

Right.

CHRIS MATTHEWS:

Same message. Different sides.

MICHAEL STEELE: Same message.

RACHEL MADDOW:

Same message. The question is whether or not one man is supposed to deliver salvation for the country. We're not supposed to be that kind of country.

CHUCK TODD:

I want to throw one more. He seemed, at least in the interview with me, he goes after Mitch McConnell, goes after Ted Cruz, goes after John Kasich.

ANDREA MITCHELL:

He is fearless in that regard.

CHUCK TODD: He really is.

ANDREA MITCHELL:

He is not going to moderate himself.

RACHEL MADDOW:

You didn't even ask about Kasich. And he's bringing it up

CHUCK TODD:

No, exactly. He brought Kasich up himself.

ANDREA MITCHELL:

And another player to be named player, who, you know, remain—could be one of the senators like Jeff Flake. Look, the fact is that he is not playing by anybody's ground rules except Donald Trump's. What he said about N.A.T.O. was extraordinary because he doubled down on that. And the whole system of collect your security in Europe, if you're in Poland today, you are not reassured—

CHUCK TODD:

What's amazing is the Trump campaign tried to walk it back all last week on the N.A.T.O. stuff. And he's basically saying, "Don't walk it back."

RACHEL MADDOW:

Even beyond N.A.T.O. to talk about Europe as a threat to America is what's good for Europe is bad for America and we have an interest in Europe being weak and divided, they only got together to screw us? Like, hold on a second.

CHRIS MATTHEWS:

Yeah, it'll play in Scranton. It'll play up there in the Eerie, Pennsylvania it'll play.

RACHEL MADDOW:

The European Union—came out of the way to try to not have World War III.

CHRIS MATTHEWS:

Because people think we're being shoved around and exploited and he's saying, "I'm going to shove back."

ANDREA MITCHELL:

They are our markets—markets, allies—

CHUCK TODD:

You guys great. I'm going to try to get another half hour. But let me sneak in this. We'll be back in a moment with our—we'll call it halftime segment. No, it's Endgame Segment. And we'll look at Hillary Clinton's popularity compared to other Democratic nominees on the eve of their conventions.

COMMERCIAL BREAK

CHUCK TODD:

The panel never stops interacting here. Seriously we just went to a commercial break—

RACHEL MADDOW:

—wants more with France!

CHUCK TODD:

It's endgame time. Look, I want to show you here very quickly some numbers, because it will help us judge whether this is a successful convention for Hillary Clinton. These are favorable ratings, personal favorable ratings, whether you're right side up or upside down, from our NBC Wall Street Journal poll, for every Democrat going back to '92. And as you can see, Hillary Clinton in the worst shape of any presumptive nominee going into their convention.

Now, let me show you what everybody else came through after their convention. So successful convention for Bill Clinton, successful one for Al Gore. Flat for John Kerry, successful, Barack Obama. Obviously, we'll find out, for Hillary Clinton, what does she need to—

ANDREA MITCHELL:

Well, what they are going to do is they're going to have gauzy films, the same kind of films you saw in 1992, the same producers—

CHUCK TODD:

And JFK?

ANDREA MITCHELL:

They're going to have all of these films, biography, résumé. They know that her résumé is not resonating with millennials. People know what she did, they don't know—they know the list of what she was. They don't know what she actually did, what she accomplished.

CHRIS MATTHEWS:

Yeah.

ANDREA MITCHELL:

They're going to do all of that. The balance is going to be very different.

RACHEL MADDOW:

—because T.V. networks don't always take the movies anymore—

ANDREA MITCHELL:

Well, they're going to have to validators.

RACHEL MADDOW:

Yeah.

ANDREA MITCHELL:

They're going to have people on that podium behind it who are going to talk about things she has done for them. And it's going to be very much all about her and much less about taking down Trump

CHRIS MATTHEWS:

I think the magic moment in this convention's going to be Thursday night. And a lot of women, and a lot of men, too, are going to see Hillary Clinton as the first party nominee, who's probably going to be like the president. She has the advantage right now. And there are going to be misty eyes all across the country.

And any men at that moment who make a wisecrack are going to be guaranteeing another vote for Hillary Clinton. I think it's a very emotional moment for people. They've haven't quite got to it becausc of all is mishegas that's gone on this year. I think it's going to be magical. And if Hillary Clinton just stands there with a little emotion, this is an amazing historic moment.

CHUCK TODD:

Michael was the Republican convention too anti-Clinton and not enough pro-Trump?

MICHAEL STEELE:

No. The Republican convention had to go anti-Clinton—

CHUCK TODD:

Had to do that?

MICHAEL STEELE:

—because of the Trump issues.

CHUCK TODD:

What about this one?

MICHAEL STEELE:

This one? I was thinking, as you guys were talking about Barack Obama and talking about Hillary Clinton being likable enough, this is going to be a convention in which they're going to showcase her so you can like her. Because people, those numbers show, don't like her. So it's going to be everything you just said, Chris, plus more. The problem is what happens afterwards. And that's where Hillary Clinton's going to have to contine .

CHUCK TODD:

Here's an out question for all of you. Besides Hillary Clinton's speech, what will be the other buzziest speech or speaker when we walk away from this convention?

RACHEL MADDOW:

We're going to have a huge one on night one. Bernie is a big deal.

MICHAEL STEELE:

Bernie.

RACHEL MADDOW:

The Democratic Party is going through a transformation. Liberals are having their moment. And this convention has to reflect it.

CHRIS MATTHEWS:

Every Democratic convention I can remember, going back to, God, '64, the best speech was never given by the nominee, whether it's Bobby Kennedy or it's Jesse Jackson, or it's Mario Cuomo.

MICHAEL STEELE:

Right.

CHRIS MATTHEWS:

The candidates never have been able to deliver the best speech. So I would bet on Bernie.

RACHEL MADDOW:

It was Trump Jr. last week.

CHRIS MATTHEWS:

Bernie or President Obama.

ANDREA MITCHELL:

Michelle Obama and Barack Obama on day two.

CHUCK TODD:

I think it's Barack Obama on Wednesday night. I think it's going to be to Hillary Clinton what Bill Clinton was to Barack Obama four years ago. All right. That's all for this Sunday morning.

CHRIS MATTHEWS:

We agree.

CHUCK TODD:

I'll be hosting a special edition of Meet the Press Daily tonight at 5:00 Eastern on MSNBC. I know that's what everybody on this table will be watching. And then, throughout the week, I'll be joined by my colleagues Lester Holt and Savannah Guthrie right here at The Wells Fargo Center for convention coverage on the network beginning at 10:00 Eastern, 7:00 Pacific. If you missed it last week, you should be regretting it. Watch us this week. And of course we'll be back next Sunday. Because if it is Sunday, Meet the Press.

* * *END OF TRANSCRIPT* * *

Exhibit Y

DONALD TRUMP

Donald Trump on Proposed Muslim Ban: 'You Know My Plans'

Katie Reilly
Dec 21, 2016

President-elect Donald Trump on Wednesday called the recent attacks in Germany and Turkey "terrible" and suggested that he does not intend to reevaluate his plans to ban Muslims from immigrating to the United States, boasting that he had been "proven to be right."

"You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful," Trump told reporters Wednesday when asked whether the recent violence has influenced his proposed Muslim ban.

Trump described the attack at a Berlin Christmas market as an "attack on humanity."

"That's what it is: an attack on humanity," he said. "And it's got to be stopped."

Trump said he had not spoken with President Obama since the attacks.

"Innocent civilians were murdered in the streets as they prepared to celebrate the Christmas holiday," Trump said in an initial statement about the attack on Monday. "ISIS and other Islamist terrorists continually slaughter Christians in their communities and places of worship as part of their global jihad."

Zeke Miller contributed to this report.

Leaked Secret Reveals A..!

The truth behind her final departure! She didn't want her fans to know.

READ THE STORY

Radiant-Lux.com

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Her Dress At The Emmys After Party Left The Crowd Speechless

Exhibit Z

1/29/17 WashingtonPost.com (Pg. Unavail. Online)
2017 WLNR 2956241

WashingtonPost.com
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January 29, 2017

Section: the-fix

Trump asked for a 'Muslim ban,' Giuliani says—and ordered a commission to do it 'legally' Giuliani claims Trump asked him how to create a Muslim ban: "He called me up. He said, 'Put a commission together. Show me the right way to do it l. . .

Amy B Wang

Giuliani claims Trump asked him how to create a Muslim ban: "He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

Former New York mayor Rudy W. Giuliani said President Trump wanted a "Muslim ban" and requested he assemble a commission to show him "the right way to do it legally."

Giuliani, an early Trump supporter who once had been rumored for a Cabinet position in the new administration, appeared on Fox News late Saturday night to describe how Trump's executive order temporarily banning refugees came together.

Trump signed orders on Friday not only to suspend admission of all refugees into the United States for 120 days but also to implement "new vetting measures" to screen out "radical Islamic terrorists." Refugee entry from Syria, however, would be suspended indefinitely, and all travel from Syria and six other nations—Iran, Iraq, Libya, Somalia, Sudan and Yemen—is suspended for 90 days. Trump also said he would give priority to Christian refugees over those of other religions, according to the Christian Broadcasting Network.

Fox News host Jeanine Pirro asked Giuliani whether the ban had anything to do with religion.

"How did the president decide the seven countries?" she asked. "Okay, talk to me."

"I'll tell you the whole history of it," Giuliani responded eagerly. "So when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

Giuliani said he assembled a "whole group of other very expert lawyers on this," including former U.S. attorney general Michael Mukasey, Rep. Mike McCaul (R-Tex.) and Rep. Peter T. King (R-N.Y.).

"And what we did was, we focused on, instead of religion, danger—the areas of the world that create danger for us," Giuliani told Pirro. "Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are substantial evidence that people are sending terrorists into our country."

It was unclear when the phone call Giuliani took place and when the commission began working. An email to the White House press office was not immediately returned Sunday.

Clips of the exchange between Giuliani and Pirro quickly went viral Saturday night, with some claiming that Giuliani's statement amounted to admitting Trump's intent had been to institute a ban based on religion.

Others, including Trump senior adviser Kellyanne Conway and White House Chief of Staff Reince Priebus, have insisted it is not a ban on Muslims, but rather one based on countries from which travel was already restricted under Barack Obama's administration.

Priebus appeared on CBS's "Face the Nation" Sunday morning to say it was possible Trump would expand the list of countries included in the travel ban.

"You can point to other countries that have similar problems, like Pakistan and others," Priebus told host John Dickerson. "Perhaps we need to take it further."

Priebus also said there had been weeks of work and "plenty of communication" between the White House, the State Department and the Department of Homeland Security regarding the ban.

"We didn't just type this thing up in an office and sign up," he told Dickerson.

Later on the same program, Rep. Keith Ellison (D-Minn.) called out Giuliani's interview with Pirro from the night before.

"They can't deny that this is a Muslim ban," Ellison told Dickerson. "On the campaign trail, [Trump] said he wanted a Muslim ban. . . . Rudolph W. Giuliani who helped him write it said that they started out with the intention of a Muslim ban and then they sort of 'languaged' it up so to try to avoid that label, but it is a religiously based ban."

Senate Democrats vowed to draft legislation to block the travel ban.

"We're demanding the president reverse these executive orders that go against what we are, everything we have always stood for," Senate Minority Leader Charles E. Schumer (D-N.Y.) said in a news conference Sunday morning, noting later that his middle name, Ellis, was originally inspired by Ellis Island.

"It was implemented in a way that created chaos and confusion across the country, and it will only serve to embolden and inspire those around the globe those that will do us harm," Schumer added of the ban. "It must be reversed immediately."

Trump's executive order sparked massive protests at airports around the country Friday and Saturday, as reports surfaced that dozens of travelers from the affected countries, including green-card holders, were being detained.

The American Civil Liberties Union filed a lawsuit Saturday morning challenging Trump's order after two Iraqi men with immigrant visas were barred from entering the United States at New York's John F. Kennedy International Airport.

As Giuliani was speaking, Fox News simultaneously aired an alert that noted federal judge Ann M. Donnelly had issued a stay to stop the deportations nationwide.

Donnelly wrote that there was a strong likelihood the order had violated the petitioners' rights to due process and equal protection by the Constitution.

"There is imminent danger that, absent the stay of removal, there will be substantial and irreparable injury to refugees, visa-holders, and other individuals from nations subject to the January 27, 2017 Executive Order," Donnelly wrote.

The ACLU hailed the victory.

"Clearly the judge understood the possibility for irreparable harm to hundreds of immigrants and lawful visitors to this country," ACLU executive director Anthony D. Romero said in a statement. "Our courts today worked as they should as bulwarks against government abuse or unconstitutional policies and orders. On week one, Donald Trump suffered his first loss in court."

On Sunday, the Department of Homeland Security issued a statement saying it did not plan to back off enforcing Trump's orders.

"President Trump's Executive Orders remain in place —prohibited travel will remain prohibited, and the U.S. government retains its right to revoke visas at any time if required for national security or public safety," the statement read. "President Trump's Executive Order affects a minor portion of international travelers, and is a first step towards reestablishing control over America's borders and national security."

The department said that less than 1 percent of daily international air travelers to the United States had been "inconvenienced" on Saturday.

Matthew Kolken, an immigration attorney based in Buffalo said there has been "a systemic bias against individuals from Muslim countries in the U.S. immigration departments" for years, including under the Obama administration.

"This isn't unprecedented," Kolken told The Washington Post by phone Sunday. "The unfortunate reality is the executive branch does have vast discretionary authority to determine who they are going to [allow in or not]."

Still, Kolken said, he believes "Trump has gone a step further without a doubt" in including even people who are lawful permanent residents and suspending all immigration applications from people from the seven countries on the banned list.

If there was evidence of disparate treatment of individuals from the same country—if there were anecdotal evidence of, for example, a Syrian family of one religious background allowed to enter over that of another religious background—then that is where lawsuits could come into play, he said.

"The question becomes whether they're trying to do an end-around by couching the ban as a country-specific ban based on a security-related issues when in reality it's a religious ban," Kolken said.

Read more:

Fact Checker: What you need to know about terror threat from foreigners and Trump's executive order

'I am heartbroken': Malala criticizes Trump for 'closing the door on children' fleeing violence

A ship full of refugees fleeing the Nazis once begged the U.S. for entry. They were turned back.

Trump's travel ban could make Rex Tillerson's potential job harder, a former defense secretary says

——Index References——

News Subject: (Civil Rights Law (1CI34); Government (1GO80); Immigration & Naturalization (1IM88); Intellectual Freedoms & Civil Liberties (1IN08); Legal (1LE33); Legislation (1LE97); Social Issues (1SO05); U.S. Legislation (1US12))

Industry: (Homeland Security (1HO11); Security (1SE29))

Region: (Africa (1AF90); Americas (1AM92); Arab States (1AR46); Mediterranean (1ME20); Middle East (1MI23); New York (1NE72); North America (1NO39); Syria (1SY20); U.S. Mid-Atlantic Region (1MI18); USA (1US73))

Language: EN

Other Indexing: (Donald Trump; Ann Donnelly had; Jeanine Pirro; Rex Tillerson; Christian refugees; Anthony Romero;

Ann Donnelly; Mike McCaul; Matthew Kolken; Kellyanne Conway; Rudolph Giuliani; Rudy Giuliani; Peter

King; Michael Mukasey; John Dickerson; Reince Priebus; Charles Schumer; Keith Ellison)

Word Count: 1325

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Exhibit AA

NewsRoom

12/8/15 WashingtonPost.com (Pg. Unavail. Online)
2015 WLNR 36291622

WashingtonPost.com
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December 8, 2015

Section: post-politics

Donald Trump says he is not bothered by comparisons to Hitler

Jenna Johnson

The comparison between Donald Trump and Hitler is being made more and more frequently—including on the cover of Tuesday's Philadelphia Daily News—but the Republican front-runner said Tuesday that the comparison doesn't bother him.

"You're increasingly being compared to Hitler," ABC News' George Stephanopoulos said during an interview with Trump on "Good Morning America" Tuesday. "Does that give you any pause at all?"

"No," Trump responded, "because what I am doing is no different than what FDR—FDR's solution for Germans, Italians, Japanese, you know, many years ago."

Stephanopoulos jumped in as Trump kept talking: "So you're for internment camps?"

"This is a president who is highly respected by all," Trump said of Franklin Delano Roosevelt. "He did the same thing—if you look at what he was doing, it was far worse."

[Donald Trump calls for 'total' ban on Muslims entering United States]

Trump's answer was confusing and meandering but he seemed to be making the point that during times of war, more extreme measures must be used.

"We are now at war," Trump said. "We have a president that doesn't want to say that, but we are now at war."

"I've got to press you on that, sir,"Stephanopoulos said. "So you're praising FDR there, I take it you're praising the setting up of internment camps for Japanese during World War II?"

"No, I'm not," Trump responded. "No, I'm not. No, I'm not."

Trump then rattled off the numbers of some of the presidential proclamations Roosevelt issued "having to do with alien Germans, alien Italians, alien Japanese."

"They went through a whole list of things—they couldn't go five miles from their homes, they weren't allowed to use radios, flashlights," Trump said. "Take a look at what FDR did many years ago, and he's one of the most highly respected presidents. . . They named highways after him."

Stephanopoulos responded: "You want to bring back policies like that?"

After a pause, Trump responded: "No, I don't to bring it back, George. At all. I don't like doing it at all. It's a temporary measure until our representatives, many of whom are grossly incompetent, until our representatives can figure out what's going on."

——**Index References**——

News Subject: (Islam (1IS02); Judaism (1JU93); Minority & Ethnic Groups (1MI43); Race Relations (1RA49); Religion (1RE60); Social Issues (1SO05))

Industry: (Celebrities (1CE65); Entertainment (1EN08))

Language: EN

Other Indexing: (Donald Trump; Franklin Delano Roosevelt; George Stephanopoulos; Hitler)

Word Count: 371

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Exhibit BB

Donald Trump: 'I think Islam hates us'

Story highlights

"I think Islam hates us," Trump told CNN's Anderson Cooper, deploring the "tremendous hatred" that he said partly defined the religion

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Asked if the hated was "in Islam itself," Trump would only say that was for the media to figure out

Washington (CNN)—Donald Trump said Wednesday that he thinks "Islam hates us," drawing little distinction between the religion and radical Islamic terrorism.

"I think Islam hates us," Trump told CNN's Anderson Cooper, deploring the "tremendous hatred" that he said partly defined the religion. He maintained the war was against radical Islam, but said, "it's very hard to define. It's very hard to separate. Because you don't know who's who."

Donald Trump CNN interview (part 1) 10:15

READ: Donald Trump: 'It's over' if I win Ohio and Florida

Asked if the hate was "in Islam itself," Trump would only say that was for the media to figure out.

"You're gonna have to figure that out, OK?" he told Cooper. "We have to be very vigilant. We have to be very careful. And we can't allow people coming into this country who have this hatred of the United States."

Donald Trump CNN interview (part 2) 10:59

Trump made headlines in December when he called for a temporary ban on Muslims entering the U.S., "until our country's representatives can figure out what is going on." Despite widespread condemnation of the remarks, Trump has stood by the proposal.

Speaking to CNN's Wolf Blitzer on "The Situation Room" Thursday, Trump spokeswoman Katrina Pierson said the real-estate magnate stood by the sentiment that many Muslims worldwide sympathize with ISIS, but said Trump should've used "radical Islam."

"It is radical Islamic extremists that do participate in these types of things," Pierson said, calling for a "broader perspective" of Muslims' ties to terror. "We've allowed this propaganda to spread all through the country that this is a religion of peace."

In speaking with Cooper, Trump added that "there can be no doctrine" when asked to outline how he would project power overseas.

Trump also tried to clarify his position on how far he would go in targeting the families of terrorists. He has said in the past that he is in favor of "expanding the laws" that govern how the U.S. can combat and deter terrorism, and Trump has called to bring back waterboarding, even vowing the U.S. "should go a lot further than waterboarding."

Donald Trump talks about working with Democrats 00:51

READ: Trump: My Muslim friends don't support my immigration ban

But Trump on Wednesday declined to say what specific measures he would support.

"I'll work on it with the generals," he told Cooper. He added, "We have to play the game at a much tougher level than we're playing it now."

Obama photographer shades Trump over secure discussions

Exhibit CC

3/22/16 Mediaite (Blog) (Pg. Unavail. Online)
2016 WLNR 8849615

Mediaite (Blog)
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March 22, 2016

Trump Responds to Brussels Attacks: 'We're Having Problems With the Muslims'—Trump on Brussels Attacks: 'We're Having Problems With the Muslims'

Alex Griswold

Mar 22, 2016

Republican presidential candidate Donald Trumpreacted to the Brussels terror attack Tuesday morning, saying bluntly on Fox Business that "we're having problems with the Muslims."

"You called after the Paris attacks for a pause to stop Muslims from coming into the United States. That got a lot of criticism, as you know," noted Wall Street Journal editor-in-chief Jerry Baker

"And a lot of support, Jerry. It got tremendous support," Trump pushed back.

Please enable Javascript to watch.

"Frankly, look, we're having problems with the Muslims, and we're having problems with Muslims coming into the country," he said, citing the San Bernardino shooters, one of whom entered the country on a fiance visa.

"You need surveillance, you have to deal with the mosques whether you like it or not," Trump said. "These attacks aren't done by Swedish people, that I can tell you."

Watch above, via Fox Business.

[Image via screengrab] —— >>Follow Alex Griswold (@HashtagGriswold) on Twitter

—— **Index References** ——

News Subject: (International Terrorism (1IN37); Islam (1IS02); Religion (1RE60); Social Issues (1SO05); Top World News (1WO62))

Region: (Belgium (1BE51); Europe (1EU83); Eurozone Countries (1EU86); Western Europe (1WE41))

Language: EN

Other Indexing: (Jerry Baker; Donald Trumpreacted)

Keywords: (brussels attacks); (iowac); (TV); (Jerry Baker); (Donald Trump); (Election 2016); (Fox Business); (Belgium)

Word Count: 162

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Exhibit DD

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No.: 2:17-cv-00135-JLR

JUWEIYA ABDIAZIZ ALI; A.F.A., A MINOR; REEMA KHALED DAHMAN; G.E., A MINOR; AHMED MOHAMMED AHMED ALI; E.A., A MINOR; ON BEHALF OF THEMSELVES AS INDIVIDUALS AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

DONALD TRUMP, PRESIDENT OF THE UNITED STATES OF AMERICA; U.S. DEPARTMENT OF STATE; TOM SHANNON, ACTING SECRETARY OF STATE; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, SECRETARY OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; LORI SCIALABA, ACTING DIRECTOR OFUSCIS; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; MICHAEL DEMPSEY, ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

DECLARATION OF REEMA KHALED DAHMAN IN SUPPORT OF PLAINTIFFS

I, Reema Khaled Dahman, declare under penalty of perjury as follows:

1. I am over the age of eighteen, am competent to testify to the matters below, and make this declaration based on personal knowledge.

2. I am a lawful permanent resident. I live in Seattle, Washington. I work as a caregiver.

3. I came to the United States with an immigrant visa on September 18, 2012. I am from Syria.

4. My son G.E. was born on May 14, 2000 in Daara, Syria. I got separated from G.E.'s biological father when I was two months pregnant with G.E. He was an abusive person. After I got separated from G.E.'s father, I started living with my parents. After G.E. was born, we continued living with them. At the time, I was working as an agricultural engineer and I was able to provide for my family.

5. I got married to my second husband on January 6, 2007 in Daara, Syria. He is a U.S. citizen. We had two sons together while we were living in Syria, one born in October 2007 and the other in October 2008.

6. After the Syrian conflict started in 2011, my husband wanted to come back to the United States. He filed a petition for me and for our two sons, but he did not file one for my son G.E. In our culture, it is not customary for a man to raise another man's son, even in circumstances like ours. Although I did not want to leave G.E., I was sure that I could figure out a way to bring him with me soon enough.

7. In January 2012, while the petitions were pending, my parents and G.E. moved to Damascus, Syria because conflict was getting worse and worse in Daraa. I had to stay in Daara with my husband and our two sons. Between January 2012 until June 2012, my son G.E. would come to visit his paternal grandparents and I would see him, too. On June 2012 I saw my son G.E.

for the last time. I did not know then that I would not see him again. On August 9, 2012, I received my immigrant visa from the U.S. Consulate in Amman, Jordan.

8. After we came to the United States, we lived in very poor conditions at my brother-in-law's house for one year. When we finally rented our apartment in August 2013, I was the only one working and supporting my family. I kept wanting to bring my son G.E. here as well. I remember very well one day my husband said "I feel like you want to bring your son here." When I answered "yes", he said "I didn't bring you here so that you can bring your son." I felt stuck. I did not know the immigration laws of the United States, I did not know that I could petition for my son G.E. as a lawful permanent resident. I thought I had to be a U.S. citizen.

9. In October 2015 , through the help of Refugee Women's Alliance and Northwest Immigrant Rights Project, I found out that as a lawful permanent resident I could petition for my son G.E.. I filed the Form I-130, family petition, on October 19 , 2015 with U.S. Citizenship and Immigration Services ("USCIS").

10. Given the terrible situation in Syria, I also submitted a request for Humanitarian Parole on November 30, 2015 with USCIS asking for a favorable exercise of parole so that my son G.E. could travel to the United States based on urgent humanitarian reasons and we can be reunited after so many years. No child should face the situation my son or any other child has been experiencing in Syria. My son has no future there; he has not been able to attend school for the last three

years. Schools are no longer functioning; so many teachers have fled the country. My heart broke into pieces during one of our rare conversations with him when he told me "Mom, I feel like I am forgetting how to write." That is not the future I dreamt for him.

11. The family petition I-130 was approved by USCIS on June 1, 2016. Towards the end of July 2016, I received immigrant visa and affidavit of support fee bills from the National Visa Center ("NVC") to continue with the consular process. I started gathering the civil and financial documents. Meanwhile, the Humanitarian Parole request I filed was still pending.

12. On September 23, 2016, ten months after I filed for humanitarian parole, I received a Request for Evidence notice from USCIS asking for a detailed explanation of why my son G.E. cannot live with his biological father in Syria while waiting for the adjudication of his immigrant visa. The request for evidence also asked me to provide a DNA test result to establish the claimed biological relationship between my son and me. I prepared a detailed explanation why my son could not live with his biological father and I was ready to do the DNA test. Upon researching for the laboratories accredited by the American Association of Blood Banks ("AABB"), I learned that there is no AABB accredited laboratory where a DNA test could be conducted in Syria. My son had to travel to Jordan or another neighboring country in order to do the DNA test. This was impossible—he is only 16 years old. He cannot travel safely from Syria to Jordan and back on his own, and he had no other family to take him.

Unfortunately, we could not provide the DNA test for these reasons. I explained this to USCIS.

13. Meanwhile, I electronically submitted his online immigrant visa application (Form DS-12 260) on December 2, 2016 to NVC to continue with his immigrant visa process.

14. On December 8, 2016, I received a notice from NVC asking for a Syria Police Clearance 14 Certificate (Judicial Record Extract) for my son G.E. as part of the consular process so that his immigrant visa interview could be scheduled.

15. The day before the Executive Order was announced, on January 26, 2017, I received a denial notice of the Humanitarian Parole I had requested. The denial notice indicated "Use of the Secretary's parole authority is discretionary, justified on a case-by-case basis, and limited by law to include only to those requests that are based upon 'urgent humanitarian reasons,' or 'significant public benefit.'" I thought that being a teenager in a war-torn country was an urgent humanitarian reason. I was crushed that the parole was denied. I had explained to USCIS the danger my son is in. The situation in Syria is so unstable that my son has even been kidnapped once. I am afraid for his safety the longer we wait.

16. The day after the denial notice, on January 27, 2017, when I heard the Executive Order of the President, I was shocked. My heart sank. I felt that all the doors are closing on me. I waited so long to be with my son and now I was left with nothing. I haven't seen my son for almost five years. We were so close

to being reunited. This executive order took my dream away. I know they say it will only cause delay for a few months, but there is no guarantee of that. Besides, a few months is a long time in a country as dangerous as Syria. Do you know how it feels to live everyday not knowing if you will ever see your child again? I do.

17. I want to be reunited with my son like any other mother would want in this situation. The war in Syria is getting worse and worse. My mother is elderly and sick, she cannot take care of G.E. like she used to. My father passed away. My siblings fled Syria. I cannot leave my two sons in the United States and go back to Syria. But I also cannot take my sons to live in the midst of a war that never seems to come to an end. It is an impossible situation.

18. I hope I can see my son soon.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on this 6th day of Feb., 2017, in Seattle, Washington.

/s/ REEMA KHALED DAHMAN
REEMA KHALED DAHMAN

Exhibit EE

N.Y. / REGION

Disorder at Airports as Travelers Are Detained Without Lawyers

By BENJAMIN MUELLER and MATTHEW ROSENBERG JAN. 29, 2017

Drab airport screening areas and waiting rooms were transformed into chaotic scenes on Sunday, with lawyers saying that border agents had put pressure on detainees and created an information blackout that left many struggling to discern how President Trump's immigration order was being applied.

In New York, a lawyer said detainees were being moved from one terminal to another in handcuffs. In Los Angeles, an Iranian graduate student was pushed by border agents to sign documents allowing them to send her out of the country, her lawyers said. And in the Washington area, agents told lawyers that officials had barred detainees from getting legal help, despite a federal judge's order that legal permanent residents be given access to lawyers.

7 who had been detained for many hours were released and reunited with relatives. But well into Sunday, two days after Mr. Trump signed an executive order keeping many foreigners from entering the country, lawyers were still sweeping airport arrival sections in search of waiting relatives, often their only source of information about who was being held.

Some detainees said they had slept on office chairs. In Los Angeles, lawyers said Customs and Border Protection agents had told them there were cots but had declined to say how many there were, or how many people were being held.

Detainees were told their phones would be disruptive and had to be taken. Lawyers and relatives were growing increasingly concerned about older detainees with medical problems.

Among those with ailments were an Iranian couple who had arrived in Los Angeles on visitors' visas. The man, in his late 60s, had been through two open-heart operations, and he and his wife, in her late 50s, were both diabetic. After arriving at the airport on Saturday afternoon, they were allowed to call their daughter in the United States only once, around 1 a.m. on Sunday, said Patricia Corrales, a private lawyer working on detainees' cases there. Relatives and lawyers repeatedly asked whether the couple were receiving proper medical care but learned nothing further from border agents.

Ms. Corrales, who was an Immigration and Customs Enforcement lawyer for 17 years, said, "I think they don't necessarily have the resources, the staff and experience to deal with these large numbers."

In a statement, the Department of Homeland Security said, "We are committed to ensuring that all individuals affected by the executive orders, including those affected by the court orders, are being provided all rights afforded under the law."

Some detainees were reportedly pressured to sign documents they hardly understood and then put on flights out of the country. When two brothers from Yemen, Tareq Aqel Mohammed Aziz, 21, and Ammar, 19, landed on Saturday morning at Dulles International Airport near Washington with immigrant visas, they planned to board a connecting flight to Flint, Mich., to join their father. Instead, they were taken off the plane, put into handcuffs and told they needed to sign a form or face being barred from the country for five years, said their lawyer, Simon Y. Sandoval-Moshenberg, of the Legal Aid Justice Center in Virginia. They signed the form and were quickly put on a plane to Ethiopia.

A 24-year-old Iranian woman who is a graduate student in the United States told relatives of a similar problem at Los Angeles International Airport, where she arrived on Saturday after a trip visiting family members in Europe. Border agents told the woman that her student visa was no longer valid, which lawyers said was not true, and that if she did not sign a document saying she was leaving voluntarily, she would be forcibly deported and barred from entry for five years.

The Iranian student signed. She had not been allowed to consult a lawyer and was permitted only three calls to relatives before her phone was confiscated and searched, said Ms. Corrales and Judy London, the directing attorney of the nonprofit Public Counsel's Immigrants' Rights Project, both of whom spoke with the woman's relatives. On Saturday night, after a federal judge in Brooklyn ruled the government could not remove travelers who had arrived with valid visas, she was put on a plane back to Europe, her lawyers said. They declined to share her name out of concern for her safety.

On Sunday morning, Ms. Corrales spoke to a supervisor from the customs agency who suggested that the Iranian student was still at the Los Angeles airport. The supervisor told Ms. Corrales that "they were waiting for orders from higher-ups in terms of how to enforce the injunction," Ms. Corrales said, referring to the Brooklyn judge's ruling.

Some detainees dealt with the whiplash of plans changing by the hour. A group of five Iranians detained in New York told family members on Sunday morning that the government planned to put them on a 1:30 p.m. flight back to Turkey, said Melanie Zuch, a staff lawyer at the Urban Justice Center. Several hours later, some of them were told they would be allowed to stay.

Vahideh Rasekhi, a graduate student at Stony Brook University on Long Island who was also detained at Kennedy Airport, said she and other detainees were also told they would be put on flights back out of the country, with agents promising only that if they held out a little longer, they might work out a way to keep them in the United States. Eventually they did, and shortly after 2:30 p.m., Ms. Rasekhi walked into Terminal 4 and was immediately surrounded by loved ones, lawyers and journalists.

"I'm just so exhausted," she said.

She said that detainees had been given meals and water and that agents had even satisfied one person's request for a lemon. Others gave accounts of more difficult conditions; one lawyer, Justin Orr, said some detainees had been given nothing but chocolate to eat.

Mousa Ahmadi, 30, an Iranian graduate student at the New Jersey Institute of Technology, gave a long hug to his sister, Dr. Fahimeh Ahmadi, 40, after she was released from additional screening at Kennedy. The siblings had not seen each other for over three years.

Dr. Ahmadi, a general practitioner in the Australian city of Gold Coast and a dual citizen of Australia and Iran, arrived for a long-planned visit without the siblings' parents, who hold only Iranian passports and canceled their flights on Saturday.

"My Mom said, 'If they don't let me in the country do you think I can see him even for a half hour?'" Dr. Ahmadi recalled. "She said, 'Is there a window where I can see him?'"

Lawyers at J.F.K. said that about half a dozen detainees were still in custody by late Sunday afternoon. The Los Angeles Police Department told lawyers there earlier on Sunday that about 40 people were being held.

A federal judge in Alexandria, Va., on Saturday ordered government officials to give lawyers access to all legal permanent residents being detained at Dulles. But when lawyers showed border agents there the court order and requested access to detainees, a supervisor replied, "That's not going to happen."

Matt Zeller, who runs **No One Left Behind**, a group that helps bring over Iraqis and Afghans who worked for the military, said he was told that there were 40 to 55 people who had been pulled aside by customs officers at Dulles on Sunday evening, and that at least some were Iraqis, although it was not clear if any had worked for the military. Detainees who had been released overnight—many of whom had green cards—spoke of hours of uncertainty as they waited to find out if they would be allowed into a country that they called home but that no longer seemed to want them.

"This is not the America that I have lived in," said one man who had been released, Seifollah Moradi, 34, a student from Columbia, Md., who has a green card. "We used to be treated with respect. This is the land of freedom."

Mr. Moradi had been held for six hours after returning from Tehran, where he was visiting his sick father.

Protesters, who were lined up just past the set of one-way doors that separate the public areas of the Dulles arrival hall from the immigration and baggage claim areas for international flights, cheered loudly as Mr. Moradi came through the doors. They chanted, "Welcome to the U.S.A.," and, "No hate, no fear, refugees are welcome here."

Mr. Moradi, his face drawn, hardly seemed to notice.

Reporting was contributed by Ruth Bashinsky, Sheri Fink, Sean Piccoli and Liz Robbins.

A version of this article appears in print on January 30, 2017, on Page A13 of the New York edition with the deadline: Confusion and Disorder at Airports as Travelers Are Detained Without Lawyers.

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Exhibit FF

Trump delays new travel ban after well-reviewed speech

By Laura Jarrett, Ariane de Vogue and Jeremy Diamond, CNN

Updated 6:01 AM ET, Wed March 1, 2017

Immigration violations: The one thing to know 01:15

Immigration violations: The one thing to know 01:15

Story highlights

The new travel ban will exclude legal permanent residents and existing visa holders

Two sources also expect that the President will formally revoke the previous executive order

Washington (CNN)—President Donald Trump has delayed plans to sign a reworked travel ban in the wake of positive reaction to his first address to Congress, a senior administration official told CNN.

The decision came late Tuesday night as positive reviews flooded in for Trump's speech, which struck a largely optimistic and unifying tone.

Signing the executive order Wednesday, as originally indicated by the White House, would have undercut the favorable coverage. The official didn't deny the positive reception was part of the administration's calculus in pushing back the travel ban announcement.

"We want the (executive order) to have its own 'moment,'" the official said.

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s address to

Trump's original executive order, signed a week after he took office, banned citizens of seven Muslim-majority countries from entering the US and temporarily suspended the entry of all refugees. A federal court issued a temporary stay that halted implementation of the travel ban earlier this month, a decision that was later upheld by a federal appeals court.

The new travel ban will exclude legal permanent residents and existing visa holders from the ban entirely, sources familiar with the plans told CNN earlier Tuesday.

While sources caution that the document has not yet been finalized and is still subject to change, there will be major changes:

- The new executive order will make clear that legal permanent residents (otherwise known as green card holders) are excluded from any travel ban.

- Those with validly issued visas will also be exempt from the ban.

- The new order is expected to revise or exclude language prioritizing the refugee claims of certain religious minorities.

Speaking in Munich, Germany, earlier this month, Department of Homeland Secretary John Kelly promised a "phased-in" approach to minimize disruption this time around.

But what remains to be seen are the other key aspects of the new executive order, especially in terms of refugees, including:

- What happens to the suspension of the refugee program for 120 days?

- Will Syrian nationals still be barred indefinitely?

- Will the cap on the number of refugees change? The first version of the executive order caps it at 50,000 for fiscal year 2017.

Two sources also expect that the President will formally revoke the earlier executive order, despite repeated statements from White House press secretary Sean Spicer that the two orders would co-exist on a "dual track."

The administration could potentially argue that the existing challenges to the original executive order are moot, but the challengers tell CNN the legal battles will likely continue even after the new order is signed.

"Exempting lawful permanent residents and current visa holders will not cure the core legal problem—that the ban was motivated by religious discrimination, as evidenced by the President's repeated statements calling for a Muslim ban," ACLU attorney Lee Gelernt explained. "That discriminatory taint cannot be removed simply by eliminating a few words or clever tinkering by lawyers."

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Dress like the first lady

F.

Exhibit GG

The New York Times | https://nyti.ms/2kVhMbe

POLITICS

H.R. McMaster Breaks With Administration on Views of Islam

By MARK LANDLER and ERIC SCHMITT
FEB. 24, 2017

WASHINGTON—President Trump's newly appointed national security adviser has told his staff that Muslims who commit terrorist acts are perverting their religion, rejecting a key ideological view of other senior Trump advisers and signaling a potentially more moderate approach to the Islamic world.

The adviser, Lt. Gen. H. R. McMaster, told the staff of the National Security Council on Thursday, in his first "all hands" staff meeting, that the label "radical Islamic terrorism" was not helpful because terrorists are "un-Islamic," according to people who were in the meeting.

That is a repudiation of the language regularly used by both the president and General McMaster's predecessor, Michael T. Flynn, who resigned last week after admitting that he had misled Vice President Mike Pence and other officials about a phone call with a Russian diplomat.

It is also a sign that General McMaster, a veteran of the Iraq war known for his sense of history and independent streak, might move the council away from the ideologically charged views of Mr. Flynn, who was also a three-star Army general before retiring.

Wearing his Army uniform, General McMaster spoke to a group that has been rattled and deeply demoralized after weeks of upheaval, following a haphazard transition from the Obama administration and amid the questions about links to Russia, which swiftly engulfed Mr. Flynn.

General McMaster, several officials said, has been vocal about his views on dealing with Islamic militancy, including with Mr. Trump, who on Monday described him as "a man of tremendous talent, tremendous experience." General McMaster got the job after Mr. Trump's first choice, Robert S. Harward, a retired Navy vice admiral, turned it down.

Within a day of his appointment on Monday, General McMaster was popping into offices to introduce himself to the council's professional staff members. The staff members, many of them holdovers from the Obama administration, felt viewed with suspicion by Mr. Trump's team and shut out of the policy-making process, according to current and former officials.

In his language, General McMaster is closer to the positions of former Presidents Barack Obama and George W. Bush. Both took pains to separate acts of terrorism from Islamic teaching, in part because they argued that the United States needed the help of Muslim allies to hunt down terrorists.

"This is very much a repudiation of his new boss's lexicon and worldview," said William McCants, a senior fellow at the Brookings Institution and the author of "The ISIS Apocalypse."

"McMaster, like Obama, is someone who was in positions ofleadership and thought the United States should not play into the jihadist propaganda that this is a religious war," Mr. Mccants said.

"There is a deep hunger for McMaster's view in the interagency," he added, referring to the process by which the State Department, Pentagon and other agencies funnel recommendations through the National Security Council. "The fact that he has made himself the champion of this view makes people realize they have an advocate to express dissenting opinions."

But Mr. McCants and others cautioned that General McMaster's views would not necessarily be the final word in a White House where Mr. Trump and several of his top advisers view Islam in deeply xenophobic terms. Some aides, including the president's chief strategist, Stephen K. Bannon, have warned of a looming existential clash between Islam and the Judeo-Christian world.

Mr. Bannon and Stephen Miller, another senior adviser with anti-Islamic views, have close ties to Mr. Trump and walk-in privileges in the Oval Office. General McMaster, 54, has neither.

Known for challenging his superiors, General McMaster was nearly passed over for the rank of brigadier general in 2007, until Gen. David H. Petraeus, who used his counterinsurgency strategy in Iraq, and Robert M. Gates, then the defense secretary, rallied support for him.

The schisms within the administration could be aired publicly if the Senate Armed Services Committee exercises a right to hold a confirmation hearing for General McMaster. Although the post of national security adviser does not require Senate confirmation, senators must approve his retention of his three-star rank in a new position.

Senator John McCain, the committee's chairman and a strong supporter of General McMaster, has not said whether he wants to hold a hearing.

To outside observers, the administration's approach to the world appears increasingly schizophrenic. Mr. Pence, Defense Secretary Jim Mattis and other senior cabinet officers have reaffirmed American support for alliances with NATO and in East Asia. Mr. Bannon and other White House officials continue to suggest there will be radical shifts in American policy. These mixed messages extend beyond the Muslim world. This week, Mr. Pence traveled to Brussels to declare —on Mr. Trump's behalf, he said—"the strong commitment of the United States to the continued cooperation and partnership with the European Union."

But on Thursday, the German ambassador to the United States, Peter Wittig, said his government remains concerned that the White House views the European Union as an ailing, inefficient economic club, rather than a political project that has kept Europe at peace.

Before Mr. Pence's trip, according to Reuters, Mr. Wittig met Mr. Bannon, who told him the White House viewed the European Union as a "flawed construct" and preferred to negotiate with Germany and other European countries one-on-one. Mr. Wittig declined to discuss the meeting, while Mr. Bannon did not respond to a request for comment.

But Mr. Wittig said to reporters, “We will certainly fight for a coherent and resilient European Union.”

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A version of this article appears in print on February 25, 2017, on Page A15 of the New York edition with the headline: McMaster Breaks With Trump on Islam.

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Exhibit HH

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The Big [illegible]
Black Friday Bombing

How the case of convicted teenager Mohamed Mohamud — convinced by the FBI he was bombing a Christmas tree lighting ceremony in Portland, Oregon — could determine whether the American government is allowed to spy wholesale on its citizens.

On Nov. 4, 2010, a small cell of al-Qaeda operatives convened at a Starbucks in Corvallis, Oregon, to review the details of their plot to kill 25,000 people in downtown Portland. The cell had three members: Hussein, an explosives expert; Youssef, a businessman turned jihadi recruiter; and Mohamed Osman Mohamud, a 19-year-old Somali-American college student.

The would-be terrorists had met earlier that year, after one of Mohamud's friends from the mosque recommended him to the Council, a secret jihadi organization that scoured the globe for potential operators. Hussein and Youssef flew to Oregon to meet the teen, whom they called "a jewel in the rough." Together, the three conceived a plot to detonate an 1,800-pound bomb during Portland's Christmas tree lighting ceremony, a yearly Black Friday tradition in Pioneer Square, the city's main plaza. Mohamud chose the target. Hussein and Youssef designed and built the bomb.

It was time for a test run. After meeting at the coffee shop, the group drove to a remote spot in the countryside. There, Hussein showed Mohamud a smaller version of the device: a backpack filled with three pounds of explosives. They placed the bomb in a tree and walked away. Hussein handed Mohamud a cell phone and asked him to dial a number. The teenager obeyed—and a small explosion rattled the last yellow leaves on the trees.

Later that day, the cell returned to Mohamud's apartment in Corvallis to record his farewell video. The teenager put on a white robe, a white-and-red headdress, and a camouflage jacket. He began to read his manifesto to the camera. "For as long as you threaten our security, your people will not remain safe," Mohamud said. "As your soldiers target our civilians, we will not fail to do so. Did you think that you could invade a Muslim land and we would not invade you?"

Two weeks later, on Nov. 26, 2010, Youssef picked up Mohamud from a friend's house in Portland. They met with Hussein and headed to a parking spot near the Comcast building, where the operators showed Mohamud a large white van. Hussein opened the side door, revealing six 55-gallon drums filled with fertilizer. On the front seat was the detonation mechanism: a cell phone, a 9-volt battery, and a switch. The whole van smelled of diesel.

"It's beautiful," Mohamud said.

The three headed to a hotel in downtown Portland, where they prayed and ordered a pizza. They turned on the TV and watched the crowds march into Pioneer Square under light rain.

Around sunset, Hussein and Mohamud drove the bomb to the chosen corner. Mohamud flipped the toggle switch attached to the detonator, arming the bomb. Youssef picked up Mohamud and Hussein in a different car and drove them to Union Station. As the three left the scene, Mohamud said he thought he saw his mother heading toward the ceremony.

After dropping off Youssef at the train station, Hussein and Mohamud parked in a nearby garage. The explosives expert handed the teen a cell phone. The teenager dialed the detonator number. Nothing happened.

"Why don't you get out of the car and try again?" Hussein said.

Mohamud did as he was told. As he pressed the last button, he heard a group of people running at him.

"Don't move!" someone yelled.

Suddenly, Mohamud was on the ground. He could hear Hussein screaming, "Allahu akbar!"—God is great—over and over again. After the third or fourth time, the 17 arresting officers started to laugh.

The bomb Mohamud had tried to detonate was fake. The test explosion was staged. There was no secret council of militant leaders seeking a gifted Somali-American teenager to wage jihad. Youssef and Hussein were undercover FBI agents.

The Black Friday non-bombing of Portland was a federal government sting, the result of a yearlong operation involving dozens of people, a secret court order, and a massive surveillance apparatus.

Mohamud went to trial three years after his arrest. (Unless otherwise stated, the facts in this article come from the voluminous public record for his criminal case, including the 2,700-page trial transcript, as well as firsthand interviews with 11 people with knowledge of the case. The FBI, the Department of Justice, and Mohamud's attorneys declined to answer detailed questions. Mohamud did not respond to letters sent to him in prison.)

In court, Mohamud's lawyers attempted an entrapment defense, arguing that their client never indicated he wanted to attack Portland before the FBI contacted him. The prosecution said Mohamud's prior correspondence with two individuals suspected of working for al-Qaeda was evidence he was looking for "the right people"—and that, had the FBI not intervened, he might have found them.

The jury convicted Mohamud. A judge sentenced him to 30 years in prison.

The story could have ended there. But, months after the trial, Mohamud's lawyers received an unexpected message from the government: At some point in the investigation, the FBI had used the 2008 amendments to the Foreign Intelligence and Surveillance Act, a law known as the FAA, to access Mohamud's communications without a particular warrant.

The notification was bewildering. The government is supposed to inform defendants they have been targeted by FAA spying before they go to trial, not after. More broadly, the Fourth Amendment to the Constitution—at least as many legal experts understand it—protects citizens and those living in the U.S. from warrantless surveillance.

Today, Mohamud's lawyers are asking the 9th Circuit of the U.S. Court of Appeals to overturn their client's conviction. Their central argument is that the FBI's use of the FAA against Mohamud violated the Constitution.

Mohamud is the very first criminal defendant to challenge the FAA before a court of appeals, which opens the door for a hearing before the U.S. Supreme Court. The appeal has widespread implications: The controversial law provides the legal framework for the mass surveillance programs that Edward Snowden revealed in 2013.

"It's not an exaggeration," Patrick Toomey, an American Civil Liberties Union attorney, told BuzzFeed News, "to say that the privacy rights of millions of Americans potentially hang in the balance of his case."

Mohamud is the very first defendant to potentially challenge the NSA's mass surveillance programs revealed by Edward Snowden before the U.S. Supreme Court.

The chain of events that led to Mohamud's appeal began in 1978, when Congress passed the Foreign Intelligence and Surveillance Act, or FISA. In its original version, the law forbade the government from spying within U.S. territory, unless it could convince a special court that the investigation's targets were "agents of a foreign power."

The law was far from perfect: The special court met in secret and approved nearly all of the government's requests. (Of the 35,333 applications for FISA warrants filed between 1979 and 2013, only 12 were rejected outright.) Still, the act required the government to name the individuals it was targeting, specify the kind of communications it wanted to intercept, and give a timeline for the investigation—provisions that generally kept it in line with the Fourth Amendment.

Instead of targeting individuals already engaged in criminal conduct, the FBI after Sept. 11, 2001, began focusing on people who it believed could potentially become terrorists.

All of that changed after Sept. 11, 2001. Instead of treating terrorism as a crime to be solved after it happened, the government began to treat it as a disaster to be prevented. In 2002, President Bush signed a secret executive order authorizing the National Security Agency to monitor every email, telephone call, and text message in which at least one party was believed to be outside the U.S.—even if everyone else in the conversation was located within the country. The administration said the NSA didn't need any kind of warrant, from the FISA court or otherwise, because such communications counted as "foreign" rather than "domestic," and were therefore not protected by the Fourth Amendment.

The FBI, however, faced a problem: All that monitoring of communications was turning up a lot of terrorist sympathizers, but not a lot of actual criminal activity. The bureau responded by refining one of its most controversial techniques: the sting operation. Instead of targeting individuals already engaged in criminal conduct, the FBI began focusing on people who it believed could *potentially* become terrorists.

Underlying many of these sting operations was a psychological doctrine—strongly challenged by several studies—known as "radicalization theory," which held that individuals with extreme political opinions tended to look for like-minded people and eventually take violent action.

Many American Muslims believe the government uses sting operations to unfairly target their communities and that radicalization theory contributes to Islamophobia. "When people assume that one of their community members could be an informant for the government, that creates a ripple effect," Kayse Jama, a Somali-American organizer who works in Portland, told BuzzFeed News. "They can't trust the people at their mosque. They can't trust anyone. They feel they can't speak freely." Studies suggest that at least some of Jama's fears are well-founded.

Federal courts convict nearly 90% of those of accused of terrorism, most of them through guilty pleas. This means the facts of most homegrown terrorism cases are rarely entered into the public record, which in turn means the FBI is almost never forced to argue the legality of its techniques. Mohamud's case is one of few exceptions.

Mohamed Osman Mohamud was born on Aug. 11, 1991, in Mogadishu, Somalia. Months earlier, rebels had ousted the country's long-standing dictator, unleashing a civil war that rages to this day. On the way to the hospital, Mohamud's parents had to confront armed thugs. They were lucky to find a doctor who helped with the baby's breech birth.

The family fled to America. Mohamud's father, Osman Mohamud Barre, went first, quitting his engineering professorship at Somali National University. Mohamud stayed behind, spending a year in a Kenyan refugee camp with his mother, Mariam Hassan.

The U.S. granted Barre refugee status. He settled in Hillsboro, Oregon, where he worked 13 hours a day at an Intel assembly line. By 1993, he had saved enough money to bring his family to the U.S. "They were malnourished and suffering, but they were happy," Barre later testified at his son's trial. "We were grateful to America."

Barre climbed the ranks at Intel. He and Mariam had two more children. They moved to Beaverton, a prosperous suburb in southwest Portland. Mohamud devoured the *Harry Potter* series and became an NBA fan. He did well in school and made friends easily. "You would never see him alone," Joshua Alinger, who befriended Mohamud in elementary school, told BuzzFeed News.

Early in high school, Mohamud became interested in religion, even as his parents became less observant. Several of his friends said many Muslim families in Beaverton felt that Mohamud exerted a positive influence. "Whenever we tried to do something that went against our religion, like date a girl, [Mohamud] was like a stopping point," Mohamud's best friend, who is not identified in the public record and who spoke on condition of anonymity, told BuzzFeed News. "He would just give us that look."

Mohamud also joined in the hijinks of American adolescence. By junior year, he began skipping school. His best friend said the two of them would sneak out to a nearby community college to play pool. They made friends with an older student, who bought them alcohol and let them hang at his house. "I think he wanted to be a normal suburban teenager," said James Duncan, an English teacher at Westville High School who oversaw Mohamud's study hall.

Like many refugee children, Mohamud had to deal with cultural barriers that separated him from his parents, his American friends, and his mostly white classmates. There is little question he felt different. For an issue of the class magazine, for example, Duncan asked his students to draw cartoons of themselves and caption them. Under his portrait, Mohamud wrote, "I'm *the* black one."

Around the same time, Mariam and Barre began to go through a breakup, Mohamud's best friend said. "Home was kind of a hostile environment for him," the friend said. "He tried to spend as much time as possible out of the house."

(Reached at her home in suburban Portland, Mohamud's mother declined to comment, saying her son's attorneys had instructed her not to speak to reporters. "But one day," she said, "I'll be able to speak out about his case, *inshallah*"—God willing. Mohamud's father did not respond to requests for comment.)

Mariam Barre at her son's trial. *Rick Bowmer / AP Photo*

As his parents' relationship deteriorated, Mohamud began spending more and more time at the Masjed As-Saber, a local mosque led by a Somali imam named Mohamed Kariye. The cleric had a complicated history. According to an immigration complaint, he spent part of his youth fighting with the Afghan mujahideen, ajihadi organization that counted Osama bin

Laden among its supporters. (At the time, however, the U.S. supported the group in its fight against the Soviet Union.) In 2003, the FBI's counterterrorism unit arrested him and charged him with Social Security fraud. (The imam pleaded guilty and paid roughly $5,000 in fines.) Today, the government is trying to take away the imam's American citizenship.

Kariye's teaching—ahhabism, a traditionalist Sunni practice—proved too restrictive for some members of Portland's Muslim community. The family of Mohamud's best friend, for example, used to attend Friday prayers at the Masjed As-Saber, but eventually switched to another congregation. Mohamud's parents, too, were "totally against the mosque," his best friend said. For the teenager, frequenting the masjed became a form of rebellion.

At Kariye's mosque, Mohamud met Amro al-Ali, an 18-year-old exchange student from Saudi Arabia. According to Marc Sageman, a former CIA officer who testified on "open source information" at Mohamud's trial, the Saudi was "a wannabe" who liked to talk big about jihad but was, at least at that point, "not a terrorist."

After meeting al-Ali, Mohamud began frequenting extremist websites, where he answered a call for submissions to an English-language webzine called *Jihadi Recollections.* The publication was the brainchild of Samir Khan, a Pakistani-American editor based in North Carolina. Khan commissioned him to write an article on fitness training, marking the beginning of a six-month-long collaboration.

But then, on Aug. 15, 2009, four days after his 18th birthday, Mohamud cut off contact with Khan. He wrote to Khan saying he was "going through a lot of things."

(Shortly after Mohamud's last email, Khan traveled to Yemen, where he became the editor of *Inspire*, the English-language outlet of al-Qaeda in the Arabian Peninsula. The U.S. government killed him in 2011, in the same drone strike that killed Anwar al-Awlaki, a top al-Qaeda figure and a U.S. citizen.)

Mohamud was indeed going through a lot—his parents had finally divorced. "You could see his discontent, sadness, and unhappiness," the teen's grandmother told his defense team. "He wouldn't listen to either one of them because there was no union. He definitely tried to talk them into staying together many, many times."

It was in that context that Mohamud received the email that sealed his fate. On Aug. 31, 2009, al-Ali sent him information about a religious school in Yemen. The thought of escaping to a distant land, away from his parents, appears to have seduced the teen. He stormed out of his mother's house and called his father to say he was moving to the Middle East. Barre tried to convince him to wait, but Mohamud said he already had a ticket and a visa. Barre called Mariam and asked her to look for their son's passport. It was missing.

Barre panicked. He had heard stories about kids from Minnesota's Somali-American community who'd been "brainwashed" into joining the civil war. He remembered one news report of a teen who fled—the parents later found a photo of him on the internet "shot in the head, dead, in Somalia."

Not knowing who to call, Barre contacted the FBI. "Can you guys help me to stop my son and make him not leave the country?" he asked the agent who picked up the phone. The agent took down Mohamud's full name, date of birth, and address and told Barre to meet one of his colleagues at the parking lot of a local high school.

Meanwhile, Mariam found her son. He was in a playground not far from her house. She took his passport and drove him back home.

Mohamed Mohamud is seen in this undated handout photo *Obtained by BuzzFeed News*

That afternoon, Barre met with FBI Special Agent Isaac DeLong, of the Joint Terrorism Task Force. "Why terrorism?" Barre asked. "Are you alluding that we are Muslim and my son's name is Mohamed? There's no terrorism here. We're citizens."

Barre explained that he wanted to keep his son from returning to Somalia. DeLong replied that there was nothing the bureau could do, because Mohamud was an adult.

That evening, the father and son had a difficult conversation. "I left my country because of violence," Barre told Mohamud. "I brought you here to give you a life of prosperity." Mohamud told his father had nothing to hide: al-Ali, a friend from the mosque, had recommended a school in Yemen. "You can learn Arabic and Islam once you finish school here and become mature enough to know wrong or right," Barre replied.

Barre forwarded al-Ali's email to the FBI, with a note saying he had spoken to Mohamud and the situation was under control. Unbeknownst to him, DeLong ran Mohamud's email address through what he described at trial as "an FBI database." The search, according to court records, turned out an interesting result: Mohamud had been in touch with the subject of another investigation—Samir Khan.

"I took this information to my superior," DeLong testified. "We decided to open a case."

The Bush administration's warrantless surveillance operations remained secret until December 2005, when the *New York Times* published an expose. The article unleashed outrage that pushed the president to seek retroactive legislative approval for the program. In July 2008, the Senate approved the FISA Amendments Act, or FAA.

The new law overwrote many of FISA's provisions, empowering the attorney general and the director of national intelligence to authorize surveillance of people "reasonably believed to be located outside the United States." Those offices no longer had to get warrants, as the original law mandated. Instead, they simply had to present the FISA court with a set of general procedures meant to "minimize" the "incidental" surveillance of people in the U.S.

On the same day President Bush signed the FAA, the ACLU filed a suit saying the law violated the First and Fourth Amendments. "The act does not require the government to demonstrate that its surveillance targets are foreign agents," the ACLU wrote in its complaint. "The statute does not require the government to identify its surveillance targets at all."

The suit, *Amnesty v. Clapper,* reached the Supreme Court. In February 2013, however, Justice Samuel Alito delivered an opinion declining to hear the case. He said the only people with standing to challenge the act were criminal defendants who, unlike the ACLU, knew for certain that their communications had been intercepted. (At that time, the government had not informed a single defendant of its use of the FAA.)

Then, in May 2013, Edward Snowden handed a group of journalists a cache of classified documents. The leaks detailed how the NSA invokes the FAA to intercept, store, and in some cases review the telephone and internet communications of hundreds of millions of people—many of them citizens and residents of the U.S.

It's unclear to what extent domestic law enforcement agencies have access to the immense databases of information obtained through warrantless surveillance. In the past, the government has said FBI agents assigned to criminal investigations cannot see the data.

Marc Aspinall for BuzzFeed News

Early in September 2009, Mohamud moved to Corvallis, a small city a few hours south of Portland, to attend classes at Oregon State University. It was too late to enroll officially, so he couldn't live in the dorms. His parents agreed to give him $300 a month for rent. Mohamud's best friend, however, had just started at

OSU, where he shared a large dorm room with two other students. Since they had an extra bed, they invited Mohamud to live with them for free. In exchange, "we called his rent budget our booze budget," the friend said.

The group soon expanded to include two young men, Raed and Mohamed. Two of Mohamud's roommates were dating a pair of best friends, and the dorm became the center of a tight-knit social scene. (The other roommates and the women declined requests for comment.) "Our freshman year was a drunken mess," Mohamud's best friend said. "It was a blast."

FBI documents described Mohamud as a "confused college kid that talks mildly radical jihad out one ear, and drugs, sex, drinking out the other."

Mohamud's friends from that time acknowledged he was easy to influence. "He'd say, 'I don't want to drink anymore,' but he could be persuaded to do it," said Raed. "Like, a friend of mine would be like, 'No, come on, let's just drink for one more week,' and he'd say, 'OK, let's go.'"

The FBI, which trial testimony shows was already reading Mohamud's communications and had agents physically following him, agreed with Raed's assessment. (The bureau refuses to disclose when, exactly, the surveillance began.) In emails sent to other FBI agents in the fall of 2009, Special Agent DeLong wrote that the "manipulable" and "conflicted" teen appeared to have "left behind his radical thinking." Christopher Henderson, the special agent who took over the case when Mohamud moved to Corvallis, described the teen in internal emails as "a confused college kid that talks mildly radical jihad out one ear, and typical 18-year-old college kid (drugs, sex, drinking) out the other."

Then, on Halloween, Mohamud and his crew headed to a fraternity party. Mohamud "was drinking like a normal person, dancing with girls," and brought a woman home, Raed said. At the dorm, Raed said, they began having sex "in front of everybody, on the top bunk." The friends eventually left the room.

The following morning, two Oregon State Police officers were in the dorm. The cops said that a young woman had filed a crime report accusing Mohamud of drugging and raping her.

[illegible]

BuzzFeed News

Mohamud met with Detective Eli Chambers at the campus police office for a polygraph test. He denied having drugged the woman, but admitted that she was very drunk—"more drunk than I thought," Mohamud said, according to Chambers' report.

Chambers closed his investigation without pressing charges against Mohamud. Still, the incident rattled the student. After the polygraph, he wrote a long post in one of the forums he frequented:

> I swear by Allah I have become so lost. And I want so badly to be in a muslim land. I keep telling myself that if I lived in a muslim land I would become

> so pious. [. . .] Being in University and living on campus hasn't helped me too much either. I have fallen into so many things (i.e. alcohol and women). [. . .] All I need is some soft words to help my heart and supporting advice.

Instead of soft words, Mohamud began receiving emails from Bill Smith, a recent convert to Islam who lived in eastern Idaho and wanted to "get more involved in the fight" against enemies of the Prophet. Smith, however, was a fictional character created by FBI Special Agent Jason Dodd of the Portland field office.

(There were a number of oddities in Dodd's decision to begin an operation against Mohamud. At trial, the agent testified that Special Agent DeLong authorized the "Bill Smith" emails, but DeLong could not recall such thing. Special Agent Elvis Chan, who would eventually run the operation that resulted in Mohamud's conviction, testified that he did not know about the "Bill Smith" emails until after the arrest.)

On Nov. 12, 2009, just days after a Muslim U.S. Army major killed 13 people at the military base in Fort Hood, Bill Smith told Mohamud that he had seen news reports of "brothers trying to fight." "I want to, as well," Smith wrote in one of about two dozen emails. "What can I do? Do you know who I can talk to? Can you help?" Mohamud did not engage him, cautioning him instead to be careful about what he said on the internet.

But then, on Dec. 3, 2009, someone familiar reached out to Mohamud. "Salamz bro," the message read. "It's me, Amro." Al-Ali said he was making a pilgrimage to the holy city of Mecca, in Saudi Arabia. If Mohamud wanted to join, he said, a "bro" would contact him "about the proper paperwork."

The FBI agents traced al-Ali's computer not to Mecca, but to the northwestern border of Pakistan, one of the centers of violent jihad. The agents became convinced that al-Ali was writing in code, trying to recruit Mohamud as a fighter. Two months earlier, Interpol had issued an Arabic-language "red notice"—a sort of international "wanted" poster—saying al-Ali was "known to be connected to a fugitive wanted by Saudi Arabian authorities who is an expert in manufacturing explosives and in facilitating the movement of extremists inside Saudi Arabia," according to a translation included in a defense brief. "He also helped al-Qaeda division in Yemen and other countries by providing them with foreign fighters to carry out terrorist attacks against western and tourist interests."

(Later, the defense and the prosecution had heated arguments about the notice, which was ambiguous in Arabic and became vaguer in translation. Was al-Ali a member of al-Qaeda, or merely associated with a member? The matter was further complicated when the Saudis captured al-Ali, holding him without charges and subjecting him to repeated interrogations. A former intelligence officer told BuzzFeed News that classified reports detailing those interrogations show that al-Ali didn't remember Mohamud.)

Mohamud responded that joining the pilgrimage would be "wonderful." Al-Ali sent him a Gmail username and password, with instructions to log in to the account and draft, but not send, a message for a brother called Abdul Hadi. The FBI went on high alert, but Mohamud couldn't figure out the system. No messages were exchanged.

Toward the end of spring semester, one of Mohamud's roommates invited him to spend the summer working on a fishing boat in Alaska. Mohamud's parents thought it would help discipline their son. They bought him a plane ticket and, on June 14, 2010, drove him to Portland International Airport.

The family made it only to the security checkpoint, where an airline employee told Mohamud he couldn't board. As the family stood at the concourse, a man in a dark suit introduced himself as Special Agent Bradford Petrie. "I understand Mohamed was not allowed to fly today," Petrie told the family. "We'd like to talk about that if we could."

Marc Aspinall for BuzzFeed News

A week earlier, the FBI had decided to launch a full-scale undercover operation against Mohamud. Miltiadis Trousas, an agent based in the FBI office in Eugene, Oregon, wrote to Special Agent Chan, a sting specialist based in San Francisco, to suggest targeting the teen "using everything we have on him," including the fact that he was "shy around authority figures." When the agents learned of Mohamud's plans to travel to Alaska, they worried he might try to continue to Pakistan or Yemen. They placed him on the no-fly list.

At the Portland airport, Petrie brought Mohamud and his parents to a conference room. Barre asked whether his call to the FBI a year earlier had anything to do with his son's placement on the no-fly list. Mohamud denied visiting extremist websites. Petrie concluded the interview promising the family he'd try to "help" the teenager. He said nothing about the operation.

A few days after the interview at the airport, Chan contacted an FBI agent in California and asked him to fly to Portland to play an "al-Qaeda spotter" in a sting against a suspected teenage radical. The agent, who had been born and raised in an Arabic country, assumed the name Youssef.

Youssef got in touch with Mohamud nine days after the airport incident. The goal was to set up an in-person meeting, purportedly to assess whether the teen was serious about wanting to join a militant organization. The agent wrote in the voice of the "brother" whom al-Ali had earlier told Mohamud to contact, and whom the teenager never reached out to. "Salamz, bro," the message began. "Go to hushmail.com and set up an account." Mohamud replied with an innocuous greeting from an encrypted account. Two days later, Youssef wrote back: "Are you still able to help the brothers?"

Mohamud wrote back something noncommittal. Youssefs next email suggested that God's plan for Mohamud was in Portland: "Allah I'm sure has good reason for you to stay where you are," the undercover agent wrote. He said he was traveling to Oregon and asked the teen to meet him in person.

Mohamud ignored the message. Worried about losing their target, the agents sent another. A week later, Mohamud responded by inviting Youssef to Friday services at the Masjed AsSaber. The FBI, however, did not want to send an undercover agent to a place of worship. Instead, the agent suggested meeting in downtown Portland. Mohamud grew suspicious. "How did you get my email?" the teen wrote. "And if Amro did give you my email, then how do you know him? And describe him to me if you really do know him."

The FBI did not know what al-Ali looked like. To avoid blowing Youssefs cover, the agents invented a fictional organization, which they called the "Ihata," or Council. They told Mohamud that "a brother from Oregon" told the Council about him, prompting the group to send Youssef to interview him. Flattered, Mohamud agreed to meet on July 30, 2010.

For the first meeting, Youssef wore a suit to match his cover: a business traveler with connections across many countries. He met Mohamud on a street corner and walked with him to the Embassy Suites, a hotel blocks away from Pioneer Square.

The public record of that meeting is incomplete. In what the FBI claimed was an honest mistake, Youssefs tape recorder had dead batteries. Apart from the anonymous agent's testimony, the only source for what Mohamud said that day is a summarized report prepared by Chan. At trial, Chan said he had destroyed his original notes.

(The defense took great issue with this at trial. Entrapment law requires prosecutors to show that a defendant was predisposed to commit the crime before the first contact with government agents. The nuances of Mohamud's behavior and language during the first meeting, the defense argued, were vital.)

In the FBI's account of the meeting, Youssef and Mohamud sat at a table in a corner of the hotel lobby. The agent said the Council wanted to interview seven possible candidates in the U.S. and Canada.

"So, what have you been doing to be a good Muslim?" Youssef asked.

Mohamud said he'd written religious poems and a couple of articles for *Jihadi Recollections*.

"Well, you know, it's pretty obvious that you can't go overseas," Youssef said. "So, what can you do for the cause? What do you want to do for the cause right now?"

Instead of answering with a concrete proposition, Mohamud told him about a dream in which he went to the mountains of Yemen, received training, and led a Muslim army against the infidels in Afghanistan. The undercover agent then repeated his question—what could the teen do for the cause? Mohamud said he could do "anything."

"I gave him five examples of how you could be a good Muslim," Youssef testified at trial. Mohamud, the agent said, could pray five times a day, train as a doctor and go overseas, donate money to the cause, become "operational," or become "a martyr."

Mohamud replied he wanted to become operational. Youssef asked what he meant. According to the FBI agent, the teen said he wanted to "get a car, fill it with explosives, park it near a target location, and detonate the vehicle." Youssef told Mohamud he "had a brother that could help him with explosives" and instructed him "to research possible places within the Portland area as possible targets." The two then parted ways.

The FBI brought a second undercover agent into the operation: a detective from a suburban police department in California assigned to his city's Joint Terrorism Task Force. Like Youssef, the second agent was born and raised in an Arabic-speaking country. For the sake of the operation, he assumed the name Hussein. He prepared to play the role of a mature and deeply religious explosives expert.

Two weeks later, Mohamud met again with Youssef. The script for that meeting, the agent testified, was to "sell" the teen to Hussein, who was supposed to be initially skeptical. Youssef and Mohamud went to a room at the Embassy Suites, where Hussein was waiting —and where the FBI had installed several hidden cameras. They shared a meal to break the Ramadan fast.

"What can I do for you?" Hussein asked, according to his testimony.

Mohamud responded he wanted "a truck or a car and explosives."

"I'd be glad to sell you a truck!" Hussein said.

"No," Mohamud answered, "I want it for something else."

The teen launched into a rant about the need to punish the U.S. for attacks against Muslims.

"You know what's going on right now?" Mohamud said, according to a transcript of the recordings included in the prosecution's trial memorandum. "The U.S. is losing the war. So they have resorted to intentionally killing civilians. And, you know, God, the glorified, the exalted, said in the Quran that if they kill your women and children intentionally, then you are allowed to do the same to them."

The conversation shifted toward more concrete plans. Had Mohamud found a target in the Portland area, like Youssef requested?

"Do you guys know Pioneer Square?" the teen said. "When they have events, everybody comes up there. So, on the 26th of November, they have a Christmas tree lighting and some 25,000 people attend. You know, the streets are packed. I thought, I thought if you could help me, you know, to have, to have a truck . . . You know, explosives, *inshallah*."

"And this is what's in your heart?" Youssef said. "You know, there's going to be a lot of children there."

"Yeah, I mean, that's what I'm looking for," Mohamud said.

"For kids?" Youssef asked.

"No, just for a huge mass," Mohamud said. "You know, for them to be attacked in their own element, with their families, celebrating the holidays."

Hussein asked Mohamud if he wanted to kill himself with the bomb.

The undercover FBI agent asked Mohamud if he wanted to kill himself with the bomb. "Yeah, I don't mind that;' the teen said.

"Yeah, I don't mind that," the teenager said. He began to stutter. "That, that, that, I mean, if I wasn't in it, then, you know, then, they'll look for me."

"And you are not worried?" Youssef asked.

"If you were going to paradise, you wouldn't have to worry, right?" Mohamud answered. "Yes, I will push the button."

"Allah is looking at you right now," Youssef said.

"You know what I like, what makes me happy? You know what I like to see? When I see the enemy of Allah, and, you know, their bodies are torn everywhere," Mohamud said.

Anticipating an entrapment defense and a jury of liberal Portlanders, the undercover agents made sure to give Mohamud a way out. "We want to make sure that it's, you know, it's in your heart," Youssef told the teen. "If we get all the way there and you're like, uh-oh—even if that happens, we'll be disappointed, but you always have a choice, you understand? With us you always have a choice."

On the drive home, Mohamud burst into tears. After he left the car, with the cameras still rolling, Hussein looked at his partner. "It's almost too good to be true," he said.

Pioneer Courthouse Square, the site of Mohamud's attempted bombing is seen on Nov. 27, 2010, in Portland
[illegible]

Over the next few months, Youssef and Hussein met with Mohamud on five more occasions. They began giving him tasks. First, they sent him shopping for a timer, two cell phones, a toggle switch, and a snap connector. They asked him to find a few possible parking spots near Pioneer Square. Later, they told him to rent a storage shed where they could build the bomb.

More than anything else, they praised him: "You got a lot of talent, brother Mohamed." "You're probably smarter than most people." "I think you can be a great poet." "I trust you with my life." "We love you, for the sake of Allah."

As the operation progressed, the two agents grew concerned that Mohamud was becoming suicidal, so they decided to tell the teen that the Council would help him flee to a Muslim country after the attack. They were also worried that Mohamud would tell someone, so they gave him $2,700 to rent an off-campus apartment away from his friends. In a moment of telling naïveté, the teenager asked the two men he thought were al-Qaeda recruiters to sign as his guarantors for the lease.

The change in Mohamud's lifestyle did not go unnoticed by his friends. He wouldn't show up to class or parties. He stopped going to Friday prayers at the Corvallis mosque. "In the beginning, I didn't really understand why he was drifting away," Mohamed, one of the college friends, told BuzzFeed News. "And then Raed said, like, 'Hey man, we feel like there's something up. Like, he's not the same anymore.'" On the few occasions when they saw him, he seemed anxious and in distress.

"One of my friends and I, we'd be walking to a party," Raed said. "And Mohamed would be extremely drunk, and he would go to one of my friends and say, 'Are you the FBI? Are you the FBI?'"

The night before the bombing, Mohamud had Thanksgiving dinner in Beaverton with a few friends. Afterward, they went shopping at a nearby mall. Several people who were there told BuzzFeed News that Mohamud seemed to be having a really good time. He insisted on buying coffee for everyone. He poured marshmallow liquor into his cup. He made jokes and laughed and acted like his old self, the way he used to be freshman year, before he moved out of the dorms and began spending all of his time alone.

"He told me, 'I'm having the greatest morning of my life,'" Raed, who ran into Mohamud at 4 a.m. outside a J.C. Penney, told BuzzFeed News.

Later that day, Mohamud called his best friend to ask about his plans. The friend said he was going to see the Christmas tree lighting ceremony. Mohamud told him to stay home, but didn't explain. The two have not spoken since.

Shortly after his arrest, Mohamud was appointed three lawyers from the Portland Federal Public Defender's Office: Steve Sady, Steve Wax, and Lisa Hay. According to attorneys from around the country, the three were among the best terrorism lawyers in the U.S. All three declined to comment.

Mohamud's trial began on Jan. 10, 2013, more than two years after the arrest. In her opening statement, Assistant U.S. Attorney Pamala Holsinger called Mohamud a "prolific user" of extremist websites, saying he was "well known" for his work for Samir Khan.

Holsinger said the government had contacted Mohamud because a "known terrorist" was trying to recruit him. She said the government would prove Mohamud's attempt to travel to Alaska was a step toward his ultimate destination: Yemen. The prosecutor concluded by emphasizing the best evidence against Mohamud: "The defendant dialed this phone. And when the phone didn't go off, he dialed it again."

Sady, in his opening statement, accused the FBI of using "flattery" to get a manipulable teenager to do their bidding, invoking God and appealing to his fragile ego to make him do "the little things and big things that ended up bringing evidence into court today." The federal defender told the jury he understood the difficulty of putting aside emotion to acquit a person who thought he was carrying out a heinous act. He implored jurors to evaluate the case based on law rather than hypothetical destruction.

'We all want law enforcement to stop crime;' Mohamud's defense lawyer said. "But the FBI cannot create the very crime they intend to stop:'

"In America, we don't create crime. The entrapment defense is how this fundamental American value is made real in the courts," Sady said. "It's a line the government cannot cross. We all want law enforcement to stop crime. But the FBI cannot create the very crime they intend to stop."

The government's case was a rare look into an FBI undercover investigation—warts and all. Over nine days, 14 agents took the stand. Several were forced to confront off-color comments caught on tape during surveillance. During his cross-examination, Special Agent Mario Galindo—who had just explained to the jury that the reason the first face-to-face meeting was not recorded was because he accidentally left the recorder powered on the night before the operation—was asked to confirm a sexually suggestive comment he made after Mohamud first met the bomb expert, Hussein.

> **Sady:** Did you express a feeling of enthusiasm by using a metaphor for sexual excitement?
>
> **Galindo:** Which one?
>
> **Sady:** Did you say, "You've got a lot of people with woodies up here right now?"
>
> **Galindo:** Yes, I said that.

Both undercover agents testified for days. At one point, Lisa Hay grilled Youssef:

> **Hay:** Did Mohamud say what kind of truck?

Youssef: He did not.

Hay: So the FBI decided what kind of truck, didn't they?

Youssef: Yes.

Hay: The FBI decided the size of the bomb?

Youssef: Yes.

Hay: The FBI designed the bomb?

Youssef: Yes.

Mohamud didn't testify in his own defense, though both his parents did. Barre told the court that he wished he had read his son's text messages to see what was going on with him. Then, during cross-examination by prosecutor Ethan Knight, the distraught father attacked the actions of the FBI:

Knight: You were concerned, and that's why you went to the FBI?

Barre: I went to the FBI to get help to stop him not to leave the country.

Knight: Because you were concerned that he might be brainwashed, isn't that right?

Barre: That is what I was afraid of. But can I tell you, the FBI brainwashed my son.

Several of Mohamud's friends took the stand on his behalf, calling him "goofy" and "funloving." Raed, however, was subpoenaed to testify for the prosecution. He wasn't happy about it and found a small way to rebel.

"The prosecution, they were like, 'Make sure you look at the jury and you talk to them eye to eye,'" Raed told BuzzFeed News. "But I'm like, no. If I were here on the defense side, sure, I can be talking straight to the jury. But I'm here because I'm forced to. So I'm going to answer your questions and go on with my day."

"I did look at Mohamed," Raed went on. "We did make eye contact. He was crying."

The trial closed after 14 days. Knight gave the government's summation. He reminded the jury that Mohamud had believed the bomb was real. The case, Knight argued, was about "a choice, a single and remarkable choice by this defendant to take the lives of thousands of people."

"An individual simply cannot be entrapped to commit an offense such as this," Knight said. "This is the type of offense that one commits only because one wholeheartedly wants to."

Steven T. Wax (left) and Stephen R. Sady (right). Rick Bowmer / AP Photo

Sady, the defense lawyer, gave an impassioned closing argument, citing Aleksandr Solzhenitsyn, the Soviet novelist who was forced into exile after publishing *The Gulag Archipelago*. "Solzhenitsyn says, 'There is a line between good and evil that runs through the hearts of all people,'" Sady said. "The government shouldn't be pushing that line."

After seven hours of deliberations, the jury returned a guilty verdict.

Nine months later, Mohamud was sentenced. The government asked that Mohamud be given 40 years in prison, while his defense team pleaded for 10 years. Judge Garr King sentenced Mohamud to 30, citing a case of "imperfect entrapment" carried out by the government.

"Now, the jury found that defendant was not entrapped, but imperfect entrapment is available as a defense," King said from the bench. "And in this case, it weighs slightly in favor of defendant in this case. The court realizes the agents often reminded the defendant he could back out of the plan if he had a change of heart, but that is balanced by the government's inducement through the agent's use of praise and religious references."

[illegible] BuzzFeed News

Just over a month after Mohamud's conviction, the Supreme Court published its decision not to hear the ACLU lawsuit challenging the constitutionality of the FISA Amendments Act, or FAA. As a criminal defendant who had been charged using evidence obtained through warrantless surveillance, Mohamud was one of the people who the court believed had standing to sue in place of the ACLU. The government, however, did not notify him of the surveillance until nearly a year after his conviction.

Sady and his team furiously litigated the issue. They filed a motion asking the court to force the government to disclose what it had learned about Mohamud using FAA warrantless surveillance. Although the attorneys were careful not to single out particular pieces of evidence for scrutiny, their motion hinted at many possible questions. Did the FBI database that Special Agent DeLong searched when he found out that Mohamud corresponded with Khan include electronic data swept up by FAA laws? What about other types of FAA surveillance that had become publicly known since the Snowden disclosures? Were those surveillance methods used against Mohamud? Could Mohamud be sure he hadn't been targeted in a myriad of ways, some of them potentially unconstitutional?

For Mohamud, those questions meant the difference between prison and a new trial. Under a legal doctrine known as "the fruit of the poisonous tree," courts must suppress any evidence that has roots in illegal government conduct, even if a warrant is later issued to legally obtain the same evidence. If it turns out that unconstitutional surveillance first led the FBI to Mohamud, the prosecution's entire case could collapse.

Judge King, however, denied Mohamud's request for more information about the FBI's tactics, saying he would review the legality of the surveillance in private meetings with prosecutors.

Mohamud's attorneys resorted to broader legal arguments. Much like the ACLU, they claimed the FAA provided "none of the protections that the First and Fourth Amendments require to limit governmental intrusions on privacy." A vein of frustration ran through the pleadings, with the defense acknowledging at one point that it sought "suppression of unknown evidence [. . .] gathered at unknown times by unknown means by unknown persons and agencies operating under unknown protocols."

The government responded that the warrantless surveillance in the case did not originally target Mohamud, but rather unspecified foreigners living abroad "who generally are not protected by the Fourth Amendment." The fact that communications belonging to American citizens living within the borders of their own country—such as Khan and Mohamud—might have been "incidentally" acquired under the authority of the FAA did not "render the collection unreasonable."

Again, Judge King sided with the prosecution, denying Mohamud's request for a new trial. (King declined a request for an interview.)

On Sep. 4, 2015, Mohamud's attorneys filed a brief asking the 9th Circuit of the Court of Appeals to overturn King's decision. The government has until December to file its response. Oral arguments could happen as soon as January 2016. Regardless of the outcome, the losing party is likely to appeal the matter before the Supreme Court.

A victory for the defense could end a significant chapter in the history of American law enforcement. It would follow other incremental decisions—including June's passing of the USA Freedom Act, which curbed an NSA program that collected most Americans' phone records —that have begun to roll back the emergency policies enacted in the tense days after Sept. 11. Crucially, it wouldn't just end particular programs, but establish a principle that will guide how courts must balance individual rights against collective security.

By contrast, a victory for the prosecution would not just keep Mohamud in prison, but also continue the preventive approach to law enforcement that has developed since Sept. 11.

"The history of the criminal justice system demonstrates that infringements on rights begin in cases against a particular targeted group that does not have any public support," Joshua Dratel, a defense attorney who has represented many American Muslims accused of terrorism, told BuzzFeed News. "However, over time those methods that get approved in those cases contaminate ordinary cases against ordinary persons, and especially against those who have politically unpopular opinions."

On a recent autumn evening, Raed and Mohamed met at a bar in Corvallis to share memories about their friend, the convicted terrorist. The two hadn't talked about Mohamud for a while, in part because things had been rough around campus after he got arrested.

"I mean, my name is Mohamed," Mohamed told BuzzFeed News. "A lot of racist things have happened to me, many times, even before the incident. Afterwards, when I was on campus and people knew I knew Mohamed or hung out with him, they'd say things like, 'Oh, Mo, you fucking terrorist!'"

"It's sad, you know," Raed said, as he flipped through Facebook photos showing himself and his friends at an anti-jihad rally. "For us to have to show up and be like, 'No, this isn't really us.'"

Would they want to see him again? The friends said nothing for a long time. Eventually, Mohamed broke the silence.

"The only reason I'd want to see him again would be to sit down with him, just like this," he said, making a sweeping gesture over the table. "Because I'm curious. I want to figure out why. I want to say to him, 'Some of your friends were [at Pioneer Square]. Why did you want to do it to them?' Not 'Why did you want to do it to everybody?' Because he, at that time, obviously did not care about everybody. But he had such a close relationship with so many people who were there or could have been there. Why would he specifically want to do that to them?"

Raed then mentioned that Mohamud had written him a few times from prison. "They're, like, normal conversations," he said of the letters. "Like we're talking like friends. He's asking how am I doing, how's my family doing, how're our friends doing."

Raed never wrote back.

Exhibit II

The Washington Post

National Security

A new travel ban with 'mostly minor technical differences'? That probably won't cut it, analysts say.

By Matt Zapotosky February 22

Senior policy adviser Stephen Miller said President Trump's revised travel ban will have "mostly minor technical differences" from the iteration frozen by the courts, and Americans would see "the same basic policy outcome for the country."

That is not what the Justice Department has promised. And legal analysts say it might not go far enough to allay the judiciary's concerns.

A senior White House official said Wednesday that Trump will issue a revised executive order on immigration next week, as the administration is working to make sure the implementation goes smoothly. Trump had said previously that the order would come this week. Neither the president nor his top advisers have detailed exactly what the new order will entail. Miller's comments on Fox News, while vague, seem to suggest the changes might not be substantive. And that could hurt the administration's bid to lift the court-imposed suspension on the ban, analysts said.

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"If you're trying to moot out litigation, which is to say, 'Look, this litigation is no longer necessary,' it is very bad to say our intent here is to engage in the prohibited outcome," said Leon Fresco, who worked in the office of immigration litigation in President Barack Obama's Justice Department.

Trump's original travel ban temporarily barred from entering the United States refugees and citizens of seven Muslim-majority countries: Iraq, Iran, Sudan, Somalia, Syria, Yemen and Libya. When it was first implemented, State Department officials unilaterally revoked tens of thousands of visas, and the order seemed to affect even legal permanent residents, though the White House counsel soon clarified that it should not.

A federal district judge in Washington state suspended the ban Feb. 3, and a three-judge panel with the U.S. Court of Appeals for the 9th Circuit later upheld that freeze. While the Justice Department could have appealed to the full appeals court—or even to the Supreme Court—it asked the 9th Circuit judges last week to hold off because a new executive order was in the works.

"Rather than continuing this litigation, the President intends in the near future to rescind the Order and replace it with a new, substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns," Justice Department lawyers wrote.

Officials still plan a new order, but White House press secretary Sean Spicer said Tuesday that they would not rescind the old one. And speaking to Fox News's Martha Maccallum, Miller seemed to play down how substantial even the revisions would be—which would seem to put him at odds with the Justice Department.

"Well, one of the big differences that you're going to see in the executive order is that it's going to be responsive to the judicial ruling, which didn't exist previously. And so these are mostly minor technical differences," he said. "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect."

Legal analysts have said previously that there are obvious ways in which the order could be cleaned up to help it pass legal muster—though anything that maintains outright bans might face a tough court battle.

Trump could craft an order that clearly exempts green-card holders—who have the best case to sue over the order—and he could also potentially exempt any current visa holders. But the 9th Circuit panel said that would not address claims "by citizens who have an interest in specific noncitizens' ability to travel to the United States."

And no matter what it does, the Trump administration must contend with the president's own call on the campaign trail for a "total and complete shutdown of Muslims entering the United States" and campaign surrogate Rudolph W. Giuliani's claim that Trump said

"Muslim ban" and asked him to form a commission to determine "the right way to do it legally."

A federal judge in Virginia referenced those comments in ordering the ban frozen with respect to Virginia residents and institutions, calling it "unrebutted evidence" that Trump's directive might violate the First Amendment. That is important because if judges found even the new order was designed to discriminate against Muslims—and not to protect national security—they might similarly strike it down. The president does possess broad power to set immigration policy, and even his original executive order might ultimately pass legal muster, analysts have said. So far, courts have just weighed temporary injunctions on the ban, not directly and finally deciding whether Trump exceeded his authority.

"To the extent that the new executive order just makes technical changes, then we don't see it solving any of the legal problems," said Lee Gelernt, deputy director of the American Civil liberties Union's national Immigrants' Rights Project, who is involved in a legal challenge to the ban in New York.

At the White House press briefing Wednesday, Spicer said he was confident the administration would ultimately prevail in court, but in the revised order officials had been "very clear about understanding what the court said, and trying to tailor that specifically."

He also said he was not concerned that Trump's prior remarks about targeting Muslims would hinder the administration's case.

"The president was very clear in his executive order that these were countries that we didn't have the proper vetting for when it came to ensuring the safety of Americans," Spicer said. "That's what the executive order said. . . . It was crafted in a way that was very clear about the countries and was not focused on anything else but the vetting requirements."

Revisions, analysts said, could ultimately help Trump prevail—particularly if he applied a ban only to the issuance of new visas, and if he issued robust procedures for those whose visas were revoked to challenge that action. His and Giuliani's comments would be an obstacle, but they would not necessarily block him forever from using his powers on immigration.

"Are you permanently prohibited from ever doing something like this because you at one time said something that was inappropriate?" Fresco said. "The courts will have to decide what they believe here."

Philip Rucker and John Wagner contributed to this report.

Matt Zapotosky covers the Justice Department for the Washington Post's National Security team.
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Exhibit JJ

Transcript of Donald Trump's Immigration Speech

SEPT. 1, 2016

Following is a transcript of the remarks by u on immigration in Phoenix on Wednesday, as transcribed by the Federal News Service.

TRUMP: Wow. Thank you. That's a lot of people, Phoenix, that's a lot of people.

(APPLAUSE)

Thank you very much.

Thank you, Phoenix. I am so glad to be back in Arizona.

(APPLAUSE)

The state that has a very, very special place in my heart. I love people of Arizona and together we are going to win the White House in November.

(APPLAUSE)

Now, you know this is where it all began for me. Remember that massive crowd also? So, I said let's go and have some fun tonight. We're going to Arizona, O.K.?

This will be a little bit different. This won't be a rally speech, per se. Instead, I'm going to deliver a detailed policy address on one of the greatest challenges facing our country today, illegal immigration.

(APPLAUSE)

I've just landed having returned from a very important and special meeting with the president of Mexico, a man I like and respect very much. And a man who truly loves his country, Mexico.

And, by the way, just like I am a man who loves my country, the United States.

(APPLAUSE)

We agree on the importance of ending the illegal flow of drugs, cash, guns, and people across our border, and to put the cartels out of business.

(APPLAUSE)

We also discussed the great contributions of Mexican-American citizens to our two countries, my love for the people of Mexico, and the leadership and friendship between Mexico and the United States. It was a thoughtful and substantive conversation and it will go on for awhile. And, in the end we're all going to win. Both countries, we're all going to win.

This is the first of what I expect will be many, many conversations. And in a Trump administration we're going to go about creating a new relationship between our two countries, but it's going to be a fair relationship. We want fairness.

(APPLAUSE)

But to fix our immigration system, we must change our leadership in Washington and we must change it quickly. Sadly, sadly there is no other way. The truth is our immigration system is worse than anybody ever realized. But the facts aren't known because the media won't report on them. The politicians won't talk about them and the special interests spend a lot of money trying to cover them up because they are making an absolute fortune. That's the way it is.

Today, on a very complicated and very difficult subject, you will get the truth. The fundamental problem with the immigration system in our country is that it serves the needs of wealthy donors, political activists and powerful, powerful politicians. It's all you can do. Thank you. Thank you.

(APPLAUSE)

Let me tell you who it does not serve. It does not serve you the American people. Doesn't serve you. When politicians talk about immigration reform, they usually mean the following: amnesty, open borders, lower wages. Immigration reform should mean something else entirely. It should mean improvements to our laws and policies to make life better for American citizens.

(APPLAUSE)

Thank you. But if we're going to make our immigration system work, then we have to be prepared to talk honestly and without fear about these important and very sensitive issues. For instance, we have to listen to the concerns that working people, our forgotten working people, have over the record pace of immigration and it's impact on their jobs, wages, housing, schools, tax bills and general living conditions.

These are valid concerns expressed by decent and patriotic citizens from all backgrounds, all over. We also have to be honest about the fact that not everyone who seeks to join our country will be able to successfully assimilate. Sometimes it's just not going to work out. It's our right, as a sovereign nation, to chose immigrants that we think are the likeliest to thrive and flourish and love us.

(APPLAUSE)

Then there is the issue of security. Countless innocent American lives have been stolen because our politicians have failed in their duty to secure our borders and enforce our laws like they have to be enforced. I have met with many of the great parents who lost their children to sanctuary cities and open borders. So many people, so many, many people. So sad. They will be joining me on this stage in a little while and I look forward to introducing, these are amazing, amazing people.

Countless Americans who have died in recent years would be alive today if not for the open border policies of this administration and the administration that causes this horrible, horrible thought process, called Hillary Clinton.

(APPLAUSE)

This includes incredible Americans like 21-year-old Sarah Root. The man who killed her arrived at the border, entered federal custody and then was released into the U.S., think of it, into the U.S. community under the policies of the White House Barack Obama and

Hillary Clinton. Weak, weak policies. Weak and foolish policies.

He was released again after the crime, and now he's out there at large. Sarah had graduated from college with a 4.0, top student in her class one day before her death.

Also among the victims of the Obama-Clinton open-border policy was Grant Ronnebeck, a 21-year-old convenience store clerk and a really good guy from Mesa, Arizona. A lot of you have known about Grant.

He was murdered by an illegal immigrant gang member previously convicted of burglary, who had also been released from federal custody, and they knew it was going to happen again.

Another victim is Kate Steinle. Gunned down in the sanctuary city of San Francisco, by an illegal immigrant, deported five previous times. And they knew he was no good.

Then there is the case of 90-year-old Earl Olander, who was brutally beaten and left to bleed to death in his home, 90 years old and defenseless. The perpetrators were illegal immigrants with criminal records a mile long, who did not meet Obama administration standards for removal. And they knew it was going to happen.

In California, a 64-year-old Air Force veteran, a great woman, according to everybody that knew her, Marilyn Pharis, was sexually assaulted and beaten to death with a hammer. Her killer had been arrested on multiple occasions but was never, ever deported, despite the fact that everybody wanted him out.

A 2011 report from the Government Accountability Office found that illegal immigrants and other non-citizens, in our prisons and jails together, had around 25,000 homicide arrests to their names, 25,000.

On top of that, illegal immigration costs our country more than $113 billion a year. And this is what we get. For the money we are going to spend on illegal immigration over the next 10 years, we could provide one million at-risk students with a school voucher, which so many people are wanting.

While there are many illegal immigrants in our country who are good people, many, many, this doesn't change the fact that most illegal immigrants are lower skilled workers with less education, who compete directly against vulnerable American workers, and that these illegal workers draw much more out from the system than they can ever possibly pay back.

And they're hurting a lot of our people that cannot get jobs under any circumstances.

But these facts are never reported. Instead, the media and my opponent discuss one thing and only one thing, the needs of people living here illegally. In many cases, by the way, they're treated better than our vets.

Not going to happen anymore, folks. November 8th. Not going to happen anymore.

(APPLAUSE)

AUDIENCE: Trump! Trump! Trump!

The truth is, the central issue is not the needs of the 11 million illegal immigrants or however many there may be—and honestly we've been hearing that number for years. It's always 11 million. Our government has no idea. It could be three million. It could be 30 million. They have no idea what the number is.

Frankly our government has no idea what they're doing on many, many fronts, folks.

(APPLAUSE)

But whatever the number, that's never really been the central issue. It will never be a central issue. It doesn't matter from that standpoint. Anyone who tells you that the core issue is the needs of those living here illegally has simply spent too much time in Washington.

(APPLAUSE)

Only the out of touch media elites think the biggest problems facing America—you know this, this is what they talk about, facing American society today is that there are 11 million illegal immigrants who don't have legal status. And, they also think the biggest thing, and you know this, it's not nuclear, and it's not ISIS, it's not Russia, it's not China, it's global warming.

To all the politicians, donors, and special interests, hear these words from me and all of you today. There is only one core issue in the immigration debate, and that issue is the well being of the American people.

(APPLAUSE)

Nothing even comes a close second. Hillary Clinton, for instance, talks constantly about her fears that families will be separated, but she's not talking about the American families who have been permanently separated from their loved ones because of a preventable homicide, because of a preventable death, because of murder.

No, she's only talking about families who come here in violation of the law. We will treat everyone living or residing in our country with great dignity. So important.

We will be fair, just, and compassionate to all, but our greatest compassion must be for our American citizens.

(APPLAUSE)

Thank you.

President Obama and Hillary Clinton have engaged in gross dereliction of duty by surrendering the safety of the American people to open borders, and you know it better than anybody right here in Arizona. You know it.

President Obama and Hillary Clinton support sanctuary cities. They support catch and release on the border. They support visa overstays. They support the release of dangerous, dangerous, dangerous, criminals from detention. And they support unconstitutional executive amnesty.

Hillary Clinton has pledged amnesty in her first 100 days, and her plan will provide Obamacare, Social Security, and Medicare for illegal immigrants, breaking the federal budget.

On top of that she promises uncontrolled, low-skilled immigration that continues to reduce jobs and wages for American workers, and especially for African-American and Hispanic workers within our country. Our citizens.

Most incredibly, because to me this is unbelievable, we have no idea who these people are, where they come from. I always say Trojan horse. Watch what's going to happen, folks. It's not going to be pretty.

This includes her plan to bring in 620,000 new refugees from Syria and that region over a short period of time. And even yesterday, when you were watching the news, you saw thousands and thousands of people coming in from Syria. What is wrong with our politicians, our leaders if we can call them that. What the hell are we doing?

(APPLAUSE)

Hard to believe. Hard to believe. Now that you've heard about Hillary Clinton's plan, about which she has not answered a single question, let me tell you about my plan. And do you notice. . .

(APPLAUSE)

And do you notice all the time for weeks and weeks of debating my plan, debating, talking about it, what about this, what about that. They never even mentioned her plan on immigration because she doesn't want to get into the quagmire. It's a tough one, she doesn't know what she's doing except open borders and let everybody come in and destroy our country by the way.

(APPLAUSE)

While Hillary Clinton meets only with donors and lobbyists, my plan was crafted with the input from Federal Immigration offices, very great people. Among the top immigration experts anywhere in this country, who represent workers, not corporations, very important to us.

I also worked with lawmakers, who've led on this issue on behalf of American citizens for many years. And most importantly I've met with the people directly impacted by these policies. So important.

Number one, are you ready? Are you ready?

(APPLAUSE)

We will build a great wall along the southern border.

(APPLAUSE)

AUDIENCE: Build the wall! Build the wall! Build the wall!

And Mexico will pay for the wall.

(APPLAUSE)

One hundred percent. They don't know it yet, but they're going to pay for it. And they're great people and great leaders but they're going to pay for the wall.

On day one, we will begin working on an impenetrable, physical, tall, power, beautiful southern border wall.

(APPLAUSE)

We will use the best technology, including above and below ground sensors that's the tunnels. Remember that, above and below.

(APPLAUSE)

Above and below ground sensors. Towers, aerial surveillance and manpower to supplement the wall, find and dislocate tunnels and keep out criminal cartels and Mexico you know that, will work with us. I really believe it. Mexico will work with us. I absolutely believe it. And especially after meeting with their wonderful, wonderful president today. I really believe they want to solve this problem along with us, and I'm sure they will.

(APPLAUSE)

Number two, we are going to end catch and release. We catch them, oh go ahead. We catch them, go ahead.

(APPLAUSE)

Under my administration, anyone who illegally crosses the border will be detained until they are removed out of our country and back to the country from which they came.

(APPLAUSE)

And they'll be brought great distances. We're not dropping them right across. They learned that. President Eisenhower. They'd drop them across, right across, and they'd come back. And across.

Then when they flew them to a long distance, all of a sudden that was the end. We will take them great distances. But we will take them to the country where they came from, O.K.?

Number three. Number three, this is the one, I think it's so great. It's hard to believe, people don't even talk about it. Zero tolerance for criminal aliens. Zero. Zero.

(APPLAUSE)

Zero. They don't come in here. They don't come in here.

According to federal data, there are at least two million, two million, think of it, criminal aliens now inside of our country, two million people criminal aliens. We will begin moving them out day one. As soon as I take office. Day one. In joint operation with local, state, and federal law enforcement.

Now, just so you understand, the police, who we all respect—say hello to the police. Boy, they don't get the credit they deserve. I can tell you. They're great people. But the police and law enforcement, they know who these people are.

They live with these people. They get mocked by these people. They can't do anything about these people, and they want to. They know who these people are. Day one, my first hour in office, those people are gone.

(APPLAUSE)

And you can call it deported if you want. The press doesn't like that term. You can call it whatever the hell you want. They're gone.

Beyond the two million, and there are vast numbers of additional criminal illegal immigrants who have fled, but their days have run out in this country. The crime will stop. They're going to be gone. It will be over.

(APPLAUSE)

They're going out. They're going out fast.

Moving forward. We will issue detainers for illegal immigrants who are arrested for any crime whatsoever, and they will be placed into immediate removal proceedings if we even have to do that.

We will terminate the Obama administration's deadly, and it is deadly, nonenforcement policies that allow thousands of criminal aliens to freely roam our streets, walk around, do whatever they want to do, crime all over the place.

That's over. That's over, folks. That's over.

Since 2013 alone, the Obama administration has allowed 300,000 criminal aliens to return back into United States communities. These are individuals encountered or identified by ICE, but who were not detained or processed for deportation because it wouldn't have been politically correct.

My plan also includes cooperating closely with local jurisdictions to remove criminal aliens immediately. We will restore the highly successful Secure Communities Program. Good program. We will expand and revitalize the popular 287(g) partnerships, which will help to identify hundreds of thousands of deportable aliens in local jails that we don't even know about.

Both of these programs have been recklessly gutted by this administration. And those were programs that worked.

This is yet one more area where we are headed in a totally opposite direction. There's no common sense, there's no brain power in our administration by our leader, or our leaders. None, none, none.

On my first day in office I am also going to ask Congress to pass Kate's Law, named for Kate Steinle . . .

(APPLAUSE)

. . . to ensure that criminal aliens convicted of illegal reentry receive strong mandatory minimum sentences. Strong.

(APPLAUSE)

And then we get them out.

Another reform I'm proposing is the passage of legislation named for Detective Michael Davis and Deputy Sheriff Danny Oliver, two law enforcement officers recently killed by a previously deported illegal immigrant.

The Davis-Oliver bill will enhance cooperation with state and local authorities to ensure that criminal immigrants and terrorists are swiftly, really swiftly, identified and removed. And they will go face, believe me. They're going to go.

We're going to triple the number of ICE deportation officers.

(APPLAUSE)

Within ICE I am going to create a new special deportation task force focused on identifying and quickly removing the most dangerous criminal illegal immigrants in America who have evaded justice just like Hillary Clinton has evaded justice, O.K.?

(APPLAUSE)

Maybe they'll be able to deport her.

(APPLAUSE)

The local police who know every one of these criminals, and they know each and every one by name, by crime, where they live, they will work so fast. And our local police will be so happy that they don't have to be abused by these thugs anymore.

There's no great mystery to it, they've put up with it for years, and now finally we will turn the tables and law enforcement and our police will be allowed to clear up this dangerous and threatening mess.

We're also going to hire 5,000 more Border Patrol agents.

(APPLAUSE)

Who gave me their endorsement, 16,500 gave me their endorsement.

And put more of them on the border instead of behind desks which is good. We will expand the number of border patrol stations significantly.

I've had a chance to spend time with these incredible law enforcement officers, and I want to take a moment to thank them. What they do is incredible.

(APPLAUSE)

And getting their endorsement means so much to me, More to me really than I can say. Means so much.

First time they've ever endorsed a presidential candidate.

Number four, block funding for sanctuary cities. We block the funding. No more funds.

(APPLAUSE)

We will end the sanctuary cities that have resulted in so many needless deaths. Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars, and we will work with Congress to pass legislation to protect those jurisdictions that do assist federal authorities. Number five, cancel unconstitutional executive orders and enforce all immigration laws.

(APPLAUSE)

We will immediately terminate President Obama's two illegal executive amnesties in which he defied federal law and the Constitution to give amnesty to approximately five million illegal immigrants, five million.

(BOOING)

And how about all the millions that are waiting on line, going through the process legally? So unfair.

Hillary Clinton has pledged to keep both of these illegal amnesty programs, including the 2014 amnesty which has been blocked by the United States Supreme Court. Great.

Clinton has also pledged to add a third executive amnesty. And by the way, folks, she will be a disaster for our country, a disaster in so many other ways.

And don't forget the Supreme Court of the United States. Don't forget that when you go to vote on

November 8. And don't forget your Second Amendment. And don't forget the repeal and replacement of Obamacare.

(APPLAUSE)

And don't forget building up our depleted military. And don't forget taking care of our vets. Don't forget our vets. They have been forgotten.

(APPLAUSE)

Clinton's plan would trigger a constitutional crisis unlike almost anything we have ever seen before. In effect, she would be abolishing the lawmaking powers of Congress in order to write her own laws from the Oval Office. And you see what bad judgment she has. She has seriously bad judgment.

(BOOING)

Can you imagine? In a Trump administration all immigration laws will be enforced, will be enforced. As with any law enforcement activity, we will set priorities. But unlike this administration, no one will be immune or exempt from enforcement. And ICE and Border Patrol officers will be allowed to do their jobs the way their jobs are supposed to be done.

(APPLAUSE)

Anyone who has entered the United States illegally is subject to deportation. That is what it means to have laws and to have a country. Otherwise we don't have a country.

Our enforcement priorities will include removing criminals, gang members, security threats, visa overstays, public charges. That is those relying on public welfare or straining the safety net along with millions of recent illegal arrivals and overstays who've come here under this current corrupt administration.

(APPLAUSE)

Number six, we are going to suspend the issuance of visas to any place where adequate screening cannot occur.

(APPLAUSE)

According to data provided by the Senate Subcommittee on Immigration, and the national interest between 9/11 and the end of 2014, at least 380 foreign born individuals were convicted in terror cases inside the United States. And even right now the largest number of people are under investigation for exactly this that we've ever had in the history of our country.

Our country is a mess. We don't even know what to look for anymore, folks. Our country has to straighten out. And we have to straighten out fast.

The number is likely higher. But the administration refuses to provide this information, even to Congress. As soon as I enter office I am going to ask the Department of State, which has been brutalized by Hillary Clinton, brutalized.

(BOOING)

Homeland Security and the Department of Justice to begin a comprehensive review of these cases in order to develop a list of regions and countries from which immigration must be suspended until proven and effective vetting mechanisms can be put in place.

I call it extreme vetting right? Extreme vetting. I want extreme. It's going to be so tough, and if somebody comes in that's fine but they're going to be good. It's extreme.

And if people don't like it, we've got have a country folks. Got to have a country. Countries in which immigration will be suspended would include places like Syria and Libya. And we are going to stop the tens of thousands of people coming in from Syria. We have no idea who they are, where they come from. There's no documentation. There's no paperwork. It's going to end badly folks. It's going to end very, very badly.

For the price of resettling one refugee in the United States, 12 could be resettled in a safe zone in their home region. Which I agree with 100 percent. We have to build safe zones and we'll get the money from Gulf states. We don't want to put up the money. We owe almost $20 trillion. Doubled since Obama took office, our national debt.

But we will get the money from Gulf states and others. We'll supervise it. We'll build safe zones which is something that I think all of us want to see.

Another reform involves new screening tests for all applicants that include, and this is so important, especially if you get the right people. And we will get the right people. An ideological certification to make sure that those we are admitting to our country share our values and love our people.

(APPLAUSE)

Thank you. We're very proud of our country. Aren't we? Really? With all it's going through, we're very proud of our country. For instance, in the last five years, we've admitted nearly 100,000 immigrants from Iraq and Afghanistan. And these two countries according to Pew Research, a majority of residents say that the barbaric practice of honor killings against women are often or sometimes justified. That's what they say.

(APPLAUSE)

That's what they say. They're justified. Right? And we're admitting them to our country. Applicants will be asked their views about honor killings, about respect for women and gays and minorities. Attitudes on radical Islam, which our president refuses to say and many other topics as part of this vetting procedure. And if we have the right people doing it, believe me, very, very few will slip through the cracks. Hopefully, none.

(APPLAUSE)

Number seven, we will insure that other countries take their people back when they order them deported.

(APPLAUSE)

There are at least 23 countries that refuse to take their people back after they've been ordered to leave the United States. Including large numbers of violent criminals, they won't take them back. So we say, O.K., we'll keep them. Not going to happen with me, not going to happen with me.

(APPLAUSE)

Due to a Supreme Court decision, if these violent offenders cannot be sent home, our law enforcement officers have to release them into your communities.

(APPLAUSE)

And by the way, the results are horrific, horrific. There are often terrible consequences, such as Casey Chadwick's tragic death in Connecticut just last year. Yet despite the existence of a law that commands the secretary of state to stop issuing visas to these countries.

Secretary Hillary Clinton ignored this law and refused to use this powerful tool to bring nations into compliance. And, they would comply if we would act properly.

In other words, if we had leaders that knew what they were doing, which we don't.

The result of her misconduct was the release of thousands and thousands of dangerous criminal aliens who should have been sent home to their countries. Instead we have them all over the place. Probably a couple in this room as a matter of fact, but I hope not.

According to a report for the Boston Globe from the year 2008 to 2014 nearly 13,000 criminal aliens were released back into U.S. communities because their home countries would not, under any circumstances, take them back. Hard to believe with the power we have. Hard to believe.

We're like the big bully that keeps getting beat up. You ever see that? The big bully that keeps getting beat up.

These 13,000 releases occurred on Hillary Clinton's watch. She had the power and the duty to stop it cold, and she decided she would not do it.

(BOOING)

And Arizona knows better than most exactly what I'm talking about.

(APPLAUSE)

Those released include individuals convicted of killings, sexual assaults, and some of the most heinous crimes imaginable.

The Boston Globe writes that a Globe review of 323 criminals released in New England from 2008 to 2012 found that as many as 30 percent committed new offenses, including rape, attempted murder, and child molestation. We take them, we take them.

(BOOING)

Number eight, we will finally complete the biometric entry-exit visa tracking system which we need desperately.

(APPLAUSE)

For years Congress has required biometric entry-exit visa tracking systems, but it has never been completed. The politicians are all talk, no action, never happens. Never happens.

Hillary Clinton, all talk. Unfortunately when there is action it's always the wrong decision. You ever notice?

In my administration we will ensure that this system is in place. And, I will tell you, it will be on land, it will be on sea, it will be in air. We will have a proper tracking system.

Approximately half of new illegal immigrants came on temporary visas and then never, ever left. Why should they? Nobody's telling them to leave. Stay as long as you want, we'll take care of you.

Beyond violating our laws, visa overstays pose—and they really are a big problem—pose a substantial threat to national security. The 9/11 Commission said that this tracking system should be a high priority and would have assisted law enforcement and intelligence officials in August and September 2001 in conducting a search for two of the 9/11 hijackers that were in the United States on expired visas.

And you know what that would have meant, what that could have meant. Wouldn't that have been wonderful, right? What that could have meant.

Last year alone nearly half a million individuals overstayed their temporary visas. Removing these overstays will be a top priority of my administration.

(APPLAUSE)

If people around the world believe they can just come on a temporary visa and never, ever leave, the Obama-Clinton policy, that's what it is, then we have a completely open border, and we no longer have a country.

We must send a message that visa expiration dates will be strongly enforced.

Number nine, we will turn off the jobs and benefits magnet.

(APPLAUSE)

We will ensure that E-Verify is used to the fullest extent possible under existing law, and we will work with Congress to strengthen and expand its use across the country.

Immigration law doesn't exist for the purpose of keeping criminals out. It exists to protect all aspects of American life. The work site, the welfare office, the education system, and everything else.

That is why immigration limits are established in the first place. If we only enforced the laws against crime, then we have an open border to the entire world. We will enforce all of our immigration laws.

(APPLAUSE)

And the same goes for government benefits. The Center for Immigration Studies estimates that 62 percent of households headed by illegal immigrants use some form of cash or non-cash welfare programs like food stamps or housing assistance.

Tremendous costs, by the way, to our country. Tremendous costs. This directly violates the federal public charge law designed to protect the United

States Treasury. Those who abuse our welfare system will be priorities for immediate removal.

(APPLAUSE)

Number 10, we will reform legal immigration to serve the best interests of America and its workers, the forgotten people. Workers. We're going to take care of our workers.

And by the way, and by the way, we're going to make great trade deals. We're going to renegotiate trade deals. We're going to bring our jobs back home. We're going to bring our jobs back home.

We have the most incompetently worked trade deals ever negotiated probably in the history of the world, and that starts with Nafta. And now they want to go TPP, one of the great disasters.

We're going to bring our jobs back home. And if companies want to leave Arizona and if they want to leave other states, there's going to be a lot of trouble for them. It's not going to be so easy. There will be consequence. Remember that. There will be consequence. They're not going to be leaving, go to another country, make the product, sell it into the United States, and all we end up with is no taxes and total unemployment. It's not going to happen. There will be consequences.

(APPLAUSE)

We've admitted 59 million immigrants to the United States between 1965 and 2015. Many of these arrivals have greatly enriched our country. So true. But we now have an obligation to them and to their children to control future immigration as we are following, if you think, previous immigration waves.

We've had some big waves. And tremendously positive things have happened. Incredible things have happened. To ensure assimilation we want to ensure that it works. Assimilation, an important word. Integration and upward mobility.

(APPLAUSE)

Within just a few years immigration as a share of national population is set to break all historical records. The time has come for a new immigration commission to develop a new set of reforms to our legal immigration system in order to achieve the following goals.

To keep immigration levels measured by population share within historical norms. To select immigrants based on their likelihood of success in U.S. society and their ability to be financially self-sufficient.

(APPLAUSE)

We take anybody. Come on in, anybody. Just come on in. Not anymore.

You know, folks, it's called a two-way street. It is a two-way street, right? We need a system that serves our needs, not the needs of others. Remember, under a Trump administration it's called America first. Remember that.

(APPLAUSE)

To choose immigrants based on merit. Merit, skill, and proficiency. Doesn't that sound nice? And to establish new immigration controls to boost wages and to ensure that open jobs are offered to American workers first. And that in particular African-American and Latino workers who are being shut out in this process so unfairly.

(APPLAUSE)

And Hillary Clinton is going to do nothing for the African-American worker, the Latino worker. She's going to do nothing. Give me your vote, she says, on November 8th. And then she'll say, so long, see you in four years. That's what it is.

She is going to do nothing. And just look at the past. She's done nothing. She's been there for 35 years. She's done nothing. And I say what do you have to lose? Choose me. Watch how good we're going to do together. Watch.

(APPLAUSE)

You watch. We want people to come into our country, but they have to come into our country legally and properly vetted, and in a manner that serves the national interest. We've been living under outdated immigration rules from decades ago. They're decades and decades old.

To avoid this happening in the future, I believe we should sunset our visa laws so that Congress is forced to periodically revise and revisit them to bring them up to date. They're archaic. They're ancient. We wouldn't put our entire federal budget on auto pilot for decades, so why should we do the same for the very, very complex subject of immigration?

So let's now talk about the big picture. These 10 steps, if rigorously followed and enforced, will accomplish more in a matter of months than our politicians have accomplished on this issue in the last 50 years. It's going to happen, folks. Because I am proudly not a politician, because I am not behold to any special interest, I've spent a lot of money on my campaign, I'll tell you. I write those checks. Nobody owns Trump.

I will get this done for you and for your family. We'll do it right. You'll be proud of our country again. We'll do it right. We will accomplish all of the steps outlined above. And, when we do, peace and law and justice and prosperity will prevail. Crime will go down. Border crossings will plummet. Gangs will disappear.

And the gangs are all over the place. And welfare use will decrease. We will have a peace dividend to spend on rebuilding America, beginning with our American inner cities. We're going to rebuild them, for once and for all.

For those here illegally today, who are seeking legal status, they will have one route and one route only. To return home and apply for reentry like everybody else, under the rules of the new legal immigration system that I have outlined above.

Those who have left to seek entry—

Thank you.

Thank you. Thank you. Those who have left to seek entry under this new system—and it will be an efficient system—will not be awarded surplus visas, but will have to apply for entry under the immigration caps or limits that will be established in the future.TRUMP: We will break the cycle of amnesty and illegal immigration. We will break the cycle. There will be no amnesty.

(APPLAUSE)

Our message to the world will be this. You cannot obtain legal status or become a citizen of the United States by illegally entering our country. Can't do it.

(APPLAUSE)

This declaration alone will help stop the crisis of illegal crossings and illegal overstays, very importantly. People will know that you can't just smuggle in, hunker down and wait to be legalized. It's not going to work that way. Those days are over.

(APPLAUSE)

Importantly, in several years when we have accomplished all of our enforcement and deportation goals and truly ended illegal immigration for good, including the construction of a great wall, which we will have built in record time. And at a reasonable cost, which you never hear from the government.

(APPLAUSE)

And the establishment of our new lawful immigration system then and only then will we be in a position to consider the appropriate disposition of those individuals who remain.

That discussion can take place only in an atmosphere in which illegal immigration is a memory of the past, no longer with us, allowing us to weigh the different options available based on the new circumstances at the time.

(APPLAUSE)

Right now, however, we're in the middle of a jobs crisis, a border crisis and a terrorism crisis like never before. All energies of the federal government and the legislative process must now be focused on immigration security. That is the only conversation we should be having at this time, immigration security. Cut it off.

Whether it's dangerous materials being smuggled across the border, terrorists entering on visas or Americans losing their jobs to foreign workers, these are the problems we must now focus on fixing. And the media needs to begin demanding to hear Hillary Clinton's answer on how her policies will affect Americans and their security.

(APPLAUSE)

These are matters of life and death for our country and its people, and we deserve answers from Hillary Clinton. And do you notice, she doesn't answer.

She didn't go to Louisiana. She didn't go to Mexico. She was invited.

She doesn't have the strength or the stamina to make America great again. Believe me.

(APPLAUSE)

What we do know, despite the lack of media curiosity, is that Hillary Clinton promises a radical amnesty combined with a radical reduction in immigration enforcement. Just ask the Border Patrol about Hillary Clinton. You won't like what you're hearing.

The result will be millions more illegal immigrants; thousands of more violent, horrible crimes; and total chaos and lawlessness. That's what's going to happen, as sure as you're standing there.

This election, and I believe this, is our last chance to secure the border, stop illegal immigration and reform our laws to make your life better. I really believe this is it. This is our last time. November 8. November 8. You got to get out and vote on November 8.

(APPLAUSE)

It's our last chance. It's our last chance. And that includes Supreme Court justices and Second Amendment. Remember that. So I want to remind everyone what we're fighting for and who we are fighting for.

I am going to ask—these are really special people that I've gotten to know. I'm going to ask all of the "Angel Moms" to come join me on the stage right now.

These are amazing women.

(APPLAUSE)

These are amazing people.

(APPLAUSE)

AUDIENCE: USA! USA! USA!

I've become friends with so many. But Jamiel Shaw, incredible guy, lost his son so violently. Say just a few words about your child.

(SPEAKER'S VOICE): My son Ronald da Silva (ph) was murdered April 27, 2002 by an illegal alien who had been previously deported. And what so—makes me so outrageous is that we came here legally.

Thank you, Mr. Trump. I totally support you. You have my vote.

TRUMP: Thank you, thank you.

(SPEAKER'S VOICE): God bless you.

(APPLAUSE)

TRUMP: You know what? Name your child and come right by. Go ahead.

(SPEAKER'S VOICE): Laura Wilkerson. And my son was Joshua Wilkerson. He was murdered by an illegal in 2010. And I personally support Mr. Trump for our next president.

(APPLAUSE)

(SPEAKER'S VOICE): My name is Ruth Johnston Martin (ph). My husband was shot by an illegal alien. He fought the good fight but he took his last breath in 2002. And I support this man who's going to change this country for the better. God bless you.

(APPLAUSE)

(SPEAKER'S VOICE): My name Maureen Maloney (ph), and our son Matthew Denise (ph) was 23 years old when he was dragged a quarter of a mile to his death by an illegal alien, while horrified witnesses were banging on the truck trying to stop him.

(APPLAUSE)

(SPEAKER'S VOICE): Our son Matthew Denise, if Donald Trump were president in 2011, our son Matthew Denise and other Americans would be alive today.

(APPLAUSE)

(SPEAKER'S VOICE): Thank you. My name is Kathy Woods (ph). My son Steve (ph), a high school senior, 17 years old, went to the beach after a high school football game. A local gang came along, nine members. The cars were battered to—like war in Beirut. And all I can say is they murdered him and if Mr. Trump had been in office then the border would have been secure and our children would not be dead today.

(APPLAUSE)

(SPEAKER'S VOICE): Hi. My name is Brenda Sparks (ph), and my son is named Eric Zapeda (ph). He was raised by a legal immigrant from Honduras only to be murdered by an illegal in 2011. His murderer never did a second in handcuffs or jail. Got away with killing an American. So I'm voting for trump. And by the way, so is my mother.

(APPLAUSE)

(SPEAKER'S VOICE): My name is Dee Angle (ph). My cousin Rebecca Ann Johnston (ph), known as Becky, was murdered on January the 1st, 1989 in North Little Rock, Arkansas. Thank you. And if you don't vote Trump, we won't have a country. Trump all the way.

(APPLAUSE)

(SPEAKER'S VOICE): I'm Shannon Estes (ph). And my daughter Shaley Estes (ph), 22 years old, was murdered here in Phoenix last July 24 by a Russian who overstayed his visa. And vote Trump.

(APPLAUSE)

(SPEAKER'S VOICE): I'm Mary Ann Mendoza, the mother of Sergeant Brandon Mendoza, who was killed in a violent head-on collision in Mesa.

Thank you.

I want to thank Phoenix for the support you've always given me, and I want to tell you what. I'm supporting the man who will—who is the only man who is going to save our country, and what we our going to be leaving our children.

(APPLAUSE)

(SPEAKER'S VOICE): I'm Steve Ronnebeck, father of Grant Ronnebeck, 21 years old. Killed January 22, 2015 by an illegal immigrant who shot him in the face. I truly believe that Mr. Trump is going to change things. He's going to fight for my family, and he's going to fight for America.

(APPLAUSE)

TRUMP: These are amazing people, and I am not asking for their endorsement, believe me that. I just think I've gotten to know so many of them, and many more, from our group. But they are incredible people and what they're going through is incredible, and there's just no reason for it. Let's give them a really tremendous hand.

(APPLAUSE)

That's tough stuff, I will tell you. That is tough stuff. Incredible people.

So, now is the time for these voices to be heard. Now is the time for the media to begin asking questions on their behalf. Now is the time for all of us as one country, Democrat, Republican, liberal, conservative to band together to deliver justice, and safety, and security for all Americans.

Let's fix this horrible, horrible, problem. It can be fixed quickly. Let's our secure our border.

(APPLAUSE)

Let's stop the drugs and the crime from pouring into our country. Let's protect our social security and Medicare. Let's get unemployed Americans off the welfare and back to work in their own country.

This has been an incredible evening. We're going to remember this evening. November 8, we have to get everybody. This is such an important state. November 8 we have to get everybody to go out and vote.

We're going to bring—thank you, thank you. We're going to take our country back, folks. This is a movement. We're going to take our country back.

Thank you.

(APPLAUSE)

Thank you.

This is an incredible movement. The world is talking about it. The world is talking about it and by the way, if you haven't been looking to what's been happening at the polls over the last three or four days I think you should start looking. You should start looking.

(APPLAUSE)

Together we can save American lives, American jobs, and American futures. Together we can save America itself. Join me in this mission, we're going to make America great again.

Thank you. I love you. God bless you, everybody. God bless you. God bless you, thank you.

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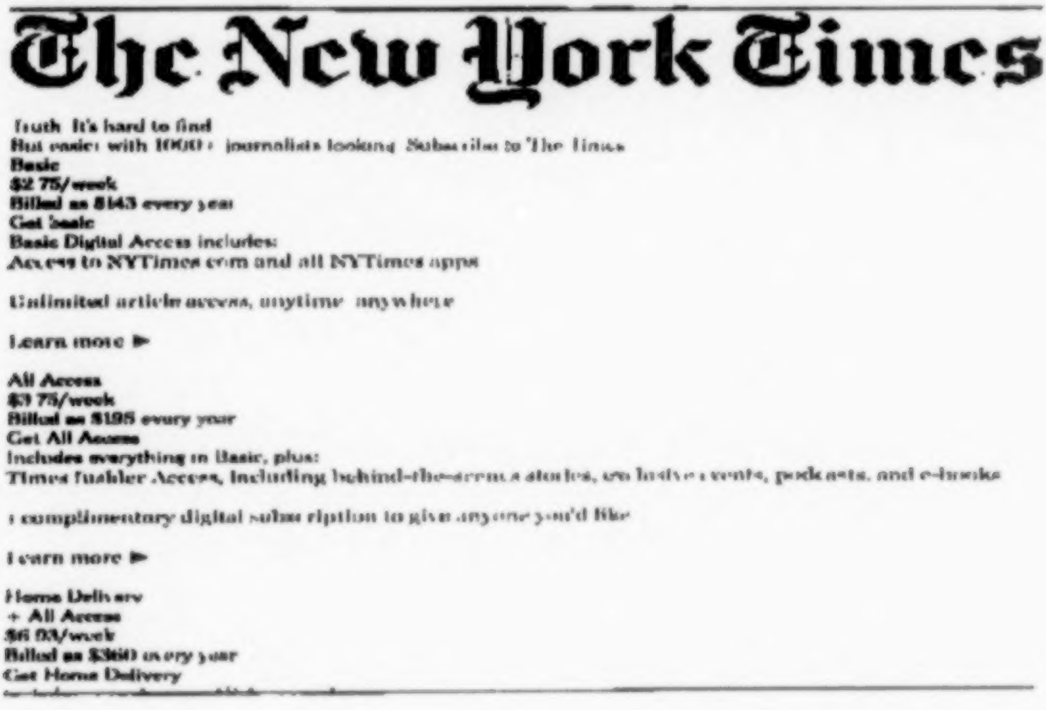

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Exhibit KK

PewResearch Center

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Key facts about refugees to the U.S.

BY JENS MANUEL KROGSTAD (HTTP://WWW.PEWRESEARCH.ORG/AUTHOR/JKROGSTAD/) AND JYNNAH RADFORD (HTTP://WWW.PEWRESEARCH.ORG/AUTHOR/JRADFORD/)

Syrian refugees take notes during their vocational ESL class at the International Rescue Committee center in San Diego on Aug. 31, 2016. (Frederic J. Brown/AFP/Getty Images)

An executive order (https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html) signed Jan. 27 by President Donald Trump suspends refugee admissions for 120 days while security procedures are reviewed, though the resettlement of persecuted religious minorities may continue during this time on a case-by-case basis. Under the plan, the maximum number of refugees allowed into the U.S. in fiscal 2017 will likely decline from 110,000 to 50,000. Separately, admission of Syrian refugees will be suspended pending a revision of security screening measures. About 3 million refugees have been resettled in the U.S. since Congress passed the Refugee Act of 1980 (https://www.acf.hhs.gov/orr/resource/the-refugee-act), which created the Federal Refugee Resettlement Program and the current national standard for the screening and admission of refugees into the country.

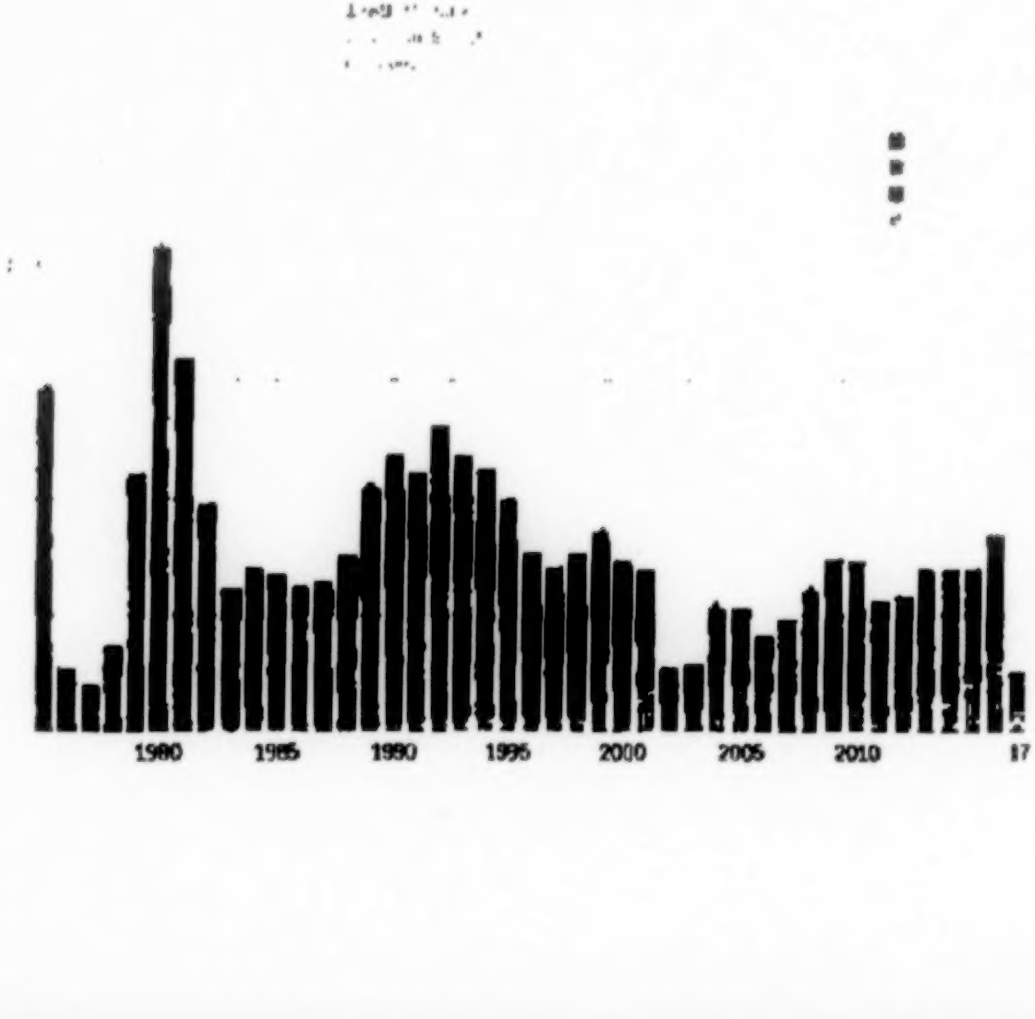
This is not the first time U.S. refugee admissions have been stopped. After the 2001 terrorist attacks, the U.S. largely suspended refugee resettlement for three months while security measures were examined. Today, the refugee admissions process (https://www.state.gov/j/prm/ra/admissions/) can take up to 18 to 24 months, and includes a review of applications by the State Department and other federal agencies, in-person interviews, health screenings and, for many, cultural orientations.

Here are key facts from our research about refugees entering the United States:

1 Historically, the total number of refugees coming to the U.S. has fluctuated (http://www.pewresearch.org/fact-tank/2016/06/17/where-refugees-to-the-u-s-come-from/) along with global events and U.S. priorities. From 1990 to 1995, an average of about 112,000 refugees arrived in the U.S. each year, with many coming from the former Soviet Union. However, refugee admissions dropped off to fewer than 27,000 in 2002 following the terrorist attacks in 2001. This number has since trended up.

The shifting origins of refugees to the U.S. over time

Number of refugees admitted to the U.S., by region of origin of principal applicant and fiscal year

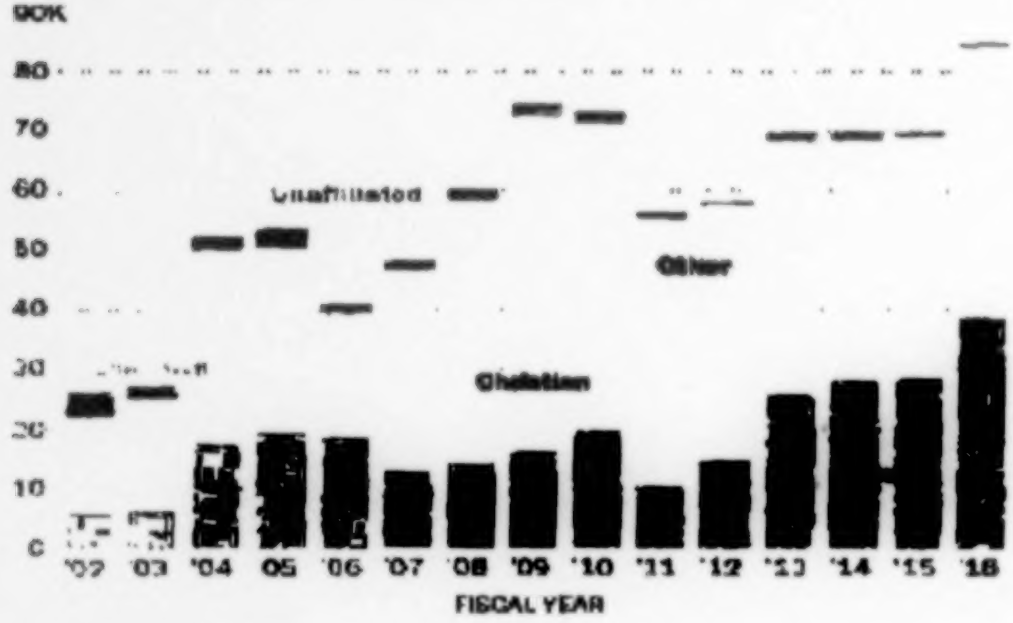


2 **The U.S. admitted 84,995 refugees in the fiscal year ending in September 2016, the most in any year during the Obama administration.** An additional 31,143 refugees have been admitted to the U.S. from Oct. 1 through Jan. 24, including more than 1,136 refugee admissions since Trump became president on Jan. 20. Though refugee admissions would drastically drop under Trump's proposal, the U.S. had been on pace to reach the Obama administration's goal of admitting 110,000 refugees (http://www.pewresearch.org/fact-tank/2017/01/20/u-s-on-track-to-reach-obama-administrations-goal-of-resettling-110000-refugees-this-year/) in fiscal 2017, which would have been the highest number since 1994.

3 In fiscal 2016, **the highest number of refugees from any nation came from the Dominican Republic of Congo.** The Congo accounted for 16,370 refugees followed by Syria (12,587), Burma (aka Myanmar, with 12,347), Iraq (9,880) and Somalia (9,020). Over the past decade, the largest numbers of refugees have come from Burma (159,692) and Iraq (135,643).

U.S. admits its highest number of Muslim refugees on record in fiscal 2016

Number of refugees entering the U.S. by religious affiliation



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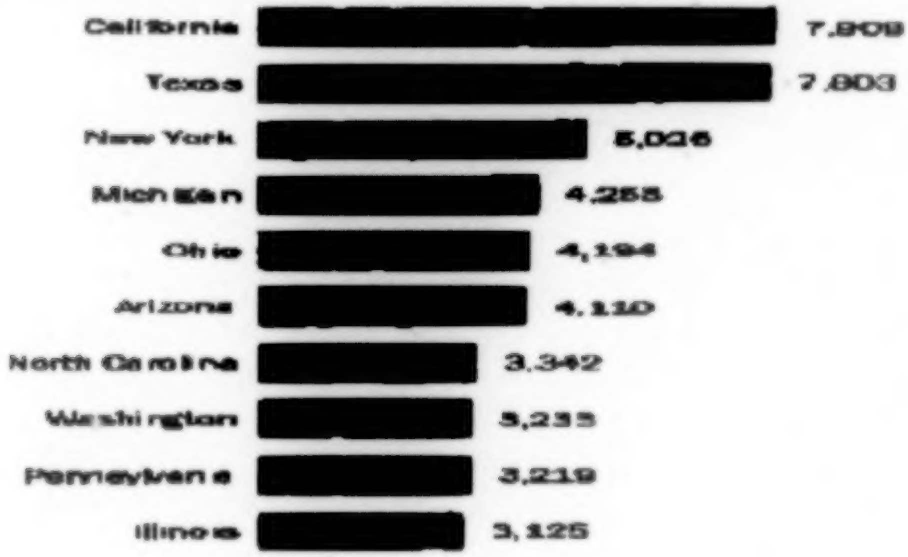
4 Nearly 39,000 Muslim refugees (http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/) entered the U.S. in fiscal 2016, the highest number on record, according to a Pew Research Center analysis of data from the State Department's Refugee Processing Center (http://ireports.wrapsnet.org/Interactive-Reporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/

MX%20-%20Arrivals%20by%20Nationality%20and%20 Religion). Muslims made up nearly half (46%) of refugee admissions, a higher share than for Christians, who accounted for 44% of refugees admitted. Muslims exceeded Christians on this measure for the first time since 2006, when a large number of Somiali refugees entered the U.S. From fiscal years 2002 to 2016, the U.S. admitted 399,677 Christian refugees and 279,339 Muslim refugees, meaning that 46% of all refugees who have entered the U.S. during this time have been Christian while 32% have been Muslim.

California, Texas and New York were the top states by number of refugees resettled in fiscal 2016

Number of refugees resettled in in fiscal year 2016



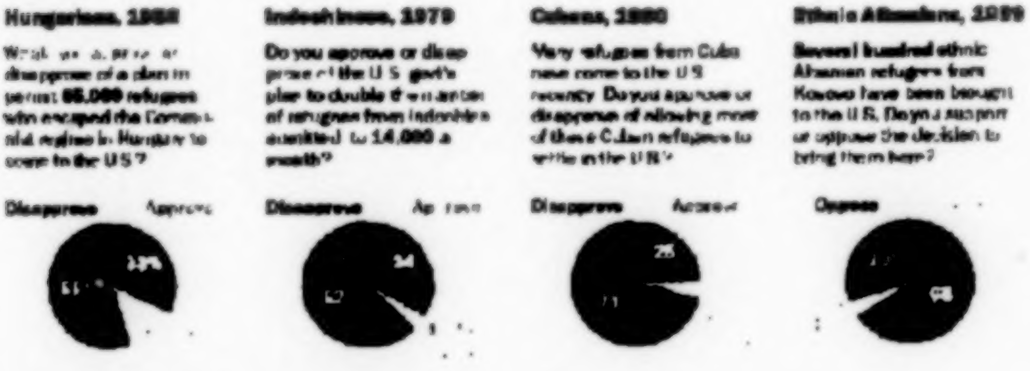
(http://www.pewresearch.org/fact-tank/2016/12/06/just-10-states-resettled-more-than-half-of-recent-refugees-to-u-s/ft_16-12-02_usrefugees_total/)

5 **California, Texas and New York** (http://www.pewresearch.org/fact-tank/2016/12/06/just-10-states-resettled-more-than-half-of-recent-refugees-to-u-s/) **resettled nearly a quarter of all refugees in fiscal year** 2016, together taking 20,738 refugees. Other states that received at least 3,000 refugees included Michigan, Ohio, Arizona, North Carolina, Washington, Pennsylvania and Illinois. By contrast, Arkansas, the District of Columbia and Wyoming each resettled fewer than 10 refugees. Delaware and Hawaii took in no refugees.

6 **The U.S. public has seldom approved of accepting large numers of refugees.** In October 2016, 54% of registered voters said the U.S. (http://www.people-press.org/2016/10/27/7-opinions-on-u-s-international-involvement-free-trade-isis-and-syria-russia-and-china/) does not have a responsibility to accept refugees from Syria, while 41% said it does. There was a wide partisan gap on this measure, with 87% of Trump supporters saying the U.S. doesn't have a responsibility to accept Syrians, compared with only 27% of Clinton supporters who said the same. U.S. public opinion polls (http://www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/) from previous decades show Americans have largely opposed admitting large numbers of refugees from countries where people are fleeing war and oppression.

Over the Decades, American Public Generally Hasn't Welcomed Refugees

% who say ...



Hungarians, 1958

Would you approve or disapprove of a plan to permit **65,000 refugees who escaped the Communist regime in Hungary** to come to the U.S.?

Indochinese, 1979

Do you approve or disapprove of the U.S. govt's plan to double the number of refugees from Indochina admitted to **14,000 a month**?

Cubans, 1980

Many refugees from Cuba have come to the U.S. recently. Do you approve or disapprove of allowing most of these Cuban refugees to settle in the U.S.?

Ethnic Albanians, 1999

Several hundred ethnic Albanian refugees from Kosovo have been brought to the U.S. Do you support or oppose the decision to bring them here?

Source: Gallup (Hungarians July/August 1958, Albanians May 1999) CBS/New York Times (Indochinese July 1979, Cubans June 1980)

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Note: This is an update of a post originally published on Jan. 27, 2017.

***Jens Manuel Krogstad** (http://www.pewresearch.org/author/jkrogstad/) is a writer/editor focusing on Hispanics, immigration and demographics at Pew Research Center.*

POSTS | EMAIL | [illegible]

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60 Comments

Anonymous • 1 month ago [illegible]

Believe or not we know that most of "so-called Congolese Refugees" are actually Rwandese from RWANDA. They will all tell you that they are from Rutshuru or Mulenge because these are the regions that were infiltrated by them. The Congolese citizenship is inherited from blood and as a rule in the East you have to proof from which family you come

Exhibit LL (Omitted)

Exhibit MM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-35105

STATE OF WASHINGTON, ET AL., PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES
ET AL., DEFENDANTS-APPELLANTS

JOINT DECLARATION OF MADELEINE K. ALBRIGHT, AVRIL D. HAINES MICHAEL V. HAYDEN JOHN F. KERRY JOHN E. McLAUGHLIN LISA O. MONACO MICHAEL J. MORELL JANET A. NAPOLITANO LEON E. PANETTA SUSAN E. RICE

We, Madeleine K. Albright, Avril D. Haines, Michael V. Hayden, John F. Kerry, John E. McLaughlin, Lisa O. Monaco, Michael J. Morell, Janet A. Napolitano, Leon E. Panetta, and Susan E. Rice declare as follows:

1. We are former national security, foreign policy, and intelligence officials in the United States Government:

   a. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997 and has been a member of the Central Intelligence Agency External Advisory Board since 2009 and the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

b. Avril D. Haines served as Deputy Director of the Central Intelligence Agency from 2013 to 2015, and as Deputy National Security Advisor from 2015 to January 20, 2017.

c. Michael V. Hayden served as Director of the National Security Agency from 1999 to 2005, and Director of the Central Intelligence Agency from 2006 to 2009.

d. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

e. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000-2004 and Acting Director of CIA in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

f. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

g. Michael J. Morell served as Acting Director of the Central Intelligence Agency in 2011 and from 2012 to 2013, Deputy Director from 2010 to 2013, and as a career official of the CIA from 1980. His duties included briefing President George W. Bush on September 11, 2001, and briefing President Barack

Obama regarding the May 2011 raid on Osama bin Laden.

h. Janet A. Napolitano served as Secretary of Homeland Security from 2009 to 2013.

i. Leon E. Panetta served as Director of the Central Intelligence Agency from 2009-11 and as Secretary of Defense from 2011-13.

j. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009-13 and as National Security Advisor from 2013 to January 20, 2017.

2. We have collectively devoted decades to combatting the various terrorist threats that the United States faces in a dynamic and dangerous world. We have all held the highest security clearances. A number of us have worked at senior levels in administrations of both political parties. Four of us (Haines, Kerry, Monaco and Rice) were current on active intelligence regarding all credible terrorist threat streams directed against the U.S. as recently as one week before the issuance of the Jan. 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Order").

3. We all agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. We all are nevertheless unaware of any specific threat that would justify the travel ban established by the Executive Order issued on January 27, 2017. We view the Order as one that ultimately undermines the

national security of the United States, rather than making us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds. It does not perform its declared task of "protecting the nation from foreign terrorist entry into the United States." To the contrary, the Order disrupts thousands of lives, including those of refugees and visa holders all previously vetted by standing procedures that the Administration has not shown to be inadequate. It could do long-term damage to our national security and foreign policy interests, endangering U.S. troops in the field and disrupting counterterrorism and national security partnerships. It will aid ISIL's propaganda effort and serve its recruitment message by feeding into the narrative that the United States is at war with Islam. It will hinder relationships with the very communities that law enforcement professionals need to address the threat. It will have a damaging humanitarian and economic impact on the lives and jobs of American citizens and residents. And apart from all of these concerns, the Order offends our nation's laws and values.

4. There is no national security purpose for a total bar on entry for aliens from the seven named countries. Since September 11, 2001, not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order. Very few attacks on U.S. soil since September 11, 2001 have been traced to foreign nationals at all. The overwhelming majority of attacks have been committed by U.S. citizens. The Administration has identified no information or basis for believing there is now a heightened

or particularized future threat from the seven named countries. Nor is there any rational basis for exempting from the ban particular religious minorities (e.g., Christians), suggesting that the real target of the ban remains one religious group (Muslims). In short, the Administration offers no reason why it abruptly shifted to group-based bans when we have a tested individualized vetting system developed and implemented by national security professionals across the government to guard the homeland, which is continually re-evaluated to ensure that it is effective.

5. In our professional opinion, the Order will harm the interests of the United States in many respects:

a. The Order will endanger U.S. troops in the field. Every day, American soldiers work and fight alongside allies in some of the named countries who put their lives on the line to protect Americans. For example, allies who would be barred by the Order work alongside our men and women in Iraq fighting against ISIL. To the extent that the Order bans travel by individuals cooperating against ISIL, we risk placing our military efforts at risk by sending an insulting message to those citizens and all Muslims.

b. The Order will disrupt key counterterrorism, foreign policy, and national security partnerships that are critical to our obtaining the necessary information sharing and collaboration in intelligence, law enforcement, military, and diplomatic channels to address the threat posed by terrorist groups such as ISIL. The international criticism of the Order has been intense, and it has alienated U.S. allies. It will strain our relationships with partner countries in Europe and the Middle East, on whom we rely for vital counterterrorism cooperation, undermining years of effort to bring them closer. By alienating these partners, we could lose access to the intelligence and resources necessary to fight the root causes of terror or disrupt attacks launched from abroad, before an attack occurs within our borders.

c. The Order will endanger intelligence sources in the field. For current information, our intelligence officers may rely on human sources in some of the countries listed. The Order breaches faith with those very sources, who have risked much or all to keep Americans safe—and whom our officers had promised always to protect with the full might of our government and our people.

d. Left in place, the Executive Order will likely feed the recruitment narrative of ISIL and other extremists that portray the United States as at war with Islam. As government officials, we took every step we could to counter violent extremism. Because of the Order's disparate impact against Muslim travelers and immigrants, it feeds ISIL's narrative and sends the wrong message to the Muslim community here at home and all over the world: that the U.S. government is at war with them based on their religion. The Order may even endanger Christian communities, by handing ISIL a recruiting tool and propaganda victory that spreads their message that the United States is engaged in a religious war.

e. The Order will disrupt ongoing law enforcement efforts. By alienating Muslim-American communities in the United States, it will harm our efforts to enlist their aid in identifying radicalized individuals who might launch attacks of the kind recently seen in San Bernardino and Orlando.

f. The Order will have a devastating humanitarian impact. When the Order issued, those disrupted included women and children who had been victimized by actual terrorists. Tens of thousands of travelers today face deep uncertainty about whether they may travel to or from the United States: for medical treatment, study or scholarly exchange, funerals or other pressing family reasons. While the Order allows for the Secretaries of State and Homeland Security to agree to admit travelers from these countries on a case-by-case basis, in our experience it would be unrealistic for these overburdened agencies to apply such procedures to every one of the thousands of affected individuals with urgent and compelling needs to travel.

g. The Order will cause economic damage to American citizens and residents. The Order will affect many foreign travelers, particularly students, who annually inject hundreds of billions into the U.S. economy, supporting well over a million U.S. jobs. Since the Order issued, affected companies have noted its adverse impacts on many strategic economic sectors, including defense, technology, medicine, culture and others.

6. As a national security measure, the Order is unnecessary. National security-based immigration restrictions have consistently been tailored to respond to: (1) specific, credible threats based on individualized information, (2) the best available intelligence and (3) thorough interagency legal and policy review. This Order rests not on such tailored grounds, but rather, on (1) general bans (2) not supported by any new intelligence that the Administration has claimed, or of which we are aware, and (3) not vetted through careful interagency legal and policy review. Since the 9/11 attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law enforcement and intelligence communities. This vetting is applied to travelers not once, but multiple times. Refugees receive the most thorough vetting of any traveler to the United States, taking on the average more than a year. Successive administrations have continually worked to improve this vetting through robust information-sharing and data integration to identify potential terrorists without resorting to a blanket ban on all aliens and refugees. Because vari-

ous threat streams are constantly mutating, as government officials, we sought continually to improve that vetting, as was done in response to particular threats identified by U.S. intelligence in 2011 and 2015. Placing additional restrictions on individuals from certain countries in the visa waiver program—as has been done on occasion in the past—merely allows for more individualized vettings before individuals with particular passports are permitted to travel to the United States.

7. In our professional opinion, the Order was ill-conceived, poorly implemented and ill-explained. The "considered judgment" of the President in the prior cases where courts have deferred was based upon administrative records showing that the President's decision rested on cleared views from expert agencies with broad experience on the matters presented to him. Here, there is little evidence that the Order underwent a thorough interagency legal and policy processes designed to address current terrorist threats, which would ordinarily include a review by the career professionals charged with implementing and carrying out the Order, an interagency legal review, and a careful policy analysis by Deputies and Principals (at the cabinet level) before policy recommendations are submitted to the President. We know of no interagency process underway before January 20, 2017 to change current vetting procedures, and the repeated need for the Administration to clarify confusion after the Order issued suggest that that Order received little, if any advance scrutiny by the Departments of State, Justice, Homeland Security or the Intelligence Community. Nor have we seen any evidence that the Order resulted

from experienced intelligence and security professionals recommending changes in response to identified threats.

8. The Order is of unprecedented scope. We know of no case where a President has invoked his statutory authority to suspend admission for such a broad class of people. Even after 9/11, the U.S. Government did not invoke the provisions of law cited by the Administration to broadly bar entrants based on nationality, national origin, or religious affiliation. In past cases, suspensions were limited to particular individuals or subclasses of nationals who posed a specific, articulable threat based on their known actions and affiliations. In adopting this Order, the Administration alleges no specific derogatory factual information about any particular recipient of a visa or green card or any vetting step omitted by current procedures.

9. Maintaining the district court's temporary restraining order while the underlying legal issues are being adjudicated would not jeopardize national security. It would simply preserve the status quo ante, still requiring that individuals be subjected to all the rigorous legal vetting processes that are currently in place. Reinstating the Executive Order would wreak havoc on innocent lives and deeply held American values. Ours is a nation of immigrants, committed to the faith that we are all equal under the law and abhor discrimination, whether based on race, religion, sex, or national origin. As government officials, we sought diligently to protect our country, even while maintaining an immigration system free from intentional discrimination, that applies no religious tests, and that measures individuals by

their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the nation and Constitution that we each took oaths to protect. Rebranding a proposal first advertised as a "Muslim Ban" as "Protecting the Nation from Foreign Terrorist Entry into the United States" does not disguise the Order's discriminatory intent, or make it necessary, effective, or faithful to America's Constitution, laws, or values.

10. For all of the foregoing reasons, in our professional opinion, the January 27 Executive Order does not further—but instead harms—sound U.S. national security and foreign policy.

Respectfully submitted,

s/MADELEINE K. ALBRIGHT*
s/AVRIL D. HAINES
s/MICHAEL V. HAYDEN
s/JOHN F. KERRY
s/JOHN E. McLAUGHLIN
s/LISA O. MONACO
s/MICHAEL J. MORELL
s/JANET A. NAPOLITANO
s/LEON E. PANETTA
s/SUSAN E. RICE

*All original signatures are on file with Harold Hongju Koh, Rule of Law Clinic, Yale Law School, New Haven, CT. 06520-8215 203-432-4932

We declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. [Individual signature pages follow]

(SIGNATURE PAGES OMITTED)

Exhibit NN

TRUMP'S EXECUTIVE ORDER MANDATES GOVERNMENT REPORTS ON HONOR KILLINGS COMMITTED BY MIGRANTS

SAVE
AGAINST WOMEN

By KATIE MCHUGH 6 Mar 2017 | 4,465

President Donald Trump's excutive order halting the importation of refugees from six terror-exporting countries also includes a section requiring the government to publicly release information on crimes committed by foreign nationals, including honor killings of women.

This lets the government "be more transparent with the American people and to implement more effectively policies and practices that serve the national interest," the order states. Department of Homeland Security Secretary John Kelly and U.S. Attorney General Jeff Sessions must work together to provide the public with a report on foreign nationals charged with and convicted of terrorism-related offenses, including those who associate with or provide support to terrorist organizations.

The order also instructs the government to release information on honor-killings. The government will now track cases involving foreign-born individuals who commit "gender-based violence against women," or honor killings. Honor killings are a brutal practice wherein Muslim males will murder or mutilate female family members accused of bringing shame and dishonor to their families and Islam. Like female genital mutilation, it is a practice that would not exist in the U.S. without mass immigration bringing its practitioners into U.S. communities.

"Cases of honor killings and/or violence in the U.S. are often unreported because of the shame it can cause to the victim and the victim's family. Also, because victims are often young women, they may feel that reporting the crime to authorities will draw too much attention to the family committing the crime," former U.S. government analyst Farhana Qazi explained to Fox News in November 2015.

The order requires the government to release its inaugural report by September 2017, close to the sixteenth anniversary of the 9/11 terror attacks committed by Islamic foreign nationals admitted to the U.S. on various visas. Reports shall be issued every six months from then on.

The transparency will likely increase the broad support Trump's immigration policies enjoy. Typically, the government conceals or refuses to collect immigration-related statistics that reveal troubling consequences of mass immigration policies. A Feb. 8 Morning Consult poll found 55 percent of voters supported Trump's executive order, including 82 percent of Republicans. Another McLaughlin & Associates poll release Feb. 8 found 57 percent support for a halt of refugee settlement to implement better screening procedures. A Rasmussen Reports poll released on Feb. 2 found 52 percent of voters favored a freeze on all refugee resettlement until the government could better screen out terrorists, including 57 percent of young voters.

A 2015 report detailing honor killings can be read here.

READ MORE STORIES ABOUT:
Big Government, Immigration, Donald Trump, Executive Order, Honor Killing, Islam, Muslim immigration, refugee resettlement

[illegible]CORD AND BRIEFS

FILED
AUG 10 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

JOINT APPENDIX
(VOLUME 3)

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CERTIORARI GRANTED: JUNE 26, 2017

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Docket No. 1:17-cv-00050-DKW-KSC

STATE OF HAWAII, ET AL., PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/3/17	1	COMPLAINT *for Declaratory and Injunctive Relief* against Donald J. Trump (Filing fee $ 400 receipt number 0975-1825544.), filed by State of Hawaii. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 JS 44—Civil Cover Sheet, # 13 Tillerson Summons, # 14 State Department Summons, # 15 DHS Summons, # 16 Kelly Summons)(Chin, Douglas) (Entered: 02/03/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
2/3/17	2	MOTION for Temporary Restraining Order Douglas S.G. Chin appearing for Plaintiff State of Hawaii (Attachments: # 1 Memorandum in Support of TRO, # 2 Certificate with Word Count, # 3 Proposed TRO)(Chin, Douglas) (Entered: 02/03/2017)
		* * * * *
2/3/17	4	Summons Issued as to Rex Tillerson, in his capacity as Secretary of State. (emt,) (Entered: 02/03/2017)
2/3/17	5	Summons Issued as to U.S. Department of State. (emt,) (Entered: 02/03/2017)
2/3/17	6	Summons Issued as to U.S. Department of Homeland Security. (emt,) (Entered: 02/03/2017)
2/3/17	7	Summons Issued as to John F. Kelly, in his capacity as Secretary of the U.S. Department of Homeland Security. (emt,) (Entered: 02/03/2017)
2/3/17	8	Order Setting Rule 16 Scheduling Conference for 09:30AM on 4/3/2017 before Magistrate Judge KENNETH J. MANSFIELD—

DATE	DOCKET NUMBER	PROCEEDINGS
		Signed by CHIEF JUDGE J. MICHAEL SEABRIGHT on 2/3/2017. (Attachments: # 1 Memo from Clerk Re: Corporate Disclosure Statements) (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry. **ATTACH THE SCHEDULING ORDER TO THE INITIATING DOCUMENT (COMPLAINT/NOTICE OF REMOVAL).** **THE SCHEDULING ORDER AND MEMO RE: CORPORATE DISCLOSURES MUST BE SERVED WITH THE DOCUMENT.** (Entered: 02/03/2017)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/3/17	10	Declaration re 2 MOTION for Temporary Restraining Order . (Attachments: # 1 Exhibit A—Doe 1, # 2 Exhibit B—Doe 2, # 3 Exhibit C—Doe 3, # 4 Exhibit D—Dickson Declaration, # 5 Exhibit E—Slaveria Declaration, # 6 Exhibit F—Szigeti Declaration, # 7 Exhibit G—Higashi Declaration, # 8 Exhibit H—Elshikh Declaration)(Chin, Douglas) (Entered: 02/03/2017)
2/3/17	11	Summons (Proposed) (Chin, Douglas) (Entered: 02/03/2017)
2/3/17	12	Summons Issued as to Donald J. Trump, in his official capacity as President of the United States. (emt,) (Entered: 02/03/2017)
2/3/17	13	Summons (Proposed) (Chin, Douglas) (Entered: 02/03/2017)
2/3/17	14	Summons Issued as to United States of America. (emt,) (Entered: 02/03/2017)
2/3/17	15	EX PARTE Motion *for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order,* Clyde J. Wadsworth appearing for Plaintiff State of Hawaii

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Declaration of Clyde J. Wadsworth, # 2 Proposed Order) (Wadsworth, Clyde) (Entered: 02/03/2017)
		* * * * *
2/3/17	18	EO: The Court is in receipt of Plaintiff State of Hawaii's Motion for Temporary Restraining Order ("TRO"). Dkt. No. 2. The Government shall file a response to the Motion for TRO by Tuesday, February 7, 2017 at 12:00 noon (HST). The Court will hold a hearing on the Motion for TRO on Wednesday, February 8, 2017 at 9:30 a.m. (HST). (JUDGE DERRICK K. WATSON) (tl,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/03/2017)
2/3/17	19	NOTICE of Hearing on Motion 2 MOTION for Temporary Restrain-

DATE	DOCKET NUMBER	PROCEEDINGS
		ing Order. Motion Hearing date has been set for 2/8/2017 at 9:30 AM in Aha Kupono before JUDGE DERRICK K. WATSON. (tl,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry. (Entered: 02/03/2017)
		* * * * *
2/6/17	23	Emergency MOTION to Stay re 18 Link,,, Michelle R. Bennett appearing for Defendants John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America (Attachments: # 1 Memorandum, # 2 Proposed Order)(Bennett, Michelle) (Entered: 02/06/2017)
2/6/17	24	EO: The Court is in receipt of Defendants' Emergency Motion to Stay All Deadlines Pending Resolution of Appellate Proceedings

DATE	DOCKET NUMBER	PROCEEDINGS
		Regarding Nationwide Injunction ("Motion to Stay"). Dkt. No. 23. Plaintiff State of Hawaii may file a response to the Motion to Stay by no later than Tuesday, February 7, 2017 at 9:00 a.m. (HST). (JUDGE DERRICK K. WATSON)(tl,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/06/2017)
2/6/17	25	MEMORANDUM in Opposition re 23 Emergency MOTION to Stay re 18 Link,,, filed by State of Hawaii. (Chin, Douglas) (Entered: 02/06/2017)
2/6/17	26	Errata re 25 Memorandum in Opposition to Motion *for Emergency Stay*. (Marie-Iha, Deirdre) (Entered: 02/06/2017)
2/7/17	27	EO: Defendants' Emergency Motion to Stay All Deadlines Pending Resolution of Appellate Proceedings

DATE	DOCKET NUMBER	PROCEEDINGS
		Regarding Nationwide Injunction is hereby GRANTED IN PART. Dkt. No. 23 . All pending deadlines and the hearing set for February 8, 2017 are VACATED. The matter is stayed as long as the February 3, 2017 injunction entered in Washington v. Trump, 2:17-cv-141 (W.D. Wash.), remains in place, or until further order of this Court. All further relief requested by the Emergency Motion is DENIED. A written order setting forth the Court's reasoning will follow. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(watson1)
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry Modified to create link to motion on 2/7/2017 (ecs,). (Entered: 02/07/2017)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/8/17	29	ORDER GRANTING 15 EX PARTE MOTION FOR IN CAMERA REVIEW OF EXHIBITS A, B, AND C TO DECLARATION OF DOUGLAS S. CHIN IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER. Signed by JUDGE DERRICK K. WATSON on 2/8/2017. (ecs,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/08/2017)
2/8/17	30	MOTION to Partially Lift Stay Neal Katyal appearing for Plaintiff State of Hawaii (Attachments: # 1 Exhibit Proposed First Am. Compl., # 2 Exhibit Decl. of Clyde J. Wadsworth, # 3 Exhibit Proposed Order, # 4 Certificate of Service)(Katyal, Neal) (Entered: 02/08/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
2/9/17	31	EO: The Court is in receipt of Plaintiff State of Hawaii's Motion to Partially Lift Stay. Dkt. No. 30. The Government may file a response to the State's motion by Monday, February 13, 2017. Thereafter, the Court intends to rule on the motion without a hearing pursuant to Local Rule 7.2(d). IT IS SO ORDERED. (JUDGE DERRICK K. WATSON) (tyk) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/09/2017)
2/9/17	32	ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' EMERGENCY MOTION TO STAY DEADLINES PENDING RESOLUTION OF APPELLATE PROCEEDINGS REGARDING NATIONWIDE INJUNCTION. Signed by JUDGE DERRICK K. WAT-

DATE	DOCKET NUMBER	PROCEEDINGS
		SON on 2/9/2017.—The Emergency Motion to Stay is GRANTED IN PART. This matter is stayed as long as the February 3, 2017 injunction entered in Washington v. Trump remains in full force and effect, or until further order of this Court. All further relief requested by the Emergency Motion to Stay is DENIED. Re: 23 Emergency MOTION to Stay Deadlines, 27 EO on Motion to Stay (ecs,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/09/2017)

* * * * *

2/13/17	35	STATEMENT of No Position re 30 MOTION to Partially Lift Stay filed by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States

DATE	DOCKET NUMBER	PROCEEDINGS
		of America. (Rosenberg, Brad) (Entered: 02/13/2017)
2/13/17	36	EO: Upon consideration of the State of Hawaii's Motion to Partially Lift Stay ("Motion")(Dkt. No. 30), the Government's Statement of No Position (Dkt. No. 35), and good cause appearing therefor, the State's Motion is hereby GRANTED. The State may file (1) its Proposed First Amended Complaint, and (2) the Declaration of Clyde J. Wadsworth Regarding Exhibit C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order, both in the form previously submitted to the Court as exhibits to the Motion (see Dkt. Nos. 30-1 and 30-2). The State may do so no later than Wednesday, February 15, 2017. The Court's February 9, 2017 stay order (Dkt. No. 32) otherwise remains in place. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(tyk) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of

DATE	DOCKET NUMBER	PROCEEDINGS
		Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/13/2017)
2/13/17	37	FIRST AMENDED COMPLAINT *for Declaratory and Injunctive Relief* against All Defendants, filed by State of Hawaii. (Attachments: # 1 Certificate of Service) (Katyal, Neal) Modified docket text on 2/14/2017 (ecs,). (Entered: 02/13/2017)
2/14/17	38	Declaration *of Clyde J. Wadsworth Regarding Exhibit C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order.* (Attachments: # 1 Certificate of Service) (Wadsworth, Clyde) (Entered: 02/14/2017)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/15/17	40	EO: The Court hereby lifts the stay in this matter for the limited purpose of allowing the parties to file Motions to Appear Pro Hac Vice, Notices of Appearance of Counsel, and/or Applications to Practice, consistent with Local Rules 83.1(d) and (e). The Court's February 9,

DATE	DOCKET NUMBER	PROCEEDINGS
		2017 stay order (Dkt. No. 32) otherwise remains in place. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(tyk) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/15/2017)
		* * * * *
3/6/17	56	NOTICE by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America *of Filing of Executive Order* John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America. (Attachments: # 1 Exhibit A: New Executive Order)(Rosenberg, Brad) (Entered: 03/06/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/7/17	57	Joint MOTION for Entry of Proposed Briefing Schedule Neal Katyal appearing for Plaintiffs Ismail Elshikh, State of Hawaii (Attachments: # 1 Proposed Order) (Katyal, Neal) (Entered: 03/07/2017)
3/7/17	58	MOTION to Lift Stay and for Leave to File a Second Amended Complaint Neal Katyal appearing for Plaintiffs Ismail Elshikh, State of Hawaii (Attachments: # 1 Exhibit Proposed Second Amended Complaint, # 2 Exhibit Proposed Order, # 3 Certificate of Service)(Katyal, Neal) (Entered: 03/07/2017)
3/8/17	59	ORDER GRANTING PLAINTIFFS' 58 MOTION TO LIFT STAY AND FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT. Signed by JUDGE DERRICK K. WATSON on 3/8/2017. —The Court lifts the litigation stay imposed by the Orders dated February 7, 2017 (Dkt. No. 27) and February 9, 2017 (Dkt. No. []32). Plaintiffs STATE OF HAWAI'I and ISMAIL ELSHIKH may file a Second Amended Complaint in the form submitted to the Court as an exhibit to the Motion (Dkt.

DATE	DOCKET NUMBER	PROCEEDINGS
		No. 58-1). (ecs,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Attachment replaced on 3/8/2017, NEF regenerated: # 1 Main Document—PDF flattened) (ecs,). (Entered: 03/08/2017)
3/8/17	60	BRIEFING SCHEDULE ORDER. Signed by JUDGE DERRICK K. WATSON on 3/8/2017. Related doc: 57 (ecs,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Attachment

DATE	DOCKET NUMBER	PROCEEDINGS
		replaced on 3/8/2017, NEF regenerated: # 1 Main Document—PDF flattened) (ecs,). (Entered: 03/08/2017)
3/8/17	61	NOTICE of Hearing on 65 Plaintiff's Motion For Temporary Restraining Order set for 3/15/2017 @ 09:30 AM before JUDGE DERRICK K. WATSON. Counsel may participate by phone by notifying Judge Watson's Courtroom Manager (808-541-3073) by 3/14/2017 and providing the phone number where counsel may be reached at the time of the hearing. The Court will contact the parties via phone at the time of the hearing.(tyk) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry. Modified on 3/9/2017 (tyk,). (Entered: 03/08/2017)

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DATE	DOCKET NUMBER	PROCEEDINGS
3/8/17	64	AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF ***(SECOND)*** against John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America, filed by State of Hawaii, Ismail Elshikh. (Attachments: # 1 Exhibit 1—Copy of Executive Order dated 3/6/2017, # 2 Exhibit 2—Copy of Executive Order dated 1/27/2017, # 3 Exhibit 3—Collection of relevant Data for Hawaii, # 4 Exhibit 4—Tables for fiscal years 2005-2015, # 5 Exhibit 5—Copy of table of contents and executive summary, # 6 Exhibit 6—Copy of press release, # 7 Exhibit 7—Copy of transcript, # 8 Exhibit 8—Copy of Washington Post Article, # 9 Exhibit 9—Copy of this NBC News article, # 10 Exhibit 10—Copy of the draft DHS report, # 11 Exhibit 11—Final version of DHS report, # 12 Exhibit 12—Copy of NBC News article, # 13 Exhibit 13—Copy of Dissent Channel memorandum, # 14 Exhibit 14—Copy of DHS Q&A, # 15 Certificate of

DATE	DOCKET NUMBER	PROCEEDINGS
		Service) (Katyal, Neal) Docket title text added on 3/9/2017 (ecs,). (Entered: 03/08/2017)
3/8/17	65	MOTION for Temporary Restraining Order Neal Katyal appearing for Plaintiffs Ismail Elshikh, State of Hawaii (Attachments: # 1 Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order, # 2 Certificate of Word Count, # 3 Proposed Temporary Restraining Order, # 4 Certificate of Service)(Katyal, Neal) (Entered: 03/08/2017)
3/8/17	66	Declaration re 65 MOTION for Temporary Restraining Order . (Attachments: # 1 Exhibit A—Dec. of Ismail Elshikh, PhD, # 2 Exhibit B-1—Supp. Dec. of George Szigeti, # 3 Exhibit B-2—Orig. Dec. of George Szigeti, # 4 Exhibit C-1—Supp. Dec. of Luis P. Salaveria, # 5 Exhibit C-2—Orig. Dec. of Luis P. Salaveria, # 6 Exhibit D-1—Supp. Dec. of Risa E. Dickson, # 7 Exhibit D-2—Orig. Dec. of Risa E. Dickson, # 8 Exhibit E—Dec. of Hakim Ounsafi, # 9 Certificate of Service) (Katyal, Neal) (Entered: 03/08/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/10/17	94	ORDER OF RECUSAL. Magistrate Judge KENNETH J. MANSFIELD recused. Case reassigned to MAGISTRATE JUDGE KEVIN S.C. CHANG. Please reflect Civil Case No: CV 17-00050 DKW-KSC on all further filings. Signed by Magistrate Judge KENNETH J. MANSFIELD on 3/10/2017. (ecs,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/10/2017)
		* * * * *
3/13/17	145	MEMORANDUM in Opposition re 65 MOTION for Temporary Restraining Order filed by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Exhibit A: March 6, 2017 Letter from DOJ and DHS to White House, # 2 Exhibit B: Department of State Q&As, # 3 Certificate of Service) (Rosenberg, Brad) (Entered: 03/13/2017)
		* * * * *
3/13/17	183	MOTION to Intervene by Defendant Vincent Lucas (Attachments: # 1 [PROPOSED] Intervenor Vincent Lucas's Cross Complaint against the State of Hawaii and Ismail Elshikh, Exh A - B, # 2 Mailing Documentation)(ecs,) [Note: Document received does not have an Original signature and no other copies provided to the court.] Modified on 3/16/2017 (ecs,). (Entered: 03/14/2017)
		* * * * *
3/13/17	189	MOTION to Intervene and to Dismiss and Enjoin Defendants by Intervenor Frederick Banks (Attachments: # 1 Mailing Documentation, # 2 Cover letter) [Note: No CV case number referenced on the Motion, however information as to the case is mentioned in the cover letter] (ecs,) (Entered: 03/14/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/14/17	190	EO: The Court is in receipt of the Motions to Intervene filed by Frederick Banks and Vincent Lucas. Dkt. Nos. 183 and 189. The Motions are DENIED. Neither Motion identifies a statutory right to intervene within the meaning of either Fed.R.Civ.P. 24(a) or 24(b). Moreover, the disposition of this action will not impair or impede either Movant's ability to protect his rights or interests. Finally, neither Movant has a claim or defense that shares with the main action a common question of law or fact sufficient for the Court to exercise its discretion in favor of intervention. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(tyk) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this

DATE	DOCKET NUMBER	PROCEEDINGS
		docket entry (Entered: 03/14/2017)
3/14/17	191	REPLY to Response to Motion re 65 MOTION for Temporary Restraining Order filed by State of Hawaii. (Attachments: # 1 Certificate of Word Count, # 2 Certificate of Service)(Katyal, Neal) (Entered: 03/14/2017)
		* * * * *
3/15/17	219	ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER 65 . Signed by JUDGE DERRICK K. WATSON on 3/15/2017. (ecs,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Main Document 219 replaced on 3/22/2017) (mta,). (Entered: 03/15/2017)
3/15/17	220	EP: Hearing held on 65 Plaintiffs' Motion For Temporary Restrain-

DATE	DOCKET NUMBER	PROCEEDINGS
		ing Order. Oral arguments heard. Motion taken under Advisement. Court to issue a written order. (Court Reporter Gloria Bediamol) (JUDGE DERRICK K. WATSON) (tyk)
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/15/2017)
		* * * * *
3/17/17	227	MOTION *for Clarification* re 219 Order on Motion for TRO, Brad P. Rosenberg appearing for Defendants John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America (Attachments: # 1 Memorandum of Law in Support of Motion for Clarification, # 2 Certificate of Service)(Rosenberg, Brad) Modified on 3/20/2017 (emt,).

DATE	DOCKET NUMBER	PROCEEDINGS
		(Entered: 03/17/2017)
3/18/17	228	OPPOSITION to 227 MOTION *for Clarification* of TRO re 219 Order on Motion for TRO, filed by State of Hawaii. (Attachments: # 1 Certificate of Service)(Katyal, Neal) Modified on 3/20/2017 (emt,). (Entered: 03/18/2017)
3/19/17	229	EO: The Court is in receipt of the Federal Defendants' Motion for Clarification of TRO. Dkt. No. 227. That Motion essentially asks whether the Court's March 15, 2017 Temporary Restraining Order was intended to apply to Sections 2 and 6 of the Executive Order. The Motion, in other words, asks the Court to make a distinction that the Federal Defendants' previous briefs and arguments never did. As important, there is nothing unclear about the scope of the Court's order. See Dkt. No. 219 (TRO) at 42 ("Defendants . . . are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation."). The Federal Defendants' Motion is DENIED. (JUDGE DERRICK K. WATSON)(watson1)

DATE	DOCKET NUMBER	PROCEEDINGS
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/19/2017)
3/19/17	230	EO: In light of the Court's TRO directing the parties to submit a certain "stipulated briefing and hearing schedule," the parties' briefs relating to the Federal Defendants' Motion for Clarification of TRO, and the Court's EO regarding the same (Dkt. No. 229), the parties are further directed to advise the Court whether a stipulated path has been reached regarding proceedings before this Court concerning a possible extension of the Court's TRO. If a status conference is necessary, the parties are requested to contact Tammy Kimura, Courtroom Manager, forthwith. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(watson1)

DATE	DOCKET NUMBER	PROCEEDINGS
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/19/2017)
3/19/17	231	Errata re 228 Response *to Mot. to Clarify*. (Attachments: # 1 Certificate of Service COS for Errata) (Marie-Iha, Deirdre) (Entered: 03/19/2017)

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DATE	DOCKET NUMBER	PROCEEDINGS
3/20/17	235	Joint MOTION for Briefing Schedule Neal Katyal appearing for Plaintiff State of Hawaii (Attachments: # 1 Exhibit Proposed Order, # 2 Certificate of Service)(Katyal, Neal) (Entered: 03/20/2017)
3/20/17	236	EO: The Court is in receipt of the parties' Joint Motion For Entry Of Proposed Briefing Schedule Order For Plaintiffs' Forthcoming Motion to Convert Temporary Restraining Order to a Preliminary Injunction. Dkt. No. 235. The Court enters the

DATE	DOCKET NUMBER	PROCEEDINGS
		following briefing schedule: Plaintiffs shall file their Motion to Convert Temporary Restraining Order to a Preliminary Injunction ("Motion") by 9:30 A.M. H.S.T. on Tuesday, March 21, 2017. The Government shall file its Opposition by 9:30 A.M. H.S.T. on Friday, March 24, 2017. Plaintiffs shall file their Reply by 9:30 A.M. H.S.T. on Saturday, March 25, 2017. The Court will hold a hearing on Plaintiffs' forthcoming Motion at 9:30 A.M. H.S.T. on Wednesday, March 29, 2017. Counsel may participate by phone by notifying Judge Watson's Courtroom Manager by Tuesday, March 28, 2017 and providing the phone number where counsel may be reached at the time of the hearing. The Court will contact the parties via phone at the time of the hearing. The Court advises that the hearing date/time may be changed, or vacated, upon review of the briefs. Per the parties' stipulation, the Court's Temporary Restraining Order ("TRO") of March 15, 2017 (Dkt. No. 219) shall remain in place until such time as the Court

DATE	DOCKET NUMBER	PROCEEDINGS
		rules on whether the TRO should be converted to a preliminary injunction or until otherwise ordered by the Court. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON) (watson1)
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/20/2017)
3/20/17	237	MOTION to Intervene ("Tertius Interveniens Notice of Lack of Standing of State of Hawaii to Challenge President's Executive Order (Travel Ban)); (FRCVP Rule 20(a)(2)(B) & 28 USC 1397)"—by Intervenor Eric Richard Eleson. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Certificate of Service, # 8 Mailing Documentation) (emt,) (Entered: 03/21/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/21/17	238	MOTION to Convert Temporary Restraining Order to Preliminary Injunction Neal Katyal appearing for Plaintiff State of Hawaii (Attachments: # 1 Memorandum, # 2 Exhibit Proposed Order, # 3 Certificate of Service)(Katyal, Neal) (Entered: 03/21/2017)
3/21/17	239	Declaration re 238 MOTION to Convert Temporary Restraining Order to Preliminary Injunction *of Neal K. Katyal.* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Certificate of Service)(Katyal, Neal) (Entered: 03/21/2017)
3/21/17	240	EO: The Court is in receipt of a Motion to Intervene entitled, "Tertius Interveniens Notice of Lack of Standing of State of Hawaii to Challenge President's Executive Order (Travel Ban)" filed by Eric Richard Eleson. Dkt. No 237. The Motion is DENIED. The Motion identifies no statutory right to intervene within the meaning of either Fed.R.Civ.P. 24(a) or 24(b). Moreover, the disposition of this action will not impair or impede Eleson's ability to protect his rights or interests. Eleson has no claim or defense that shares with

DATE	DOCKET NUMBER	PROCEEDINGS
		the main action a common question of law or fact sufficient for the Court to exercise its discretion in favor of intervention. Finally, to the extent Eleson seeks permissive joinder pursuant to Fed.R.Civ.P. 20(a)(2)(B), the Motion is likewise without merit. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(tl,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/21/2017)
3/21/17	241	Mikki the Mime's MOTION to Intervene Pursuant to Fed.R.Civ.P. 24(a) and (b)—by Intervenor Joseph Camp. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Transmittal Letter, # 5 Mailing Documentation) (emt,) (Entered: 03/22/2017)

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DATE	DOCKET NUMBER	PROCEEDINGS
3/22/17	243	EO: The Court is in receipt of a Motion to Intervene filed by Mikki the Mime. Dkt. No 241. The Motion is DENIED. The Motion identifies no statutory right to intervene within the meaning of either Fed.R.Civ.P. 24(a) or 24(b). Moreover, the disposition of this action will not impair or impede Movant's ability to protect her rights or interests. Finally, Movant has no claim or defense that shares with the main action a common question of law or fact sufficient for the Court to exercise its discretion in favor of intervention. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON) (tl,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/22/2017)

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DATE	DOCKET NUMBER	PROCEEDINGS
3/24/17	251	MEMORANDUM in Opposition re 238 MOTION to Convert Temporary Restraining Order to Preliminary Injunction filed by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America. (Attachments: # 1 Sarsour v. Trump Slip Opinion, # 2 Washington v. Trump Order Containing Dissents)(Rosenberg, Brad) (Entered: 03/24/2017)
3/25/17	252	REPLY to Response to Motion re 238 MOTION to Convert Temporary Restraining Order to Preliminary Injunction filed by Ismail Elshikh, State of Hawaii. (Attachments: # 1 Certificate of Word Count, # 2 Certificate of Service) (Katyal, Neal) (Entered: 03/25/2017)
3/25/17	253	Declaration re 252 Reply to Response to Motion, *Supplemental Declaration of Neal K. Katyal*. (Attachments: # 1 Exhibit D (DHS Fact Sheet), # 2 Exhibit E (DHS Q&A), # 3 Exhibit F (N.Y. Times Article), # 4 Certificate of Service)(Katyal, Neal) (Entered: 03/25/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
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3/28/17	258	NOTICE *of Filing of Declaration of Lawrence E. Bartlett* by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America re 238 MOTION to Convert Temporary Restraining Order to Preliminary Injunction , 251 Memorandum in Opposition to Motion . (Attachments: # 1 Declaration of Lawrence E. Bartlett, # 2 Certificate of Service) (Rosenberg, Brad) Modified on 3/29/2017 (emt,). (Entered: 03/28/2017)
		* * * * *
3/29/17	270	ORDER GRANTING MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION re 238— Signed by JUDGE DERRICK K. WATSON on 3/29/2017. "It is hereby ADJUDGED, ORDERED, and DECREED that: Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in

DATE	DOCKET NUMBER	PROCEEDINGS
		active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court. No security bond is required under Federal Rule of Civil Procedure 65(c). The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed." (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 03/29/2017)
3/30/17	271	**NOTICE OF APPEAL** as to 219 Order on Motion for TRO,, 270 Order on Motion for Miscellaneous

DATE	DOCKET NUMBER	PROCEEDINGS
		Relief,,,, by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America. (Rosenberg, Brad) Modified on 3/30/2017 9CCA NO. 17-15589 (emt,). (Entered: 03/30/2017)
3/30/17	272	USCA Case Number 17-15589 for 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump. (emt,)
		CERTIFICATE OF SERVICE Parties served by Ninth Circuit Court of Appeals. (Entered: 03/30/2017)
		* * * * *
3/31/17	275	TRANSCRIPT of Proceedings Pltf. Mt. for TRO held on March 15, 2017, —before Judge Derrick K. Watson. Court Reporter/Transcriber Gloria T. Bediamol, Telephone number (808) 541-2060. **90-Day Transcript Restriction:** PACER access to filed transcripts is restricted for 90 days from the file date to permit redaction of personal identifiers. Cita-

DATE	DOCKET NUMBER	PROCEEDINGS
		tions to restricted transcripts in filed documents must be limited to those portions of the proceedings that are relevant and in need of judicial review. Attaching restricted transcripts, in their entirety, to filed documents should be limited to situations with specific need. Transcript may be viewed at the court public terminal or ordered through the Court Reporter before the deadline for Release of Transcript. Redaction Request due 4/18/2017. Redacted Transcript Deadline set for 4/28/2017. Release of Transcript Restriction set for 6/26/2017. pp. 55. (gb@hid.uscourts.gov) (Entered: 03/31/2017)
3/31/17	276	TRANSCRIPT of Proceedings Mt. to convert TRO to PI held on March 29, 2017,—before Judge Derrick K. Watson. Court Reporter/Transcriber Gloria T. Bediamol, Telephone number (808) 541-2060. 90-Day Transcript Restriction: PACER access to filed transcripts is restricted for 90 days from the file date to permit redaction of personal identifiers. Citations to restricted transcripts in filed documents must be limited to

DATE	DOCKET NUMBER	PROCEEDINGS
		those portions of the proceedings that are relevant and in need of judicial review. Attaching restricted transcripts, in their entirety, to filed documents should be limited to situations with specific need. Transcript may be viewed at the court public terminal or ordered through the Court Reporter before the deadline for Release of Transcript. Redaction Request due 4/18/2017. Redacted Transcript Deadline set for 4/28/2017. Release of Transcript Restriction set for 6/26/2017. pp. 45. (gb@hid.uscourts.gov) (Entered: 03/31/2017)
3/31/17	277	Joint MOTION to Stay *District Court Proceedings Pending Resolution of Defendants' Appeal* Brad P. Rosenberg appearing for Defendants John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America (Attachments: # 1 Proposed Order, # 2 Certificate of Service) (Rosenberg, Brad) (Entered: 04/03/2017)
4/3/17	278	ORDER of USCA as to 271 Notice of Appeal, filed by U.S. Depart-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: "Appellants' unopposed motion to expedite the briefing and consideration of a motion to stay and to expedite the briefing and consideration of the merits of this preliminary injunction appeal (Docket Entry No. 12) is granted. The briefing schedule shall proceed as follows: the opening brief and the motion for a stay pending appeal are due April 7, 2017; the answering brief and the response to the motion for a stay pending appeal are due April 21, 2017; and the optional reply brief and the reply in support of the motion for a stay pending appeal are due April 28, 2017. Any amicus briefs are due April 21, 2017. The parties' request for expedited argument is granted. This case shall be heard on the calendar for May 2017, taking into account the limited dates the parties have advised they are available for argument."

DATE	DOCKET NUMBER	PROCEEDINGS
		(emt,)
		CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 04/03/2017)
4/3/17	279	ORDER re 277—Signed by JUDGE DERRICK K. WATSON on 4/3/2017. "All deadlines in this case, including the Defendants' deadline to file a response to the Second Amended Complaint, the parties' deadline to file a Scheduling Conference Statement pursuant to Rule 16.2(b), and the deadline to hold a conference pursuant to Rule 26.1(a), are hereby **STAYED.** The Court also hereby CONTINUES the Rule 16 Scheduling Conference that had been set for April 18, 2017. **It is further ORDERED that the parties shall submit, within fourteen days of the final disposition of appellate proceedings, a joint status report proposing the schedule for any further proceedings in this matter."** Motion terminated: 277 Joint MOTION to Stay *District Court Proceedings Pending Resolution of*

DATE	DOCKET NUMBER	PROCEEDINGS
		Defendants' Appeal filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump. (emt,)
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 04/03/2017)
4/3/17	280	EO: Rule 16 Scheduling Conference set for 4/18/2017 before Magistrate Judge Kevin Chang is hereby vacated. Refer to [ECF No. 279] Order issued by Judge Derrick K. Watson. (MAGISTRATE JUDGE KEVIN S.C. CHANG)(lls,)
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Partici-

DATE	DOCKET NUMBER	PROCEEDINGS
		pants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 04/03/2017)
		* * * * *
4/21/17	285	ORDER of USCA as to 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: " . . . initial en banc proceedings are concluded, and all remaining issues will be decided by the three-judge panel." "This case is scheduled for oral argument before the three-judge panel at 9:30 a.m. on Monday, May 15, 2017, in Seattle Washington." (emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 04/21/2017)
5/24/17	286	ORDER of USCA as to 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of

DATE	DOCKET NUMBER	PROCEEDINGS
		Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: “Plaintiffs-Appellees’ motion for leave to supplement the record is GRANTED.” (emt,) CERTIFICATE OF SERVICE Parties served by Ninth Circuit Court of Appeals. (Entered: 05/24/2017)
6/9/17	287	ORDER of USCA as to 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: “The Law Professors’ motion for leave to file a brief as amici curiae, see Dkt.208, is granted.” (emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 06/09/2017)
6/12/17	288	OPINION of USCA as to 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of

DATE	DOCKET NUMBER	PROCEEDINGS
		Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: "We affirm in part and vacate in part the district court's preliminary injunction order. As to the remaining Defendants, we affirm the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending USRAP for 120 days; and Section 6(b), capping the entry of refugees to 50,000 in the fiscal year 2017. We vacate the portions of the injunction that prevent the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it runs against the President. We remand the case to the district court with instructions to re-issue a preliminary injunction consistent with this opinion. **AFFIRMED in part; VACATED in part; and REMANDED with Instructions.** Each party shall bear its own costs on appeal."

DATE	DOCKET NUMBER	PROCEEDINGS
		(emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 06/13/2017)
6/19/17	289	ORDER of USCA as to 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: "The Government's consent motion to issue the mandate, Dkt. No. 316, is GRANTED. The mandate shall issue immediately." (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 06/19/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
6/19/17	290	MANDATE of USCA as to 271 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-15589: "The judgment of this Court, entered June 12, 201 7, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure." (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 06/19/2017)
6/19/17	291	AMENDED PRELIMINARY INJUNCTION. Signed by JUDGE DERRICK K. WATSON on 06/19/2017.

DATE	DOCKET NUMBER	PROCEEDINGS
		(eps,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 06/19/2017)
6/27/17	292	Appeal Remark re 271 Notice of Appeal, 9CCA NO. 17-15589 : Letter addressed to the Ninth Circuit Court of Appeals from the Supreme Court of the United States, dated June 26, 2017 Re: "The petition for a writ of certiorari in the above entitled case was filed on June 26, 2017 and placed on the docket June 26, 2017 as No. 16-1540." (emt,)No COS issued for this docket entry (Entered: 06/27/2017)
6/29/17	293	Emergency MOTION to Clarify Scope of Preliminary Injunction re 291 Preliminary Injunction, Neal Katyal appearing for Plaintiff State of Hawaii (Attachments: # 1 Mem-

DATE	DOCKET NUMBER	PROCEEDINGS
		orandum Memorandum of Law in Support of Emergency Motion to Clarify, # 2 Exhibit Proposed Order, # 3 Certificate of Service)(Katyal, Neal) (Entered: 06/29/2017)
6/29/17	294	Declaration of Neal K. Katyal in Support of 293 Plaintiff's Emergency MOTION to Clarify Scope of Preliminary Injunction re 291 Preliminary Injunction, . (Attachments: # 1 Exhibit Ex. A, # 2 Exhibit Ex. B, # 3 Exhibit Ex. C, # 4 Exhibit Ex. D, # 5 Exhibit Ex. E, # 6 Certificate of Service)(Katyal, Neal) Modified on 6/30/2017 (emt,). (Entered: 06/29/2017)
6/29/17	295	EO: The Court partially lifts the April 3, 2017 stay in this matter for the limited purpose of considering Plaintiffs' Emergency Motion to Clarify Scope of Preliminary Injunction. Dkt. No. 293 . Defendants shall file their opposition, limited to 20 pages, by Monday, July 3, 2017. Plaintiffs shall file any reply, limited to 15 pages, by Thursday, July 6, 2017. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(watson1)

DATE	DOCKET NUMBER	PROCEEDINGS
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 06/29/2017)
		* * * * *
7/3/17	301	MEMORANDUM in Opposition re 293 Emergency MOTION to Clarify Scope of Preliminary Injunction re 291 Preliminary Injunction, filed by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America. (Attachments: # 1 Declaration of Lawrence E. Bartlett & Att. 1-3, # 2 Exhibit A: Department of State FAQs, # 3 Exhibit B: Emails from Rosenberg to Katyal, # 4 Exhibit C: Department of State Fact Sheet re Refugee Program, # 5 Exhibit D: Department of Homeland Security FAQs, # 6 Certificate of Service) (Rosen-

DATE	DOCKET NUMBER	PROCEEDINGS
		berg, Brad) (Entered: 07/03/2017)
		* * * * *
7/5/17	303	REPLY re 293 Emergency MOTION to Clarify Scope of Preliminary Injunction re 291 Preliminary Injunction, filed by State of Hawaii. (Attachments: # 1 Exhibit Proposed Order, # 2 Certificate of Service)(Katyal, Neal) (Entered: 07/05/2017)
7/5/17	304	Declaration re 303 Reply, *Supplemental Declaration of Neal K. Katyal.* (Attachments: # 1 Exhibit F, # 2 Exhibit G, # 3 Exhibit H, # 4 Exhibit I, # 5 Certificate of Service)(Katyal, Neal) (Entered: 07/05/2017)
		* * * * *
7/5/17	315	Errata re 303 Reply, *Proposed Order*. (Attachments: # 1 Errata Proposed Order, # 2 Certificate of Service)(Katyal, Neal) (Entered: 07/05/2017)
		* * * * *
7/6/17	322	ORDER DENYING PLAINTIFFS' EMERGENCY MOTION TO CLARIFY SCOPE OF PRELIMINARY

DATE	DOCKET NUMBER	PROCEEDINGS
		INJUNCTION re 293— Signed by JUDGE DERRICK K. WATSON on 7/6/2017. (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 07/06/2017)
		* * * * *
7/6/17	324	NOTICE OF APPEAL as to 322 Order on Motion for Miscellaneous Relief,, by State of Hawaii. Filing fee $ 505, receipt number 0975-1895381. (Attachments: # 1 Exhibit Representation Statement, # 2 Certificate of Service) (Katyal, Neal) Modified on 7/7/2017 9CCA NO. 17-16366 (emt,). (Entered: 07/06/2017)
7/6/17	325	USCA Case Number 17-16366 for 324 Notice of Appeal filed by State

DATE	DOCKET NUMBER	PROCEEDINGS
		of Hawaii. (emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 07/07/2017)
		* * * * *
7/7/17	327	ORDER of USCA as to 324 Notice of Appeal, filed by State of Hawaii, 9CCA NO. 17-16366: This appeal is DISMISSED for lack of jurisdiction. Plaintiffs' "Emergency Motion under FRAP 8 and Circuit Rule 27-3 for Injunction Pending Appeal" is DENIED as moot. (emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 07/07/2017)
7/7/17	328	MOTION to Enforce or, In the Alternative, to Modify Preliminary Injunction re 291 Preliminary Injunction, Neal Katyal appearing for Plaintiff State of Hawaii (Attachments: # 1 Memorandum, # 2 Exhibit Proposed Order on

DATE	DOCKET NUMBER	PROCEEDINGS
		Motion to Enforce Preliminary Injunction, # 3 Exhibit Proposed Order Modifying Preliminary Injunction, # 4 Certificate of Service) (Katyal, Neal) (Entered: 07/07/2017)
7/7/17	329	Declaration re 328 MOTION to Enforce or, In the Alternative, to Modify Preliminary Injunction re 291 Preliminary Injunction, *of Neal K. Katyal.* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Certificate of Service)(Katyal, Neal) (Entered: 07/07/2017)
7/8/17	330	EO: The Court is in receipt of Plaintiffs' Motion to Enforce or, In the Alternative, to Modify Preliminary Injunction. Dkt. No. 328. Defendants shall file their opposition by Tuesday, July 11, 2017. Plaintiffs shall file any reply by Wednesday, July 12, 2017. The parties' opposition and reply briefs are limited to no more than 15 pages each. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON) (watson1)

DATE	DOCKET NUMBER	PROCEEDINGS
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 07/08/2017)

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DATE	DOCKET NUMBER	PROCEEDINGS
7/10/17	335	EO: The Court partially lifts the April 3, 2017 stay in this matter for the limited purpose of considering Plaintiffs' Motion to Enforce or, In the Alternative, to Modify Preliminary Injunction. Dkt. No. 328. IT IS SO ORDERED. (JUDGE DERRICK K. WATSON)(tyk)
		CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 07/10/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/11/17	338	MEMORANDUM in Opposition re 328 MOTION to Enforce or, In the Alternative, to Modify Preliminary Injunction re 291 Preliminary Injunction, filed by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United States of America. (Rosenberg, Brad) (Entered: 07/11/2017)
		* * * * *
7/12/17	342	REPLY re 328 MOTION to Enforce or, In the Alternative, to Modify Preliminary Injunction re 291 Preliminary Injunction, filed by State of Hawaii. (Attachments: # 1 Certificate of Service)(Katyal, Neal) (Entered: 07/12/2017)
7/12/17	343	Declaration re 342 Reply *Supplemental Declaration of Neal K. Katyal*. (Attachments: # 1 Exhibit G, # 2 Exhibit H, # 3 Exhibit I, # 4 Certificate of Service)(Katyal, Neal) (Entered: 07/12/2017)
7/13/17	344	Declaration re 342 Reply *Third Declaration of Neal K. Katyal*. (Attach-

DATE	DOCKET NUMBER	PROCEEDINGS
		ments: # 1 Exhibit J, # 2 Exhibit K, # 3 Exhibit L, # 4 Certificate of Service)(Katyal, Neal) (Entered: 07/13/2017)
7/13/17	345	ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO ENFORCE, OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION re 328—Signed by JUDGE DERRICK K. WATSON on 7/13/2017. (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 07/13/2017)
7/14/17	346	**NOTICE OF APPEAL** as to 345 Order on Motion for Miscellaneous Relief,, by John F. Kelly, Rex Tillerson, Donald J. Trump, U.S. Department of Homeland Security, U.S. Department of State, United

DATE	DOCKET NUMBER	PROCEEDINGS
		States of America. 9CCA NO. 17-16426 (Bennett, Michelle) Modified on 7/14/2017 (emt,). (Entered: 07/14/2017)
7/14/17	347	USCA Case Number 17-16426 for 346 Notice of Appeal filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump. (emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 07/14/2017)
		* * * * *
7/19/17	349	Appeal Remark re 271 Notice of Appeal, re 9CCA NO. 17-15589 : ORDER issued by the U.S. Supreme Court (16-1540) ~ "The Government's motion seeking clarification of our order of June 26, 2017, is denied. The District Court order modifying the preliminary injunction with respect to refugees covered by a formal assurance is stayed pending resolution of the Gov-

DATE	DOCKET NUMBER	PROCEEDINGS
		ernment's appeal to the Court of Appeals for the Ninth Circuit." (emt,) CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 07/19/2017)
7/19/17	350	Appeal Remark re 346 Notice of Appeal, re 9CCA NO. 17-16426 : ORDER issued by the U.S. Supreme Court (16-1540) ~ "The Government 's motion seeking clarification of our order of June 26, 2017, is denied. The District Court order modifying the preliminary injunction with respect to refugees covered by a formal assurance is stayed pending resolution of the Government's appeal to the Court of Appeals for the Ninth Circuit." (emt,) CERTIFICATE OF SERVICE Participants registered to receive

DATE	DOCKET NUMBER	PROCEEDINGS
		electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 07/19/2017)
		* * * * *
7/24/17	352	ORDER of USCA as to 346 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump, 9CCA NO. 17-16426: "The Government's motion to stay pending appeal, Dkt. No. 3, is denied as moot. The briefing schedule entered at Dkt. No. 2 is vacated. The parties' joint motion to expedite the briefing and consideration of the merits of this appeal, Dkt. No. 6, is granted." emt,) CERTIFICATE OF SERVICE Parties served by the Ninth Circuit Court of Appeals. (Entered: 07/24/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/28/17	354	ORDER of USCA CA No. 17-16426 as to 346 Notice of Appeal, filed by U.S. Department of State, U.S. Department of Homeland Security, Rex Tillerson, John F. Kelly, United States of America, Donald J. Trump The Court has received an Emergency Motion to Intervene (Dkt. #10). Any response shall be filed on or before 12:00 p.m. PST, Wednesday, August 2, 2017. Proposed-Intervenor may file a reply on or before 12:00 p.m. PST, Thursday, August 3, 2017. (eps,) CERTIFICATE OF SERVICE Participants served by 9CCA (Entered: 07/28/2017)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 17-15589

STATE OF HAWAII, ET AL., PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/30/17	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: to be set. Preliminary Injunction Appeal. Circuit Rule 3-3. [10378209] (RT) [Entered: 03/30/2017 04:20 PM]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/31/17	12	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS Unopposed Motion to expedite case. Date of service: 03/31/2017. [10379547] [17-15589] (Swingle, Sharon)

DATE	DOCKET NUMBER	PROCEEDINGS
		[Entered: 03/31/2017 02:46 PM]
		* * * * *
4/3/17	14	Filed order (BARRY G. SILVERMAN, M. MARGARET MCKEOWN and ANDREW D. HURWITZ) Appellants' unopposed motion to expedite the briefing and consideration of a motion to stay and to expedite the briefing and consideration of the merits of this preliminary injunction appeal (Docket Entry No. [12]) is granted. The briefing schedule shall proceed as follows: the opening brief and the motion for a stay pending appeal are due April 7, 2017; the answering brief and the response to the motion for a stay pending appeal are due April 21, 2017; and the optional reply brief and the reply in support of the motion for a stay pending appeal are due April 28, 2017. Any amicus briefs are due April 21, 2017. The parties' request for expedited argument is granted. This case shall be heard on the calendar for May 2017, taking into account the limited dates the parties have advised they are available for argument. See 9th Cir. Gen. Order 3.3(g). This case shall

DATE	DOCKET NUMBER	PROCEEDINGS
		be heard by a panel composed of three members of this court. See 9th Cir. Gen. Order 3.3(h). [10381034] (ME) [Entered: 04/03/2017 01:18 PM]
		* * * * *
4/4/17	18	Notice of Oral Argument on Monday, May 15, 2017—09:30 A.M.—SE 7th Flr Courtroom 2—Seattle WA. View the Oral Argument Calendar for your case here. Be sure to review the GUIDELINES for important information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: SEATTLE Office. [10382890] (AW) [Entered: 04/04/2017 01:13 PM]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/6/17	20	Filed (ECF) Plaintiffs in Ali v. Trump, 2:17-cv-00135 (W.D.Wash.) Motion to intervene. Date of service: 04/06/2017. [10387252] [17-15589] (Adams, Matt) [Entered: 04/06/2017 04:40 PM]
		* * * * *
4/7/17	22	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS Motion to stay lower court action. Date of service: 04/07/2017. [10388981] [17-15589] (Swingle, Sharon) [Entered: 04/07/2017 05:02 PM]
4/7/17	23	Submitted (ECF) Opening Brief for review. Submitted by Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS. Date of service: 04/07/2017. [10388990] [17-15589]—[COURT UPDATE: Attached corrected brief (statement of related cases added). 04/10/2017 by LA] (Swingle, Sharon) [Entered: 04/07/2017 05:06 PM]
4/7/17	24	Submitted (ECF) excerpts of record. Submitted by Appellants John F. Kelly, Rex W. Tillerson, Donald

DATE	DOCKET NUMBER	PROCEEDINGS
		J. Trump, U.S. Department of State, USA and USDHS. Date of service: 04/07/2017. [10388991] [17-15589] (Swingle, Sharon) [Entered: 04/07/2017 05:08 PM]
		* * * * *
4/10/17	29	Filed clerk order (Deputy Clerk: AF): Plaintiffs-Intervenors ("Ali Plaintiffs") have filed a motion for leave to intervene in this appeal. Dkt. [20]. Their motion indicates that counsel for the State of Hawaii and Ismail Elshikh take no position on the motion and that counsel for the federal government oppose the motion. Ordinarily, a party filing a response to a motion must do so within 10 days after service of the motion. Fed. R. App. P. 27. Given the expedited briefing and oral argument schedule set in this case, the Court shortens the deadline to respond. The parties may file a response to the Ali Plaintiffs' motion to intervene no later than April 12, 2017. [10389403] (AF) [Entered: 04/10/2017 09:21 AM]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/17	34	Filed clerk order: The opening brief [23] submitted by appellants is filed. Appellants are ordered to file 7 copies of the brief in paper format for delivery to the Court by 12:00 p.m. Pacific time on Tuesday, April 11, 2017, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [24] submitted by appellants. Appellants are ordered to file 4 copies of the excerpts in paper format, with a white cover, for delivery to the Court by 12:00 p.m. Pacific time on Tuesday, April 11, 2017. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10389531] (LA) [Entered: 04/10/2017 10:05 AM]

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DATE	DOCKET NUMBER	PROCEEDINGS
4/11/17	52	Filed (ECF) Appellees State of Hawaii and Ismail Elshikh Motion for miscellaneous relief [Petition for

DATE	DOCKET NUMBER	PROCEEDINGS
		initial hearing en banc.]. Date of service: 04/11/2017. [10392720] [17-15589] (Katyal, Neal) [Entered: 04/11/2017 05:15 PM]
4/12/17	53	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS response opposing motion ([20] Motion (ECF Filing), [20] Motion (ECF Filing) motion to intervene). Date of service: 04/12/2017. [10392989] [17-15589] (Swingle, Sharon) [Entered: 04/12/2017 09:40 AM]
4/12/17	54	Filed clerk order (Deputy Clerk: OC): Plaintiffs-Intervenors (the "Ali Plaintiffs") have filed a motion for leave to intervene in this appeal. Dkt. [20]. The Ali Plaintiffs may file a reply to any party's opposition briefing, but this must be expedited: Any optional reply in support of the motion shall be filed no later than Friday, April 14, 2017.[10393781] (OC) [Entered: 04/12/2017 03:02 PM]

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DATE	DOCKET NUMBER	PROCEEDINGS
4/14/17	56	Filed (ECF) Intervenor—Pending Ali Plaintiffs reply to response

DATE	DOCKET NUMBER	PROCEEDINGS
		(motion to intervene,). Date of service: 04/14/2017. [10397544] [17-15589] (Adams, Matt) [Entered: 04/14/2017 06:30 PM]
4/14/17	57	Filed (ECF) Plaintiffs in Doe v. Trump, 2:17-cv-00178 (W.D. Wash.) —Joseph Doe, James Doe, and the Episcopal Diocese of Olympia Motion to intervene. Date of service: 04/14/2017. [10397563] [17-15589] —[COURT UPDATE: Edited docket text to reflect correct party filers per motion. 04/17/2017 by RY] (Sarko, Lynn) [Entered: 04/14/2017 11:11 PM]

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DATE	DOCKET NUMBER	PROCEEDINGS
4/17/17	61	Filed clerk order (Deputy Clerk: WL): Plaintiffs-Intervenors (the "Doe Plaintiffs") have filed a motion for leave to intervene in this appeal. Dkt. No. [57]. Their motion indicates that counsel for the State of Hawaii and Ismail Elshikh take no position on the motion and that counsel for the federal government oppose the motion. Ordinarily, a party filing a response to a motion must do so within 10 days after service of the motion, and a party

DATE	DOCKET NUMBER	PROCEEDINGS
		filing a reply must due so within 7 days after service of the response. Fed. R. App. P. 27. Given the expedited briefing and oral argument schedule set in this case, the Court shortens the deadline to respond and reply. The parties may file a response to the Doe Plaintiffs' motion to intervene no later than Wednesday, April 19, 2017. The Doe Plaintiffs may file an optional reply in support of their motion no later than Friday, April 21, 2017. [10399041] (AF) [Entered: 04/17/2017 03:30 PM]
		* * * * *
4/19/17	76	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS response opposing motion ([57] Motion (ECF Filing), [57] Motion (ECF Filing) motion to intervene). Date of service: 04/19/2017. [10402576] [17-15589] (Swingle, Sharon) [Entered: 04/19/2017 01:26 PM]
		* * * * *
4/20/17	115	Filed (ECF) Intervenors—Pending James Doe, Joseph Doe and Epis-

DATE	DOCKET NUMBER	PROCEEDINGS
		copal Diocese of Olympia reply to response (motion to intervene). Date of service: 04/20/2017. [10404566] [17-15589] (Sarko, Lynn) [Entered: 04/20/2017 01:27 PM]
		* * * * *
4/21/17	184	Filed Order for PUBLICATION (SIDNEY R. THOMAS) The full court was advised of the petition for initial hearing en banc. A judge requested a vote on whether to hear the matter en banc before the limited en banc court. Another judge requested a vote on whether to hear the matter en banc before the full court. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of initial en banc consideration. Fed. R. App. P 35. Therefore, initial en banc proceedings are concluded, and all remaining issues will be decided by the three-judge panel. The denial of the request for initial hearing en banc does not preclude any party from filing a petition for rehearing en banc pursuant to the applicable rules following issuance of the panel opinion. This case is scheduled for oral argument before

DATE	DOCKET NUMBER	PROCEEDINGS
		the three-judge panel at 9:30 a.m. on Monday, May 15, 2017, in Seattle Washington. [10406467] (RMM) [Entered: 04/21/2017 01:47 PM]
		* * * * *
4/21/17	203	Filed clerk order (Deputy Clerk: OC): The Ali Plaintiffs' motion to intervene, Dkt. No. [20], and the Doe Plaintiffs' motion to intervene, Dkt. No. [57], are denied for the purposes of this expedited appeal only. See Bates v. Jones, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is . . . unusual and should ordinarily be allowed only for imperative reasons." (internal quotation marks omitted)); Fed. R. Civ. P. 24(a)(2) (intervention as of right must be given where "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"); Fed. R. Civ. P. 24(b)(3). The interests of the Ali Plaintiffs may be pursued through their case, Ali v. Trump, No. 2:17-cv-00135-JLR (W.D. Wash. filed Jan. 30, 2017), and possibly on appeal to our court. The same goes for the Doe Plaintiffs, who may

DATE	DOCKET NUMBER	PROCEEDINGS
		protect their interests in their case, Doe v. Trump, No. 2:17-cv-00178-JLR (W.D. Wash. filed Feb. 7, 2017). Although "[t]he prospect of stare decisis may, under certain circumstances, supply the requisite practical impairment warranting intervention as of right," United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986), vacated on other grounds, 480 U.S. 370 (1987), the outcome of this appeal will not "for all practical purposes . . . foreclose" the Ali and Doe Plaintiffs' claims, Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977). See In re Estate of Ferdinand E. Marcos Human Rights Litig., 536 F.3d 980, 986 (9th Cir. 2008) (noting that a non-party's concerns about the precedential effect of an opinion may not warrant intervention). The Ali and Doe Plaintiffs may file briefs as amici curiae no later than Wednesday, April 26, 2017. [10406960] (OC) [Entered: 04/21/2017 04:16 PM]

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4/21/17	216	Filed (ECF) Appellees Isma Elshikh and State of Hawaii response opposing motion ([22] Motion (ECF Fil-

DATE	DOCKET NUMBER	PROCEEDINGS
		ing), [22] Motion (ECF Filing) motion to stay lower court action). Date of service: 04/21/2017. [10407174] [17-15589] (Katyal, Neal) [Entered: 04/21/2017 06:08 PM]
4/21/17	217	Submitted (ECF) Answering Brief for review. Submitted by Appellees State of Hawaii and Ismail Elshikh. Date of service: 04/21/2017. [10407177] [17-15589] —[COURT UPDATE: Attached corrected brief. 4/24/2017 by TYL] (Katyal, Neal) [Entered: 04/21/2017 06:11 PM]
4/21/17	218	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees State of Hawaii and Ismail Elshikh. Date of service: 04/21/2017. [10407178] [17-15589] (Katyal, Neal) [Entered: 04/21/2017 06:13 PM]
		* * * * *
4/24/17	238	Filed clerk order: The answering brief [217] submitted by Ismail Elshikh and State of Hawaii is filed. Appellees are ordered to file 7 copies of the brief in paper format for delivery to the Court by 12:00 p.m. Pacific time on Tuesday, April 25,

DATE	DOCKET NUMBER	PROCEEDINGS
		2017, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ ECF. The Court has reviewed the supplemental excerpts of record [218] submitted by Ismail Elshikh and State of Hawaii. Appellees are ordered to file 4 copies of the excerpts in paper format, with a white cover, for delivery to the Court by 12:00 p.m. Pacific time on Tuesday, April 25, 2017 The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10408095] (KT) [Entered: 04/24/2017 11:53 AM]
		* * * * *
4/28/17	281	Submitted (ECF) Reply Brief for review. Submitted by Appellants Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA, USDHS and John F. Kelly. Date of service: 04/28/2017. [10416088] [17-15589] (Murphy, Anne) [Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		04/28/2017 07:06 PM]
4/28/17	282	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS reply to response (). Date of service: 04/28/2017. [10416089] [17-15589] (Murphy, Anne) [Entered: 04/28/2017 07:12 PM]
		* * * * *
5/1/17	284	Filed clerk order: The reply brief [281] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format for delivery to the Court by 12:00 p.m. Pacific time on Tuesday, May 2, 2017, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10416515] (LA) [Entered: 05/01/2017 10:20 AM]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/2/17	288	Filed clerk order (Deputy Clerk: OC): This case is scheduled for oral argument before a three-judge panel at 9:30 a.m. on Monday, May 15, 2017, in Seattle, Washington. Each side is allocated 30 minutes per side. Please note that this is a change in the minutes assigned for oral argument. [10418746] (OC) [Entered: 05/02/2017 11:55 AM]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/15/17	304	ARGUED AND SUBMITTED TO MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ. [10434008] (SB) [Entered: 05/15/2017 11:18 AM]
5/15/17	305	Filed Audio recording of oral argument. **Note**: Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [10435657] (SB) [Entered: 05/16/2017 09:42 AM]
5/18/17	306	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS citation of supple-

DATE	DOCKET NUMBER	PROCEEDINGS
		mental authorities. Date of service: 05/18/2017. [10440536] [17-15589] (Swingle, Sharon) [Entered: 05/18/2017 03:20 PM]
5/19/17	307	Filed (ECF) Appellees State of Hawaii and Ismail Elshikh Motion to supplement record on appeal. Date of service: 05/19/2017. [10441693] [17-15589] (Katyal, Neal) [Entered: 05/19/2017 01:33 PM]
5/19/17	308	Filed (ECF) Appellees Ismail Elshikh and State of Hawaii citation of supplemental authorities. Date of service: 05/19/2017. [10441854] [17-15589] (Sinzdak, Colleen) [Entered: 05/19/2017 02:14 PM]
5/24/17	309	Filed order (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ) Plaintiffs-Appellees' motion for leave to supplement the record is GRANTED. Plaintiffs-Appellees have advised that Defendants-Appellants do not oppose the motion but that they intend to file a response to the motion, addressing the relevance of the material to the issues before the Court. Defendants-Appellants may file such a response without further leave of the Court. [10446417] (OC)

DATE	DOCKET NUMBER	PROCEEDINGS
		[Entered: 05/24/2017 09:26 AM]
5/25/17	310	Filed (ECF) Appellants USDHS, John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State and USA response to motion ([307] Motion (ECF Filing), [307] Motion (ECF Filing) motion to supplement record on appeal). Date of service: 05/25/2017. [10448867] [17-15589] (Swingle, Sharon) [Entered: 05/25/2017 02:07 PM]
5/25/17	311	Filed (ECF) Appellees State of Hawaii and Ismail Elshikh citation of supplemental authorities. Date of service: 05/25/2017. [10449368] [17-15589] (Katyal, Neal) [Entered: 05/25/2017 04:15 PM]
6/9/17	312	Filed order (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ) The Law Professors' motion for leave to file a brief as amici curiae, see Dkt. [208], is granted. [10467727] (OC) [Entered: 06/09/2017 04:39 PM]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/12/17	314	FILED PER CURIAM OPINION (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICH-

DATE	DOCKET NUMBER	PROCEEDINGS
		ARD A. PAEZ) The Government's motion for a stay pending appeal is DENIED as moot. AFFIRMED in part; VACATED in part; and REMANDED with instructions. Each party shall bear its own costs on appeal. FILED AND ENTERED JUDGMENT. [10468371]—[Edited: attached PDF of WebCites. 06/16/2017 by RY] (RMM) [Entered: 06/12/2017 10:00 AM]
		* * * * *
6/13/17	316	Filed (ECF) Appellants USDHS, USA, U.S. Department of State, Donald J. Trump, Rex W. Tillerson and John F. Kelly Unopposed Motion for miscellaneous relief [Consent Motion To Issue The Mandate]. Date of service: 06/13/2017. [10472085] [17-15589] (Byron, H. Thomas) [Entered: 06/13/2017 05:43 PM]
6/19/17	317	Filed order (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ) The Government's consent motion to issue the mandate, Dkt. No. [316], is GRANTED. The mandate shall

DATE	DOCKET NUMBER	PROCEEDINGS
		issue immediately. [10479792] (OC) [Entered: 06/19/2017 04:27 PM]
6/19/17	318	MANDATE ISSUED.(MDH, RMG and RAP) [10479819] (MT) [Entered: 06/19/2017 04:38 PM]
6/27/17	319	**Supreme Court Case Info** Case number: 16-1540 Filed on: 06/26/2017 Cert Petition Action 1: Pending [10490185] (RR) [Entered: 06/27/2017 04:54 PM]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 17-16366

STATE OF HAWAII, ET AL., PLAINTIFFS-APPELLANTS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/6/17	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. 9th Circuit Rule 3-3 Preliminary Injunction Appeal. [10500168] (HH) [Entered: 07/06/2017 10:29 PM]
7/7/17	2	Filed (ECF) Appellants State of Hawaii and Ismail Elshikh EMERGENCY Motion for injunction pending appeal. Date of service: 07/07/2017. [10500624] [17-16366] (Katyal, Neal) [Entered: 07/07/2017 10:27 AM]
7/7/17	3	Order filed (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ) This is

DATE	DOCKET NUMBER	PROCEEDINGS
		an appeal of the district court's July 6, 2017 denial of Plaintiffs' "Emergency Motion to Clarify Scope of Preliminary Injunction." Plaintiffs requested that the district court "clarify the scope of the Court's June 19, 2017 amended preliminary injunction." The district court denied the clarification motion, explaining that, because it was the Supreme Court—not the district court—that issued the June 26, 2017 order staying in part the district court's preliminary injunction, clarification of the June 26 order must be sought from the Supreme Court. Plaintiffs have filed an emergency motion requesting that this court enjoin the Government from violating the Supreme Court's June 26 order or directing the district court to do so. We lack jurisdiction to address Plaintiffs' appeal of the district court's order denying the motion to clarify the scope of the injunction. This court possesses jurisdiction to review only final judgments and a limited set of interlocutory orders. See 28 U.S.C. §§ 1291, 1292(a). The district court's

DATE	DOCKET NUMBER	PROCEEDINGS
		order neither resulted in a final judgment nor engaged in action deemed immediately appealable in 28 U.S.C. § 1292(a). Specifically, the district court's order did not "grant[], continu[e], modify[], refus[e], or dissolv[e]" an injunction, or "refus[e] to dissolve or modify" an injunction. Id. § 1291(a)(1). Nor do any of the various judicially-crafted bases for appellate jurisdiction apply under these circumstances. Because the "practical effect" of Plaintiffs' requested relief is declaratory in nature—not injunctive—we do not construe their clarification motion before the district court as one for injunctive relief. See, e.g., Alsea Valley All. v. Dep't of Commerce, 358 F.3d 1181, 1186 (9th Cir. 2004). And this scenario does not present an order of "practical finality" because—as discussed below—Plaintiffs may seek injunctive relief from the district court. Cf. Nehmer v. U.S. Dep't of Veterans Affairs, 494 F.3d 846, 856 n.5 (9th Cir. 2007); All Alaskan Seafoods, Inc. v. M/V Sea Producer, 882 F.2d 425, 428 n.2 (9th Cir. 1989). Because we lack

DATE	DOCKET NUMBER	PROCEEDINGS
		jurisdiction to review the district court's order, this appeal is DISMISSED and Plaintiffs' "Emergency Motion under FRAP 8 and Circuit Rule 27-3 for Injunction Pending Appeal" is DENIED as moot. 1 Finally, we note that although the district court may not have authority to clarify an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against, for example, a party's violation of the Supreme Court's order placing effective limitations on the scope of the district court's preliminary injunction. Cf. United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 79-80 (9th Cir. 1951). But Plaintiffs' motion before the district court was clear: it sought clarification of the Supreme Court's June 26 order, not injunctive relief. Because the district court was not asked to grant injunctive relief or to modify the injunction, we do not fault it for not doing so. IT IS SO ORDERED. [10501556] (WL) [Entered: 07/07/2017 03:40 PM]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 17-16426

STATE OF HAWAII, ET AL., PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/14/17	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: to be set. Preliminary Injunction Appeal. C.R. 3-3. [10509016] (RT) [Entered: 07/14/2017 12:38 PM]
7/14/17	2	Filed clerk order (Deputy Clerk: MCD): The appeal filed on July 14, 2017 is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply. The mediation questionnaire is due three days after the date of this order. If they have not already done so, within 7 calendar days after the filing date

DATE	DOCKET NUMBER	PROCEEDINGS
		of this order, the parties shall make arrangements to obtain from the court reporter an official transcript of proceedings in the district court that will be included in the record on appeal. The briefing schedule shall proceed as follows: the opening brief and excerpts of record are due not later than August 11, 2017; the answering brief is due September 8, 2017 or 28 days after service of the opening brief, whichever is earlier; and the optional reply brief is due within 21 days after service of the answering brief. See 9th Cir. R. 3-3(b). The parties are reminded that streamlined requests for extensions of time are not available in preliminary injunction appeals. See http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000638. Any request for an extension of time must be requested under Ninth Circuit Rule 31-2.2(b). Failure to file timely the opening brief shall result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. See 9th Cir. R. 42-1. [10509444] (ME) [Entered: 07/14/2017 02:42 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
7/15/17	3	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS Motion for injunction pending appeal. Date of service: 07/15/2017. [10509983] [17-16426] (Swingle, Sharon) [Entered: 07/15/2017 10:52 AM]
7/19/17	4	Received Order from the Supreme Court, dated 07/19/2017: The Government's motion seeking clarification of our order of June 26, 2017, is denied. The District Court order modifying the preliminary injunction with respect to refugees covered by a formal assurance is stayed pending resolution of the Government's appeal to the Court of Appeals for the Ninth Circuit. Justice Thomas, Justice Alito, and Justice Gorsuch would have stayed the District Court order in its entirety. Supreme Court No. 16-1540 (16A1191). [10513992] (HH) [Entered: 07/19/2017 10:17 AM]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/21/17	6	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State,

DATE	DOCKET NUMBER	PROCEEDINGS
		USA and USDHS Joint Motion to expedite case. Date of service: 07/21/2017. [10516877] [17-16426] (Swingle, Sharon) [Entered: 07/21/2017 10:39 AM]
7/24/17	7	Filed order (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ): The Government's motion to stay pending appeal, Dkt. No. [3], is denied as moot. The briefing schedule entered at Dkt. No. [2] is vacated. The parties' joint motion to expedite the briefing and consideration of the merits of this appeal, Dkt. No. [6], is granted. The briefing schedule shall proceed as follows: the opening brief and excerpts of record are due July 27, 2017; the answering brief and supplemental excerpts of record (if any) are due August 3, 2017; and the reply brief is due August 9, 2017. Any amicus briefs are due August 3, 2017. Oral argument is presently not scheduled, but if the panel later concludes that oral argument is necessary, argument will be scheduled by the panel as soon as practicable after briefing concludes. [10518691] (AF)

DATE	DOCKET NUMBER	PROCEEDINGS
		[Entered: 07/24/2017 11:49 AM]
7/27/17	8	Submitted (ECF) Opening Brief for review. Submitted by Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS. Date of service: 07/27/2017. [10524184] [17-16426] (Swingle, Sharon) [Entered: 07/27/2017 02:39 PM]
7/27/17	9	Submitted (ECF) excerpts of record. Submitted by Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS. Date of service: 07/27/2017. [10524263] [17-16426]—[COURT UPDATE: Attached corrected excerpts of record. 7/28/2017 by TYL] (Swingle, Sharon) [Entered: 07/27/2017 03:04 PM]
7/27/17	10	Filed (ECF) U.S. Committee for Refugees and Immigrants Motion to intervene. Date of service: 07/27/2016. [10524434] [17-16426] (Doblick, Donna) [Entered: 07/27/2017 03:55 PM]
		* * * * *
7/28/17	14	Filed clerk order: The opening brief [8] submitted by appellants is filed.

DATE	DOCKET NUMBER	PROCEEDINGS
		Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [9] submitted by appellants. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10525654] (KT) [Entered: 07/28/2017 01:47 PM]
7/28/17	15	Filed order (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ): The Court has received an Emergency Motion to Intervene (Dkt. # [10]). Any response shall be filed on or before 12:00 p.m. PST, Wednesday, August 2, 2017. Proposed-

DATE	DOCKET NUMBER	PROCEEDINGS
		Intervenor may file a reply on or before 12:00 p.m. PST, Thursday, August 3, 2017. [10525844] (AF) [Entered: 07/28/2017 02:35 PM]
8/2/17	16	Filed (ECF) Appellants John F. Kelly, Rex W. Tillerson, Donald J. Trump, U.S. Department of State, USA and USDHS response opposing motion ([10] Motion (ECF Filing), [10] Motion (ECF Filing) motion to intervene). Date of service: 08/02/2017. [10530017] [17-16426] (Swingle, Sharon) [Entered: 08/02/2017 09:33 AM]
		* * * * *
8/3/17	22	Filed (ECF) Intervenor—Pending U.S. Committee for Refugees and Immigrants reply to response (motion to intervene). Date of service: 08/03/2017. [10531927] [17-16426] (Doblick, Donna) [Entered: 08/03/2017 11:45 AM]
		* * * * *
8/3/17	25	Filed order (MICHAEL DALY HAWKINS, RONALD M. GOULD and RICHARD A. PAEZ): The Emergency Motion to Intervene (Dkt. # [10]) is DENIED. See

DATE	DOCKET NUMBER	PROCEEDINGS
		Bates v. Jones, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is . . . unusual and should ordinarily be allowed only for imperative reasons." (internal quotation marks omitted)); Fed. R. Civ. P. 24(a)(2) (requiring the court to permit intervention unless "existing parties adequately represent [proposed-intervenors'] interest"). The United States Committee for Refugees and Immigrants may file a brief as amicus curiae no later than Wednesday, August 9, 2017. If Appellants wish to respond to any argument raised in that brief, they may do so no later than 12:00 p.m. PST on Friday, August 11, 2017. [10532222] (AF) [Entered: 08/03/2017 01:49 PM]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAI'I AND ISMAIL ELSHIKH,
PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Mar. 8, 2017]

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The State of Hawai'i (the "State") brings this action to protect its residents, its employers, its educational institutions, and its sovereignty against illegal actions of President Donald J. Trump and the federal government, specifically: President Trump's March 6, 2017 Executive Order, "Protecting the Nation From Foreign Terrorist Entry into the United States" (the

"Executive Order").[1] Plaintiff Ismail Elshikh, PhD, the Imam of the Muslim Association of Hawai'i, joins the State in its challenge because the Executive Order inflicts a grave injury on Muslims in Hawai'i, including Dr. Elshikh, his family, and members of his Mosque.

2. President Trump's original Executive Order dated January 27, 2017 blocked the entry into the United States, including Hawai'i, of any person from seven Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[2] His new Executive Order also blocks the entry into the United States, including Hawai'i, of nationals from six of the same countries—all except for Iraq—as long as those individuals do not have a valid U.S. visa as of the effective date of the Executive Order, or did not have one as of 5:00 p.m. EST on January 27, 2017. In other words, the Executive Order means that no prospective visa holder from the six designated countries will be able to enter the United States. This second Executive Order is infected with the same legal problems as the first Order—undermining bedrock constitutional and statutory guarantees.

3. The Executive Order means that thousands of individuals across the United States and in Hawai'i who have immediate family members living in the affected

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[1] As of this filing, President Trump's March 6, 2017 has not yet been published in the Federal Register. A copy of the Executive Order published on the White House website is attached as Exhibit 1, and is available at https://goo.gl/rnecqx.

[2] *See* Executive Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). A copy of the first Executive Order is attached as Exhibit 2.

countries will now be unable to receive visits from those persons or to be reunited with them in the United States. It means that universities, employers, and other institutions throughout the United States and in Hawai'i will be unable to recruit or to welcome qualified individuals from the six designated countries. It threatens certain non-citizens within the United States and in Hawai'i with the possibility that they will be unable to travel abroad and return—for instance, because their visa only permits them one entry, or because their visa will have expired during the time the Executive Order is still in place.

4. President Trump's Executive Order is subjecting a portion of Hawaii's population, including Dr. Elshikh, his family, and members of his Mosque, to discrimination and second-class treatment, in violation of both the Constitution and the Immigration and Nationality Act. The Order denies them their right to associate with family members overseas on the basis of their religion and national origin. And it results in their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion.

5. The Executive Order bars students, tourists, family members, and other visitors from the State on grounds that Congress and the Constitution have expressly prohibited. It is damaging Hawaii's institutions, harming its economy, and eroding Hawaii's sovereign interests in maintaining the separation between church and state as well as in welcoming persons from all nations around the world into the fabric of its society.

6. Plaintiffs accordingly seek an Order invalidating the portions of President Trump's Executive Order challenged here.

JURISDICTION AND VENUE

7. This Court has Federal Question Jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution, the Administrative Procedure Act ("APA"), the Immigration and Nationality Act ("INA"), and other Federal statutes.

8. The Court is authorized to award the requested declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the APA, 5 U.S.C. § 706.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1). A substantial part of the events giving rise to this claim occurred in this District, and each Defendant is an officer of the United States sued in his official capacity.

PARTIES

10. Plaintiffs are the State of Hawai'i and Ismail Elshikh, PhD.

11. Hawai'i is the nation's most ethnically diverse State, and is home to more than 250,000 foreign-born residents. More than 100,000 of Hawaii's foreign-born residents are non-citizens.[3]

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[3] United States Census Bureau, *2015 American Community Survey 1-Year Estimates*, *available at* https://goo.gl/IGwJyf. A collection of the relevant data for Hawai'i is attached as Exhibit 3.

12. Estimates from the Fiscal Policy Institute show that as of 2010, Hawai'i had the fifth-highest percentage of foreign-born workers of any State (20% of the labor force). And 22.5% of Hawai'i business owners were foreign-born.[4]

13. Thousands of people living in Hawai'i obtain lawful permanent resident status each year, including over 6,500 in 2015.[5] That includes numerous individuals from the seven countries designated in the original Executive Order. According to DHS statistics, over 100 Hawai'i residents from Iran, Iraq, and Syria have obtained lawful permanent resident status since 2004 (DHS has withheld data pertaining to additional residents from the seven designated countries).[6]

14. Hawai'i is also home to 12,000 foreign students.[7] That includes numerous individuals from the seven originally-designated countries. At the University of Hawai'i, there are at least 27 graduate students from

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[4] The Fiscal Policy Institute, *Immigrant Small Business Owners*, at 24 (June 2012), *available at* https://goo.gl/vyNK9W.

[5] U.S. Department of Homeland Security, *Lawful Permanent Residents Supplemental Table 1: Persons Obtaining Lawful Permanent Resident Status by State or Territory of Residence and Region and Country of Birth Fiscal Year 2015*, *available at* https://goo.gl/ELYIkn. Copies of these tables for fiscal years 2005 through 2015 are attached as Exhibit 4.

[6] *See* Exhibit 4.

[7] Hawaii Department of Business, Economic Development & Tourism, *The Economic Impact of International Students in Hawaii—2016 Update*, at 8 (June 2016), *available at* https://goo.gl/mogNMA.

the seven countries studying pursuant to valid visas issued by the U.S. government.

15. In 2016, Hawaii's foreign students contributed over $400 million to Hawaii's economy through the payment of tuition and fees, living expenses, and other activities. These foreign students supported 7,590 jobs and generated more than $43 million in state tax revenues.[8]

16. In 2009, foreign residents (i.e., non-citizens who had not obtained lawful permanent resident status) made up 42.9% of doctorate students, and 27.7% of master's students in science, technology, engineering, and mathematics ("STEM") programs in Hawai'i.[9]

17. Hawaii's educational institutions have diverse faculties. At the University of Hawai'i, there are approximately 477 international faculty members legally present in the United States. There are at least 10 faculty members at the University who are lawful permanent residents from one of the seven designated countries in the original Executive Order, and 30 visiting faculty members with valid visas who are from one of the seven designated countries.

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[8] *The Economic Impact of International Students in Hawaii—2016 Update*, *supra*, at 10-11.

[9] U.S. Chamber of Commerce et al., *Help Wanted: The Role of Foreign Workers in the Innovation Economy*, at 21 (2013), *available at* https://goo.gl/c3BYBu.

18. Tourism is Hawaii's "lead economic driver."[10] In 2015 alone, Hawai'i welcomed 8.7 million visitors accounting for $15 billion in spending.[11]

19. Hawai'i is home to several airports, including Honolulu International Airport and Kona International Airport.

20. David Yutaka Ige is the Governor of Hawai'i, the chief executive officer of the State of Hawai'i. The Governor is responsible for overseeing the operations of the state government, protecting the welfare of Hawaii's citizens, and ensuring that the laws of the State are faithfully executed.

21. Douglas S. Chin is the Attorney General of Hawai'i, the chief legal officer of the State. The Attorney General is charged with representing the State in Federal Court on matters of public concern.

22. The Constitution of the State of Hawai'i provides that "[n]o law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof." Haw. Const. art. I, § 4. And the State has declared that the practice of discrimination "because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability" is against public

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[10] Hawai'i Tourism Authority, *2016 Annual Report to the Hawai'i State Legislature*, at 20, *available at* https://goo.gl/T8uiWW.

[11] Hawai'i Tourism Authority, *2015 Annual Visitor Research Report*, at 2, *available at* https://goo.gl/u3RQmX. A copy of the table of contents and executive summary of this report is attached as Exhibit 5.

policy. Haw. Rev. Stat. Ann. § 381-1; *accord id.* §§ 489-3 & 515-3.

23. The State has an interest in protecting the health, safety, and welfare of its residents and in safeguarding its ability to enforce state law. The State also has an interest in "assuring that the benefits of the federal system," including the rights and privileges protected by the United States Constitution and Federal statutes, "are not denied to its general population." *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 608 (1982). The State's interests extend to all of the State's residents, including individuals who suffer indirect injuries and members of the general public.

24. Plaintiff Ismail Elshikh, PhD, is an American citizen of Egyptian descent. He has been a resident of Hawai'i for over a decade.

25. Dr. Elshikh is the Imam of the Muslim Association of Hawai'i. He is a leader within Hawaii's Islamic community.

26. Dr. Elshikh's wife is of Syrian descent and is also a resident of Hawai'i.

27. Dr. Elshikh's mother-in-law is a Syrian national, living in Syria. Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother in September 2015. The I-130 Petition was approved in February 2016. Dr. Elshikh's mother-in-law does not currently hold a visa to enter the United States.

28. Dr. Elshikh and his wife have five children. They are all American citizens and residents of Hawai'i.

29. Defendant Donald J. Trump is the President of the United States. He issued both the original January 27, 2017 Executive Order, as well as the new March 6, 2017 Executive Order that is the subject of this Complaint.

30. Defendant U.S. Department of Homeland Security ("DHS") is a federal cabinet agency responsible for implementing and enforcing the Immigration and Nationality Act ("INA") and the Executive Order that is the subject of this Complaint. DHS is a Department of the Executive Branch of the United States Government, and is an agency within the meaning of 5. U.S.C. § 552(f). United States Customs and Border Protection ("CBP") is an Operational and Support Component agency within DHS, and is responsible for detaining and removing non-citizens from Iran, Syria, Somalia, Sudan, Libya, and Yemen who arrive at air, land, and sea ports across the United States, including Honolulu International Airport and Kona International Airport.

31. Defendant John F. Kelly is the Secretary of Homeland Security. He is responsible for implementing and enforcing the INA and the Executive Order that is the subject of this Complaint, and he oversees CBP. He is sued in his official capacity.

32. Defendant U.S. Department of State is a federal cabinet agency responsible for implementing the U.S. Refugee Admissions Program and the Executive Order that is the subject of this Complaint. The Department of State is a department of the Executive Branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f).

33. Defendant Rex Tillerson is the Secretary of State. He oversees the Department of State's implementation of the U.S. Refugee Admissions Program and the Executive Order that is the subject of this Complaint. The Secretary of State has authority to determine and implement certain visa procedures for non-citizens. Secretary Tillerson is sued in his official capacity.

34. Defendant United States of America includes all government agencies and departments responsible for the implementation of the INA, and for detention and removal of non-citizens from Iran, Syria, Somalia, Sudan, Libya, and Yemen who arrive at air, land, and sea ports across the United States, including Honolulu International Airport and Kona International Airport.

ALLEGATIONS

A. President Trump's Campaign Promises.

35. President Trump repeatedly campaigned on the promise that he would ban Muslim immigrants and refugees from entering the United States, particularly from Syria, and maintained the same rhetoric after he was elected.

36. On July 11, 2015, Mr. Trump claimed (falsely) that Christian refugees from Syria are blocked from entering the United States. In a speech in Las Vegas, Mr. Trump said, "If you're from Syria and you're a Christian, you cannot come into this country, and they're the ones that are being decimated. If you are

Islamic . . . it's hard to believe, you can come in so easily."[12]

37. On September 30, 2015, while speaking in New Hampshire about the 10,000 Syrian refugees the Obama Administration had accepted for 2016, Mr. Trump said "if I win, they're going back!" He said "they could be ISIS," and referred to Syrian refugees as a "200,000-man army."[13]

38. On December 7, 2015, shortly after the terror attacks in Paris, Mr. Trump issued a press release entitled: "Donald J. Trump Statement on Preventing Muslim Immigration."[14] The press release stated: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States . . . ." The release asserted that "there is great hatred towards Americans by large segments of the Muslim population." The press release remains accessible on www.donaldjtrump.com as of this filing.

39. The next day, when questioned about the proposed "shutdown," Mr. Trump compared his proposal to President Franklin Roosevelt's internment of Japanese

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[12] Louis Jacobson, *Donald Trump says if you're from Syria and a Christian, you can't come to the U.S. as a refugee*, Politifact (July 20, 2015 10:00 AM ET), https://goo.gl/fucYZP.

[13] Ali Vitali, *Donald Trump in New Hampshire: Syrian Refugees Are 'Going Back*, NBC News (Oct. 1, 2015, 7:33 AM ET), https://goo.gl/4XSeGX.

[14] Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://goo.gl/D3OdJJ. A copy of this press release is attached as Exhibit 6.

Americans during World War II, saying, "[Roosevelt] did the same thing."[15] When asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said, "[T]hey would say, are you Muslim?" The interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct."[16]

40. During a Republican primary debate in January 2016, Mr. Trump was asked about how his "comments about banning Muslims from entering the country created a firestorm," and whether he wanted to "rethink this position." He said, "No."[17]

41. A few months later, in March 2016, Mr. Trump said, during an interview, "I think Islam hates us." Mr. Trump was asked, "Is there a war between the West and radical Islam, or between the West and Islam itself?" He replied: "It's very hard to separate. Because you don't know who's who."[18]

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[15] Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, The Washington Post (Dec. 8, 2015), https://goo.gl/6G0oH7.

[16] Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015 7:51 AM ET), https://goo.gl/IkBzPO.

[17] The American Presidency Project, *Presidential Candidates Debates: Republican Candidates Debate in North Charleston, South Carolina* (January 14, 2016), https://goo.gl/se0aCX.

[18] *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), *transcript available at* https://goo.gl/y7s2kQ.

42. Later, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban. Following the mass shootings at an Orlando nightclub in June 2016, Mr. Trump gave a speech promising to "suspend immigration from areas of the world where there's a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats." But he continued to link that idea to the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." He said that "to protect the quality of life for all Americans—women and children, gay and straight, Jews and Christians and all people then we need to tell the truth about radical Islam." And he criticized Hillary Clinton for, as he described it, "her refusal to say the words 'radical Islam,'" stating: "Here is what she said, exact quote, 'Muslims are peaceful and tolerant people, and have nothing whatsoever to do with terrorism.' That is Hillary Clinton." Mr. Trump further stated that the Obama administration had "put political correctness above common sense," but said that he "refuse[d] to be politically correct."

43. Mr. Trump's June 2016 speech also covered refugees. He said that "[e]ach year the United States permanently admits 100,000 immigrants from the Middle East and many more from Muslim countries outside of the Middle East. Our government has been admitting ever-growing numbers, year after year, without

any effective plan for our own security."[19] He issued a press release stating: "We have to stop the tremendous flow of Syrian refugees into the United States."[20]

44. Later, on July 24, 2016, Mr. Trump was asked: "The Muslim ban. I think you've pulled back from it, but you tell me." Mr. Trump responded: "I don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."[21]

45. During an October 9, 2016 Presidential Debate, Mr. Trump was asked: "Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?" Mr. Trump replied: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." When asked to clarify whether "the Muslim ban still

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[19] Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time (June 13, 2016, 4:36 PM ET), https://goo.gl/kgHKrb.

[20] Press Release, Donald J. Trump for President, *Donald J. Trump Addresses Terrorism, Immigration, and National Security* (June 13, 2016), *available at* https://goo.gl/GcrFhw.

[21] *Meet the Press* (NBC television broadcast July 24, 2016), *transcript available at* https://goo.gl/jHc6aU. A copy of this transcript is attached as Exhibit 7.

stands," Mr. Trump said, "It's called extreme vetting."[22]

46. Then, on December 21, 2016, following terror attacks in Berlin, Mr. Trump was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States." Mr. Trump replied: "You know my plans. All along, I've been proven to be right."[23]

B. President Trump's First Executive Order.

47. Within a week of being sworn in, President Trump acted upon his ominous campaign promises to restrict Muslim immigration, curb refugee admissions, and prioritize non-Muslim refugees.

48. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States. He remarked: "[N]o, it's not the Muslim ban. But it's countries that have tremendous terror. . . . [I]t's countries that people are going to come in and cause us tremendous problems."[24]

49. Two days later, on January 27, 2017, President Trump signed an Executive Order entitled, "Protecting

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[22] The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), https://goo.gl/iIzf0A.

[23] *President-Elect Trump Remarks in Palm Beach, Florida*, C-SPAN (Dec. 21, 2016), https://goo.gl/JlMCst.

[24] *Transcript: ABC News Anchor David Muir Interviews President Trump*, ABC News (Jan. 25, 2017, 10:25 PM ET), https://goo.gl/NUzSpq.

the Nation From Foreign Terrorist Entry into the United States."

50. The first Executive Order was issued without a notice and comment period and without interagency review. Moreover, the first Executive Order was issued with little explanation of how it could further its stated objective.

51. When signing the first Executive Order, President Trump read the title, looked up, and said: "We all know what that means."[25] President Trump said he was "establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."[26]

52. Section 3 of the first Executive Order was entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern." Section 3(c) "suspend[ed] entry into the United States, as immigrants and nonimmigrants" of persons from countries referred to in Section 217(a)(12) of the INA [8 U.S.C. § 1187(a)(12)], that is: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The majority of the population in each of these seven countries is Muslim.

53. According to one report, not a single fatal terrorist attack has been perpetrated in the United States

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[25] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), https://goo.gl/7Jzird.

[26] Sarah Pulliam Bailey, *Trump signs order limiting refugee entry, says he will prioritize Christian refugees*, The Washington Post (Jan. 27, 2017), https://goo.gl/WF2hmS.

by a national of one of these seven countries since at *least 1975.*[27] *Other countries whose nationals have* perpetrated fatal terrorist attacks in the United States are not part of either the original or the revised immigration ban.[28]

54. Section 3(c) of the first Executive Order meant that Lawful Permanent Residents, foreign students enrolled in U.S. universities (including in Hawai'i), individuals employed in the United States on temporary *work visas, and others were to be halted at the* border if they arrived in the United States (in Hawai'i or elsewhere) from one of the seven designated countries, including if the individual left the country and tried to return. Section 3(g) of the first Executive Order allowed the Secretaries of State and Homeland Security to make exceptions when they determined that doing so was "in the national interest."

55. The first Executive Order also provided for an expansion of its immigration ban to nationals from additional countries in the future. Section 3(d) directed the Secretary of State to (within about 30 days) "request [that] all foreign governments" provide the United States with information to determine whether a person is a security threat. Section 3(e) directed the Secretaries of Homeland Security and State to "submit to

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[27] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, Cato Institute Blog (Jan. 25, 2017, 3:31 PM ET), https://goo.gl/BCv6rQ.

[28] Scott Schane, *Immigration Ban Is Unlikely to Reduce Terrorist Threat, Experts Say*, N.Y. Times (Jan. 28, 2017), https://goo.gl/MBvOTk.

the President a list of countries recommended for inclusion" in the ban from among any countries that did not provide the information requested. Section 3(f) of the first Executive Order gave the Secretaries of State and Homeland Security further authority to "submit to the President the names of any additional countries recommended for similar treatment" in the future.

56. Section 5 of the first Executive Order was entitled "Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017." Section 5(a) directed the Secretary of State to "suspend the U.S. Refugee Admissions Program (USRAP) for 120 days." Section 5(e) permitted the Secretaries of State and Homeland Security to admit individuals as refugees on a case-by-case basis, but only if they determined that admission of the refugee was in the "national interest," including "when the person is a religious minority in his country of nationality facing religious persecution."

57. Section 5(b) directed the Secretaries of State and Homeland Security, "[u]pon resumption of USRAP admissions," to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." In Section 5(c), President Trump "proclaim[ed] that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend[ed] any such entry" indefinitely.

58. In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. He said (once again, falsely):

"Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."[29]

59. The day after signing the first Executive Order, President Trump's advisor, Rudolph Giuliani, explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[30]

60. The President and his spokespersons defended the rushed nature of their issuance of the first Executive Order on January 27, 2017, by saying that their urgency was imperative to stop the inflow of dangerous persons to the United States. On January 30, 2017, President Trump tweeted: "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week."[31] In a forum on January

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[29] *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017), https://goo.gl/2GLB5q.

[30] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says—and ordered a commission to do it 'legally'*, The Washington Post (Jan. 29, 2017), https://goo.gl/Xog80h. A copy of this article is attached as Exhibit 8.

[31] *See* Donald J. Trump (@realDonaldTrump), Twitter (Jan. 30, 2017, 5:31 AM ET), https://goo.gl/FAEDTd.

30, 2017 at George Washington University, White House spokesman Sean Spicer said: "At the end of the day, what was the other option? To rush it out quickly, telegraph it five days so that people could rush into this country and undermine the safety of our nation?"[32] On February 9, 2017, President Trump claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that "you can't do that because then people are gonna pour in before the toughness."[33]

61. On February 24, 2017, a draft report published by the Department of Homeland Security—and obtained by the Associated Press—concluded that citizenship was an "unlikely indicator" of terrorism threats against the United States. The draft report also found that very few persons from the seven countries included in President Trump's first Executive Order had carried out or attempted to carry out terrorism activities in the United States since 2011. Specifically, the DHS report determined that 82 people were inspired by a foreign terrorist group to carry out or attempt to carry out an attack in the United States. Half were U.S. citizens born in the United States, and the remaining persons were from 26 countries—with the most individuals

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[32] *See* Videotape: ***WATCH: White House Press Secretary Sean Spicer joins forum at George Washington University to discuss the Trump Administration's "war" with the media and the access journalists should have covering the White House***, at 1:00, Fox 5 DC (Jan. 30, 2017), *available at* https://goo.gl/cpNUjT.

[33] Kevin Liptak, *Trump: I wanted month delay before travel ban, was told no*, CNN Politics (Feb. 9, 2017, 6:31 AM ET), https://goo.gl/EOez3k.

originating from Pakistan, followed by Somalia, Bangladesh, Cuba, Ethiopia, Iraq and Uzbekistan. Of the seven countries originally included in the travel ban, only Somalia and Iraq were identified as being among the "top" countries-of-origin for the terrorists analyzed in the report.[34] The draft report related that three offenders (in the time period covered) had been from Somalia, two were from Iraq, one was from Iran, Sudan, and Yemen, and none were from Syria or Libya.[35] The draft report also found that terrorist groups in three of the original seven countries posed a threat to the United States (Iraq, Yemen, and Syria), while groups in the other four named countries in the original Executive Order were regionally focused.[36]

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[34] Vivian Salama & Alicia A. Caldwell, *AP Exclusive: DHS report disputes threat from banned nations*, Associated Press (Feb. 24, 2017), https://goo.gl/91to90. A copy of the Associated Press article is attached as Exhibit 9. A copy of the draft DHS report is available at https://goo.gl/0yfXpZ and attached as Exhibit 10. A final version of the report, entitled *Intelligence Assessment: Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist*, was later obtained by CNN, and is attached as Exhibit 11. *See* Tammy Kupperman, *DHS assessment: Individuals radicalized once in US*, CNN Politics (Mar. 4, 2017, 3:02 PM ET), https://goo.gl/Q6OVTd.

[35] Phil Helsel, *DHS Draft Report Casts Doubt on Extra Threat from 'Travel Ban' Nationals in U.S.*, NBC News (Feb. 24, 2017, 9:26 PM ET), https://goo.gl/gDHq6i. A copy of this NBC News article is attached as Exhibit 12.

[36] *Id.*

C. Implementation and Judicial Enjoinment of the First Executive Order.

62. Upon the issuance of the first Executive Order, Defendants began detaining people at U.S. airports who, but for the first Executive Order, were legally entitled to enter the United States. Some were also removed from the United States. Estimates indicate that over 100 people were detained upon arrival at U.S. airports.[37]

63. Among others, Defendants detained and/or removed:

a. Lawful permanent residents, including dozens at Dulles International Airport in Virginia,[38] and others at Los Angeles International Airport who were pressured to sign Form I-407 to *relinquish* their green cards;[39]

b. People with special immigrant visas, including an Iraqi national at John F. Kennedy International Airport who worked as an interpreter for the U.S. Army in Iraq;[40]

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[37] Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. Times (Jan. 28, 2017), https://goo.gl/OrUJEr.

[38] *See, e.g.*, Petition ¶ 2, *Aziz v. Trump*, No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017).

[39] Leslie Berestein Rojas et al., *LAX immigration agents asks detainees to sign away their legal residency status, attorneys say*, Southern California Public Radio News (Jan. 30, 2017), https://goo.gl/v6JoUC; Brenda Gazzar & Cynthia Washicko, *Thousands protest Trump's immigration order at LAX*, Los Angeles Daily News (Jan. 29, 2017), https://goo.gl/1vA37M.

c. A doctor at the Cleveland Clinic with a valid work visa who was trying to return home from vacation;[41]

d. People with valid visas to visit family in the United States, including a Syrian woman sent to Saudi Arabia after being convinced by officials at O'Hare International Airport to sign paperwork cancelling her visa.[42]

64. People overseas were blocked from boarding flights to the United States or told they could no longer come here. The State Department released information verifying that 60,000 visas were revoked between January 27, 2017, when the first Executive Order was signed, and February 3, 2017.[43]

65. Confusion, backlash, and habeas corpus litigation arose in the wake of the first Executive Order, including with regard to whether it applied to lawful permanent residents. Within the first 72 hours that

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[40] *See, e.g.*, Petition 2, *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017).

[41] Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), https://goo.gl/f0EGV3.

[42] John Rogers, *Longtime US residents, aspiring citizens caught up in ban*, StarTribune (Jan. 30, 2017, 1:45 AM ET), https://goo.gl/eEPAuE.

[43] Adam Kelsey et al., *60,000 Visas Revoked Since Immigration Executive Order Signed: State Department*, ABC News (Feb. 3, 2017, 6:32 PM ET), https://goo.gl/JwPDEa.

the first Executive Order was in effect, Defendants reportedly changed their minds three times about whether it did.[44]

66. Hundreds of State Department officials signed a memorandum circulated through the State Department's "Dissent Channel" stating that the Executive Order "runs counter to core American values" including "nondiscrimination," and that "[d]espite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals" here on visas.[45]

67. Likewise, Senators John McCain (R-AZ) and Lindsey Graham (R-SC) stated: "This executive order sends a signal, intended or not, that America does not want Muslims coming into our country."[46]

68. DHS Secretary Kelly issued a press release on Sunday, January 29, 2017, stating that: "In applying the provisions of the president's executive order, I hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a seri-

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[44] Evan Perez et al., *Inside the confusion of the Trump executive order and travel ban*, CNN Politics (Jan. 30, 2017 11:29 AM ET), https://goo.gl/Z3kYEC.

[45] Jeffrey Gettleman, *State Department Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. Times (Jan. 31, 2017), https://goo.gl/svRdIw. A copy of the Dissent Channel memorandum is attached as Exhibit 13.

[46] Press Release, Senator John McCain, *Statement By Senators McCain & Graham On Executive Order On Immigration* (Jan. 29, 2017), *available at* https://goo.gl/EvHvmc.

ous threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations."[47]

69. Secretary Kelly's statement thus indicated that the first Executive Order *did* apply to lawful permanent residents from the designated countries, and only the Secretary's determination under Section 3(g) that admission of lawful permanent residents, absent certain information reviewed on a case-by-case basis, is in the national interest, allows them to enter.

70. Then, on February 1, 2017, White House Counsel Donald McGahn issued a Memorandum taking yet another position on green-card holders, now purporting to "clarify" that such persons were never covered by Sections 3 and 5 of the first Executive Order.

71. On February 3, 2017, the District Court for the Western District of Washington entered a temporary restraining order, enjoining President Trump and his Administration from enforcing the first Executive Order. On February 9, 2017, the Court of Appeals for the Ninth Circuit issued a *per curiam* opinion denying the Government's emergency motion for a stay of the District Court's order. On February 16, 2017, the Government filed a brief in the Ninth Circuit advising the court that "the President intends in the near future to rescind the [first Executive] Order and replace it with a new, substantially revised Executive Order"; accord-

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[47] Press Release, U.S. Department of Homeland Security, *Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States* (Jan. 29, 2017), *available at* https://goo.gl/6krafi.

ingly, the Government requested that the court "hold its consideration of the case until the President issues the new Order and then vacate the panel's preliminary decision."[48] On February 24, 2017, the Government filed another motion requesting that the Ninth Circuit hold its proceedings in abeyance. On February 27, 2017, the Ninth Circuit panel denied the motion to hold appellate proceedings in abeyance and set forth a new briefing schedule. Under that schedule, the Government's opening brief is due March 10, 2017.

D. President Trump's New Executive Order.

72. On March 6, 2017—a full month after the District Court for the Western District of Washington enjoined the first Executive Order—President Trump issued the new Executive Order that is the subject of this Complaint. The new Order is entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."

73. Also on March 6, 2017, the Department of Homeland Security published a "Q&A" document with answers to thirty-seven questions about the new Executive Order.[49]

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[48] Appellants' Supplemental Brief On *En Banc* Consideration at 4, *Washington v. Trump*, No. 17-35105 (Feb. 16, 2017), ECF No. 154.

[49] *See* Department of Homeland Security, Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States (March 6, 2017, 11:30 AM ET), https://goo.gl/zFtFg8. A copy of this Q&A document is attached as Exhibit 14.

74. For several weeks before its release, members of the Administration had foreshadowed the arrival of the revised Executive Order.

a. On February 21, Senior Advisor to the President, Stephen Miller, told Fox News that the new travel ban would have the same effect as the old one. He said: "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect."[50]

b. The White House originally indicated it would sign the new Executive Order on Wednesday, March 1, 2017, but then postponed the announcement. One Administration official told a news outlet on February 28 that a reason for President Trump's delay in signing an updated Executive Order was "the busy news cycle," and the desire of the President that the new order "get plenty of attention."[51]

c. A senior Administration official told a different news outlet on March 1, 2017, that a related reason for the delay in releasing the updated Executive Order was the "positive reaction" to President Trump's "first address to Congress" on the evening of Tuesday, February 28, 2017. That article reported that "[s]igning the executive order Wednesday, as originally indicated by the White House, would have undercut the favorable coverage," and the senior Administration official "didn't deny the positive reception was part of the [A]dministration's calculus in pushing back the travel ban announcement."[52]

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[50] *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start* (Fox News television broadcast Feb. 21, 2017), *transcript available at* https://goo.gl/wcHvHH.

[51] Shane Goldmacher & Nahal Toosi, *Trump delays signing new travel ban order, officials say*, Politico (Feb. 28, 2017, 11:51 PM ET), https://goo.gl/5UJIFz.

75. Section 1 of the new Executive Order states that its purpose is to "protect [the United States'] citizens from terrorist attacks, including those committed by foreign nationals." Section 1(h) identifies two concrete examples of persons who have committed terrorism-related crimes in the United States, after either entering the country "legally on visas" or entering "as refugees": "In January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]" Iraq is no longer included in the ambit of the travel ban.

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[52] Laura Jarrett et al., *Trump delays new travel ban after well-reviewed speech*, CNN Politics (Mar. 1, 2017, 6:01 AM ET), https://goo.gl/McqMm5.

76. Section 2(c) of the new Executive Order suspends the "entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen"—six of the seven countries that were designated in the first Order, with Iraq now omitted—for a period of "90 days from the effective date of this order."

77. Section 3 provides for various "exceptions" and potential "waivers" to Section 2's travel ban. Under Section 3(a), "the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who: (i) are outside the United States on the effective date of this order; (ii) did not have a valid visa at 5:00 p.m., eastern standard time, on January 27, 2017; and (iii) do not have a valid visa on the effective date of this order." *See* Executive Order § 3(a)(i)-(iii).

78. Section 3(b) lists categorical "exceptions" from Section 2: lawful permanent residents; foreign nationals who are admitted or paroled into the United States "on or after the effective date of this order"; foreign nationals with "a document other than a visa . . . that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document"; dual nationals traveling on passports issued by a non-designated country; foreign nationals traveling on certain diplomatic visas; and foreign nationals who have been granted asylum as well as refugees who have been admitted to the United States. *Id.* at § 3(b)(i)-(iv).

79. Section 3(c) provides that "a consular officer, or as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP) . . . may, in the consular officer's or the CBP official's discretion, decide on a

case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended" if he or she determines that "denying entry during the suspension period would cause undue hardship . . . [and the individual's] entry would not pose a threat to national security and would be in the national interest." *Id.* § 3(c).

80. Like the first Executive Order, the new Executive Order provides for an expansion of its immigration ban to nationals from additional countries in the future. Section 2(a) directs the Secretary of Homeland Security, in consultation with the Secretary of State as well as the Director of National Intelligence, to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA . . . to determine that the individual is not a security or public safety threat." *Id.* § 2(a). Those officials are instructed to submit a report on "the results of the worldwide review" to the President, as well as "a list of countries that do not provide adequate information," within 20 days of the effective date of the Executive Order. *Id.* § 2(b). The Secretary of State shall then "request that all foreign governments that do not supply [the necessary] information regarding their nationals begin providing it within 50 days of notification." *Id.* § 2(d). After that 50-day period, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, "shall submit to the President a list of countries recommended for inclusion" in the travel ban.

Id. § 2(e). Those officials are also authorized to "submit to the President," at "any point after the submission of the list" of countries recommended for inclusion, "the names of additional countries recommended for similar treatment." *Id.* § 2(f).

81. Section 6 of the Executive Order suspends the "travel" of all refugees to the United States for a period of 120 days, and suspends all "decisions" by the Secretary of Homeland Security on applications for refugee status for 120 days. *Id.* § 6(a). After those 120 days are over, "the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined" that "additional procedures"—identified by those officials as being necessary "to ensure that individuals seeking admission as refugees do not pose a threat" to the United States—have been "implemented" and "are adequate to ensure the security and welfare of the United States." *Id.* § 6(a).

82. Under Section 14, the revised Executive Order takes effect on March 16, 2017.

83. In the Department of Homeland Security's Q&A document about the Executive Order, DHS relates that nationals from one of the six designated countries who are presently in the United States, and "in possession of a valid single entry visa," will have to obtain "a valid visa or other document permitting [them] to travel to and seek admission to the United States" in order to

leave and obtain "subsequent entry to the United States."[53]

84. In the Department of Homeland Security's Q&A document about the Executive Order, DHS also relates that international students, exchange visitors and their dependents from the six designated countries —who are in the United States presently but whose visas "expire[] *while the Executive Order is in place*"—will have to "obtain a new, valid visa to return to the United States" if they have to "depart the country."[54]

E. Effects of the New Executive Order on Individual Plaintiff Dr. Elshikh.

85. The new Executive Order will prevent Dr. Elshikh's mother-in-law from obtaining a visa to visit or reunite with her family in Hawai'i. That is so even though Dr. Elshikh, his wife, and their children are all *American citizens*, and even though Dr. Elshikh's wife's I-130 Petition was granted.

86. Dr. Elshikh's mother-in-law last visited the family in 2005, when she stayed for one month. She has not met two of Dr. Elshikh's children, and only Dr. Elshikh's oldest child remembers meeting her grandmother.

87. On January 31, 2017—after the first Executive Order was put in place—Dr. Elshikh was notified by an individual from the National Visa Center that his mother-in-law's application for an immigrant visa had been put on hold. Then, on March 2, 2017—after the

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[53] *See* Exhibit 14, at Q4.

[54] *See id.* at Q25.

first Executive Order was enjoined—Dr. Elshikh and his family were notified by the National Visa Center that his mother-in-law's visa application had progressed to the next stage of the process and that her interview would be scheduled at an embassy overseas. Under the new Executive Order, however, Dr. Elshikh fears that his mother-in-law will, once again, be unable to "enter" the country under Section 2(c) of the Executive Order. The family is devastated.

88. Dr. Elshikh's children, all twelve years of age or younger, are deeply affected by the new Executive Order. It conveys to them a message that their own country would discriminate against individuals who share their ethnicity, including members of their own family, and who hold the same religious beliefs.

89. Members of Dr. Elshikh's Mosque are also affected by the new Executive Order. Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths.

90. Dr. Elshikh feels that, as a result of the new Executive Order, there is now a favored and disfavored religion in Hawai'i and the United States, i.e., that a religion has been established.

91. Many members of Dr. Elshikh's Mosque have family and friends living in the countries listed in the new Executive Order. Because of the new Executive

Order, they live in forced separation from those family and friends.

F. Effects of the New Executive Order on Plaintiff State of Hawai'i.

92. The new Executive Order also has profound effects on the State as a whole. It prevents nationals of the six designated countries from relocating to, or even visiting, Hawai'i for educational, family, religious, or business reasons.

93. Hawai'i currently has 27 graduate students, 10 permanent faculty members, and 30 visiting faculty members from the seven countries originally designated in the first Executive Order. This demonstrates the extent to which the University of Hawai'i draws on talent from around the world, including from Muslim-majority countries, to enrich its student body and educational environment. In the wake of the new Executive Order, Hawai'i will no longer be able to recruit, accept, enroll, or welcome similar individuals from the six countries designated in the new Executive Order.

94. The University of Hawai'i and other state learning institutions depend on the collaborative exchange of ideas, including among people of different religions and national backgrounds. For this reason, the University of Hawai'i has study abroad or exchange programs in over thirty countries, and international agreements for faculty collaboration with over 350 international institutions spanning forty different countries. The new Executive Order threatens such educational collaboration and harms the ability of the University of Hawai'i to fulfill its educational mission.

95. Hawai‘i is also home to numerous non-citizens from the six designated countries—foreign students, persons on exchange, visitors, and temporary workers —whose lives may be directly affected by the new Executive Order. Some of these non-citizens may be unable to travel abroad to their home countries, for fear that they will be unable to return—for instance, if they have only a single entry visa, or if their visa will expire while the new Executive Order is in place.

96. In addition, the new Executive Order blocks all of Hawaii's residents—including U.S. citizens—from receiving visits from, and/or reunifying with, their family members who live in these six designated countries. In 2016, approximately 8% of Hawaii's visitors (in total) came to visit family and friends, and approximately 12% of Hawaii's visitors from the areas of the globe including the Middle East and Africa came to visit family and friends. Under the new Executive Order, these individuals, to the extent that they live in the six designated countries, will no longer be able to travel to Hawai‘i to visit family and friends.

97. More broadly, the new Executive Order means that Hawai‘i will be unable to honor the commitments to nondiscrimination and diversity embodied in the State's Constitution, laws, and policies. For example, state agencies and universities cannot accept qualified applicants for open positions if they are residents of one of the six designated countries. This contravenes policies at the State's universities and agencies that are

designed to promote diversity and recruit talent from abroad.[55]

98. Given that the new Executive Order began life as a "Muslim ban," its implementation also means that the State will be forced to tolerate a policy that disfavors one religion and violates the Establishment Clauses of both the federal and state constitutions.

99. Beyond these severe intangible harms, the new Executive Order has a detrimental effect on Hawaii's economy as a whole. It is not only governmental entities that are barred from recruiting and/or hiring workers from the six designated countries. Private employers within the State are similarly burdened.

100. Further, both the first Executive Order and the new Executive Order have the effect of depressing international travel to and tourism in Hawai'i. Under the new Executive Order, Hawai'i can no longer welcome tourists from the six designated countries. This directly harms Hawaii's businesses and, in turn, the State's revenue. In 2015 alone, Hawai'i welcomed over 6,800 visitors from the Middle East and over 2,000 visitors from Africa. Data from Hawaii's Tourism Authority suggests that even during the short period of

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[55] *See, e.g.*, State of Hawai'i, Department of Human Resources Development, Policy No. 601.001: Discrimination / Harassment-Free Workplace Policy (revised Nov. 16, 2016), *available at* https://goo.gl/7q6yzJ; University of Hawai'i, Mānoa, Policy M1.100: Non-Discrimination and Affirmative Action Policy, *available at* https://goo.gl/6YqVl8 (last visited Mar. 7, 2017 8:27 PM ET); *see also, e.g.*, *Campus Life: Diversity*, University of Hawai'i, Mānoa, https://goo.gl/3nF5C9 (last visited Mar. 7, 2017 8:27 PM ET).

time that the first Executive Order was in place, the number of visitors to Hawai'i from the Middle East (including Iran, Iraq, Syria and Yemen) fell—namely, Hawai'i had 278 visitors from the Middle East in January 2017, compared to 348 visitors from that same region in January 2016. This depressed effect on travel and tourism from the Middle East and Africa is likely to continue under the new Executive Order.

101. According to reports from travel companies and research firms, travel to the United States more broadly "took a nosedive" following President Trump's issuance of the first Executive Order.[56] For instance, an airfare prediction company found that flight search demand from 122 countries to the United States dropped 17% between January 26 and February 1, after the first Executive Order was signed.[57]

102. Even with respect to countries not currently targeted by the new Executive Order, there is a likely "chilling effect" on tourism to the United States, including Hawai'i. The new Executive Order contemplates an expansion of the immigration ban and in fact authorizes the Secretaries of State and Homeland Security to recommend additional countries for inclusion in the near future. This likely instills fear and a disinclination to travel to the United States among foreigners in other countries that President Trump has been hostile towards—i.e., residents of other Muslims countries, China, and Mexico. The new Executive Order gives

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[56] Shivani Vora, *After Travel Ban, Interest in Trips to U.S. Declines*, N.Y. Times (Feb. 20, 2017), https://goo.gl/Mz9o5T.

[57] *Id.*

rise to a global perception that the United States is an exclusionary country, and it dampens the appetite for international travel here generally.

103. A decrease in national and international tourism would have a severe impact on Hawaii's economy.

104. The new Executive Order also hinders the efforts of the State and its residents to resettle and assist refugees. Refugees from numerous countries have resettled in Hawai'i in recent years.[58] While the State's refugee program is small, it is an important part of the State's culture, and aiding refugees is central to the mission of private Hawai'i organizations like Catholic Charities Hawai'i and the Pacific Gateway Center.[59] In late 2015, as other States objected to the admission of Syrian refugees, Governor Ige issued a statement that "slamming the door in their face would be a betrayal of our values." Governor Ige explained: "Hawai'i and our nation have a long history of welcoming refugees impacted by war and oppression. Hawai'i is the Aloha State, known for its tradition of welcoming all people with tolerance and mutual respect."[60] But as long as the new Executive Order prohibits refugee admissions,

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[58] U.S. Department of Health & Human Servs., Office of Refugee Resettlement, *Overseas Refugee Arrival Data: Fiscal Years 2012-2015*, *available at* https://goo.gl/JcgkDM.

[59] *See About: Our History*, Catholic Charities Hawai'i, https://goo.gl/deVBla (last visited Mar. 7, 2017, 11:35 AM ET); *About: Mission*, Pacific Gateway Center, https://goo.gl/J8bN5k (last visited Mar. 7, 2017, 11:35 AM ET).

[60] Press Release, Governor of the State of Hawai'i, *Governor David Ige's Statement On Syrian Refugees* (Nov. 16, 2015), *available at* https://goo.gl/gJcMIv.

the State and its residents are prevented from helping refugees resettle in Hawai'i.

105. President Trump's new Executive Order is antithetical to Hawaii's State identity and spirit. For many in Hawai'i, including State officials, the Executive Order conjures up the memory of the Chinese Exclusion Acts and the imposition of martial law and Japanese internment after the bombing of Pearl Harbor. As Governor Ige observed two days after President Trump issued the first Executive Order, "Hawai'i has a proud history as a place immigrants of diverse backgrounds can achieve their dreams through hard work. Many of our people also know all too well the consequences of giving in to fear of newcomers. The remains of the internment camp at Honouliuli are a sad testament to that fear. We must remain true to our values and be vigilant where we see the worst part of history about to be repeated."[61]

CAUSES OF ACTION

COUNT I

(First Amendment—Establishment Clause)

106. The foregoing allegations are realleged and incorporated by reference herein.

107. The Establishment Clause of the First Amendment prohibits the Federal Government from officially preferring one religion over another.

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[61] Press Release, Governor of the State of Hawai'i, *Statement of Governor David Ige On Immigration To The United States* (Jan. 29, 2017), *available at* https://goo.gl/62w1fh.

108. Sections 2 and 6 of President Trump's March 6, 2017 Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, are intended to disfavor Islam.

109. Sections 2 and 6 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, have the effect of disfavoring Islam.

110. Through their actions described in this Complaint, Defendants have violated the Establishment Clause. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT II

(Fifth Amendment—Equal Protection)

111. The foregoing allegations are realleged and incorporated by reference herein.

112. The Due Process Clause of the Fifth Amendment prohibits the Federal Government from denying equal protection of the laws, including on the basis of religion and/or national origin, nationality, or alienage.

113. The March 6, 2017 Executive Order was motivated by animus and a desire to discriminate on the basis of religion and/or national origin, nationality, or alienage.

114. The Executive Order differentiates between people based on their religion and/or national origin, nationality, or alienage and is accordingly subject to

strict scrutiny. It fails that test, because it is over- and under-inclusive in restricting immigration for security reasons. The statements of President Trump and his advisors also provide direct evidence of the Executive Order's discriminatory motivations.

115. For the same reasons, the Executive Order is not rationally related to a legitimate government interest.

116. Sections 2 and 6 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, discriminate against individuals based on their religion and/or national origin, nationality, or alienage without lawful justification.

117. Through their actions described in this Complaint, Defendants have violated the Equal Protection guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT III

(Fifth Amendment—Substantive Due Process)

118. The foregoing allegations are realleged and incorporated by reference herein.

119. The right to international travel is protected by the Due Process Clause of the Fifth Amendment. Moreover, citizens may have a constitutionally protected interest in specific non-citizens' ability to travel to the United States.

120. The March 6, 2017 Executive Order curtails those rights for numerous individuals, without any legal justification.

121. Through their actions described in this Complaint, Defendants have violated the Substantive Due Process guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT IV

(Fifth Amendment—Procedural Due Process)

122. The foregoing allegations are realleged and incorporated by reference herein.

123. The Due Process Clause of the Fifth Amendment prohibits the Federal Government from depriving individuals of liberty interests without due process of law.

124. Non-citizens, including lawful permanent residents and non-immigrants holding valid visas, have a liberty interest in leaving and entering the country, and in being free from unlawful detention. Moreover, citizens may assert cognizable liberty interests with respect to noncitizen relatives who are deprived of due process.

125. The Due Process Clause establishes a minimum level of procedural protection before those liberty interests can be deprived. A non-citizen must be given an opportunity to present her case effectively, which

includes a hearing and some consideration of individual circumstances.

126. Through their actions described in this Complaint, Defendants have violated the Procedural Due Process guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT V

(Immigration and Nationality Act)

127. The foregoing allegations are realleged and incorporated by reference herein.

128. The INA provides that "[e]xcept as specifically provided" in certain subsections, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

129. The INA also establishes specific criteria for determining terrorism-related inadmissibility.

130. Sections 2 and 6 of the March 6, 2017 Executive Order violate the INA by discriminating on the basis of nationality, ignoring and modifying the statutory criteria for determining terrorism-related inadmissibility, and exceeding the President's authority under the INA, including under 8 U.S.C. §§ 1182(f) and 1185(a).

131. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as

well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT VI

(Religious Freedom Restoration Act)

132. The foregoing allegations are realleged and incorporated by reference herein.

133. The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a), prohibits the Federal Government from substantially burdening the exercise of religion, even if the burden results from a rule of general applicability.

134. Section 2 of the March 6, 2017 Executive Order and Defendants' actions to implement the Executive Order impose a substantial burden on the exercise of religion.

135. Among other injuries, some non-citizens currently outside the United States cannot enter the United States to reunite with their families or religious communities. Religious communities in the United States cannot welcome visitors, including religious workers, from designated countries. And some non-citizens currently in the United States may be prevented from travelling abroad on religious trips, including pilgrimages or trips to attend religious ceremonies overseas, if they do not have the requisite travel documents or multiple-entry visas.

136. Through their actions described in this Complaint, Defendants have violated the RFRA. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other

Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT VII

(Substantive Violation of the Administrative Procedure Act through Violations of the Constitution, Immigration and Nationality Act, and Arbitrary and Capricious Action)

137. The foregoing allegations are realleged and incorporated by reference herein.

138. The APA requires courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C).

139. In enacting and implementing Sections 2 and 6 of the March 6, 2017 Executive Order, Defendants have acted contrary to the Establishment Clause and Fifth Amendment of the United States Constitution.

140. In enacting and implementing Sections 2 and 6 of the Executive Order, Defendants have acted contrary to the INA and RFRA. Defendants have exceeded their statutory authority, engaged in nationality- and religion-based discrimination, and failed to vindicate statutory rights guaranteed by the INA.

141. Further, in enacting and implementing Sections 2 and 6 of the Executive Order, Defendants have acted arbitrarily and capriciously. Among other arbitrary actions and omissions, Defendants have not offered

a satisfactory explanation for the countries that are and are not included within the scope of the Executive Order. The Executive Order purports to protect the country from terrorism, but sweeps in millions of people who have absolutely no connection to terrorism. Through their actions described in this Complaint, Defendants have violated the substantive requirements of the APA. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT VIII

(Procedural Violation of the Administrative Procedure Act)

142. The foregoing allegations are realleged and incorporated by reference herein.

143. The APA requires courts to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

144. The Departments of State and Homeland Security are "agencies" under the APA. *See* 5 U.S.C. § 551(1).

145. The APA requires that agencies follow rulemaking procedures before engaging in action that impacts substantive rights. *See* 5 U.S.C. § 553.

146. In implementing Sections 2 and 6 of the March 6, 2017 Executive Order, federal agencies have changed the substantive criteria by which individuals from the six designated countries may enter the United

States. This, among other actions by Defendants, impacts substantive rights.

147. Defendants did not follow the rulemaking procedures required by the APA in enacting and implementing the Executive Order.

148. Through their actions described in this Complaint, Defendants have violated the procedural requirements of the APA. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

PRAYER FOR RELIEF

149. WHEREFORE, Plaintiffs pray that the Court:

a. Declare that Sections 2 and 6 of President Trump's Executive Order of March 6, 2017 are unauthorized by, and contrary to, the Constitution and laws of the United States;

b. Enjoin Defendants from implementing or enforcing Sections 2 and 6 across the nation;

c. Pursuant to Federal Rule of Civil Procedure 65(b)(2), set an expedited hearing within fourteen (14) days to determine whether the Temporary Restraining Order should be extended; and

d. Award such additional relief as the interests of justice may require.

DATED: Honolulu, Hawaiʻi, Mar. 8, 2017.

Respectfully submitted,

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- December 07, 2015 -

DONALD J. TRUMP STATEMENT ON PREVENTING MUSLIM IMMIGRATION

(New York, NY) December 7th, 2015,—Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled, "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life. If I win the election for President, we are going to Make America Great Again."—*Donald J. Trump*

Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States

Scope Note: This paper was prepared at the request of the DHS Acting Under Secretary for Intelligence and Analysis. It assesses the international terrorist threat to the United States and worldwide by citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. Citizens of these seven countries were impacted by Section 3 of Executive Order (E.O.) 13769 "Protecting the Nation from Foreign Terrorist Entry into the United States." The assessment relies on unclassified information from Department of Justice press releases on terrorism-related convictions and terrorist attack perpetrators killed in the act, Department of State visa statistics, the 2016 Worldwide Threat Assessment of the US Intelligence Community, and the Department of State Country Reports on Terrorism 2015. This paper does not assess the threat of domestic terrorism.

Key Findings

- DHS I&A assesses that country of citizenship is unlikely to be a reliable indicator of potential terrorist activity. Since the beginning of the Syrian conflict in March 2011, the foreign-born primarily US-based individuals who were inspired by a foreign terrorist organization to participate in terrorism-related activity were citizens of 26 different countries, with no one country representing more than 13.5 percent of the foreign-born total.

- Relatively few citizens of the seven countries impacted by E.O. 13769, compared to neighboring countries, maintain access to the United States.

- Terrorist groups in Iraq, Syria, and Yemen pose a threat of attacks in the United States while groups in Iran, Libya, Somalia, and Sudan remain regionally focused.

Citizens of Countries Affected by E.O. 13769 Rarely Implicated in US-Based Terrorism

DHS I&A assesses that country of citizenship is unlikely to be a reliable indicator of potential terrorist activity. Since the beginning of the Syrian conflict in March 2011, at least 82 primarily US-based individuals, who died in the pursuit of or were convicted of any terrorism-related federal offense inspired by a foreign terrorist organization, according to a DHS study of Department of Justice press releases on convictions and terrorist attack perpetrators killed in the act.[62*] Of the 82 individuals we identified, slightly more than half were native-born United States citizens. Of the foreign-born individuals, they came from 26 different countries, with no one country representing more than 13.5 percent of the foreign-born total.

- The top seven origin countries of the foreign-born individuals are: Pakistan (5), Somalia (3), and Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan (2).

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[*] For the purposes of this paper, we limited our data to individuals prosecuted under 18 U.S.C. Chapter 133B in support of or inspired by a Foreign Terrorist Organization (FTO). We excluded traveling or attempting to travel overseas to join a FTO and activities unrelated to FTOs, to include purely domestic terrorism.

- Of the seven countries impacted by E.O. 13769 that are not listed above, Iran, Sudan, and Yemen had 1 each, and there were no individuals from Syria.

Limited Access to the United States by Citizens of Impacted Countries

Relatively few citizens of the seven countries impacted by E.O. 13769, compared to neighboring countries, maintain access to the United States. None of the seven countries account for more than 7 percent of the US visas granted in their region—the Middle East and North Africa or Sub-Saharan Africa—in Fiscal Year 2015, according to publicly available Fiscal Year 2015 visa issuance data from the Department of State.[23][T]

[T] Fiscal Year 2015 is the most recent year we have visa issuance data for both immigrant and non-immigrant visas. A-1, A-2, A-3, C-2, NATO, G-1, G-2, G-3, and G-3 non-immigrant visas were excluded from these calculations to be consistent with section 3(c) in E.O. 13769.

FY15 US Visas Granted as Percentage of Regional Total

Few of the Impacted Countries Have Terrorist Groups that Threaten the West

Terrorist groups in Iraq, Syria, and Yemen pose a threat of attacks in the United States, while groups in Iran, Libya, Somalia, and Sudan are regionally focused, according to the 2016 Worldwide Threat Assessment of the US Intelligence Community and the Department of State Country Reports on Terrorism 2015.

Iran—Designated as a State Sponsor of Terrorism in 1984, Iran continued its terrorist-related activity in 2015, including support for Hizballah, Palestinian terrorist groups in Gaza, and various groups in Iraq and throughout the Middle East, according to the Country Reports on Terrorism 2015.[4] Iran used the Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) to implement foreign policy goals, provide cover for intelligence operations, and create instability in the Middle East. The IRGC-QF is Iran's primary mechanism for cultivating and supporting terrorists abroad.

Iraq and Syria—The Islamic State of Iraq and the Levant (ISIL) has become the preeminent terrorist threat because of its self-described caliphate in Syria and Iraq, its branches and emerging branches in other countries, and its increasing ability to direct and inspire attacks against a wide range of targets around the world, according to the 2016 Worldwide Threat Assessment.[5] ISIL's narrative supports jihadist recruiting, attracts others to travel to Iraq and Syria, draws individuals and groups to declare allegiance to ISIL, and justifies attacks across the globe.

Libya—Libya has been locked in civil war between two rival governments and affiliated armed groups, according to the 2016 Worldwide Threat Assessment.[6] The 17 December 2015 signing of a UN-brokered agreement to form a Government of National Accord resulted from a year-long political dialogue that sought to end the ongoing civil war and reconcile Libya's rival governments. Extremists and terrorists have exploited the security vacuum to plan and launch attacks in Libya and throughout the region.

Somalia—In 2015, al-Shabaab continued to commit deadly attacks in Somalia, seeking to reverse progress

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[1] DHS I&A; DHS I&A Terrorism-Related Activities Study; 16 FEB 17; DOI 01 MAR 11-31 JAN 17; DHS I&A Terrorism-Related Activities Study

[2] https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXIV.pdf

made by the Federal Government of Somalia and weaken the political will of the African Union Mission in Somalia troop contributing countries, according to the Country Reports on Terrorism 2015.[7]

Sudan—Sudan was designated as a State Sponsor of Terrorism in 1993 due to concerns about support to international terrorist groups, according to the Country Reports on Terrorism 2015.[8] In 2014, members of Hamas were allowed to raise funds, travel, and live in Sudan. However, in 2015 the use of Sudan by Palestinian designated terrorist groups appeared to have declined. The last known shipment was interdicted by Israel in 2014.

Yemen—Al-Qa'ida in the Arabian Peninsula remained a significant threat to Yemen, the region, and to the United States in 2015, as efforts to counter the group were hampered by the ongoing conflict in that country, according to the Country Reports on Terrorism 2015.[9] The Islamic State of Iraq and the Levant in Yemen also exploited the political and security vacuum to strengthen its foothold inside the country.

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[3] https://travel.state.gov/content/dam/visas/Statistics/Non-immigrant-Statistics/NIVDetailTables/FY15%20NIV%20Detail%20Table.xls

[4] https://www.state.gov/j/ct/rls/crt/2015/257520.htm

INTELLIGENCE ASSESSMENT

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Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist

Homeland Security

Office of Intelligence and Analysis

Homeland Security

INTELLIGENCE ASSESSMENT

1 March 20 7

(U//FOUO) Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist

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(U) Scope

(U//FOUO) This *Assessment* examines the immigration history and radicalization of 88 foreign-born, US-based persons who participated in a terrorism-related activity inspired by at least one named foreign terrorist organization (FTO).* All examined individuals primarily resided in the United States either at the time of their involvement in a terrorism-related activity or prior to their travel to join an FTO. The list of individuals included in this study was derived from academic and government sources, including a Department of Justice (DOJ) list of unsealed international terrorism and terrorism-related cases. The terrorism-related activities these individuals engaged in were identified in US Government sources or reliable media reporting. These activities include conducting or attempting to conduct an attack in the United States, traveling or attempting to travel from the United States to join an FTO overseas, and providing funds, goods, or logistical assistance to support an FTO. All individuals examined in our study were indicted or killed between March 2011—the start of the Syrian conflict—and December 2016. Individuals who were minors at the time of their indictment or death were not included. Our review did not consider classified or non-disseminated investigative information.

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* (U//FOUO) OHS defines radicalization as the process through which an individual changes from a nonviolent belief system to a belief system that includes the willingness to actively advocate, facilitate . or use unlawful violence as a method to effect societal or political change.

(U//FOUO) This Assessment identifies several factors, some of which are constitutionally protected activity, which we assess contributed to the radicalization of foreign-born, US-based violent extremists mentioned in this report. None of these factors should be viewed as definitive indicators of radicalization to violence absent corroborative information revealing a link to violence or terrorism. This Assessment is intended to inform federal. state, local, tribal, and territorial counterterrorism, law enforcement, and countering violent extremism (CVE) officials, as well as immigrant screening and vetting officials on trends of foreign-born individuals engaged in terrorism activity in the Homeland. It also provides an overview of opportunities to prevent and detect future violent extremist radicalization. The information cutoff date is 31 December 2016.

(U) Key Judgments

(U//FOUO) We assess that most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of

screening and vetting officials to prevent their entry because of national security concerns. We base this assessment on our findings that nearly half of the foreign-born, US-based violent extremists examined in our dataset were less than 16 years old when they entered the country and that the majority of foreign-born individuals resided in the United States for more than 10 years before their indictment or death. A separate DHS study that found recent foreign-born US violent extremists began radicalizing, on average, 13 years after their entry to the United States further supports our assessment.

(U//FOUO) We assess nearly all parents who entered the country with minor-age children likely did not espouse a violent extremist ideology at the time they entered or at any time since, suggesting these foreign-born individuals were likely not radicalized by their parents before or after their arrival in the Homeland. We base this judgment on their admissions to the United States by screening and vetting agencies who review all available derogatory information, our review of press interviews of parents after their child was arrested or killed, and the lack of arrests of the parents since their entry.

(U//FOUO) We assess that the integration and mentoring services provided by federal, state or private sector entities to refugees and asylees offer an opportunity to help foreign-born US residents adjust to their new communities and raise their awareness of and resistance to violent extremist narratives and recruiters, and likely increase their resilience to radicalization.

(U//FOUO) The experiences and grievances we assessed as common within these individuals present opportunities for CVE programs focused on integration and mentorship. Such programs could address adolescent immigrants' feelings of isolation, anger, and depression caused by immigration experiences—which could in turn reduce the vulnerability of FTOs to exploit these feelings for recruitment. Program administrators would be positioned to assist adolescents if the administrators are made aware of common radicalization vulnerabilities and behavioral indicators, as well as effective counternarratives to challenge FTO messaging.

(U//FOUO) Most Foreign-born, US-based Violent Extremists Likely Radicalized after Entering Homeland

(U//FOUO) We assess that most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns. We base this assessment on our findings that nearly half of the foreign-born, US-based violent extremists examined in our dataset were younger than 16 years old when they entered the country and that the majority of foreign-born individuals resided in the United States for more than 10 years before their indictment or death. A previous DHS study which found recent foreign-born US violent extremists began radicalizing, on average, 13 years after their entry to the United States further supports our assessment.*

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* (U//FOUO) For more information, please see I&A *Intelligence* Assessment "Commonalities in HVE Radicalization to Violence

- (U//FOUO) Miguel Diaz^{USPER}, who arrived in the United States from Cuba in 1989, likely first displayed signs of radicalization in 2015—26 years after his entry—by posting articles related to the self-proclaimed Islamic State of Iraq and ash-Sham (ISIS) and a picture of himself posing with a firearm on Facebook, according to a DOJ criminal complaint and DHS immigration records.[1,2] Diaz later discussed conducting sniper attacks and scratching "ISIS" into shell casings. He was arrested in April 2015 and subsequently pleaded guilty to being a felon in possession of a firearm. In July 2015, Diaz was sentenced to 10 years in prison followed by three years of supervised release.[3]
- (U//FOUO) Mohimanul Bhuiya^{USPER} entered the United States from Bangladesh when he was 11 months old and resided in the country for 24 years before his arrest in 2014 for successfully traveling to Syria and joining ISIS, according to DHS immigration records and reliable press reporting.[4,5] He was likely radicalized by June 2014, when FBI learned that he may have had plans to travel to Syria, according to reliable press reporting.[6,7] In November 2014, he pleaded guilty to providing material support and receiving military training from a FTO.[8]
- (U//FOUO) A separate DHS examination of the radicalization of the seven foreign-born, US-based violent extremists who attempted or succeeded in

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Provide Prevention Opportunities," published 10 February 2017. Some of the numbers cited in this previous paper slightly differ due to scoping differences.

conducting attacks between January 2015 and December 2016 found that they typically entered the United States 15 years before their arrest or attack, and often only began radicalizing two years before they attempted their attack. This suggests that, on average, 13 years passed between the time these foreign-born, US-based violent extremists entered the United States and subsequently began to radicalize.

(U//FOUO) Countries of Birth of foreign-born, US-based Violent Extremists

(U//FOUO) The 88 foreign-born, US-based violent extremists that we examined were born in 33 different countries, none of which holds a majority. Many of the individuals born in these countries were associates of each other, lived in the same area in the United States, and participated in a terrorism-related incident as a group. Four countries—Somalia, Uzbekistan, Bosnia, and Pakistan—comprised the country of birth of about 40 percent of the individuals in our dataset. Some of the individuals in our dataset may have immigrated to the United States from a country other than their place of birth. For example, some of the individuals in our dataset resided in refugee camps in a country other than their birth country prior to immigrating to the United States.

» *(U//FOUO) At least eight of the 13 individuals in our dataset who were born in Somalia were associates of each other and provided material support to ISIS as a group, according to DOJ criminal complaints.*[9,10]

- *(U//FOUO) In 2012, two individuals born in Uzbekistan were arrested for providing material support to the Islamic Jihad Union, according to DOJ criminal complaints.*[11,12] *Separately, four Uzbekistan-born individuals were arrested in 2015 for providing material support to ISIS, according to a DOJ criminal complaint and superseding indictment.*[13,14] *These two groups comprised six of the nine individuals in our dataset who were born in Uzbekistan.*
- *(U//FOUO) All seven individuals born in Bosnia were associates of each other. Six were arrested in 2015 for providing material support to ISIS and one died in 2014 after successfully joining ISIS in Syria, according to DOJ criminal complaints and a press report.*[15,16]
- *(U//FOUO) Two of the seven violent extremists in our dataset who were born in Pakistan were brothers who plotted together to provide material support to al-Qa'ida in the Arabian Peninsula (AQAP), according to a DOJ indictment.*[17]

(U//FOUO) We assess nearly all parents who entered the country with minor-age children likely did not espouse a violent extremist ideology at the time they entered or at any time since, suggesting these foreign-born individuals were likely not radicalized by their parents before or after their arrival in the Homeland. We base this judgment on their admissions to the United States by screening and vetting agencies who review all available derogatory information, our review of press interviews of parents after their child was arrested or killed, and the lack of arrests of the parents since their entry.

- (U//FOUO) Two months before Somali immigrant Abdirizak Warsame^USPER was arrested for conspiring to provide material support to ISIS, his mother lectured other parents about the importance of talking with their children about risks stemming from adhering to a violent extremist ideology and the need to work with the FBI, according to press reporting.[18] Warsame was sentenced to 30 months in prison in November 2016 because of his attempt to travel to Syria to join ISIS, according to a press report.[19]
- (U//FOUO) Harlem Suarez's^USPER family was surprised by his arrest for plotting an attack in support of ISIS in 2015, according to a press report.[20] The family described Suarez, who was born in Cuba, as curious and unable to hurt anything, according to the same report.[21] Suarez is currently awaiting trial, according to another press report.[22]
- (U//FOUO) Jose Pimentel's^USPER mother publicly apologized to the City of New York after his arrest in 2011, saying she was disappointed with her son's actions, according to multiple press reports.[23,24,25] Pimentel—who immigrated from the Dominican Republic with his family when he was five—was sentenced to 16 years in prison after pleading guilty in February 2014 to terrorism charges related to plotting to conduct an attack in the Homeland, according to a separate press report.[26]

(U//FOUO) Similar Radicalization Factors among Native- and Foreign-born US Violent Extremists

(U//FOUO) Our review of 116 native-born US violent extremists, who were publicly identified as having been arrested or killed between March 2011 and December 2016, showed that many had similar experiences and grievances to the 88 foreign-born violent extremists we examined. We assess that these experiences and grievances probably in part contributed to the radicalization of some native- and foreign-born, US-based violent extremists and included perceived injustices against Muslims in the Homeland and abroad because of US policies, feelings of anger and isolation, and witnessing violence as a child. The lack of extensive open source information detailing some of these US violent extremists' radicalization histories prevented us from identifying motivating factors for all individuals examined in our dataset.

» *(U//FOUO) Native-born brothers Nader Saadeh*^{USPER} *and Alaa Saadeh*^{USPER}*—who both pleaded guilty after their arrest in 2015 for providing material support to ISIS—believed the United States oppressed its own people and failed to protect Muslims. according to DOJ criminal complaints.*[27,28] *Similarly, Ibrahim Mohammad*^{USPER}*, born in the UAE and arrested in 2015 for providing material support to AQAP, believed the United States was actively at war with Islam, according another DOJ criminal complaint.*[29]

» *(U//FOUO) Native-born Josh Van Haften*^{USPER}*, who is awaiting his trial for attempting to travel overseas to join ISIS, became isolated from his* *peers after a sexual assault required him to register as a sex offender, according to press reporting.*[30] *He was told to leave his housing because he was a sex offender, and he was never able to have a romantic relationship, according to a press interview with Van Haften's mother and her partner.*[31] *The FBI assesses isolation to be one of many factors in Van Haften's radicalization, but not the primary one. Similarly, the now-deceased foreign-born former editor of AQAP's Inspire magazine, Samir Khan, and now-deceased ISIS foreign fighter Abdullah Ramo Pazara felt isolated or different from their communities and peers, according to multiple press reports.*[32,33,34]

- *(U//FOUO) At least five foreign-born US violent extremists were exposed to violence or substance abuse as children, according to a review of available press reporting.*[35-39] *We judge, however, there are likely additional individuals included in our dataset who were also exposed to violence during their childhood, based on our finding that 41 foreign-born US violent extremists in our dataset entered the United States as a refugee, asylee, or child of a refugee or asylee.*

(U//FOUO) CVE Opportunities to Prevent Radicalization of Foreign-born, US-based Individuals

(U//FOUO) We assess that the integration and mentoring services provided by federal, state, and private sector entities to refugees and asylees offer an opportunity to help foreign-born US residents adjust to their new communities and raise their awareness of and resistance to violent extremist narratives and recruiters, and likely increase their resistance to radicalization. Immigrants not entering the United States as refugees or asylees must prove their ability to provide basic needs for themselves before arriving in the United States, and thus they would not be eligible to receive many of these healthcare, housing, employment, and education services; however, there are many programs available to all immigrants to assist with integration into US society.

» (U) There are a variety of federal, state, local, and nongovernmental programs aimed at helping refugees and asylees integrate into US society by addressing their basic healthcare, housing, employment, and education needs.[40] Additionally, USCIS, through its Citizenship and Integration Grant Program, as of September 2016 awarded $63 million through 308 competitive grants in 37 states to help immigrants prepare and apply for US citizenship, according to USCIS.[41]

» (U) Many nonprofit organizations engage with immigrant communities, including a Georgia-based nonprofit that serves the cultural, psychological, and social-economic needs of refugees and immigrants in Atlanta, according to their website.[42]

(U//FOUO) The experiences and grievances we assessed as common within these individuals present opportunities for CVE programs focused on integration and mentorship. Such programs could address adolescent immigrants' feelings of isolation, anger, and depression caused by immigration experiences—which could in turn reduce the ability of FTOs to exploit these feelings for recruitment. Program administrators would be positioned to assist adolescents if the administrators are made aware of common radicalization vulnerabilities and behavioral indicators, as well as effective counter-narratives to challenge FTO messaging.

- (U//FOUO) Guled Omar^USPER, who was sentenced in 2016 for attempting travel overseas to join ISIS, claimed in a December 2016 press interview that after his older brother traveled to Somalia in 2007 to join al-Shabaab, he was shunned and isolated from the Somali-American community in Minneapolis, which led to his depression, drug use, and taunting by peers.[43]
- (U) Successful programs for adolescent immigrants could include convening youth from varying cultural backgrounds to promote cultural understanding and providing opportunities to counter anti-immigrant attitudes in mainstream culture, according to research published by a State University of New York at Albany^USPER program called Voices for Change: Immigrant Women and State Policy.[44] Separately, the Department of Health and Human Services' Child Welfare Information Gateway offers online resources for immigrant youth, including a guide on living in America, educational and safety resources for parents, and a handbook for raising children in a new country.[45]

(U//FOUO) We also judge that open discussions with community and religious centers about overseas conflicts and ways that violent extremists may use religion to justify their actions would likely help dissuade some foreign-born, US-based individuals who are seeking answers to their questions from relying exclusively on research conducted online, which is often dominated by FTO messaging that offers only a violent extremist perspective.

- (U//FOUO) Some individuals in our dataset who became interested in conflict zones or their religion sought to educate themselves on the Internet—where they encountered videos and literature espousing violent extremist ideology—rather than their local religious or community leaders, according to press reporting.[46][47] Somali-Americans Abdi Nur[USPER] and Guled Omar—who have since been indicted for attempting to provide material support to ISIS—were asked to leave their respective mosques because of their expressions of violent extremist beliefs, which, in effect, pushed their research underground, where they turned to the Internet and had their nascent violent extremist views reinforced, according to a press report.[48] Abdi Nur was indicted on conspiracy charges for providing material support to ISIS in 2014, according to a DOJ press release.[49]

- (U//FOUO) Abdizirak Warsame stated in his court appearance that he was always listening to one side, referring to the "radical" messages he saw online, according co a press report. Warsame claimed that at the time be did not realize innocent people were being killed, according to the same report, which was likely a reference to terrorists' targeting of civilians.[50]

[redacted]

Most Foreign-born, US-based Violent Extremists Probably Radicalize After Entering the Homeland

[illegible]

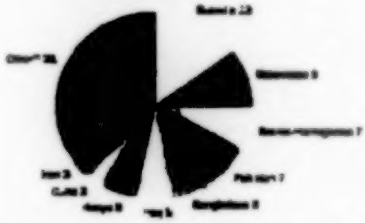
[illegible]

AGE OF ENTRY OF FOREIGN-BORN VIOLENT EXTREMISTS

LENGTH OF TIME IN US OF FOREIGN-BORN VIOLENT EXTREMISTS

[illegible]

COUNTRIES OF BIRTH OF FOREIGN-BORN VIOLENT EXTREMISTS

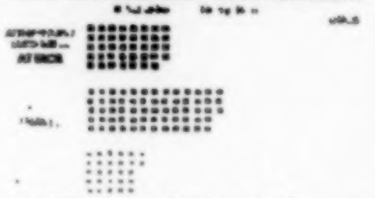


[illegible]

NATIVE- AND FOREIGN-BORN VIOLENT EXTREMISTS US CITIZENSHIP (USC) STATUS AT TIME OF INDICTMENT OR DEATH

[illegible]

TERRORISM-RELATED ACTIVITES OF NATIVE- AND FOREIGN-BORN VIOLENT EXTREMISTS



[illegible]

[illegible]

(U) Source Summary Statement

(U//FOUO) This Assessment is based primarily on I&A's review of DHS immigration and travel records and publicly available court documents as well as relevant reliable press reporting. The scope of our study did not include consideration of non-disseminated investigative information.

(U//FOUO) I&A has ***moderate confidence*** *that most foreign-born US violent extremists likely radicalize several years after their entry to the United States, based on a review of court documents and press reporting from which we determined the first known sign of radicalization to violence among recent US violent extremists and a body of USCIS data from which we determined the length of time the individuals examined in our current dataset spent in the United States before their indictment or death. We note that there are challenges in determining the exact date that radicalization began, which is often a personal and individualized process that is difficult to observe. Additional reporting on the online activities of the US violent extremists, as well as information from the US violent extremists themselves or their family and friends about possible indicators of their loved ones' radicalization would further strengthen our confidence in this assessment. Our assessment is further supported by our finding that nearly half of the foreign-born individuals in our dataset entered the United States when they were younger than 16 years*

old, an age group that is typically younger than the age most violent extremists begin radicalizing.

(U//FOUO) We have **moderate confidence** *in our assessment that nearly all parents who entered the country with these foreign-born, US-based violent extremists likely did not espouse a violent extremist ideology or exhibit any violent radicalization or mobilization indicators at the time they entered or since. Our assessment is based on a qualitative review of reliable press reporting describing the family life and parents of the individuals in our dataset. Additional information about the parents of these individuals—which is likely contained in immigration screening and vetting interview transcripts related to these individuals and their parents, which we lacked access to—would strengthen our confidence in this assessment.*

(U//FOUO) We have **moderate confidence** *that provision of services to refugees and asylees and programs tailored to adolescents offer opportunities to provide CVE programs to address radicalization factors possibly relevant to foreign-born US residents. Our assessment is based on a review of services provided to refugees and asylum seekers and current programs focused on immigrant youth, which, collectively, can address many of the common grievances and experiences of the foreign-born individuals in our dataset*

(U//FOUO) We have **moderate confidence** *that open discussions with community and religious centers about overseas conflicts and ways violent extremists may use religion to justify their actions would likely help dissuade some foreign-born, US-based individu-*

als from relying exclusively on Internet research. Our assessment is based on an analysis of current CVE programs and grievances cited by the individuals in our dataset to determine whether these programs would likely address the radicalization factors of these individuals. The inherent challenges involved in proving that CVE efforts have successfully countered radicalization of violent extremists or possible radicalization of vulnerable individuals limit our confidence in this assessment.

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[1] (U); United States District Court, Southern District of Florida; "United States of America v. Miguel Moran Diaz"; 06 APR 2015.

[2] (U); USCIS; CLAIMS 3; SRC9702052653; accessed on 22 DEC 2016; DOI 21 OCT 1996; (U); N400 Application for Naturalization; Extracted information is UNCLASSIFIED; Overall document classification is UNCLASSIFIED .

[3] (U); DOJ Office of Public Affairs; Press Release; "Miami Resident and ISIL Sympathizer Sentenced to 10 Years in Prison for Illegally Possessing a Firearm"; 28 JUL 2015; https://www.justice.gov/opa/pr/miami-resident-and-isil-sympathizer-sentenced-10-years-prison-illegally-possessing-firearm; accessed on 28 OCT 206.

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[5] (U); Adam Goldman; *The Washington Post;* "'I am fed up with this evil': How an American went from Ivy League student to disillusioned ISIS fighter"; 30 JUN 2016; https://www.washingtonpost.com/world/national-security/i-am-fed-up-with-this-evil-how-an-american-went-from-ivy-league-student-to-disillusioned-isis-fighter/2016/06/29/155e777e-3e07-11e6-80bc-

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[6] (U); Adam Goldman; *The Washington Post*; "'I am fed up with this evil': How an American went from Ivy League student to disillusioned ISIS fighter"; 30 JUN 2016; https://www.washingtonpost.com/world/national-security/i-am-fed-up-with-this-evil-how-an-american-went-from-ivy-league-student-to-disillusioned-isis-fighter/2016/06/29/155e777e-3e07-11e6-80bc-d06711fd2125_story.html?utm_term=.f3268b20b17f#comments; accessed on 13 DEC 2016.

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[8] (U); Adam Goldman; *The Washington Post*; "'I am fed up with this evil': How an American went from Ivy League student to disillusioned ISIS fighter"; 30 JUN 2016; https://www.washingtonpost.com/world/national-security/i-am-fed-up-with-this-evil-how-an-american-went-from-ivy-league-student-to-disillusioned-isis-fighter/2016/06/29/155e777e-3e07-11e6-80bc-d06711fd2125_story.html?utm_term=.f3268b20b17f#comments; accessed on 13 DEC 2016.

[9] (U); United States District Court, the District of Minnesota; "United States of America v . Mohamed Abdihamid Farah, Adnan Abdihamid Farah, Abdurahman Yasin Daud, Zacharia Yusuf Abdurahman, Hanad Mustafe Musse and Guled Ali Omar"; 18 APR 2015.

[10] (U); US District Court, District of Minnesota; "United States of American v. Abdullahi Yusuf, Abdi Nur"; Criminal Complaint; 24 NOV 2014.

[11] (U); United States District Court, District of Colorado; "United States of America v. Bakhtiyor Jumaev"; Criminal Complaint; 14 MAR 2012.

[12] (U) ; United States District Court, District of Colorado; "United States of America v. Jamshid Muhtorov"; 19 JAN 2012 .

[13] (U); United States District Court, Eastern District of New York; "United States of America v. Abdurasul Hasanovich Juraboev, Akhror Saidakhmetov, and Abror Habibov"; 24 FEB 2015.

[14] (U); United States District Court, Eastern District of New York; "United States of America v. Akhror Saidakhmetov, Abror Habibov, Azizjon Rakhmatov, Akmal Zakirov and Dilkhayot Kasimov"; 09 MAY 2016.

[15] (U); US District Court, Eastern District of Missouri Eastern Division; "United States of America v. Ramiz Zijad Hodzic, Sedina Unkic Hodzic. Nihad Rosic, Mediha Medy Salkicevic, Armin Harcevic and Jasminka Ramic"; 05 FEB 2015.

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[17] (U); United States District Court, Southern District of Florida; "United States of America v. Raees Alam Qazi and Sheheryar Alam Qazi"; 30 NOV 2012.

[18] (U); CBS Minnesota; "Abdirizak Mohamed Warsame And ISIS: A Cautionary Tale"; 09 APR 2016; http://minnesota.cbslocal.com/2016/04/09/abdirizak-warsame/; accessed on 07 DEC 2016.

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[27] (U); United States District Court, District of New Jersey; "United States of America v. Alaa Saadeh"; 29 JUN 2015.

[28] (U); United States District Court, District of New Jersey; "United States of America v. Nader Saadeh"; 01 AUG 2015.

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DISSENT CHANNEL

SENSITIVE BUT UNCLASSIFIED

TO:
FROM:
SUBJECT: Dissent Channel: Alternatives to Closing Doors in Order to Secure Our Borders

(U) The following is a Dissent Channel message from

(SBU) Summary: We are writing to register our dissent to the State Department's implementation of President Trump's Friday, January 27, 2017 Executive Order on "Protecting The Nation From Foreign Terrorist Entry Into The United States," which, among other things, blocks the Department of State from issuing immigrant and nonimmigrant visas to citizens of Syria, Iraq, Iran, Libya, Somalia, Sudan, and Yemen for a minimum 90 day period with an unclear timeline for when issuance would resume. As consular professionals, Foreign Service Officers, and members of the Civil Service, we see every day the value that "**Secure Borders and Open Doors**" brings to our nation. A policy which closes our doors to over 200 million legitimate travelers in the hopes of preventing a small number of travelers who intend to harm Americans from using the visa system to enter the United States will not achieve its aim of making our country safer. Moreover, such a policy runs counter to core American values of nondiscrimination, fair play, and extending a warm welcome to foreign visitors and immigrants. Alternative solutions are available to address the risk

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This Ban Does Not Achieve Its Aims—And Will Likely Be Counterproductive

(SBU) This ban, which can only be lifted under conditions which will be difficult or impossible for countries to meet, will not achieve its stated aim of to protect the American people from terrorist attacks by foreign nationals admitted to the United States. Despite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals who recently entered the United States on an immigrant or nonimmigrant visa. Rather, the overwhelming majority of attacks have been committed by native-born or naturalized U.S. citizens—individuals who have been living in the United States for decades, if not since birth. In the isolated incidents of foreign nationals entering the U.S. on a visa to commit acts of terror, the nationals have come from a range of countries, including many (such as Pakistan or Saudi Arabia) which are not covered by the Executive Order.

(SBU) Given the near-absence of terror attacks committed in recent years by Syrian, Iraqi, Irani, Libyan, Somalia, Sudanese, and Yemeni citizens who are in the U.S. in after entering on a visa, this ban will have little practical effect in improving public safety.

(SBU) If this ban will not prevent terror attacks from occurring, what will it do?

- (SBU) It will immediately sour relations with these six countries, as well as much of the Muslim world, which sees the ban as religiously-motivated. These governments of these countries are important allies and partners in the fight against terrorism, regionally and globally. By alienating them, we lose access the intelligence and resources need to fight the root causes of terror abroad, before an attack occurs within our borders.

- (SBU) It will increase anti-American sentiment. When the 220 million citizens of these countries lose the opportunity to travel to the U.S. overnight, hostility towards the United States will grow. Instead of building bridges to these societies through formal outreach and exchanges and through informal people-to-people contact, we send the message that we consider all nationals of these countries to be an unacceptable security risk. Almost one-third of these countries' combined populations are children under the age of 15; there is no question that their perception of the United States will be heavily colored by this ban. We are directly impact the attitudes of current and future leaders in these societies —including those for whom this may be a tipping point towards radicalization.

- (SBU) It will have an immediate and clear humanitarian impact. Every day foreign nationals come to the United States to seek medical treatment for a child with a rare heart condition, to attend a parent's funeral, or to help a relative in distress. For citizens of these countries, a blanket ban on travel will not just ruin vacation plans but potentially cut off access to life-saving medical treatment or impose terrible humanitarian burdens. While the Executive Order allows for the Secretary of State or the Secretary of Homeland security to admit travelers from these countries on a case-by-case basis, it is unrealistic to think that this will be feasible to implements for the thousands of aliens with urgent and compelling needs to travel.

- (SBU) It will have a negative impact on the U.S. economy. According to the Department of Commerce, foreign travelers collectively injected almost $250 billion into the U.S. economy in 2015 alone, supporting over one million American jobs. Foreign students along contribute more than $30 billion to the U.S. economy. Preventing travelers from these six countries from spending their money in the U.S. will immediately decrease that amount; more perniciously, this ban can be expected to cause an overall drop in traveler dollars as the U.S. quickly sheds its welcoming "Secure Borders, **Open Doors**" reputation.

(SBU) The end result of this ban will not be a drop in terror attacks in the United States; rather, it will be a drop in international good will towards Americans and a threat towards our economy.

We Are Better Than This Ban

(SBU) Looking beyond its effectiveness, this ban stands in opposition to the core American and constitutional values that we, as federal employees, took an oath to uphold.

(SBU) The United States is a nation of immigrants, starting from its very origins. The concept that immigrants foreigners are welcome is an essential element of our society, our government, and our foreign policy. So, too, is the concept that we are all equal under the law and that we as a nation abhor discrimination, whether it is based on race, religion, sex, or national origin. Combined together, that means we have a *special* obligation to maintain an immigration system that is as free as possible from discrimination, that does not have implied or actual religious tests, and that views individuals as individuals, not as part of stereotyped groups.

(SBU) The Executive Order frames the ban as a 90-day suspension of entry for these nationals until their countries can set up arrangements to provide adequate information to determine that an individual seeking a benefit is who the individual claims to be and is not a security or public-safety threat. This is a high, vague, and nebulous bar. In some cases, the governments of these countries may be wholly incapable of providing this information; in others, the government may be unwilling. In either case, individual citizens will pay the price—a situation which runs counter to U.S. values of fair play and offering equal opportunities to all.

(SBU) Banning travelers from these seven countries calls back to some of the worst times in our history. Law enacted in the 1920s and which lasted through the 1960s severely restricted immigration based on national origin and, in some cases, race. The decision to restrict the freedom of Japanese-Americans in the U.S. and foreign citizens who wanted to travel to or settle in the U.S. during the 1940s has been a source of lasting shame for many in our country. Decades from now, we will look back and realize we made the same mistakes our predecessors: shutting borders in a kn jerk reaction instead of setting up systems of che that protect our interests and our values.

Alternative Ways Forward

(SBU) Just as equality and multiculturalism are co American values, so too is pragmatism. And there pragmatic ways to achieve our common goals to prot the American people from terrorist attacks by fore nationals admitted to the United States and to secur better and more prosperous future.

(SBU) Rather than a blanket ban on the travel of ov 200 million citizens, we need to strengthen our target and interagency approach to deterring, detecting, a subverting attacks. We should not focus our scree ing and vetting on specific nationalities at the exper of missing the forest for the trees but should turn thos tools to cover the full range of sources of terror, includir those who may hold "friendly" or even U.S. passport

(SBU) There is no question that the visa process can improved and refined to better detect individuals w intend to exploit United States immigration laws f malevolent purposes. We need to expand existir interagency cooperation between the different el ments of the government responsible for border sec rity and protection of the homeland. This includ cooperation with state, local, campus, and tribal l enforcement, who in many cases are best situated detect threats. The Visa Security Program wh embeds Department of Homeland Security staff i consular sections around the world has proven effectiveness of incorporating a law enforcement pe spective into the visa process; this approach should be expanded.

(SBU) Continuous vetting program for visa holders—which looks at all visa holders, not just those of specific nationalities—allows our law enforcement and intelligence bodies to act on new information and to focus on individuals that may become radicalized. This vetting should be expanded and made more comprehensive. Likewise, the Visa Viper Program, which allows posts overseas to report on potential threats, should be strengthened to become a more reliable source of intelligence.

(SBU) The Department of State and the U.S. government already has numerous tools already at its disposal to secure its visa process: access to law enforcement databases, biometric screening, Security Advisory Opinions, continuous vetting. If we haven't accomplished our goals so far, then let's strengthen and improve these tools. And let's develop new tools: cutting-edge data analytics, social media tracking, data mining, aggressive outreach.

(SBU) We do not need to place a blanket ban that keeps 220 million people—men, women, and children —from entering the United States to protect our homeland. We do not need to alienate entire societies to stay safe. And we do not need to sacrifice our reputation as a nation which is open and welcoming to protect our families. It is well within our reach to create a visa process which is more secure, which reflects our American values, and which would make the Department proud.

Q&A: Protecting the Nation From Foreign Terrorist Entry To The United States

Release Date: March 6, 2017

March 6, 2017 11:30 a.m. EST
Office of Public Affairs
Contact: 202-282-8010

Q1. Who is subject to the suspension of entry under the Executive Order?

Per the Executive Order, foreign nationals from Sudan, Syria, Iran, Libya, Somalia, and Yemen, who are outside the United States and who did not have a valid visa at 5 p.m. Eastern Standard Time on January 27, 2017, and do not have a valid visa on the effective date of this order are not eligible to enter the United States while the temporary suspension remains in effect. Thus any individual who had a valid visa either on January 27, 2017 (prior to 5:00 PM) or holds a valid visa on the effective date of the Executive Order is not barred from seeking entry.

Q2. Will "in-transit" travelers within the scope of the Executive Order be denied entry into the United States and returned to their country of origin?

Those individuals who are traveling on valid visas and arrive at a U.S. port of entry will still be permitted to seek entry into the United States. All foreign nationals traveling with a visa must continue to satisfy all requirements for entry, including demonstrating that they are admissible. Additional information on applying for admission to the United States is available on

CBP.gov. (https://www.cbp.gov/travel/international-visitors/applying-admission-united-states)

Q3. I am a national from one of the six affected countries currently overseas and in possession of a valid visa, but I have no prior travel to the United States. Can I travel to the United States?

Per the Executive Order, foreign nationals from Sudan, Syria, Iran, Libya, Somalia, and Yemen who have valid visas will not be affected by this Executive Order. No visas will be revoked solely based on this Executive Order.

Q4. I am presently in the United States in possession of a valid single entry visa but I am a national of one of the six impacted countries. Can I travel abroad and return to the United States?

Regardless of the Executive Order, your visa is not valid for multiple entries into the Unites States. While the Executive Order does not apply to those within the United States and your travel abroad is not limited, a valid visa or other document permitting you to travel to and seek admission to the United States is still required for any subsequent entry to the United States.

Q5. I am presently in the United States in possession of a valid multiple entry visa but am a national of one of the six affected countries, can I travel abroad and return to the United States?

Yes. Individuals within the United States with valid multiple entry visas on the effective date of the order are eligible for travel to and from the United States, provided the visa remains valid and the traveler is otherwise admissible. All foreign nationals traveling with a visa must satisfy all admissibility requirements for entry. Additional information on applying for admission to the United States is available on CBP.gov. (https://www.cbp.gov/travel/international-visitors/applying-admission-united-states)

Q6. I am from one of the six countries, currently in the United States in possession of a valid visa and have planned overseas travel. My visa will expire while I am overseas, can I return to the United States?

Travelers must have a valid visa to travel to the United States, regardless of the Executive Order. Travelers who do not have a valid visa due to its expiration while abroad must obtain a new valid visa prior to returning to the United States.

Q7. Will the Department of Homeland Security (DHS) and the Department of State (DOS) be revoking the visas of persons ineligible to travel under the revised Executive Order?

Visas will not be revoked solely as a result of the Executive Order. The Department of State has broad authority under Section 221(i) of the Immigration and Nationality Act to revoke visas.

Q8. What is the process for overseas travelers affected by the Executive Order to request a waiver?

Waivers for overseas travelers without a valid U.S. visa will be adjudicated by the Department of State in conjunction with a visa application.

Q9. How are returning refugees and asylees affected by the Executive Order?

Returning refugees and asylees, i.e., individuals who have already been granted asylum or refugee status in the United States, are explicitly excepted from this Executive Order. As such, they may continue to travel consistent with existing requirements.

Q10. Are first-time arrival refugees with valid /travel documents allowed to travel to the United States?

Yes, but only refugees, regardless of nationality, whose travel was already formally scheduled by the Department of State, are permitted to travel to the United States and seek admission. The Department of State will have additional information.

Q11. Will unaccompanied minors within the scope of the Executive Order be denied boarding and or denied entry into the United States?

The Executive Order applies to those who do not have valid visas. Any individuals, including children, who seek entry to the United States must have a valid visa (or other approved travel document) before travel to the United States. The Secretary of State may issue a waiver on a case-by-case basis when in the national interest of the United States. With such a waiver, a visa may be issued.

Q12. Is DHS complying with all court orders?

DHS is complying, and will continue to comply, with all court orders in effect.

Q13. When will the Executive Order be implemented?

The Executive Order is effective at 12:01 A.M., Eastern Standard Time, on March 16, 2017.

Q14. Will the Executive Order impact Trusted Traveler Program membership?

No. Currently, CBP does not have reciprocal agreements for a Trusted Traveler Program with any of the countries designated in the Executive Order.

Q15. When will CBP issue guidance to both the field and airlines regarding the Executive Order?

CBP will issue guidance and contact stakeholders to ensure timely implementation consistent with the terms of the Executive Order.

Q16. Will first-time arrivals with valid immigrant visas be allowed to travel to the U.S.?

Yes. Individuals holding valid visas on the effective date of the Executive Order or on January 27, 2017 prior to 5:00 PM do not fall within the scope of the Order.

Q17. Does this affect travelers at all ports of entry?

Yes, this Executive Order applies to travelers who are applying for entry into the United States at any port of entry—air, land, or sea—and includes preclearance locations.

Q18. What does granting a waiver to the Executive Order mean? How are waivers applied to individual cases?

Per the Executive Order, the Departments of Homeland Security and State can review individual cases and grant waivers on a case-by-case basis if a foreign national demonstrates that his or her entry into the United States is in the national interest, will not pose a threat to national security, and that denying entry during the suspension period will cause undue hardship.

Q19. Does "from one of the six countries" mean citizen, national, or born in?

The Executive Order applies to both nationals and citizens of the six countries.

Q20. How does the lawsuit/stay affect DHS operations in implementing this Executive Order?

Questions regarding the application of specific federal court orders should be directed to the Department of Justice.

Q21. Will nationals of the six countries with valid green cards (lawful permanent residents of the United States) be allowed to return to the United States?

Per the Executive Order, the suspension of entry does not apply to lawful permanent residents of the United States.

Q22. Can a dual national who holds nationality with one of the six designated countries traveling with a passport from an unrestricted country travel to the United States?

The Executive Order exempts from its scope any dual national of one of the six countries when the individual is traveling on a passport issued by a different non-designated country.

Q23. Can a dual national who holds nationality with one of the six designated countries and is currently overseas, apply for an immigrant or nonimmigrant visa to the United States?

Please contact the Department of State for information about how the Executive Order applies to visa applicants.

Q24. Are international students, exchange visitors, and their dependents from the six countries (such as F, M, or J visa holders) included in the Executive Order? What kind of guidance is being given to foreign students from these countries legally in the United States?

The Executive Order does not apply to individuals who are within the United States on the effective date of the Order or to those individuals who hold a valid visa. Visas which were provisionally revoked solely as a result of the enforcement of Executive Order 13769 are valid for purposes of administering this Executive Order. Individuals holding valid F, M, or J visas may continue to travel to the United States on those visas if they are otherwise valid.

Please contact the State Department for information about how the Executive Order applies to visa applicants.

Q25. What happens to international students, exchange visitors or their dependents from the six countries, such as F, M or J visa holders if their visa expires while the Executive Order is in place and they have to depart the country?

The Executive Order does not affect F, M, or J visa holders if they currently have a valid visa on the effective date or held a valid visa on January 27, 2017 prior to the issuance of the Executive Order. With that said, travelers must have a valid visa to travel to the United States, regardless of the Executive Order. Travelers whose visa expires after the effective date of the Executive Order must obtain a new, valid visa to return to the United States.

Q26. Can U.S. Citizenship and Immigration Services (USCIS) continue refugee interviews?

The Departments of Homeland Security and State will conduct interviews as appropriate and consistent with the Executive Order. However, the Executive Order suspends decisions on applications for refugee status, unless the Secretary of Homeland Security and the Secretary of State jointly determine, on a case-by-case basis, that the entry of an individual as a refugee is in the national interest and would not pose a threat to the security or welfare of the United States.

Q27. Can the exception for refugee admission be used for Refugee/Asylee Relative Petitions (Form I-730) cases where a family member is requesting a beneficiary follow to join?

No. Individuals who already have valid visas or travel documents that permit them to travel to the United States are exempt from the Executive Order. To the extent that an individual does not yet have such documents, please contact the Department of State.

Q28. Does the Executive Order apply to those currently being adjudicated for naturalization or adjustment of status?

USCIS will continue to adjudicate Applications for Naturalization (Form N-400) and Applications to Register Permanent Residence or Adjust Status (Form I-485) and grant citizenship consistent with existing practices.

Q29. Will landed immigrants of Canada affected by the Executive Order be eligible for entry to the United States?

Landed immigrants of Canada who hold passports from one of the six countries are eligible to apply for a visa, and coordinate a waiver, at a location within Canada.

Q30. Has CBP issued clear guidance to CBP officers at ports of entry regarding the Executive Order? CBP has and will continue to issue any needed guidance to the field with respect to this Executive Order.

Q31. What coordination is being done between CBP and the carriers?

CBP has been and will remain in continuous communication with the airlines through CBP regional carrier liaisons. In addition, CBP will hold executive level calls with airlines in order to provide guidance, answer questions, and address concerns.

Q32. What additional screening will nationals of restricted countries (as well as any visa applications) undergo as a result of the Executive Order?

In making admission and visa eligibility determinations, DHS and DOS will continue to apply all appropriate security vetting procedures.

Q33. Why is a temporary suspension warranted?

The Executive Order signed on March 6, 2017, allows for the proper review and establishment of standards to prevent terrorist or criminal infiltration by foreign nationals. The Executive Order protects the United States from countries compromised by terrorism and ensures a more rigorous vetting process. Protecting the American people is the highest priority of our Government and this Department.

Congress and the Obama Administration designated these six countries as countries of concern due to the national security risks associated with their instability and the prevalence of terrorist fighters in their territories. The conditions in the six designated countries present a recognized threat, warranting additional scrutiny of their nationals seeking to travel to and enter the United States. In order to ensure that the

U.S. Government can conduct a thorough and comprehensive analysis of the national security risks, the Executive Order imposes a 90-day suspension on entry to the United States of nationals of those countries.

Based on commitments from the Government of Iraq, the suspension of entry in this Executive Order will not apply to nationals of Iraq. Iraq has taken steps to increase their cooperation with the United States in the vetting of Iraqi nationals and as such it was determined that a temporary suspension is not warranted.

DHS will faithfully execute the immigration laws and the President's Executive Order, and will treat all of those we encounter humanely and with professionalism.

Q34. Why is a suspension of the refugee program warranted?

Some of those who have entered the United States as refugees have also proved to be threats to our national security. For example, in October 2014, an individual admitted to the United States as a refugee from Somalia, and who later became a naturalized U.S. citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction in connection with a plot to set off a bomb at a Christmas tree-lighting ceremony in Portland, Oregon. The Federal Bureau of Investigation has reported that approximately 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Q35. How were the six countries designated in the Executive Order selected?

The six countries, Iran, Libya, Somalia, Sudan, Syria, and Yemen, had already been identified as presenting concerns about terrorism and travel to the United States.Specifically, the suspension applies to countries referred to in, or designated under—except Iraq—section 217(a)(12) of the INA, 8 U.S.C. § 1187(a)(12).In that provision Congress restricted use of the Visa Waiver Program by dual nationals of, and aliens recently present in, (A) Syria and Iraq, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence.In 2016, the former Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern regarding aliens recently present in those countries.

For the purposes of this Executive Order, although Iraq has been previously identified, based on commitments from the Government of Iraq, the suspension of entry in this Executive Order will not apply to nationals of Iraq. However, those who are dual nationals of Iraq and aliens recently present in Iraq continue to have restricted use of the Visa Waiver Program.

On the basis of negotiations that have taken place between the Government of Iraq and the U.S. Department of State in the last month, Iraq will increase cooperation with the U.S. Government on the vetting of its citizens applying for a visa to travel to the United

States.As such it was determined that a temporary suspension with respect to nationals of Iraq is not warranted at this time.

Q36. Why was Iraq treated differently in this Executive Order?

The close cooperative relationship between the United States and the democratically-elected Iraqi government, the strong U.S. diplomatic presence in Iraq, the significant presence of U.S. forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment.In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have earned special status.In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to provide additional information about its citizens for purposes of our immigration decisions.Accordingly, it is no longer necessary to include Iraq in the temporary suspension applicable to the other six countries, but visa applications and applications for admission to the United States by Iraqi nationals will be subjected to additional scrutiny to determine if they have connections with ISIS or other terrorist organizations.

Q37. Are Iraqi nationals subject to the Executive Order? Will they require a waiver to travel to the United States?

This Executive Order does not presently suspend the entry of nationals of Iraq. However, all travelers must have a valid travel document in order to travel to the United States. Admissibility will be determined by a CBP officer upon arrival at a Port of Entry. Please contact the Department of State for information related to visa eligibility and application.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

CV. No. 17-00050 DKW-KSC

STATE OF HAWAIʻI AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, ET AL., DEFENDANTS

[Filed: Mar. 15, 2017]

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). On March 6, 2017, the President issued another Executive Order, No. 13,780, identically entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." (the "Executive Order"). *See* 82 Fed. Reg. 13209 (Mar. 6, 2017). The Executive Order revokes Executive Order No. 13,769 upon taking effect.[1] Exec. Order §§ 13, 14. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends entrants from the United States refugee program for specified periods of time.

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[1] By its terms, the Executive Order becomes effective as of March 16, 2017 at 12:01 a.m., Eastern Daylight Time—*i.e.*, March 15, 2017 at 6:01 p.m. Hawaii Time. Exec. Order § 14.

Plaintiffs State of Hawai'i ("State") and Ismail Elshikh, Ph.D. seek a nationwide temporary restraining order that would prohibit the Federal Defendants[2] from "enforcing or implementing Sections 2 and 6 of the Executive Order" before it takes effect. Pls.' Mot. for TRO 4, Mar. 8, 2017, ECF No. 65.[3] Upon evaluation of the parties' submissions, and following a hearing on March 15, 2017, the Court concludes that, on the record before it, Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs' Motion for TRO (ECF. No. 65) is granted for the reasons detailed below.

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[2] Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security ("DHS"); John F. Kelly, in his official capacity as Secretary of DHS; the U.S. Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

[3] Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 simultaneous with their Motion for TRO. SAC, ECF. No. 64.

BACKGROUND

I. The President's Executive Orders

A. Executive Order No. 13,769

Executive Order No. 13,769 became effective upon signing on January 27, 2017. *See* 82 Fed. Reg. 8977. It inspired several lawsuits across the nation in the days that followed.[4] Among those lawsuits was this one: On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin, nationwide, Sections 3(c), 5(a)-(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2.

This Court did not rule on the State's initial TRO motion because later that same day, the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State here. *See Washington v. Trump*, 2017 WL 462040. As such, the Court stayed this case, effective February 7, 2017, specifying that the stay would continue "as long as the

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[4] *See, e.g., Mohammed v. United States*, No. 2:17-cv-00786-AB-PLA (C.D. Cal. Jan. 31, 2017); *City & Cty. of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017); *Louhghalam v. Trump*, Civil Action No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Int'l Refugee Assistance Project v. Trump*, No. 8:17-0361-TDC (D. Md. filed Feb. 7, 2017); *Darweesh v. Trump*, 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, — F. Supp. 3d ----, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, Case No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017). This list is not exhaustive.

February 3, 2017 injunction entered in *Washington v. Trump* remain[ed] in full force and effect, or until further order of this Court." ECF Nos. 27 & 32.

On February 4, 2017, the Government filed an emergency motion in the Ninth Circuit Court of Appeals seeking a stay of the *Washington* TRO, pending appeal.[5] *See Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). The Ninth Circuit heard oral argument on February 7, after which it denied the emergency motion via written Order dated February 9, 2017. *See* Case No. 17-35105, ECF Nos. 125 (Tr. of Hr'g), 134 (Filed Order for Publication at 847 F.3d 1151).

On March 8, 2017, the Ninth Circuit granted the Government's unopposed motion to voluntarily dismiss the appeal. *See* Order, No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187. As a result, the same sections of Executive Order No. 13,769 initially challenged by the State in the instant action remain enjoined as of the date of this Order.

B. The New Executive Order

Section 2 of the new Executive Order suspends from "entry into the United States" for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*: Iran, Libya, Somalia,

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[5] The Government also requested "an immediate administrative stay pending full consideration of the emergency motion for a stay pending appeal" on February 4, 2017 (Emergency Mot. to Stay, No. 17-35105 (9th Cir.), ECF No. 14), which the Ninth Circuit panel swiftly denied (Order, No. 17-35105 (9th Cir.), ECF No. 15).

Sudan, Syria, and Yemen.[6] 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date, and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of the prior Executive Order, No. 13,769). Exec. Order § 3(a).

The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b).

Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis. The Executive Order includes the following list of circumstances when such waivers "could be appropriate:"

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[6] Because of the "close cooperative relationship" between the United States and the Iraqi government, the Executive Order declares that Iraq no longer merits inclusion in this list of countries, as it was in Executive Order No. 13,769. Iraq "presents a special case." Exec. Order § 1(g).

> (i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other longterm activity, is outside the United States on the effective date of the Order, seeks to reenter the United States to resume that activity, and denial of reentry during the suspension period would impair that activity;
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> (ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of the Order for work, study, or other lawful activity;
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> (iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;
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> (iv) the foreign national seeks to enter the United States to visit a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;
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> (v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

> (vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;
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> (vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOAI), 22 U.S.C. § 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under IOIA;
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> (viii) the foreign national is a landed Canadian immigrant who applies for admission at a land border port of entry or a preclearance location located in Canada; or
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> (ix) the foreign national is traveling as a United States Government sponsored exchange visitor.

Exec. Order § 3(c).

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status for the same period. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and DHS to admit refugee applicants on a case-by-case basis. *See* Exec.

Order § 6(c). The Executive Order identifies examples of circumstances in which waivers may be warranted, including: where the admission of the individual would allow the United States to conform its conduct to a pre-existing international agreement or denying admission would cause undue hardship. Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

Section 1 states that the purpose of the Executive Order is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." Section 1(h) identifies two examples of terrorism-related crimes committed in the United States by persons entering the country either "legally on visas" or "as refugees":

> [1] In January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. [2] [I]n October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]

Exec. Order § 1(h).

By its terms, the Executive Order also represents a response to the Ninth Circuit's decision in *Washington v. Trump*. *See* 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit." *See* Notice of Filing of Executive Order 4-5, ECF No. 56.

It is with this backdrop that we turn to consideration of Plaintiffs' restraining order application.

II. Plaintiffs' Motion For TRO

Plaintiffs' Second Amended Complaint (ECF No. 64) and Motion for TRO (ECF No. 65) contend that portions of the new Executive Order suffer from the same infirmities as those provisions of Executive Order No. 13,769 enjoined in ***Washington***, 847 F.3d 1151. Once more, the State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

Plaintiffs allege that the Executive Order subjects portions of the State's population, including Dr. Elshikh and his family, to discrimination in violation of both the Constitution and the INA, denying them their right, among other things, to associate with family members overseas on the basis of their religion and national origin. The State purports that the Executive Order has injured its institutions, economy, and sovereign interest in maintaining the separation between church and state. SAC ¶¶ 4-5.

According to Plaintiffs, the Executive order also results in "their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion." SAC ¶ 5.

Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a "Muslim ban," which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35-51. For example, Plaintiffs point to the following statements made contemporaneously with the implementation of Executive Order No. 13,769 and in its immediate aftermath:

> 48. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States. He remarked: "[N]o, it's not the Muslim ban. But it's countries that have tremendous terror. . . . [I]t's countries that people are going to come in and cause us tremendous problems."
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> 49. Two days later, on January 27, 2017, President Trump signed an Executive Order entitled, "Protecting the Nation From Foreign Terrorist Entry into the United States."
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> 50. The first Executive Order [No. 13,769] was issued without a notice and comment period and without interagency review. Moreover, the first Executive Order was issued with little explanation of how it could further its stated objective.
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> 51. When signing the first Executive Order [No. 13,769], President Trump read the title, looked up, and said: "We all know what that means." President Trump said he was "establishing a new

vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."

. . . .

58. In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. He said (once again, falsely): "Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."

59. The day after signing the first Executive Order [No. 13,769], President Trump's advisor, Rudolph Giuliani, explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

60. The President and his spokespersons defended the rushed nature of their issuance of the first Executive Order [No. 13,769] on January 27, 2017, by saying that their urgency was imperative to stop the inflow of dangerous persons to the United States. On January 30, 2017, President Trump tweeted: "If the ban were announced with a one week notice, the 'bad' would rush into our country during that

> week." In a forum on January 30, 2017 at George Washington University, White House spokesman Sean Spicer said: "At the end of the day, what was the other option? To rush it out quickly, telegraph it five days so that people could rush into this country and undermine the safety of our nation?" On February 9, 2017, President Trump claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that "you can't do that because then people are gonna pour in before the toughness."

SAC ¶¶ 48-51, 58-60 (footnotes and citations omitted).

Plaintiffs also highlight statements by members of the Administration prior to the signing of the new Executive Order, seeking to tie its content to Executive Order No. 13,769 enjoined by the *Washington* TRO. In particular, they note that:

> On February 21, Senior Advisor to the President, Stephen Miller, told Fox News that the new travel ban would have the same effect as the old one. He said: "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect."

SAC ¶ 74(a) (citing *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start, The First 100 Days* (Fox News television broadcast Feb. 21, 2017), transcript *available at* https://goo.gl/wcHvHH (rush transcript)). Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1.

In addition to these accounts, Plaintiffs describe a draft report from the DHS, which they contend undermines the purported national security rationale for the Executive Order. *See* SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). The February 24, 2017 draft report states that citizenship is an "unlikely indicator" of terrorism threats against the United States and that very few individuals from the seven countries included in Executive Order No. 13,769 had carried out or attempted to carry out terrorism activities in the United States. SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). According to Plaintiffs, this and other evidence demonstrates the Administration's pretextual justification for the Executive Order.

Plaintiffs assert the following causes of action: (1) violation of the Establishment Clause of the First Amendment (Count I); (2) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count II); (3) violation of the Due Process Clause of the Fifth Amendment based upon substantive due process rights (Count III); (4) violation of the procedural due process guarantees of the Fifth Amendment (Count IV); (5) violation of the INA due to discrimination on the basis of nationality, and exceeding the President's authority under Sections 1182(f) and 1185(a) (Count V); (6) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a) (Count VI); (7) substantive violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2)(A)-(C), through violations of the Constitution, INA, and RFRA (Count VII); and (8) procedural violation of the APA, 5 U.S.C. § 706 (2)(D) (Count VIII).

Plaintiffs contend that these alleged violations of law have caused and continue to cause them irreparable injury. To that end, through their Motion for TRO, Plaintiffs seek to temporarily enjoin Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order. Mot. for TRO 4, ECF No. 65. They argue that "both of these sections are unlawful in all of their applications:" Section 2 discriminates on the basis of nationality, Sections 2 and 6 exceed the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a), and both provisions are motivated by anti-Muslim animus. TRO Mem. 50, Dkt. No. 65-1. Moreover, Plaintiffs assert that both sections infringe "on the 'due process rights' of numerous U.S. citizens and institutions by barring the entry of non-citizens with whom they have close relationships." TRO Mem. 50 (quoting *Washington*, 847 F.3d at 1166).

Defendants oppose the Motion for TRO. The Court held a hearing on the matter on March 15, 2017, before the Executive Order was scheduled to take effect.

DISCUSSION

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "Those two words confine 'the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

"At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts*, 549 U.S. at 517)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). "With these allegations and evidence, the [Plaintiffs] must make a 'clear showing of each element of standing.'" *Id.* (quoting *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). At this preliminary stage of the proceedings, on the record presented, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

The State alleges standing based both upon injuries to its proprietary interests and to its quasi-sovereign interests, *i.e.*, in its role as *parens patriae*.[7] Just as the Ninth Circuit panel in *Washington* concluded on a similar record that the alleged harms to the states' proprietary interests as operators of their public universities were sufficient to support standing, the Court concludes likewise here. The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

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[7] The State's *parens patriae* theory focuses on the Executive Order

> subject[ing] citizens of Hawai'i like Dr. Elshikh to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai'i has a quasi-sovereign interest in 'securing [its] residents from the harmful effects of discrimination.' *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 609 (1982). The [Executive] Order also harms Hawai'i by debasing its culture and tradition of ethnic diversity and inclusion.

TRO Mem. 48, ECF No. 65-1.

Hawaii primarily asserts two proprietary injuries stemming from the Executive Order. First, the State alleges the impacts that the Executive Order will have on the University of Hawaii system, both financial and intangible. The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. The University recruits students, permanent faculty, and visiting faculty from the targeted countries. *See, e.g.*, Suppl. Decl. of Risa E. Dickson ¶¶ 6-8, Mot. for TRO, Ex. D-1, ECF No. 66-6. Students or faculty suspended from entry are deterred from studying or teaching at the University, now and in the future, irrevocably damaging their personal and professional lives and harming the educational institutions themselves. *See id.*

There is also evidence of a financial impact from the Executive Order on the University system. The University recruits from the six affected countries. It currently has twenty-three graduate students, several permanent faculty members, and twenty-nine visiting faculty members from the six countries listed. Suppl. Dickson Decl. ¶ 7. The State contends that any prospective recruits who are without visas as of March 16, 2017 will not be able to travel to Hawaii to attend the

University. As a result, the University will not be able to collect the tuition that those students would have paid. Suppl. Dickson Decl. ¶ 8 ("Individuals who are neither legal permanent residents nor current visa holders will be entirely precluded from considering our institution."). These individuals' spouses, parents, and children likewise would be unable to join them in the United States. The State asserts that the Executive Order also risks "dissuad[ing] some of [the University's] current professors or scholars from continuing their scholarship in the United States and at [the University]." Suppl. Dickson Decl. ¶ 9.

The State argues that the University will also suffer non-monetary losses, including damage to the collaborative exchange of ideas among people of different religions and national backgrounds on which the State's educational institutions depend. Suppl. Dickson Decl. ¶¶ 9-10, ECF no. 66-6; *see also* Original Dickson Decl. ¶ 13, Mot. for TRO, Ex. D-2, ECF, 66-7; SAC ¶ 94. This will impair the University's ability to recruit and accept the most qualified students and faculty, undermine its commitment to being "one of the most diverse institutions of higher education" in the world, Suppl. Dickson Decl. ¶ 11, and grind to a halt certain academic programs, including the University's Persian Language and Culture program, *id.* ¶ 8. *Cf. Washington*, 847 F.3d at 1160 ("[The universities] have a mission of 'global engagement' and rely on such visiting students, scholars, and faculty to advance their educational goals.").

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's decision in *Washington*. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement.").

The second proprietary injury alleged Hawaii alleges is to the State's main economic driver: tourism. The State contends that the Executive Order will "have the effect of depressing international travel to and tourism in Hawai'i," which "directly harms Hawaii's businesses and, in turn, the State's revenue." SAC ¶ 100, ECF No. 64. *See also* Suppl. Decl. of Luis P. Salaveria ¶¶ 6-10, Mot. for TRO, Ex. C-1, ECF No. 66-4 ("I expect, given the uncertainty the new executive order and its predecessor have caused to international travel generally, that these changing policies may depress tourism, business travel, and financial investments in Hawaii."). The State points to preliminary data from the Hawaii Tourism Authority, which suggests that during the interval of time that the first Executive Order was in place, the number of visitors to Hawai'i from the Middle East dropped (data including visitors from Iran, Iraq, Syria and Yemen). *See* Suppl. Decl. of George Szigeti, ¶¶ 5-8, Mot. for TRO, Ex. B-1, ECF No. 66-2; *see also* SAC ¶ 100 (identifying 278 visitors in January 2017, compared to 348 visitors from that same region in

January 2016).[8] Tourism accounted for $15 billion in spending in 2015, and a decline in tourism has a direct effect on the State's revenue. *See* SAC ¶ 18. Because there is preliminary evidence that losses of current and future revenue are traceable to the Executive Order, this injury to the State's proprietary interest also appears sufficient to confer standing. *Cf. Texas v. United States*, 809 F.3d 134, 155-56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the "financial loss[es]" that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.[9]

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[8] This data relates to the prior Executive Order No. 13,769. At this preliminary stage, the Court looks to the earlier order's effect on tourism in order to gauge the economic impact of the new Executive Order, while understanding that the provisions of the two differ. Because the new Executive Order has yet to take effect, its precise economic impact cannot presently be determined.

[9] To the extent the Government argues that the State does not have standing to bring an Establishment Clause violation on its own behalf, the Court does not reach this argument. *Cf. Wash-*

C. Dr. Elshikh Has Standing

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai'i for over a decade. Declaration of Ismail Elshikh ¶ 1, Mot. for TRO, Ex. A, ECF No. 66-1. He is the Imam of the Muslim Association of Hawai'i and a leader within Hawaii's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His mother-in-law, also Muslim, is a Syrian national without a visa, who last visited the family in Hawaii in 2005. Elshikh Decl. ¶¶ 4-5.

In September 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother. On January 31, 2017, Dr. Elshikh called the National Visa Center and learned that his mother-in-law's visa application had been put on hold and would not proceed to the next stage of the process because of the implementation of Executive Order No. 13,769. Elshikh Decl. ¶ 4. Thereafter, on March 2, 2017, during the pendency of the nationwide injunction imposed by *Wash-*

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ington, 847 F.3d at 1160 n.4 ("The Government argues that the States may not bring Establishment Clause claims because they lack Establishment Clause rights. Even if we assume that States lack such rights, an issue we need not decide, that is irrelevant in this case because the States are asserting the rights of their students and professors. Male doctors do not have personal rights in abortion and yet any physician may assert those rights on behalf of his female patients." (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976))). Unlike in *Washington* where there was no individual plaintiff, Dr. Elshikh has standing to assert an Establishment Clause violation, as discussed herein.

ington, Dr. Elshikh received an email from the National Visa Center advising that his mother-in-law's visa application had progressed to the next stage and that her interview would be scheduled at an embassy overseas. Although no date was given, the communication stated that most interviews occur within three months. Elshikh Decl. ¶ 4. Dr. Elshikh fears that although she has made progress toward obtaining a visa, his mother-in-law will be unable to enter the country if the new Executive Order is implemented. Elshikh Decl. ¶ 4. According to Plaintiffs, despite her pending visa application, Dr. Elshikh's mother-in-law would be barred in the short-term from entering the United States under the terms of Section 2(c) of the Executive Order, unless she is granted a waiver, because she is not a current visa holder.

Dr. Elshikh has standing to assert his claims, including an Establishment Clause violation. Courts observe that the injury-in-fact prerequisite can be "particularly elusive" in Establishment Clause cases because plaintiffs do not typically allege an invasion of a physical or economic interest. Despite that, a plaintiff may nonetheless show an injury that is sufficiently concrete, particularized, and actual to confer standing. *See Catholic League*, 624 F.3d at 1048-49; *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) ("The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context."). "The standing question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness' required."

Catholic League, 624 F.3d at 1048-49. In Establishment Clause cases—

> [e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Plaintiffs aver that not only does the resolution make them feel like second-class citizens, but that their participation in the political community will be chilled by the [government's] hostility to their church and their religion.

Id. at 1048-49 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Dr. Elshikh attests that he and his family suffer just such injuries here. He declares that the effects of the Executive Order are "devastating to me, my wife and children." Elshikh Decl. ¶ 6, ECF No. 66-1.

Like his children, Dr. Elshikh is "deeply saddened by the message that [both Executive Orders] convey—that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States." Elshikh Decl. ¶ 1 ("Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from now-six Muslim majority countries from entering the United States."); *id.* ¶ 3 (["My children] are deeply affected by the knowledge that the United States—their own country—would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.").

"Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths." SAC ¶ 90. These injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context.

The final two aspects of Article III standing—causation and redressability—are also satisfied. Dr. Elshikh's injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

II. Ripeness

"While standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when litigation may occur." *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). "[I]n many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). In fact, the ripeness inquiry is often "characterized as standing on a timeline." *Id.* "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

The Government argues that "the only concrete injury Elshikh alleges is that the Order 'will prevent [his] mother-in-law'—a Syrian national who lacks a visa —from visiting Elshikh and his family in Hawaii." These claims are not ripe, according to the Government, because there is a visa waiver process that Elshikh's mother-in-law has yet to even initiate. Govt. Mem. in Opp'n to Mot. for TRO (citing SAC ¶ 85), ECF No. 145.

The Government's premise is not true. Dr. Elshikh alleges direct, concrete injuries to both himself and his immediate family that are independent of his mother-in-law's visa status. *See, e.g.*, SAC ¶¶ 88-90; Elshikh Decl. ¶¶ 1, 3.[10] These alleged injuries have already occurred and will continue to occur once the Executive Order is implemented and enforced—the injuries are not contingent ones. *Cf. 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) ("Plaintiffs' alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. . . . Here, the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression."); *see also Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("[W]hen the threatened enforcement effort implicates First Amendment [free speech] rights, the inquiry tilts dramatically toward a finding of standing.").

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[10] There is no dispute that Dr. Elshikh's mother-in-law does not currently possess a valid visa, would be barred from entering as a Syrian national by Section 2(c) of the Executive Order, and has not yet applied for a waiver under Section 3(c) of the Executive Order. Since the Executive Order is not yet effective, it is difficult to see how she could. None of these propositions, however, alter the Court's finding that Dr. Elshikh has sufficiently established, at this preliminary stage, that he has suffered an injury-in-fact separate and apart from his mother-in-law that is sufficiently concrete, particularized, and actual to confer standing.

The Court turns to the merits of Plaintiffs' Motion for TRO.

III. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130-31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

"[I]f a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two

Winter factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis by *Shell Offshore*)).

For the reasons that follow, Plaintiffs have met this burden here.

IV. Analysis of TRO Factors: Likelihood of Success on the Merits

The Court turns to whether Plaintiffs sufficiently establish a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause of the First Amendment. Because a reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion, in spite of its stated, religiously-neutral purpose, the Court finds that Plaintiffs, and Dr. Elshikh in particular, are likely to succeed on the merits of their Establishment Clause claim.[11]

A. Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). To determine whether the Executive Order runs afoul of that command, the Court is guided by the three-part test for Establishment Clause claims set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076-77 (9th Cir. 2010). Because the Executive Order at issue here cannot survive the secular purpose prong, the Court does not reach the balance of the criteria. *See id.* (noting that it is unnecessary to reach the second or third *Lemon* criteria if the challenged law or practice fails the first test).

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[11] The Court expresses no views on Plaintiffs' due-process or INA-based statutory claims.

B. The Executive Order's Primary Purpose

It is undisputed that the Executive Order does not facially discriminate for or against any particular religion, or for or against religion versus non-religion. There is no express reference, for instance, to any religion nor does the Executive Order—unlike its predecessor—contain any term or phrase that can be reasonably characterized as having a religious origin or connotation.

Indeed, the Government defends the Executive Order principally because of its religiously neutral text—"[i]t applies to six countries that Congress and the prior Administration determined posed special risks of terrorism. [The Executive Order] applies to *all* individuals in those countries, regardless of their religion." Gov't. Mem. in Opp'n 40. The Government does not stop there. By its reading, the Executive Order could not have been religiously motivated because "the six countries represent only a small fraction of the world's 50 Muslim-majority nations, and are home to less than 9% of the global Muslim population . . . [T]he suspension covers *every* national of those countries, including millions of non-Muslim individuals[.]" Gov't. Mem. in Opp'n 42.

The illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment Clause analysis to a purely mathematical exercise. *See Aziz*, 2017 WL 580855, at *9 (rejecting the argument that "the Court cannot infer an anti-Muslim animus because [Executive Order No. 13,769] does not affect all, or even most, Muslims," because "the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution" (citation omitted)). Equally flawed is the notion that the Executive Order cannot be found to have targeted Islam because it applies to *all individuals* in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations that range from 90.7% to 99.8%.[12] It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.

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[12] *See* Pew-Templeton Global Religious Futures Project, Muslim Population by Country (2010), *available at* http://www.globalreligiousfutures.org/religions/muslims.

The Government compounds these shortcomings by suggesting that the Executive Order's neutral text is what this Court must rely on to evaluate purpose. Govt. Mem. in Opp'n at 42-43 ("[C]ourts may not 'look behind the exercise of [Executive] discretion' taken 'on the basis of a facially legitimate and bona fide reason.'"). Only a few weeks ago, the Ninth Circuit commanded otherwise: "It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Washington*, 847 F.3d at 1167-68 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Larson*, 456 U.S. at 254-55 (holding that a facially neutral statute violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose)). The Supreme Court has been even more emphatic: courts may not "turn a blind eye to the context in which [a] policy arose." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (citation and quotation signals omitted).[13] "[H]istorical context and 'the specific sequence of events leading up to'" the adoption of a challenged policy are relevant considerations. *Id.* at 862; *see also Aziz*, 2017 WL 580855, at *7.

A review of the historical background here makes plain why the Government wishes to focus on the Executive Order's text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor. For example—

> In March 2016, Mr. Trump said, during an interview, "I think Islam hates us." Mr. Trump was asked, "Is there a war between the West and radical Islam, or between the West and Islam itself?" He replied: "It's very hard to separate. Because you don't know who's who."

SAC ¶ 41 (citing *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), transcript *available at* https://goo.gl/y7s2kQ)). In that same interview, Mr. Trump stated: "But there's a tremendous hatred. And we have to be very vigilant. We have to be very careful. And we can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim."

Plaintiffs allege that "[l]ater, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban." SAC ¶ 42. For example, they point to a July 24, 2016 interview:

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[13] In *McCreary*, the Supreme Court examined whether the posting of successive Ten Commandments displays at two county courthouses violated the Establishment Clause. 545 U.S. at 850-82.

> Mr. Trump was asked: "'The Muslim ban. I think you've pulled back from it, but you tell me." Mr. Trump responded: "I don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."

SAC ¶ 44; Ex. 7 (*Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* https://goo.gl/jHc6aU). And during an October 9, 2016 televised presidential debate, Mr. Trump was asked:

> "Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?" Mr. Trump replied: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." When asked to clarify whether "the Muslim ban still stands," Mr. Trump said, "It's called extreme vetting."

SAC ¶ 45 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* https://goo.gl/iIzf0A)).

The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." Govt. Opp'n at

40 (citing *McCreary*, 545 U.S. at 862). The Government need not fear. The remarkable facts at issue here require no such impermissible inquiry. For instance, there is nothing "*veiled*" about this press release: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[]" SAC ¶ 38, Ex. 6 (Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://goo.gl/D3OdJJ)). Nor is there anything "*secret*" about the Executive's motive specific to the issuance of the Executive Order:

> Rudolph Giuliani explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

SAC ¶ 59, Ex. 8. On February 21, 2017, commenting on the then-upcoming revision to the Executive Order, the President's Senior Adviser, Stephen Miller, stated, "Fundamentally, [despite "technical" revisions meant to address the Ninth Circuit's concerns in *Washington*,] you're still going to have the same basic policy outcome [as the first]." SAC ¶ 74.

These plainly-worded statements,[14] made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims. *See McCreary*, 545 U.S. at 864.[15]

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[14] There are many more. *See, e.g.*, Br. of The Roderick and Solange MacArthur Justice Center as Amicus Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 204, at 19-20 ("It's not unconstitutional keeping people out, frankly, and until we get a hold of what's going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it. Because look we are at war with radical Islam.") (quoting Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and 'Morning Joe' Cuts to Commercial*, New York Times (Dec. 8, 2015), *available at* https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donaldtrump-interrupts-and-morning-joe-cuts-to-commercial/)); Br. of Muslim Advocates et al. as Amici Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 198, at 10-11 ("On June 13, 2016, after the attack on a nightclub in Orlando, Florida, Mr. Trump said in a speech: 'I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so.' Mr. Trump then specified that the Muslim ban would be 'temporary,' 'and apply to certain 'areas of the world when [sic] there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.'") (quoting Transcript: Donald Trump's national security speech, *available at* http://www.politico.com/story/2016/06/transcript-donald-trump-national-security- speech-22427).

To emphasize these points, Plaintiffs assert that the stated national security reasons for the Executive Order are pretextual. Two examples of such pretext include the security rationales set forth in Section 1(h):

> "[I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." [Exec. Order] § 1(h). "And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]" *Id.* Iraq is no longer included in the ambit of the travel ban, *id.*, and the Order states that a waiver could be granted for a foreign national that is a "young child." *Id.* § 3(c)(v).

TRO Mem. 13. Other indicia of pretext asserted by Plaintiffs include the delayed timing of the Executive Order, which detracts from the national security urgency claimed by the Administration, and the Executive Order's focus on nationality, which could have the paradoxical effect of "bar[ring] entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war," revealing a "gross mismatch between the [Executive] Order's ostensible purpose and its implementation and effects." Pls.' Reply 20 (citation omitted).

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[15] This Court is not the first to examine these issues. In *Aziz v. Trump*, United States District Court Judge Leonie Brinkema determined that plaintiffs were likely to succeed on the merits of their Establishment Clause claim as it related to Executive Order No. 13,769. Accordingly, Judge Brinkema granted the Commonwealth of Virginia's motion for preliminary injunction. *Aziz v. Trump*, ___ F. Supp. 3d ___, 2017 WL 580855, at *7-*10 (E.D. Va. Feb. 13, 2017).

While these additional assertions certainly call the motivations behind the Executive Order into greater question,[16] they are not necessary to the Court's Establishment Clause determination. *See Aziz*, 2017 WL 580855, at *8 (the Establishment Clause concerns addressed by the district court's order "do not involve an assessment of the merits of the president's national security judgment. Instead, the question is whether [Executive Order No. 13,769] was animated by national security concerns at all, as opposed to the impermissible notion of, in the context of entry, disfavoring one religious group, and in the context of refugees, favoring another religious group").

Nor does the Court's preliminary determination foreclose future Executive action. As the Supreme Court noted in *McCreary*, in preliminarily enjoining the third iteration of a Ten Commandments display, "we do not decide that the [government's] past actions forever taint any effort on their part to deal with the subject matter." *McCreary*, 545 U.S. at 873-74; *see also Felix v. City of Bloomfield*, 841 F.3d 848, 863

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[16] *See also* Br. of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 200, at 15-25 (detailing evidence contrary to the Executive Order's national security justifications).

(10th Cir. 2016) ("In other words, it is possible that a government may begin with an impermissible purpose, or create an unconstitutional effect, but later take affirmative actions to neutralize the endorsement message so that "adherence to a religion [is not] relevant in any way to a person's standing in the political community." (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))). Here, it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. Based upon the current record available, however, the Court cannot find the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order to be "genuine changes in constitutionally significant conditions." *McCreary*, 545 U.S. at 874.[17] The Court recognizes that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *Id.* Yet, context may change during the course of litigation, and the Court is prepared to respond accordingly.

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[17] The Tenth Circuit asked: "What would be enough to meet this standard?"

> The case law does not yield a ready answer. But from the above principles we conclude that a government cure should be (1) purposeful, (2) public, and (3) at least as persuasive as the initial endorsement of religion. It should be purposeful enough for an objective observer to know, unequivocally, that the government does not endorse religion. It should be public enough so that people need not burrow into a difficult-to-access legislative record for evidence to assure themselves that the government is not endorsing a religious view. And it should be persuasive enough to countermand the preexisting message of religious endorsement.

Felix, 841 F.3d 863-64.

Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here. *Cf. Aziz*, 2017 WL 580855, at *9 ("The Court's conclusion rests on the highly particular 'sequence of events' leading to this specific [Executive Order No. 13,769] and the dearth of evidence indicating a national security purpose. The evidence in this record focuses on the president's statements about a 'Muslim ban' and the link Giuliani established between those statements and the [Executive Order].") (citing *McCreary*, 545 U.S. at 862).

V. Analysis of TRO Factors: Irreparable Harm

Dr. Elshikh has made a preliminary showing of direct, concrete injuries to the exercise of his Establishment Clause rights. *See, e.g.*, SAC ¶¶ 88-90; Elshikh Decl. ¶¶ 1, 3. These alleged injuries have already occurred and likely will continue to occur upon implementation of the Executive Order.

Indeed, irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Washington*, 847 F.3d at 1169 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'")) (additional citations omitted). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable injury in the absence of a TRO.

VI. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessor, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. For example, the Government insists that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably important to the public at large. Plaintiffs and the public, on the other hand, have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169-70.

As discussed above, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (emphasis added) (citing

Elrod, 427 U.S. at 373); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest." (citing *Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

When considered alongside the constitutional injuries and harms discussed above, and the questionable evidence supporting the Government's national security motivations, the balance of equities and public interests justify granting the Plaintiffs' TRO. *See Aziz*, 2017 WL 580855, at * 10. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion for TRO is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith.

IT IS SO ORDERED.

Dated: Mar. 15, 2017 at Honolulu, Hawai'i.

[SEAL OMITTED]

/s/ DERRICK K. WATSON
DERRICK K. WATSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

CV. NO. 17-00050 DKW-KSC

STATE OF HAWAI'I AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, ET AL., DEFENDANTS

[Filed: Mar. 29, 2017]

ORDER GRANTING MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION

INTRODUCTION

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of Executive Order No. 13,780, entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). *See* Order Granting Mot. for TRO, ECF No. 219 [hereinafter TRO]. Plaintiffs State of Hawai'i and Ismail Elshikh, Ph.D., now move to convert the TRO to a preliminary injunction. *See* Pls.' Mot. to Convert TRO to Prelim. Inj., ECF No. 238 [hereinafter Motion].

Upon consideration of the parties' submissions, and following a hearing on March 29, 2017, the Court concludes that, on the record before it, Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs' Motion (ECF No. 238) is GRANTED.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion. A fuller recitation of the facts is set forth in the Court's TRO. *See* TRO 3-14, ECF No. 219.

I. The President's Executive Orders

A. Executive Order No. 13,769

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017).[1] On March 6, 2017, the President issued another

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[1] On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin Sections 3(c), 5(a)-(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2. The Court stayed the case (*see* ECF Nos. 27 & 32) after the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking a stay of the *Washington* TRO, pending appeal. That emergency motion was denied on February 9, 2017. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir.) (per curium), *denying reconsideration en banc*, — F.3d —, 2017 WL 992527 (9th Cir. 2017). On March 8, 2017, the Ninth Circuit granted the Government's unop-

Executive Order, No. 13,780, identically entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), 82 Fed. Reg. 13209. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends the United States refugee program for specified periods of time.

B. Executive Order No. 13,780

Section 1 of the Executive Order declares that its purpose is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." By its terms, the Executive Order also represents a response to the Ninth Circuit's per curiam decision in *Washington v. Trump*, 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit." Notice of Filing of Executive Order 4-5, ECF No. 56.

Section 2 suspends from "entry into the United States" for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*: Iran, Libya, Somalia, Sudan, Syria, and Yemen. 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date; and (3) did not

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posed motion to voluntarily dismiss the appeal. *See* Order, Case No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187.

have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of Executive Order No. 13,769). Exec. Order § 3(a). The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b). Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis.

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and Homeland Security to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c).

Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

II. Plaintiffs' Claims

Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 (ECF No. 64) simultaneous with their Motion for TRO (ECF No. 65). The State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

According to Plaintiffs, the Executive Order results in "their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion." SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a "Muslim ban," which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35-60. Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1. Plaintiffs additionally present evidence that they contend undermines the purported national security rationale for the Executive Order and demonstrates the Administration's pretextual justification for the Executive Order. *E.g.*, SAC ¶ 61 (citing Draft DHS Report, SAC, Ex. 10, ECF No. 64-10).

III. March 15, 2017 TRO

The Court's nationwide TRO (ECF No. 219) temporarily enjoined Sections 2 and 6 of the Executive Order, based on the Court's preliminary finding that Plaintiffs demonstrated a sufficient likelihood of succeeding on their claim that the Executive Order violates the Establishment Clause. *See* TRO 41-42. The Court concluded, based upon the showing of constitutional injury and irreparable harm, the balance of equities, and public interest, that Plaintiffs met their burden in seeking a TRO, and directed the parties to submit a stipulated briefing and preliminary injunction hearing schedule. *See* TRO 42-43.

On March 21, 2017, Plaintiffs filed the instant Motion (ECF No. 238) seeking to convert the TRO to a preliminary injunction prohibiting Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order until the matter is fully decided on the merits. They argue that both of these sections are unlawful in all of their applications and that both provisions are motivated by anti-Muslim animus. Defendants oppose the Motion. *See* Govt. Mem. in Opp'n to Mot. to Convert TRO to Prelim. Inj., ECF No. 251. After full briefing and notice to the parties, the Court held a hearing on the Motion on March 29, 2017.

DISCUSSION

The Court's TRO details why Plaintiffs are entitled to preliminary injunctive relief. *See* TRO 15-43. The Court reaffirms and incorporates those findings and conclusions here, and addresses the parties' additional arguments on Plaintiffs' Motion to Convert.

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

The Court previously found that Plaintiffs satisfied Article III standing requirements at this preliminary stage of the litigation. *See* TRO 15-21 (State), 22-25 (Dr. Elshikh). The Court renews that conclusion here.

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden."

Washington, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). "With these allegations and evidence, the [Plaintiffs] must make a 'clear showing of each element of standing.'" *Id.* (quoting *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). On the record presented at this preliminary stage of the proceedings, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

For the reasons stated in the TRO, the State has standing based upon injuries to its proprietary interests. *See* TRO 16-21.[2]

The State sufficiently identified monetary and intangible injuries to the University of Hawaii. *See, e.g.*, Suppl. Decl. of Risa E. Dickson, Mot. for TRO, Ex. D-1, ECF No. 66-6; Original Dickson Decl., Mot. for TRO, Ex. D-2, ECF No. 66-7. The Court previously found these types of injuries to be nearly indistinguishable from those found sufficient to confer standing according to the Ninth Circuit's *Washington* decision. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement."). The State also presented evidence of injury to its tourism industry. *See, e.g.*, SAC ¶ 100; Suppl. Decl. of Luis P. Salaveria, Mot. for TRO, Ex. C-1, ECF No. 66-4; Suppl. Decl. of George Szigeti, ¶¶ 5-8, Mot. for TRO, Ex. B-1, ECF No. 66-2.

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[2] The Court once again does not reach the State's alternative standing theory based on protecting the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

For purposes of the instant Motion, the Court concludes that the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. *See* TRO 21. These preliminary findings apply to each of the challenged Sections of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

C. Dr. Elshikh Has Standing

Dr. Elshikh likewise has met his preliminary burden to establish standing to assert an Establishment Clause violation. *See* TRO 22-25. "The standing question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness' required." *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048-49 (9th Cir. 2010) (en banc). Dr. Elshikh attests that the effects of the Executive Order are "devastating to me, my wife and children." Elshikh Decl. ¶ 6, Mot. for TRO, Ex. A, ECF No. 66-1; *see also id.* ¶¶ 1, 3 ("I am deeply saddened . . . . by the message that both [Executive Orders] convey—that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States."); SAC ¶ 90 ("Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths."). The alleged injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context. *E.g.*, SAC ¶¶ 88-90; Elshikh Decl. ¶¶ 1, 3. These injuries have already occurred and will continue to occur if the Executive Order is implemented and enforced; the injuries are neither contingent nor speculative.

The final two aspects of Article III standing—causation and redressability—are also satisfied with respect to each of the Executive Order's challenged Sections. Dr. Elshikh's injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at

1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

The Court turns to the factors for granting preliminary injunctive relief.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130-31 (9th Cir. 2006).

The Court applies the same standard for issuing a preliminary injunction as it did when considering Plaintiffs' Motion for TRO. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

The Court, in its discretion, may convert a temporary restraining order into a preliminary injunction. *See, e.g., ABX Air, Inc. v. Int'l Bhd. of Teamsters*, No. 1:16-CV-1096, 2016 WL 7117388, at *5 (S.D. Ohio Dec. 7, 2016) (granting motion to convert TRO into a preliminary injunction because "Defendants fail to allege any material fact suggesting that, if a hearing were held, this Court would reach a different outcome"; "[n]othing has occurred to alter the analysis in the

Court's original TRO, and since this Court has already complied with the requirements for the issuance of a preliminary injunction, it can simply convert the nature of its existing Order."); *Productive People, LLC v. Ives Design*, No. CV-09-1080-PHX-GMS, 2009 WL 1749751, at *3 (D. Ariz. June 18, 2009) ("Because Defendants have given the Court no reason to alter the conclusions provided in its previous Order [granting a TRO], and because '[t]he standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction,' the Court will enter a preliminary injunction." (quoting *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002))). Here, the parties were afforded notice, a full-briefing on the merits, and a hearing both prior to entry of the original TRO and prior to consideration of the instant Motion.

For the reasons that follow and as set forth more fully in the Court's TRO, Plaintiffs have met their burden here.

III. Analysis of Factors: Likelihood of Success on the Merits

The Court's prior finding that Plaintiffs sufficiently established a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause remains undisturbed. *See* TRO 30-40.[3]

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[3] The Court again expresses no view on Plaintiffs' additional statutory or constitutional claims.

A. Establishment Clause

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), provides the benchmark for evaluating whether governmental action is consistent with or at odds with the Establishment Clause. According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076-77 (9th Cir. 2010).

The Court determined in its TRO that the preliminary evidence demonstrates the Executive Order's failure to satisfy *Lemon*'s first test. *See* TRO 33-36. The Court will not repeat that discussion here. As no *new* evidence contradicting the purpose identified by the Court has been submitted by the parties since the issuance of the March 15, 2017 TRO, there is no reason to disturb the Court's prior determination.

Instead, the Federal Defendants take a different tack. They once more urge the Court not to look beyond the four corners of the Executive Order. According to the Government, the Court must afford the President deference in the national security context and should not "'look behind the exercise of [the President's] discretion' taken 'on the basis of a facially legitimate and bona fide reason.'" Govt. Mem. in Opp'n to Mot. for TRO 42-43 (quoting *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972)), ECF No. 145. No binding authority, however, has decreed that Establishment Clause jurisprudence ends at the Executive's door. In fact, *every court* that has considered whether to apply the Establishment Clause to either the Executive Order or its predecessor (regardless of the ultimate outcome) has done so.[4] Significantly, this Court is constrained by the binding precedent and guidance offered in *Washington*. There, citing *Lemon*, the Ninth Circuit clearly indicated that the Executive Order is subject to the very type of secular purpose review conducted by this

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[4] *See Sarsour v. Trump*, No. 1:17-cv-00120 AJT-IDD, 2017 WL 1113305, at *11 (E.D. Va. Mar. 27, 2017) ("[T]he Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its analysis of the constitutional validity of EO-2 to the four corners of the Order.") (citations omitted); *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017) ("Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a 'facially legitimate and bona fide reason' for its action. *Mandel*, 408 U.S. at 777 . . . . [A]lthough '[t]he Executive has broad discretion over the admission and exclusion of aliens,' that discretion 'may not transgress constitutional limitations,' and it is 'the duty of the courts' to 'say where those statutory and constitutional boundaries lie.' *Abourezk[v. Reagan]*, 785 F.2d [1043,] 1061 [(D.C. Cir. 1986)]."); *Aziz v. Trump*, No. 1:17-CV-116 LMB-TCB, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) ("Moreover, even if Mandel[, 408 U.S. at 770,] did apply, it requires that the proffered executive reason be 'bona fide.' As the Second and Ninth Circuits have persuasively held, if the proffered 'facially legitimate' reason has been given in 'bad faith,' it is not 'bona fide.' *Am. Academy of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.")).

Court in considering the TRO. *Washington*, 847 F.3d at 1167-68; *id.* at 1162 (stating that *Mandel* does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches").

The Federal Defendants' arguments, advanced from the very inception of this action, make sense from this perspective—where the "historical context and 'the specific sequence of events leading up to'" the adoption of the challenged Executive Order are as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context. *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). The Court, however, declines to do so. *Washington*, 847 F.3d at 1167 ("It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."). The Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has.[5] The Supreme Court and this Circuit both dictate otherwise, and that is the law this Court is bound to follow.

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[5] *See Int'l Refugee Assistance Project*, 2017 WL 1018235, at *14 ("Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the 'reasonable memory' of a 'reasonable observer.'" (quoting *McCreary*, 545 U.S. at 866)).

B. Future Executive Action

The Court's preliminary determination does not foreclose future Executive action. The Court recognizes that it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. *See* TRO 38-39. Based upon the preliminary record available, however, one cannot conclude that the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order represent "*genuine* changes in constitutionally significant conditions." *McCreary*, 545 U.S. at 874 (emphasis added).

The Government emphasizes that "the Executive Branch revised the new Executive Order to avoid any Establishment Clause concerns," and, in particular, removed the preference for religious minorities provided in Executive Order No. 13,769. Mem. in Opp'n 21, ECF No. 251. These efforts, however, appear to be precisely what Plaintiffs characterize them to be: efforts to "sanitize [Executive Order No. 13,769's] refugee provision in order to 'be responsive to a lot of very technical issues that were brought up by the court.'" Mem. in Supp. of Mot. to Convert TRO to Prelim. Inj. 20, ECF No. 238-1 [hereinafter PI Mem.] (quoting SAC ¶ 74(a)). Plaintiffs also direct the Court to the President's March 15, 2017 description of the Executive Order as "a watered-down version of the first one." PI Mem. 20 (citing Katyal Decl. 7, Ex. A, ECF No. 239-1). "[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *McCreary*, 545 U.S. at 874.

IV. Analysis of Factors: Irreparable Harm

Irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable, ongoing, and significant injury in the absence of a preliminary injunction. *See* TRO 40 (citing SAC ¶¶ 88-90; Elshikh Decl. ¶¶ 1, 3).

V. Analysis of Factors: Balance of Equities And Public Interest

The final step in determining whether to grant Plaintiffs' Motion is to assess the balance of equities and examine the general public interests that will be affected. The Court acknowledges Defendants' position that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably of vital importance to the public interest. The same is true with respect to affording appropriate deference to the President's constitutional and statutory responsibilities to set immigration policy and provide for the national defense. Upon careful consideration of the totality of the circumstances, however, the Court reaffirms its prior finding that the balance of equities and public interest weigh in favor of maintaining the status quo.

As discussed above and in the TRO, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. *See* TRO 41-42; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is *always* in the public interest to prevent the violation of a party's constitutional rights." (emphasis added) (citing *Elrod*, 427 U.S. at 373)).

VI. Scope of Preliminary Injunction: Sections 2 And 6

Having considered the constitutional injuries and harms discussed above, the balance of equities, and public interest, the Court hereby grants Plaintiffs' request to convert the existing TRO into a preliminary injunction. The requested nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' Establishment Clause claim. *See, e.g., Texas v. U.S.*, 809 F.3d 134, 188 (5th Cir. 2015) ("[Because] the Constitution vests [district courts] with 'the judicial Power of the United States' . . . , [i]t is not beyond the power of the court, in appropriate circumstances, to issue a nationwide injunction." (citing U.S. Const. art. III, § 1)), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Washington*, 847 F.3d at 1167 ("Moreover, even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders.").

The Government insists that the Court, at minimum, limit any preliminary injunction to Section 2(c) of the Executive Order. It makes little sense to do so. That is because the entirety of the Executive Order runs afoul of the Establishment Clause where "openly available data support[] a commonsense conclusion that a religious objective permeated the government's action," and not merely the promulgation of Section 2(c). *McCreary*, 545 U.S. at 863; *see* SAC ¶¶ 36-38, 58, 107; TRO 16, 24-25, 42. Put another way, the historical context and evidence relied on by the Court, highlighted by the comments of the Executive and his surrogates, does not parse between Section 2 and Section 6, nor does it do so between subsections within Section 2. Accordingly, there is no basis to narrow the Court's ruling in the manner requested by the Federal Defendants.[6] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539-40 (1993) ("[It would be] implausible to suggest that [Section 2(c)] but not the [other Sections] had as [its] object the suppression of [or discrimination against a] religion. . . . We need not decide whether the Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.").

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[6] Plaintiffs further note that the Executive Order "bans refugees at a time when the publicized refugee crisis is focused on Muslim-majority nations." Reply in Supp. of Mot. to Convert TRO to Prelim. Inj. 14. Indeed, according to Pew Research Center analysis of data from the State Department's Refugee Processing Center, a total of 38,901 Muslim refugees entered the United States in fiscal year 2016, accounting for nearly half of the almost 85,000 refugees who entered the country during that period. *See* Br. of Chicago, Los Angeles, New York, Philadelphia, & Other Major Cities & Counties as Amici Curiae in Supp. of Pls.' Mot. to Convert TRO to Prelim. Inj. 12, ECF No. 271-1 (citing Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research Center (Oct. 5, 2016), http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-ofmuslim-refugees-in-2016). "That means the U.S. has admitted the highest number of Muslim refugees of any year since date of self-reported religious affiliations first became publicly available in 2002." *Id.*

The Court is cognizant of the difficult position in which this ruling might place government employees performing what the Federal Defendants refer to as "inward-facing" tasks of the Executive Order. Any confusion, however, is due in part to the Government's failure to provide a workable framework for narrowing the scope of the enjoined conduct by specifically identifying those portions of the Executive Order that are in conflict with what it merely argues are "internal governmental communications and activities, most if not all of which could take place in the absence of the Executive Order but the status of which is now, at the very least, unclear in view of the current TRO." Mem. in Opp'n 29. The Court simply cannot discern, on the present record, a method for determining which enjoined provisions of the Executive Order are causing the alleged confusion asserted by the Government. *See, e.g.*, Mem. in Opp'n 28 ("[A]n internal review of procedures obviously can take place independently of the 90-day suspension-of-entry provision (though doing so would place additional burdens on the Executive Branch, which is one of the several reasons for the 90-day suspension (citing Exec. Order No. 13,780, § 2(c)). Without more, "even if the [preliminary injunction] might be overbroad in some respects, it is not our role to try, in effect, to rewrite the Executive Order." *Washington*, 847 F.3d at 1167.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Convert Temporary Restraining Order to A Preliminary Injunction is hereby GRANTED.

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed.

IT IS SO ORDERED.

Dated: Mar. 29, 2017 at Honolulu, Hawai'i.

[SEAL OMITTED]

/s/ DERRICK K. WATSON
DERRICK K. WATSON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15589
D.C. No. 1:17-cv-00050-DKW-KSC

STATE OF HAWAII; ISMAIL ELSHIKH,
PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS

Argued and Submitted: May 15, 2017
Seattle, Washington
[Filed: June 12, 2017]

OPINION

Appeal from the United States District Court
for the District of Hawai'i
Derrick Kahala Watson, District Judge, Presiding

Before: MICHAEL DALY HAWKINS, RONALD M. GOULD, and RICHARD A. PAEZ, Circuit Judges.

OPINION[1]

PER CURIAM:

We are asked to delineate the statutory and constitutional limits to the President's power to control immigration in this appeal of the district court's order preliminarily enjoining two sections of Executive Order 13780 ("EO2" or "the Order"), "Protecting the Nation From Foreign Terrorist Entry Into the United States." The Immigration and Nationality Act ("INA") gives the President broad powers to control the entry of aliens, and to take actions to protect the American public. But immigration, even for the President, is not a one-person show. The President's authority is subject to certain statutory and constitutional restraints. We conclude that the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress. In suspending the entry of more than 180 million nationals from six countries, suspending the entry of all refugees, and reducing the cap on the admission of refugees from 110,000 to 50,000 for the 2017 fiscal year, the President did not meet the essential precondition to exercising his delegated authority: The President must make a sufficient finding that the entry of these classes of people would be "detrimental to the interests of the United States." Further, the Order runs afoul of other provisions of the INA that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees. On these statutory bases, we affirm in large part the district court's order preliminarily enjoining Sections 2 and 6 of the Executive Order.

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[1] We thank the parties and their counsel, as well as the amici, for their excellent briefs and arguments in this case.

I

A

One week after inauguration and without interagency review, President Donald J. Trump issued Executive Order 13769 ("EO1"). Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).[2] Entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States," EO1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO1 recited that "[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program." *Id.*

EO1 mandated two main courses of action to assure that the United States remain "vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism." *Id.* In Section 3, the President invoked his authority under 8 U.S.C. § 1182(f) to suspend for 90 days immigrant and nonimmigrant entry into the United States of nationals from seven majority-Muslim countries: Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen. *See id.* at 8978. In Section 5, the President immediately suspended the U.S.

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[2] EO1 was a predecessor to Executive Order 13780, which is the subject of the current appeal.

Refugee Admissions Program ("USRAP") for 120 days, imposed a ban of indefinite duration on the entry of refugees from Syria, and limited the entry of refugees to 50,000 in fiscal year 2017. *Id.* at 8979. EO1 also ordered that changes be made to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* EO1 permitted the Secretaries of State and Homeland Security to make case-by-case exceptions to these restrictions "when in the national interest," and explained that it would be in the national interest "when the person is a religious minority in his country of nationality facing religious persecution." *Id.*

EO1 took immediate effect, causing great uncertainty as to the scope of the order, particularly in its application to lawful permanent residents. Notably, federal officials themselves were unsure as to the scope of EO1, which caused mass confusion at airports and other ports of entry. *See* Brief of the Foundation of Children of Iran and Iranian Alliance Across Borders as Amici Curiae, Dkt. No. 77 at 11-12 (describing how an Iranian visa holder was turned away while en route to the United States because of the confusion regarding the contours of EO1's scope); Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 25 n.53 & 54 (noting confusion at airports because officials were neither consulted nor informed of EO1 in advance).

Shortly after EO1 issued, the States of Washington and Minnesota filed suit in the Western District of Washington to enjoin EO1. On February 3, 2017, the district court granted a temporary restraining order

("TRO"). *Washington v. Trump,* No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in our court, seeking a stay of the TRO pending appeal.

On February 9, 2017, this court denied the Government's emergency motion for a stay of the injunction. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017). In so doing, the panel rejected the Government's arguments that EO1 was wholly unreviewable. *See id.* at 1161-64. After determining that the states had standing based on the alleged harms to their proprietary interests, *id.* at 1159-61, this court concluded that the states demonstrated a likelihood of success on their procedural due process claim, at least as to lawful permanent residents and nonimmigrant visa holders, *id.* at 1164-66. The panel did not review the states' other claims, including the statutory-based claims. *Id.* at 1164.

Rather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1. The curtain opens next to the present controversy regarding EO2.

B

On March 6, 2017, the President issued EO2, also entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). The revised

Order was to take effect on March 16, 2017, at which point EO1 would be revoked. *Id.* at 13218. The Order expressly stated that EO1 "did not provide a basis for discriminating for or against members of any particular religion" and was "not motivated by animus toward any religion." *Id.* at 13210.

Section 2—"Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period"—reinstates the 90-day ban on travel for nationals of six of the seven majority-Muslim countries identified in EO1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* at 13213. Section 2 also directs the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public- safety threat." *Id.* at 13212. Section 2(c) states in full:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. [§§] 1182(f) and 1185(a), that the

> unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

Id. at 13213.

Regarding the six identified countries, EO2 explains:

> Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

Id. at 13210. Based on the conditions of these six countries, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13211.

The Order states that it no longer includes Iraq on the list of designated countries because of Iraq's "close cooperative relationship" with the United States and its recent efforts to enhance its travel documentation procedures. *Id.* at 13212. The Order also states that its scope has been narrowed from EO1 in response to "judicial concerns" about the suspension of entry with respect to certain categories of aliens. *Id.* EO2 applies only to individuals outside of the United States who do not have a valid visa as of the issuance of EO1 or EO2. EO2, unlike EO1, expressly exempts lawful permanent residents, dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. *See id.* at 13213-14. The Order also provides that consular officers or Customs and Border Protection officials can exercise discretion in authorizing case-by-case waivers to issue visas and grant entry during the suspension period, and offers examples of when waivers "could be appropriate." *See id.* at 13214-15.

Section 6—"Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017"—suspends USRAP for 120 days. *Id.* at 13215. During this period, the heads of certain executive agencies are directed to review the current USRAP application and adjudication processes, and to determine the additional procedures that "should" be required for individuals seeking admission as refugees. *See id.* at 13215-16. Invoking 8 U.S.C. § 1182(f), Section 6(b) reduces the number of refugees to be admitted from 110,000 to 50,000 in fiscal year 2017. *Id.* at 13216. The Order also removes EO1's preference for refugees facing persecution as a member of a minority religion, and no longer imposes a complete ban on Syrian refugees. Section 6 further provides for discretionary case-by- case waivers. *Id.*

EO2 supplies additional information relevant to national security concerns. The Order includes excerpts from the State Department's 2015 Country Reports on Terrorism, that it asserts demonstrate "why . . . nationals [from the designated countries] continue to present heightened risk to the security of the United States." *Id.* at 13210; *see id.* at 13210-11 (providing a brief description of country conditions for each of the designated countries). The Order states that foreign nationals and refugees have committed acts of terrorism:

> Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction

> as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

Id. at 13212. EO2 does not discuss any instances of domestic terrorism involving nationals from Iran, Libya, Sudan, Syria, or Yemen.

C

Two versions of a report from the Department of Homeland Security ("DHS") surfaced after EO1 issued. First, a draft report from DHS, prepared about one month after EO1 issued and two weeks prior to EO2's issuance, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity" and that citizens of countries affected by EO1 are "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism." Specifically, the DHS report determined that since the spring of 2011, at least eighty-two individuals were inspired by a foreign terrorist group to carry out or attempt to carry out an attack in the United States. Slightly more than half were U.S. citizens born in the United States, and the remaining persons were from twenty-six different countries—with the most individuals originating from Pakistan, followed by Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan. *Id.* Of the six countries included in EO2, only Somalia was identified as being among the "top" countries-of- origin for the terrorists analyzed in the report. During the time period covered in the report, three offenders were from

Somalia; one was from Iran, Sudan, and Yemen each; and none was from Syria or Libya. The final version of the report, issued five days prior to EO2, concluded "that most foreign-born, [U.S.]-based violent extremists likely radicalized several years *after* their entry to the United States, [thus] limiting the ability of screening and vetting officials to prevent their entry because of national security concerns" (emphasis added).

The same day EO2 issued, Attorney General Jefferson B. Sessions III and Secretary of Homeland Security John F. Kelly submitted a letter to the President recommending that he "direct[] a temporary pause in entry" from countries that are "unable or unwilling to provide the United States with adequate information about their nationals" or are designated as "state sponsors of terrorism."

D

The State of Hawai'i ("the State") filed a motion for a TRO seeking to enjoin EO1, which the District of Hawai'i did not rule on because of the nationwide TRO entered in the Western District of Washington. After EO2 issued, the State filed an amended complaint challenging EO2 in order "to protect its residents, its employers, its educational institutions, and its sovereignty." Dr. Elshikh, the Imam of the Muslim Association of Hawai'i, joined the State's challenge because the Order "inflicts a grave injury on Muslims in Hawai'i, including Dr. Elshikh, his family, and members of his Mosque." In 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother—Dr. Elshikh's mother-in-law—a Syrian national living in Syria. Dr. Elshikh fears that his mother- in-law will not be able to enter the United States if EO2 is implemented. Plaintiffs named as Defendants Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security; John F. Kelly, in his official capacity as Secretary of Homeland Security; the U.S. Department of State; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America (collectively referred to as "the Government").

Plaintiffs allege that EO2 suffers similar constitutional and statutory defects as EO1 and claim that the Order violates: the Establishment Clause of the First Amendment; the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion and/or national origin, nationality, or alienage; the Due Process Clause of the Fifth Amendment based on substantive due process rights; the Due Process Clause of the Fifth Amendment based on procedural due process rights; the Immigration and Nationality Act; the Religious Freedom Restoration Act; and the Administrative Procedure Act. For their INA claim, Plaintiffs specifically contend that EO2 violates the INA by discriminating on the basis of nationality, ignoring and modifying the statutory criteria for determining terrorism-related inadmissibility, and exceeding the President's delegated authority under the INA.[3] Plaintiffs also filed a motion for a TRO along with their amended complaint.

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[3] On appeal, Plaintiffs also contend that EO2 violates the INA because it ignores the codified procedures for setting annual refugee admissions provided in 8 U.S.C. § 1157.

On March 15, 2017, the district court granted the TRO, holding that Plaintiffs had shown a likelihood of success on the merits of their Establishment Clause claim, and entered a nationwide injunction prohibiting enforcement of Sections 2 and 6 of EO2. *See Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) ("*Hawai'i TRO*"). On March 29, 2017, the district court granted Plaintiffs' motion to convert the TRO to a preliminary injunction. *See Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1167383 (D. Haw. Mar. 29, 2017) ("*Hawai'i PI*"). The district court declined to narrow the scope of the injunction, concluding that the entirety of Sections 2 and 6 of the Order ran afoul of the Establishment Clause and that the Government did not provide a workable framework for narrowing the scope of the enjoined conduct. *See id.* at *8. The court entered the following injunction:

> Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

Id. at *9.

On March 30, 2017, the Government filed a notice of appeal. This court granted the Government's unopposed motion to expedite the case. The Government requests that this court vacate the preliminary injunction, or at least narrow the injunction, and also stay the injunction pending appeal.

II

The district court held that Plaintiffs were entitled to preliminary relief because they had made a strong showing of success on the merits of their Establishment Clause claim. Applying the secular purpose test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and relying on the historical record that contained "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order," the district court concluded that EO2 was issued with an intent to disfavor people of Islamic faith. *See Hawai'i TRO*, 2017 WL 1011673, at *12-16. In so doing, the district court decided an important and controversial constitutional claim without first expressing its views on Plaintiffs' statutory claims, including their INA-based claim. *See id.* at *11 n.11.

The INA claim was squarely before the district court and briefed and argued before this court. Mindful of the Supreme Court's admonition that "courts should be extremely careful not to issue unnecessary constitutional rulings," "[p]articularly where, as here, a case implicates the fundamental relationship between the Branches," we think it appropriate to turn first to the INA claim. *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam); *accord Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

After first determining that Plaintiffs have standing to assert their INA-based statutory claim, we conclude that Plaintiffs have shown a likelihood of success on the merits of that claim and that the district court's preliminary injunction order can be affirmed in large part based on statutory grounds. For reasons further explained below, we need not, and do not, reach the Establishment Clause claim to resolve this appeal. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

III

Before turning to our review of Plaintiffs' statutory claim, we first address the Government's challenge to the preliminary injunction order on justiciability grounds. The Government contends both that Plaintiffs lack standing to pursue this case and that the case is not yet ripe. The Government further contends that the consular nonreviewability doctrine bars this court from reviewing EO2. We address each contention in turn.

A

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy" and limits who may "maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "At this very preliminary stage of the litigation, [Plaintiffs] may rely on the allegations in their [amended complaint] and whatever other evidence they submitted in support of their [preliminary injunction] motion to meet their burden." *Washington*, 847 F.3d at 1159; *see Lujan*, 504 U.S. at 561.

The district court determined that both the State of Hawai'i and Dr. Elshikh have standing to pursue their Establishment Clause claim. *See Hawai'i TRO*, 2017 WL 1011673, at *7-10. The Government argues that Plaintiffs fail to satisfy the requirements of Article III standing to bring their Establishment Clause claim. Plaintiffs must establish standing for each of their claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). As we do not reach Plaintiffs' Establishment Clause claim, we address only whether Plaintiffs have standing to challenge EO2 based on their INA-based statutory claim and conclude that they do.

1

Dr. Elshikh is an American citizen of Egyptian descent. He alleges that EO2 will prevent his mother-in-law from obtaining a visa to reunite with her family. His mother-in-law is a Syrian national currently living in Syria; she last visited her family in Hawai'i in 2005 and has not yet met two of her five grandchildren. Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother in September 2015, and the petition was approved in February 2016. After EO1 issued, Dr. Elshikh was told that his mother-in-law's visa application for an immigrant visa had been put on hold. After EO1 was enjoined, he was notified that the application had progressed to the next stage of the process, and that her interview would be scheduled at an embassy overseas. Dr. Elshikh understandably and reasonably fears that EO2 will prevent his mother-in-law from entering the country.[4] Dr. Elshikh asserts that he has standing based on the barriers EO2 imposes in preventing him from reuniting his mother-in-law with his family.

This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner. *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (involving a challenge by a U.S. citizen to the denial of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756-60 (1972) (addressing a challenge by American professors to the denial of a visa to a journalist they had invited to speak at several academic events); *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (determining that a U.S. citizen could challenge the denial of her husband's visa). Most similar to this case, in *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*, the D.C. Circuit determined that visa sponsors had standing to assert that the State Department's refusal to process visa applications of Vietnamese citizens living in Hong Kong violated 8 U.S.C. § 1152. 45 F.3d 469, 471-73 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). The court explained that the State Department's actions prolonged the separation of immediate family members, which resulted in injury to the sponsors. *Id.*

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[4] Dr. Elshikh also alleges that EO2 results in a disfavored religion in Hawai'i and the United States; that the Order communicates to his five children that their own country discriminates against individuals who share their ethnicity and religious beliefs; and that the Order has caused members of the Islamic community in Hawai'i, including members of his mosque, to feel that Muslim citizens are targeted because of their religion and national origin. For purposes of determining standing to pursue the INA-based statutory claim, we need not address these aspects of Dr. Elshikh's injury.

Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her. By suspending the entry of nationals from the six designated countries, including Syria, EO2 operates to delay or prevent the issuance of visas to nationals from those countries, including Dr. Elshikh's mother-in-law. Dr. Elshikh has alleged a concrete harm because EO2, specifically the operation of Section 2, is a barrier to reunification with his mother-in-law in light of her stalled visa process. *See id.* (holding that U.S. resident sponsors had standing to challenge the State Department's refusal to process visa applications); *Int'l Refugee Assistance Project v. Trump*,

— F.3d —, No. 17-1351, 2017 WL 2273306, at *10 (4th Cir. May 25, 2017) (en banc), *as amended* (May 31, 2017) (identifying prolonged separation between plaintiff and his wife as a concrete harm). That his mother-in-law's visa application process was placed on hold when EO1 took effect, but moved forward when EO1 was enjoined, further shows that Dr. Elshikh's injury is concrete, real, and immediate if EO2 takes effect. Dr. Elshikh has thus alleged a sufficient injury-in-fact. While not challenged by the Government, it is also clear that Dr. Elshikh has established causation and redressability. His injuries are fairly traceable to the Order, satisfying causation, and enjoining EO2 will remove a barrier to reunification and redress that injury, satisfying redressability.

Dr. Elshikh has met the requirements for constitutional standing with respect to the INA-based statutory claim.

2

The State of Hawai'i alleges two primary theories of harm in asserting its standing: harm to its proprietary interests and impairment of its sovereign interests.

"[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). "And like other such proprietors [the State] may at times need to pursue those interests in court." *Id.* at 601-02.

The State asserts that it has standing because of the injuries inflicted on its university. The University of

Hawai'i ("the University"), which the State operates, has twenty-three graduate students, at least twenty-nine visiting faculty members, and other permanent faculty members from the six countries designated in EO2. The State asserts that EO2 constrains the University's ability to recruit and enroll undergraduate and graduate students, and recruit and hire visiting faculty from the affected countries. The State also contends that EO2 threatens the University's ability to fulfill its educational mission by hampering recruitment of diverse students, preventing scholars from considering employment at the University, dissuading current professors and scholars from continuing their scholarship at the University, hindering the free flow of ideas, and harming its values of inclusiveness and tolerance.

Given the timing of the admissions cycle and this litigation, the State concedes that it is too soon to determine the full impact on recruitment, but asserts that individuals who are not current visa holders or lawful permanent residents would be precluded from considering the University. In its opposition brief, the State gave updated information, explaining that eleven graduate students from the countries affected by the Order have been admitted, and the University was still considering applications from twenty-one other affected applicants. After the case was submitted, Plaintiffs supplemented the record with further updates on the University's admissions cycle.[5] At least three graduate students, each from one of the six designated countries, have accepted their offers of admission and have committed to attending the University. There are eleven graduate student applicants, each from one of the six designated countries, with pending offers of admission for the 2017-18 school year. University classes begin on August 21, 2017, but at least two of the students who have accepted their offers of admission must be present on campus by August 1, 2017 and August 10, 2017, respectively, for their graduate programs. The State further explains that if EO2 takes effect now, these students' ability to obtain visas will be impeded.

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[5] The Government did not oppose Plaintiffs' motion for leave to supplement the record, and we granted the motion.

Before Plaintiffs supplemented the record, the Government argued that the State had not identified any prospective student or faculty member who wished to enter the country *during* Section 2(c)'s 90-day period. However, the State's alleged harm is that EO2 *presently* constrains their recruitment efforts for students and faculty, and that EO2 deters prospective students and faculty members. Given the short admissions cycle—from when the University offers admissions to when international students must decide whether to attend—and the uncertainty of whether EO2 will inhibit their ability to secure a visa before the fall semester begins, EO2's deterrent effect is an injury that is "concrete" and "imminent," as opposed to merely "speculative." *See Lujan*, 504 U.S. at 560-61 (internal quotation marks omitted). Of course, a student who is not permitted to obtain a visa and enter our country would not accept an offer of admission.

The Government next contends that Plaintiffs cannot rely on events that unfolded after the filing of the complaint to establish standing. This argument is not persuasive. The State had previously contended that its recruitment was constrained by EO2 and its supplemental declaration merely provides greater detail regarding the students who may be unable to join the academic community this fall if EO2 takes effect. We consider the supplemental information as further evidence that EO2 will harm the State because students affected by Section 2(c) may not attend the University, and the University will lose tuition and educational benefits.

The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body. *See Washington*, 847 F.3d at 1161 (holding that states, as operators of universities, had Article III standing to challenge EO1 based on harms to their proprietary interests); *Texas v. United States*, 809 F.3d 134, 155-63 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the state of Texas had standing to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program based on its alleged injury of subsidizing driver's licenses to DAPA beneficiaries). We further conclude that the State has shown that its injury is fairly traceable to EO2 and that enjoining EO2 would redress its harm.

The State also presents an alternative standing theory: that the Order impairs its sovereign interests in carrying out its refugee policies, among other things.

A state has an interest in its "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." *Alfred L. Snapp & Son*, 458 U.S. at 601. The State contends that EO2 hinders the exercise of its sovereign power to enforce its laws and policies and this inflicts an injury sufficient to provide the State standing to challenge the Order. The State has laws protecting equal rights, barring discrimination, and fostering diversity. *See, e.g.*, Haw. Const. art. 1, §§ 2, 5; Haw. Rev. Stat. §§ 489-3, 515-3. Specific to refugees, the State created the Office of Community Services ("OCS"), which is directed to "[a]ssist and coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." Haw. Rev. Stat. § 371K-4. OCS operates multiple programs for refugees.

The State has resettled three refugees this fiscal year, and at least twenty since 2010. EO2 would prevent the State from assisting with refugee resettlement and thus prevent it from effectuating its policies aimed at assisting refugee and immigrant populations. *See id.* The State's requested injunctive relief would permit it to assist in the resettlement of refugees, at least through fiscal year 2017. As the State exercises "sovereign power over individuals and entities within the relevant jurisdiction" in administering OCS, we conclude, at this preliminary stage, that the State has made sufficient allegations to support standing to challenge the refugee-related provisions of EO2. *See Alfred L. Snapp & Son*, 458 U.S. at 601; *see also Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (collecting cases where state was found to possess sovereign standing based on state statutes that regulated behavior or provided for the administration of a state program).

Concluding that Dr. Elshikh and the State have satisfied Article III's standing requirements,[6] we turn to whether Plaintiffs are within the "zone of interests" protected by the INA.

3

Because Plaintiffs allege a statutory claim, we must determine whether they meet the requirement of having interests that "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal quotation marks omitted).

We have little trouble determining that Dr. Elshikh is within the zone of interests of the INA to challenge EO2 based on this statutory claim. He asserts that the travel ban prevents his mother-in-law from reuniting with his family. *See Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 471-72 ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (internal quotation marks, citations, and alterations omitted)).

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[6] The State has asserted other proprietary interests, including the loss of tourism revenue. The State also appears to present a standing theory based on its quasi-sovereign interests, as *parens patriae*, to secure its residents from the harmful effects of discrimination. We do not reach these arguments because we conclude that the State's proprietary interests, as an operator of the University of Hawai'i, and its sovereign interests, in carrying out its refugee programs and policies, are sufficient to confer standing. *See Washington*, 847 F.3d at 1161 n.5.

Likewise, the State's efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the INA. The INA makes clear that a nonimmigrant student may be admitted into the United States. *See* 8 U.S.C. § 1101(a)(15)(F) (identifying students qualified to pursue a full course of study); 8 C.F.R. § 214.2(f) (providing the requirements for nonimmigrant students, including those in colleges and universities). The INA also provides that nonimmigrant scholars and teachers may be admitted into the United States. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in fields of specialized knowledge or skill); *id.* § 1101(a)(15)(H) (identifying aliens coming to perform services in a specialty occupation); *id.* § 1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business, or athletics). International students and visiting faculty may qualify for F-1 visas, J-1 27 visas, H-1B visas, or O-1 visas. *See* Directory of Visa Categories, U.S. Dep't of State, https://travel.state.gov/content/visas/en/general/all-visa-categories.html (last visited June 6, 2017). The INA leaves no doubt that the State's interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA.

The State's interest in effectuating its refugee resettlement policies and programs also falls within the zone of interests protected by the INA. *See* 8 U.S.C. § 1101(a)(42) (defining "refugees"); *id.* § 1157 (providing the procedure for determining the number of refugee admissions). These provisions of the INA were amended to provide a "systematic procedure" for the admission of refugees into the United States, as well as "uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980). The State argues that EO2 upsets this finely-tuned system devised by Congress.

We conclude that Plaintiffs' claims of injury as a result of the alleged statutory violations are, at the least, "*arguably* within the zone of interests" that the INA protects.[7] *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

Plaintiffs have standing to assert their INA-based statutory claim that EO2 exceeds the scope of the President's authority under the INA and conflicts with various INA provisions.

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[7] The Government also argues that third party prudential standing limitations counsel against this court deciding Plaintiffs' Establishment Clause claim. To the extent this argument applies to Plaintiffs' INA-based statutory claim, we reject it because Plaintiffs have shown that they have suffered injuries as a result of EO2.

B

The Government next argues that Plaintiffs' claims are speculative and not ripe. "Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (internal quotations marks and alteration omitted). "Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

We are unpersuaded by the Government's arguments that *until* a student or faculty member requests a waiver and it is denied, or *until* Dr. Elshikh's mother-in-law requests a waiver and she is denied,[8] Plaintiffs injuries are not ripe because they assume "contingent future events that may not occur." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted)).

Although the waiver may, in theory, provide students, visiting faculty members, or Dr. Elshikh's mother-in-law an opportunity to obtain visas, the waiver is discretionary. Indeed, no one can count on it. The Order poses hardships to nationals from the six designated countries by barring throughout the suspension period their ability to obtain visas. The waiver provision neither guarantees that waivers will be granted nor provides a process for applying for a waiver; moreover, the ultimate decision is clearly committed to a consular officer's discretion. *See* 82 Fed. Reg. at 13214 ("Case-by-case waivers *could be appropriate* in circumstances such as the following . . . .") (emphasis added); *id.* at 13219 (stating that nothing in the Order provides any "enforceable" rights). The discretionary waiver is not "a sufficient safety valve," *Washington*, 847 F.3d at 1169, and is a far cry from the "contingent future" argued by the Government. Here, nationals from the six designated countries, including Dr. Elshikh's mother-in-law and students who have accepted, or been offered, admission to the University of Hawai'i, are burdened by EO2 because they are not permitted entry, and whether they might obtain a waiver is speculative and at the discretion of a consular officer or a Customs and Border Protection official. *See* 82 Fed. Reg. at 13214.

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[8] The Government needlessly argues that travel conditions in Syria make it speculative that Dr. Elshikh's mother-in-law would have made her application interview scheduled for May 24, 2017. This argument does not diminish Dr. Elshikh's argument that the Order's suspension of entry of nationals from the six designated countries creates a significant obstacle to reuniting his mother-in-law with him and his family.

We decline the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver to assess whether Plaintiffs have shown a likelihood of success on the merits of their claims. Regardless of whether Dr. Elshikh's mother-in-law or the University's prospective students and faculty members might conceivably obtain such a waiver, they will face substantial hardship if we were to first require that they try to obtain a waiver before we will consider their case. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). We conclude that the claim is ripe for review.

C

Finally, the Government renews the argument it made before this court in *Washington v. Trump* that we may not review EO2 because the consular nonreviewability doctrine counsels that the decision to issue or withhold a visa is not subject to judicial review. *See Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986) ("[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review."). We reject this argument.

Plaintiffs do not seek review of an individual consular officer's decision to grant or to deny a visa pursuant to valid regulations, which could implicate the consular nonreviewability doctrine. Plaintiffs instead challenge "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162. Courts can and do review both constitutional and statutory "challenges to the substance and implementation of immigration policy." *Id.* at 1163; *see, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993) (addressing the merits of a challenge that an executive order violated the INA and the United Nations Convention Relating to the Status of Refugees); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (addressing whether a section of the INA that authorized one House of Congress to invalidate a decision of the Executive to allow a deportable alien to remain in the United States was unconstitutional).

This case is justiciable because Plaintiffs seek judicial review of EO2, contending that EO2 exceeds the statutory authority delegated by Congress and constitutional boundaries. "This is a familiar judicial exercise." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). We reject the Government's argument that the Order is not subject to judicial review. Although "[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

Whatever deference we accord to the President's immigration and national security policy judgments does not preclude us from reviewing the policy at all. *See Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("[D]eference does not mean abdication."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role.").

We do not abdicate the judicial role, and we affirm our obligation "to say what the law is" in this case. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). We turn to the merits of the appeal of the preliminary injunction order.

IV

A

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. We may affirm the district court's entry of the preliminary injunction "on any ground supported by the record." *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

B

We consider whether Plaintiffs are entitled to preliminary relief based on the likelihood that EO2 violates the INA.[9] First, we address whether the President complied with the conditions set forth in § 1182(f), which are necessary for invoking his authority. We next address the conflicts between EO2 and other provisions of the INA.

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[9] This claim looks at whether the President appropriately exercised his authority under § 1182(f) by satisfying its precondition, and whether, and to what extent, his authority under § 1182(f) is cabined by other provisions of the INA. Because this challenge does not look at whether "the Executive exercises this [delegated and conditional exercise of] power *negatively*," *Mandel*, 408 U.S. at 770 (emphasis added), nor involves a constitutional challenge by a citizen to a visa denial on the basis of congressionally enumerated standards, *id.* at 769-70, but rather looks at whether the President exceeded the scope of his delegated authority, we do not apply *Mandel*'s "facially legitimate and bona fide reason," *id.*, standard. *See Sale*, 509 U.S. at 166-77 (reviewing whether the executive order complied with the INA without reference to *Mandel*'s standard).

1

Under Article I of the Constitution, the power to make immigration laws "is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954); *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (internal quotation marks omitted)); *id.* at 796 ("The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification . . . have been recognized as matters solely for the responsibility of the Congress . . . ." (internal quotation marks omitted)).

In the INA of 1952, Congress delegated some of its power to the President through Section 212(f), which provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

In Section 2(c) of the Order, the President invokes this power along with § 1185(a)[10] to suspend for 90 days the entry of nationals from the six designated countries. *See* 82 Fed. Reg. at 13213. In Section 6(a) of the Order, the President invokes neither section to suspend travel of refugees and to suspend decisions on applications for refugee status for 120 days, but, in Section 6(b), the President invokes § 1182(f) to cap refugee admissions at 50,000 for the 2017 fiscal year. *Id.* at 13215-16.

The parties dispute whether EO2 falls clearly within the President's congressionally delegated authority. To be sure, § 1182(f) gives the President broad authority to suspend the entry of aliens or classes of aliens. However, this authority is not unlimited. *Cf. Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("[I]f that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."); *J.W. Hampton, Jr.*,

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[10] Section 1185(a)(1) states:

> Unless otherwise ordered by the President, it shall be unlawful —(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe[.]

8 U.S.C. § 1185(a)(1). The Government does not argue that § 1185(a)(1) provides an independent basis for the suspension of entry. Because, here, this section does not grant the President a meaningfully different authority than § 1182(f), and 35 because § 1182(f) specifically provides for the President's authority to suspend entry, our analysis proceeds under § 1182(f), understanding that the "reasonable rules, regulations, and orders" the President prescribes would need to, at a minimum, align with the President's authority under § 1182(f).

& Co. v. United States, 276 U.S. 394, 409 (1928) ("[L]egislative action is not a forbidden delegation of legislative power" if Congress provides an "intelligible principle to which the person or body authorized . . . is directed to conform."). Section 1182(f) requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States.[11] This section requires that the President's findings support the conclusion that entry of all nationals from the six designated countries, all refugees, and refugees in excess of 50,000 would be harmful to the national interest. There is no sufficient finding in EO2 that the entry of the excluded classes would be detrimental to the interests of the United States.

i

Section 2(c) declares that "the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States" and directs that the entry of nationals from those designated countries be barred for 90 days. 82 Fed. Reg. at 13213. The provision bans more than 180 million people from entry based on their national origin, including nationals who may have never been physically present in those countries. *See* Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 17. Section 2(c) states:

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[11] We construe the term "detrimental" to have its common-sense, dictionary definition. Detrimental is defined as "causing loss or damage; harmful, injurious, hurtful." *Detrimental*, Oxford English Dictionary, http://www.oed.com/view/Entry/51332?redirectedFrom=detrimental#eid. Throughout the opinion, in addition to the term "detrimental," we also use its synonyms "harmful" and "injurious."

> [1] To temporarily reduce investigative burdens on relevant agencies during the review period [of the United States' vetting procedures], [2] to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [3] to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and [4] in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. [§§] 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended.

82 Fed. Reg. at 13213. The Government explains that the Order's objective "is to address the risk that potential terrorists might exploit possible weaknesses in the Nation's screening and vetting procedures while the review of those procedures is underway."

We reject the first three reasons provided in Section 2(c) because they relate to preservation of government resources to review existing procedures and ensure adequate vetting procedures. There is no finding that present vetting standards are inadequate, and no finding that absent the improved vetting procedures there likely will be harm to our national interests. These identified reasons do not support the conclusion that the entry of nationals from the six designated countries would be harmful to our national interests.

We turn to the fourth reason—national security concerns—and examine whether it confers a legally sufficient basis for the President's conclusion that the nationality-based entry restriction is warranted. Section 1(d) of the Order explains that nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen warrant additional scrutiny because:

> Each of these *countries* is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these *countries* of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these *countries* typically delay issuing, or refuse to issue, travel documents.

Id. at 13210 (emphasis added).

Because of these country conditions, the Order concludes that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high."

Id. at 13211. The Order further indicates that "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States[,]" but does not identify the number of nationals from the six designated countries who have been so convicted.[12] *See id.* at 13212.

The Order makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States. *See Int'l Refugee Assistance Project*, 2017 WL 2273306, at *31 (Keenan, J., concurring in part and concurring in the judgment) ("[T]he Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States.").

The Order does not tie these nationals in any way to terrorist organizations within the six designated countries. It does not identify these nationals as contributors to active conflict or as those responsible for insecure country conditions. It does not provide any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness.[13] In short, the Order does not provide a

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[12] Amicus Cato Institute explains that over the past decade and a half, only twenty-six nationals from the six designated countries have been convicted for any kind of terrorism offense, and that only four nationals from the six designated countries have been convicted of attempting or plotting a terrorist attack in the United States in that time frame. Brief of the Cato Institute as Amicus Curiae, Dkt. No. 170 at 11-12. Since the September 11, 2001 attacks, twelve people have succeeded in carrying out fatal domestic terrorist attacks—none committed by nationals from the six designated countries in EO2. *See* Brief of Foundation of Children of Iran and Iranian Alliance Across Borders as Amici Curiae, Dkt. No. 77 at 23.

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[13] Former Presidents have invoked § 1182(f) under non-exigent circumstances to address compromised security conditions abroad but have tied exclusions to the culpable conduct of barred aliens, such as aliens who contributed to a country's situation in a specified way or were members of particular narrowly defined and/or dangerous groups. *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* 6-10, Congressional Research Service (2017) (listing categories of aliens excluded under 8 U.S.C. § 1182(f)); *see also* 9 *Foreign Affairs Manual* § 302.14-3(B)(1)(b) (2016), https://fam.state.gov/FAM/09FAM/09FAM030214.html (stating that executive orders issued under § 1182(f) have typically applied to "individuals"; have sometimes been "based on affiliation"; and otherwise have suspended entry "based on objectionable conduct"); Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae, Dkt. No. 176 at 18-19 ("None of the Executive actions cited elsewhere by the Government, nor any others known to amici, invoked § 1182(f) to suspend entry from one or more countries based on the assumption that nationals from those countries were inherently dangerous." (footnotes omitted)). President Obama's Executive Order 13726, for example, suspended the entry into the United States of persons who were responsible or complicit in particular actions or policies that threaten the stability of Libya. *See* 81 Fed. Reg. 23559 (Apr. 19, 2016).

In two instances, former Presidents have distinguished classes of aliens on the basis of nationality. But these distinctions were made not because of a particular concern that entry of the individuals themselves would be detrimental, but rather, as retaliatory diplomatic measures responsive to government conduct directed at the United States. For example, President Carter's proclamation barring the future entry of Iranians occurred during the exigent circumstance of the Iranian hostage crisis. This was one of many sanctions imposed to increase political pressure on the Iranian government to ensure the safe return of American hostages. *See* Exec. Order 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979), *amended by* rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States.[14]

The Order's discussion of country conditions fails to bridge the gap. Indeed, its use of nationality as the sole basis for suspending entry means that nationals

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Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980); President Jimmy Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions*, The American Presidency Project (Apr. 7, 1980), http://www.presidency.ucsb.edu/ws/?pid=33233%20. President Reagan's suspension of entry of certain Cuban nationals as immigrants came as a response to the Cuban government's own suspension of "all types of procedures regarding the execution" of an immigration agreement between the United States and Cuba, which had "disrupt[ed] normal migration procedures between the two countries." *See* Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 22, 1986).

[14] Indeed, the President recently confirmed his assessment that it is the "countries" that are inherently dangerous, rather than the 180 million individual nationals of those countries who are barred from entry under the President's "travel ban." *See* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM), https://twitter.com/realDonaldTrump/status/871899511 525961728 ("That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!") (emphasis in original); *see also* Elizabeth Landers, White House: Trump's tweets are "official statements", CNN (June 6, 2017, 4:37 PM), http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/ (reporting the White House Press Secretary's confirmation that the President's tweets are "considered official statements by the President of the United States"). We take judicial notice of President Trump's statement as the veracity of this statement "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry. Yet, nationals of other countries who do have meaningful ties to the six designated countries—and may be contributing to the very country conditions discussed—fall outside the scope of Section 2(c). Consequently, EO2's focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." *Hawai'i TRO*, 2017 WL 1011673, at *15 (internal quotation marks and alterations omitted); *see also* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 170 at 14-15 (providing statistics on nationals of the designated countries living in other countries as migrants, refugees, or asylum seekers and explaining that Syrian and Iranian nationals do not gain nationality by virtue of their place of birth).

Although the Order explains that country conditions in the six designated countries lessen their governments' ability to share information about nationals seeking to travel to our country, the Order specifically avoids making any finding that the current screening processes are inadequate. As the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa or other document for entry and is not inadmissible. *See* 8 U.S.C. § 1361. The Government already can exclude individuals who do not meet that burden. *See id.* The Order offers no further reason explaining how this individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States.

Finally, the Order relies on 8 U.S.C. § 1187(a)(12) to explain why the six countries have been designated. 82 Fed. Reg. at 13210. In § 1187(a)(12), Congress prevented use of the Visa Waiver Program by dual nationals of, or those who have visited in the last six years, (1) Iraq and Syria, (2) any country designated by the Secretary of State as a state sponsor of terrorism, and (3) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. Rather than setting an outright ban on entry of nationals from these countries, Congress restricted access to the tourist Visa Waiver Program and instead required that persons who are nationals of or have recently traveled to these countries enter the United States with a visa. This provision reflects Congress's considered view on similar security concerns that the Order seeks to address. *See Chadha*, 462 U.S. at 951, 959 (explaining that our founders "consciously" chose to place the legislative process in the hands of a "deliberate and deliberative" body). The Order identifies no new information to justify Section 2(c)'s blanket ban as contrasted with § 1187(a)(12)'s restriction from the Visa Waiver Program. Moreover, relying on § 1187(a)(12) alone, which requires that aliens from these countries undergo vetting through visa procedures, does not explain why their *entry* would be detrimental to the interests of the United States. To the contrary, it effectively negates the Order's statement of detriment—that the "*unrestricted* entry into the United States of nationals [of the six designated countries] would be detrimental to the interests of the United States." 82 Fed. Reg. at 13213 (emphasis added). Section 1187(a)(12) dictates that the entry of individuals covered by the Order is never "unrestricted."

In conclusion, the Order does not offer a sufficient justification to suspend the entry of more than 180 million people on the basis of nationality. National security is not a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under § 1182(f). *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *see also Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("[T]he exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption."). Section 1182(f) requires that the President exercise his authority only after meeting the precondition of finding that entry of an alien or class of aliens *would be* detrimental to the interests of the United States. Here, the President has not done so.

ii

Section 6(a) suspends travel of refugees into the United States under USRAP and suspends decisions on applications for refugee status for 120 days but does not specifically announce that the entry of refugees would be detrimental to the interests of the United States. 82 Fed. Reg. at 13215.

Assuming the President also relied on § 1182(f) to suspend USRAP for 120 days, EO2 provides the following information to possibly support the conclusion that refugee admissions would injure the national interest. First, EO2 explains that the screening and vetting procedures associated with USRAP "play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States," and that it is the policy of the United States to improve screening and vetting procedures associated with USRAP. *Id.* at 13209. Section 1(h) cites two examples of refugees who have been convicted of terrorism-related crimes in the United States:

> [1] [I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses.[15] [2] [I]n October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was

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[15] These two Iraqi nationals pleaded guilty to federal terrorism charges for engaging in terrorism against Americans overseas and providing material support to foreign terrorists and did not face charges for planning a domestic terrorist attack. *See* Press Release: Former Iraqi Terrorists Living in Kentucky Sentenced for Terrorist Activities, U.S. Dep't of Justice, https://www.justice.gov/opa/pr/former-iraqi-terrorists-living-kentucky-sentenced-terrorist-activities (Jan. 29, 2013) (last visited June 6, 2017).

> sentenced to 30 years in prison for attempting to use a weapon of mass destruction . . . .[16]

82 Fed. Reg. at 13212. Section 1(h) also explains that there are "more than 300 persons who entered the United States as refugees [who] are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation." *Id.*

EO2 does not reveal any threat or harm to warrant suspension of USRAP for 120 days and does not support the conclusion that the entry of refugees in the interim time period would be harmful. Nor does it provide any indication that present vetting and screening procedures are inadequate.[17] Instead, EO2 justifies the 120-day suspension as a review period of USRAP application and adjudication processes. 82 Fed. Reg. at 13215. The Government reiterates that the President directed the suspension "in order to allow the Secretary of State to review application and adjudication processes." These explanations do not support a finding that the travel and admission of refugees would be detrimental to the interests of the United States.

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[16] This Somali national entered the United States at the age of three in approximately 1994; the conduct underlying his conviction occurred in 2010 when he was nineteen years old. *See United States v. Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016). His background is consistent with DHS's report that most foreign-born, U.S.-based violent extremists are "likely radicalized several years *after* their entry to the United States," thus "limiting the ability of screening and vetting officials to prevent their entry because of national security concerns" (emphasis added).

[17] Refugees receive the most thorough vetting of all travelers to the United States in a process that takes eighteen to twenty-four months. By the time refugees are approved for resettlement in the United States, they have been reviewed by the United Nations High Commissioner for Refugees, the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and the U.S. intelligence community. *See* Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 14-16.

iii

Section 6(b) of EO2 restricts entry of refugees to no more than 50,000 in the 2017 fiscal year because entry in excess of 50,000 "would be detrimental to the interests of the United States." 82 Fed. Reg. at 13216. But in accordance with 8 U.S.C. § 1157, President Obama previously determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified by humanitarian concerns or otherwise in the national interest. *See* Presidential Determination on Refugee Admissions for Fiscal Year 2017, Presidential Determination No. 2016-13, 81 Fed. Reg. 70315 (Sept. 28, 2016); *see also* Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress, https://www.state.gov/documents/organization/262168.pdf.[18]

To the extent that 60,000 additional refugees can be considered a class of aliens, EO2 makes *no* findings to justify barring entry in excess of 50,000 as detrimental to the interests of the United States. EO2 gives no explanation for why the 50,001st to the 110,000th refugee would be harmful to the national interest, nor does it specify any further threat to national security. And there is not any rationale explaining why the previous target admission of 110,000 refugees this fiscal year was justified by humanitarian concerns or otherwise in the national interest, *see* 8 U.S.C. § 1157(a)(2), but that the entry of more than 50,000 refugees this same fiscal year would be detrimental to the national interest. Here too, the President did not meet the statutory precondition of exercising his authority under § 1182(f) to cap refugee admissions.

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[18] As of May 31, 2017, the United States has admitted 46,403 refugees in the 2017 fiscal year. U.S. Dep't of State, Bureau of Population, Refugees, and Migration, Refugee Admissions Report (2017), http://www.wrapsnet.org/admissions-and-arrivals (last visited June 6, 2017).

The actions taken in Sections 2 and 6 require the President first to make sufficient findings that the entry of nationals from the six designated countries and the entry of all refugees would be detrimental to the interests of the United States. We conclude that the President did not satisfy this precondition before exercising his delegated authority. Plaintiffs have shown a likelihood of success on the merits of their claim that the President exceeded his authority under §§ 1182(f) and 1185(a).

2

Plaintiffs contend that Section 2(c) of the Order violates the INA because it discriminates on the basis of nationality, thus violating the non-discrimination mandate of § 1152(a)(1)(A) of the INA. They argue that although the President is given broad authority under § 1182(f), this authority is restrained by § 1152(a)(1)(A).

Contemporaneous to enacting the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress passed the INA of 1965 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965).

Section 1152(a)(1)(A) was enacted as part of that act, and provides:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A) (emphasis added). Section 1152(a)(1)(A) contains specific exemptions, and § 1182(f) is not among them.

The Government tries to reconcile the Order's Section 2(c) with § 1152(a)(1)(A) by arguing that Section 2(c) bars *entry* of nationals from the six designated countries but does not deny the *issuance of immigrant visas* based on nationality. EO2's suspension of entry on the basis of nationality, however, in substance operates as a ban on visa issuance on the basis of nationality. The Order's text confirms as much. Its primary purpose is to evaluate screening and vetting procedures associated with the visa issuance process. 82 Fed. Reg. at 13209. EO2 affects nationals of the six designated countries who were outside of the United States on the effective date of the Order but did not have a valid visa at specific times, such as the effective date of EO1. 82 Fed. Reg. at 13213. Further, it provides for a waiver so consular officers or Customs and Border Protection officials may authorize the issuance of visas during the suspension period. *Id.* at 13214. The Government also stresses that it should not be required to issue visas for aliens who are validly barred from entry, explaining that "[r]equiring that such aliens be issued visas permitting them to travel to this country, only to be denied entry upon arrival, would create needless difficulties and confusion." Indeed, the Government clarified at oral argument that as a practical matter, the entry ban would be implemented through visa denials. Moreover, the statute makes clear that aliens deemed inadmissible under § 1182, including under § 1182(f) "are ineligible to receive visas," thus confirming the substantial overlap between a denial of entry under § 1182(f) and a visa denial. *See* 8 U.S.C. § 1182(a); *see also Int'l Refugee Assistance Project*, 2017 WL 2273306, at *52 (Thacker, J., concurring) (explaining that the Government's "own arguments and the text and operation of [EO2] belie [the] notion" that the visa issuance process is a different activity than suspension of entry).

We cannot blind ourselves to the fact that, for nationals of the six designated countries, EO2 is effectively a ban on the issuance of immigrant visas. If allowed to stand, EO2 would bar issuance of visas based on nationality in violation of § 1152(a)(1)(A). The Government did not dispute this point at oral argument, and it stands to reason that the whole system of the visa issuance would grind to a halt for nationals of the six designated countries whose entry is barred from the United States. Issuance of visas will automatically stop for those who are banned based on nationality. Yet Congress could not have used "more explicit language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

The Government additionally argues that § 1152(a)(1)(A) does not displace the President's preexisting authority under § 1182(f), because the President may validly bar *entry* and the non-discrimination mandate applies strictly to the *issuance of visas*. Based on the plain statutory text, the Government contends that the non-discrimination mandate of § 1152(a)(1)(A) does not reach the President's suspension of entry under § 1182(f).

This argument, however, presents a clear conflict between § 1152(a)(1)(A) and § 1182, because it would enable the President to restore discrimination on the basis of nationality that Congress sought to eliminate. It is our duty, if possible, to reconcile the President's statutory authority under § 1182(f) with the non-discrimination mandate of § 1152(a)(1)(A). We begin with the instruction that "all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hyson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973); *accord Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . fit, if possible, all parts into an harmonious whole." (internal citation and quotation marks omitted)). We also look "to the design of the statute as a whole and to its object and policy." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

Under the Government's argument, the President could circumvent the limitations set by § 1152(a)(1)(A) by permitting the issuance of visas to nationals of the six designated countries, but then deny them entry. Congress could not have intended to permit the President to flout § 1152(a) so easily. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (courts should not read statutes in such a way that renders them a "nullity" or is "unsustainable").

To avoid this result, and to give effect to § 1152(a)(1)(A), the section "is best read to prohibit discrimination throughout the visa process, which must include the decision whether to admit a visa holder upon presenting the visa." Brief of Former Immigration and Homeland Security Officials as Amici Curiae, Dkt. No. 176 at 9. In prohibiting nationality-based discrimination in the issuance of immigrant visas, Congress also in effect prohibited nationality-based discrimination in the admission of aliens. "Congress could not have intended to prohibit discrimination at the embassy, but permit it at the airport gate." Brief of Technology Companies as Amici Curiae, Dkt. No. 180 at 20. We do not suggest that visa holders must gain automatic entry into the United States, but rather, that visa holders cannot be discriminated against on the basis of "race, sex, nationality, place of birth, or place of residence" throughout the visa process, whether during the issuance of a visa or at the port of entry.[19]

Our conclusion that § 1152(a)(1)(A)'s nondiscrimination mandate cabins the President's authority under § 1182(f) is reinforced by other canons of statutory construction.

First, a later enacted, more specific statute generally governs over an earlier, more general one. *See* Antonin Scalia & Bryan A. Garner, *Reading Law:*

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[19] While a foreign national may properly obtain a visa, this does not guarantee entry into the United States because they may otherwise be inadmissible. *See* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States."); *see also* 8 U.S.C. § 1182 (listing the myriad ways an alien can be deemed inadmissible).

The Interpretation of Legal Texts 183-87 (2012). Here, § 1152(a)(1)(A) was enacted in 1965, after § 1182(f) was enacted in 1952. Section 1152(a)(1)(A) is also more specific, and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

Second, § 1152(a)(1)(A) specifically identifies exemptions from the non-discrimination mandate, implying that unmentioned sections are not exempted. *See United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned."). Section 1152(a)(1)(A) explicitly exempts three different INA provisions from its application—8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153—all of which deal with giving preference to certain immigrants, such as family members of current citizens and permanent residents. Had Congress likewise intended to permit § 1182(f) to override § 1152(a)(1)(A)'s non-discrimination requirement, it would have done so in the same way it did for the other provisions.

The Government contends that §§ 1182(f) and 1185(a)(1) "have long been understood to permit the president to draw nationality-based distinctions." However, as discussed above, *supra* note 13, prior executive orders and proclamations did not suspend classes of aliens on the basis of national origin, but instead on the basis of affiliation or culpable conduct. *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* 6-10, Congressional Research Service (2017). The other instances cited by the Government are distinguishable. The executive order at issue in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), made no nationality-based distinctions and concerned "suspend[ing] the entry of aliens coming by sea to the United States without necessary documentation." Exec. Order No. 12807, 57 Fed. Reg. 23133 (May 24, 1992). President Carter's executive orders in response to the Iranian hostage crisis delegated authority to the Secretary of State and the Attorney General to prescribe limitations governing the entry of Iranian nationals and did not ban Iranian immigrants outright. *See* Exec. Order 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979), *amended by* Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980). Finally, President Reagan's Proclamation 5517 suspended the entry of Cuban nationals coming as immigrants, with some exceptions. 51 Fed. Reg. 30470 (Aug. 22, 1986). The proclamation did not exclude all foreign nationals, as exceptions were provided, and the proclamation was in response to Cuba's decision "'to suspend all types of procedures regarding the execution' of the December 14, 1984, immigration agreement between the United States and Cuba."[20]

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[20] Because these executive actions were not challenged as violations of § 1182(f) or § 1152(a)(1)(A), "the judiciary [has not] address[ed] whether the order[s] complied with those provisions or the Constitution." *Int'l Refugee Assistance Project*, 2017 WL 2273306, at *45 n.11 (Wynn, J., concurring).

Id. To be clear, Presidents have invoked §§ 1182(f) and 1185(a)(1) to restrict certain aliens or classes of aliens from entering the United States, but EO2 is unprecedented in its scope, purpose, and breadth.

The Government also argues that the President may engage in discrimination on the basis of nationality because of the exception provided in § 1152(a)(1)(B). Section 1152(a)(1)(B) provides, "[n]othing in [§ 1152(a)(1)(A)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." However, this provision governs the Secretary of State's manner and place for processing applications, not the President's asserted ability to deny immigrant visas on the basis of nationality.

Having considered the President's authority under § 1182(f) and the non-discrimination mandate of § 1152(a)(1)(A), we also conclude that Plaintiffs have shown a likelihood of success on the merits of their claim that Section 2(c) of the Order, in suspending the issuance of immigrant visas and denying entry based on nationality, exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress.

3

Aside from the President's failure to make the requisite findings to justify reducing the entry of refugees in fiscal year 2017 as an exercise of authority under § 1182(f), Plaintiffs contend that 8 U.S.C. § 1157 circumscribes the President's actions in setting the number of refugees to be admitted this fiscal year. We agree.

The Refugee Act of 1980 amended the INA "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980).

The Act requires that the President, after consulting with Congress, set the annual admission of refugees before the beginning of every fiscal year:

> [T]he number of refugees who may be admitted under this section in any fiscal year . . . shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

8 U.S.C. § 1157(a)(2). "Appropriate consultation" is defined as "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives." *Id.* § 1157(e). After undergoing this process in 2016, President Obama determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified by humanitarian concerns or otherwise in the national interest. *See* 81 Fed. Reg. at 70315. Section 6(b) of EO2 reduced the refugee admission cap for the same year to 50,000. *See* 82 Fed. Reg. at 13216.

The statute requires the President to set the number of annual refugee admissions (1) before the start of the new fiscal year, and (2) after appropriate consultation with Congress. The Government responds that § 1157 only refers to a ceiling—not the floor—for the number of refugees who may be admitted, and that §§ 1182(f) and 1185(a)(1) permit the President to lower the number of refugees permitted to enter.

We disagree. This interpretation reads out the language that the number of refugees who may be admitted *shall be* the number determined by the President. *See* 8 U.S.C. § 1157(a)(2). The Government's argument would require us to conclude that Congress set forth very specific requirements for the President to provide the number and allocation of the refugees to be admitted as justified by humanitarian concerns or the national interest, after appropriate consultation, only to permit the President to order a midyear reduction in the level of refugee admissions, and to do so without consulting Congress. Section 1157 contemplates that the President, after consultation with Congress, may *increase* the number of refugees admitted in the middle of the fiscal year, but does not provide a mechanism for the President to *decrease* the number of refugees to be admitted mid-year. *See id.* § 1157(b) (describing how, after appropriate consultation, the President may fix a number of additional refugees to be admitted to the United States).

Well-settled interpretive canons further explain why § 1182(f) does not give the President authority to override the requirements of § 1157. First, applying the "later in time" canon, § 1182(f) was adopted in 1952, and § 1157 was adopted in 1980, indicating that this subsequent statute shapes the scope of the President's authority. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 143 ("The 'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988))).

Second, § 1157, the more specific provision, controls the more general § 1182(f). *See id.* ("This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Section 1157 provides a very specific process for "appropriate consultation" that the President must follow before setting the number of refugees to be admitted to the United States that is justified by humanitarian concerns or is otherwise in the national interest. "Appropriate consultation" requires in-person discussions between cabinet-level representatives and members of Congress "to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, [and] to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest . . . ." 8 U.S.C. § 1157(e). As part of the consultation, the Executive also must present the following information:

> (1) A description of the nature of the refugee situation.
>
> (2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

Id. According to the statute, this information would ideally be provided at least two weeks in advance of the discussions. *Id.*

Congress prescribed specific actions the President must take before setting the number of refugees who may be admitted as justified by humanitarian concerns or as otherwise in the national interest. *See generally* 8 U.S.C. § 1157. The President relied on § 1182(f)—an earlier and more general provision—to conclude that admission of refugees above 50,000 is detrimental to the interest of the United States. But § 1157, a "narrow, precise, and specific" statutory provision, may not be overridden by § 1182(f), a provision "covering a more generalized spectrum" of issues. *Radzanower*, 426 U.S. at 153-54; *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 504 (2012) (explaining that the interpretive principle *generalia specialibus non derogant* means that "the specific governs the general" and applies to conflict between "laws of equivalent dignity").

As a result, Plaintiffs have also shown a likelihood of success on the merits for their argument that Section 6(b) of EO2 conflicts with 8 U.S.C. § 1157.

4

Plaintiffs additionally argue that EO2 conflicts with 8 U.S.C. § 1182(a)(3)(B), which sets forth detailed and "specific criteria for determining terrorism-related inadmissibility." *Din*, 135 S. Ct. at 2140.

EO2 attempts to eliminate the marginal risk of "erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts," 82 Fed. Reg. at 13211, by suspending entry of all nationals from the six designated countries. We need not decide the precise scope of § 1182(f) authority in relation to § 1182(a)(3)(B) because the President has not met the precondition to exercising his power under § 1182(f), that is, of making a detrimentality finding. We note, however, that executive action should not render superfluous Congress's requirement that there be a "reasonable ground to believe" that an alien "is likely to engage after entry in any [specifically defined] terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(II), and other specific grounds for terrorism-related admissibility. *Cf. Abourezk*, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under § 1182(f)] provides a safeguard against the danger posed by any particular case or class of cases *that is not covered* by one of the categories in section 1182(a)." (emphasis added)); *Allende v. Shultz*, 845 F.2d 1111, 1118 (1st Cir.

1988) ("Each subsection [of § 1182(a)] creates a different and distinct ground for exclusion.").

5

Finally, we note that in considering the President's authority, we are cognizant of Justice Jackson's tripartite framework in *Youngstown Sheet & Tube Co. v. Sawyer*. *See* 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Section 1182(f) ordinarily places the President's authority at its maximum. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. However, given the express will of Congress through § 1152(a)(1)(A)'s non-discrimination mandate, § 1157's procedure for refugee admissions to this country, and § 1182(a)(3)(B)'s criteria for determining terrorism-related inadmissibility, the President took measures that were incompatible with the expressed will of Congress, placing his power "at its lowest ebb." *Id.* at 637. In this zone, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638. We have based our decision holding the entry ban unlawful on statutory considerations, and nothing said herein precludes Congress and the President from reaching a new understanding and confirming it by statute. If there were such consensus between Congress and the President, then we would view Presidential power at its maximum, and not in the weakened state based on conflict with statutory law. *See id.* at 635-38.

* * *

In sum, we conclude that Plaintiffs have shown a likelihood of success on the merits at least as to their arguments that EO2 contravenes the INA by exceeding the President's authority under § 1182(f), discriminating on the basis of nationality, and disregarding the procedures for setting annual admissions of refugees.[21]

C

The current record is sufficient to permit the court's evaluation of the irreparable harms threatening Plaintiffs. Plaintiffs identify harms, such as prolonged separation from family members, constraints to recruiting and attracting students and faculty members to the University of Hawai'i, decreased tuition revenue, and the State's inability to assist in refugee resettlement. Many of these harms are not compensable with monetary damages and therefore weigh in favor of finding irreparable harm. *See, e.g.*, *Washington*, 847 F.3d at 1169 (identifying harms such as harms to States' university employees and students, separated families, and stranded States' residents abroad); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"); *cf. Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503-04 (1977)

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[21] Because this claim relates to EO2's conflict with the INA, we leave open whether and in what circumstances the President may suspend entry under his inherent powers as commander-in-chief or in a time of national emergency. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

(explaining that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

We conclude Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

D

In considering the equities of a preliminary injunction, we next "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.

The district court did not abuse its discretion in finding that the balance of hardships tipped in Plaintiffs' favor. The Government argues that the injunction causes direct, irreparable injury by constraining the Executive's authority in "protect[ing] national security on behalf of the entire United States."[22] "[T]he Government's interest in combating terrorism is an urgent objective of the highest order." *Humanitarian*

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[22] To the extent the Government argues that it is injured simply by nature of the judiciary limiting the President's authority, *ipso facto*, when it argues that it suffered a "form of irreparable injury" because it was "enjoined by a court from effectuating statutes enacted by representatives of its people," we reject that argument. *See Robel*, 389 U.S. at 264 ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."); *see also Int'l Refugee Assistance Project*, 2017 WL 2273306, at *25 (rejecting the Government's "institutional injury" argument, as "even the President's actions are not above judicial scrutiny").

Law Project, 561 U.S. at 28. Nonetheless, the President must exercise his authority under § 1182(f) lawfully by making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest and ensuring that such exercise does not conflict with other INA provisions. Because the President has not done so, we cannot conclude that national security interests outweigh the harms to Plaintiffs. *See Int'l Refugee Assistance Project*, 2017 WL 2273306, at *32 (Keenan, J., concurring in part and concurring in the judgment).

Further, the Government has not put forth evidence of injuries resulting from the preliminary injunction, or how the screening and vetting procedures in place before the Order was enjoined were inadequate such that the Order should take immediate effect. Continuing to enjoin portions of EO2 restores immigration procedures and programs to the position they were in prior to its issuance. *See Washington*, 847 F.3d at 1168; *see also* Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 9 (explaining that a number of amici officials, in office on January 20, 2017 and current on active intelligence, knew of no "credible terrorist threat streams directed against the United States" at that time).

In weighing the harms, the equities tip in Plaintiffs' favor.

E

Plaintiffs must finally show that preliminary injunctive relief is in the public interest.

National security is undoubtedly a paramount public interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981)

("[N]o governmental interest is more compelling than the security of the Nation.").[23] Although we recognize that "sensitive and weighty interests of national security and foreign affairs" are implicated, *Humanitarian Law Project*, 561 U.S. at 33-34, the President must nonetheless exercise his executive power under § 1182(f) lawfully. The public interest is served by "curtailing unlawful executive action." *Texas*, 809 F.3d at 187.

The public interests in uniting families and supporting humanitarian efforts in refugee resettlement support the conclusion that the public interest is served by preliminarily enjoining EO2 and maintaining the status quo. *Cf. Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."); *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (explaining that "the humane purpose" of the INA is to reunite families).

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[23] Several amici contend that the Order not only serves no national security interest, but actually harms our security. *See, e.g.*, Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 2 (explaining that the Order will harm the country's national security and foreign policy interest: "It will endanger troops in the field, and disrupt key counterterrorism and national security partnerships. It will aid the propaganda effort of the Islamic State in Iraq and the Levant ("ISIL") and support its recruitment message. By feeding the narrative that the United States is at war with Islam, the Order will impair relationships with the very Muslim communities that law enforcement professionals rely on to address the threat of terrorism. And it will have a damaging humanitarian and economic impact."); Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae, Dkt. No. 176 at 20-21 ("[T]he Order weakens vetting protocols and procedures by using national-origin discrimination as a substitute for individualized threat assessments. The Order also threatens to fracture critical military, intelligence, and counterterrorism partnerships and hinder cooperation with the very communities with which law enforcement professionals work to disrupt terrorist plots."); Brief of *Doe* Plaintiffs as Amici Curiae, Dkt. No. 276, Ex. G., U.S. Dep't of State, Dissent Channel: Alternatives to Closing Doors in Order to Secure Our Borders (voicing the State Department officers' concerns about EO1). A draft DHS report also concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity."

Amici also have identified specific harms that will result if EO2 takes effect, bolstering the conclusion that the injunction is in the public interest. They explain that EO2 would, *inter alia*: curtail children's ability to travel to the United States to obtain life-saving medical care, *see* Brief of the Foundation for the Children of Iran and Iranian Alliances Across Borders as Amici Curiae, Dkt. No. 77; undermine the efforts of religious organizations in the United States rendering humanitarian aid, *see* Brief of Episcopal Bishops as Amici Curiae, Dkt. No. 87; compromise the diversity interests that are central to universities, *see* Brief of New York University as Amicus Curiae, Dkt. No. 95; deter international students, faculty, and scholars from studying at American universities and harm the research mission of universities, *see* Brief of Colleges and Universities as Amici Curiae, Dkt. No. 97; impose additional hardship for child refugees already facing violence and trauma, *see* Brief of Professional Society on the Abuse of Children as Amicus Curiae, Dkt. No. 107; immediately harm refugees who will be denied entry and risk the vitality of entire refugee assistance programs and resettlement efforts, *see* Brief of Interfaith Group of Religions and Interreligious Organizations as Amici Curiae, Dkt. No. 121, Brief of Oxfam America as Amicus Curiae, Dkt. No. 149, Brief of HIAS, IRC, and USCRI as Amici Curiae, Dkt. No. 155, Brief of *Doe* Plaintiffs as Amici Curiae, Dkt. No. 276; uniquely exclude Muslim family members, scholars, religious leaders, and professionals from entry, *see* Brief of Muslim Rights, Professional, and Public Health Organizations as Amici Curiae, Dkt. No. 124, Brief of Muslim Justice League et al. as Amici Curiae, Dkt. No. 207; inflict proprietary harms on the states by harming state colleges, disrupting staffing and research at state medical institutions, and reducing tax revenues and reinvestment of refugee funding into local economies, *see* Brief of Illinois et al. as Amici Curiae, Dkt. No. 125; undermine trust between law enforcement and immigrant communities and inflict financial and social costs, such as loss of tourism dollars, *see* Brief of Chicago et al. as Amici Curiae, Dkt. No. 137; interfere with union members' ability to do their work and serve the American public, *see* Brief of Service Employees International Union et al. as Amici Curiae, Dkt. No. 166; harm American competitiveness by disrupting ongoing business operations and inhibiting technology companies' abilities to attract talent, business, and investment to the United States, *see* Brief of Technology Companies as Amici Curiae, Dkt. No. 180, Brief of Massachusetts Technology Leadership Council as Amicus Curiae, Dkt. No. 194; place victims of gender-based violence at particular risk, *see* Tahirih Justice Center et al. as Amici Curiae, Dkt. No. 185; interrupt foreign artists' exhibitions and performances in the United States, *see* Brief of the Association of Art Museum Directors et al. as Amici Curiae, Dkt. No. 204; and prevent U.S. citizens and lawful permanent residents from receiving visits from or reuniting with family members, *see* Brief of Human Rights First et al. as Amici Curiae, Dkt. No. 222.

The public interest favors affirming the preliminary injunction. *See Winter*, 555 U.S. at 24 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

* * *

Plaintiffs have satisfied all four factors to warrant entry of the preliminary injunction. *See id.* at 20. The district court did not abuse its discretion in granting an injunction.

V

With respect to the injunction's scope, the Government contends that the district court erred by enjoining internal government procedures, giving nationwide relief, and entering an order against the President.

We review the scope of a preliminary injunction for abuse of discretion. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012). Although the district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), there are limitations on this discretion. Injunctive relief must be tailored to remedy the specific harms shown by the plaintiffs. *See id.* ("Injunctive relief . . . must be tailored to remedy the specific harm alleged."); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established . . . ."). "An overbroad injunction is an abuse of discretion." *Stormans*, 586 F.3d at 1140.

A

The Government first argues that the injunction improperly enjoins enforcement of parts of Sections 2 and 6 that are unrelated to any alleged harm to Plaintiffs—specifically, the provisions that pertain to internal government operations and procedures.

Portions of Section 2 require various agencies to conduct a review of worldwide vetting procedures to determine what additional information, if any, is needed from each foreign country to adjudicate a visa application, prepare a report on the results of the worldwide review, submit a list of countries that do not provide requested information to the President, and recommend other lawful restrictions or limitations deemed necessary for the security of the United States. 82 Fed. Reg. at 13212-13. Likewise, during the interim period when refugee admissions is suspended, Section 6 directs the Secretary of State, in conjunction with the Secretary of Homeland Security and the Director of National Intelligence, to conduct an internal review and implement additional procedures identified by the review. *Id.* at 13215. Section 6 also requires the Secretary of State to review the "existing law" to determine how State and local jurisdictions could have greater involvement in the process of determining refugee placement. *Id.* at 13216.

Although other unenjoined sections of EO2 permit interagency coordination to review vetting procedures, the district court nonetheless abused its discretion in enjoining the inward-facing tasks of Sections 2 and 6. Enjoining the entirety of Sections 2 and 6 was not narrowly tailored to addressing only the harms alleged. For example, internal determinations regarding the necessary information for visa application adjudications do not have an obvious relationship to the constitutional rights at stake or statutory conflicts at issue here. Plaintiffs have not shown how the Government's internal review of its vetting procedures will harm them. We vacate the preliminary injunction to the extent it enjoins internal review procedures that do not burden individuals outside of the executive branch of the federal government. *See Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) ("An injunction against a government agency must be structured to take into account 'the well-established rule that the government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs."'" (quoting *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976))); *cf. Bowen v. Roy*, 476 U.S. 693, 700 (1986) (explaining that the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion [but] does not afford an individual a right to dictate the conduct of the Government's internal procedures").

B

The Government next argues that the district court erred in enjoining Section 6's refugee provisions, specifically the suspension of refugees and adoption of the 50,000 refugee cap.

The State alleges that Section 6 will force it to abandon the refugee program that embodies the State's traditions of openness and diversity. The State has several policies that aid and resettle refugees, and has a "long history of welcoming refugees impacted by war and oppression." As discussed earlier, OCS, a division of the Department of Labor and Industrial Relations, is directed to "[a]ssist and coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." Haw. Rev. Stat. § 371K-4(5). OCS also operates the Refugee Social Services Program and the Refugee Cash and Medical Assistance Program. *See* Department of Labor and Industrial Relations, Office of Community Services, 2017 Hawaii State Plan for Refugee Assistance and Services (2016); https://labor.hawaii.gov/ocs/files/2013/02/FY17-State-Plan-for-Hawaii.pdf (last visited June 6, 2017). The State further highlights that aiding refugees is central to the mission of private organizations, like Catholic Charities Hawai'i and Pacific Gateway Center.

Since fiscal year 2010, at least twenty refugees have arrived and resettled in Hawai'i, and in fiscal year 2017 to date, three have resettled there. While this is a small number of refugees, it does not diminish Hawai'i's interest in effectuating its refugee programs and investments. Enjoining the suspension and cap would protect the State's programs and efforts in resettling refugees.

Although the Government is correct in pointing out that most of Plaintiffs' alleged injuries center on the implementation of Section 2(c), at this preliminary stage of litigation, the district court did not abuse its discretion by enjoining Section 6's operative provisions suspending refugee admission on the basis of the current record. We therefore reject the Government's challenge on this point.

C

The Government next contends that the district court erred by enjoining Section 2(c) as to all persons everywhere, rather than redressing only Plaintiffs' injuries. The Government requests that the nationwide injunction be limited to Plaintiffs only.[24]

The district court identified two reasons to support a nationwide injunction. First, the district court emphasized that in certain circumstances, it is appropriate for courts to issue nationwide injunctions. *Hawai'i PI*, 2017 WL 1167383, at *8. As the Fifth Circuit observed in *Texas v. United States*, nationwide injunctions are particularly appropriate in the immigration context because "immigration laws of the United States should be enforced vigorously and *uniformly*." 809 F.3d at 187-88; *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an *uniform* Rule of Naturalization . . . .") (emphasis added). Enjoining the conduct as to Plaintiffs may result in "fragmented immigration policy [that] would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67 (citing to *Texas*, 809 F.3d at 187-88)).

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[24] The Government also argues that to the extent § 1152(a)(1)(A) cabins executive authority, the injunction entered by the district court can only apply to immigrant visas and should not apply to *nonimmigrant* visas. We decline to narrow the injunction on the grounds proposed by the Government because, even assuming the Government is correct, the President failed to meet the precondition to exercising his authority under § 1182(f).

Second, the district court made clear that the Government did not provide a workable framework for narrowing the geographic scope of the injunction. *See id.* at 1167 ("[E]ven if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders."). On appeal, the Government has not offered any new workable method of limiting the geographic scope of the injunction.

An "injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*" *Bresgal*, 843 F.2d at 1170-71. Narrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA. *See Int'l Refugee Assistance Project*, 2017 WL 2273306, at *27 (affirming the nationwide injunction because Section 2(c) of EO2 likely violates the Establishment Clause, and its constitutional deficiency "would endure" in all applications); *cf. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989))).

The district court did not abuse its discretion in entering a nationwide preliminary injunction.

D

Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the Government is well taken. Generally, we lack "jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)); *see id.* at 802 ("[I]njunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows."). Injunctive relief, however, may run against executive officials, including the Secretary of Homeland Security and the Secretary of State. *See, e.g., Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89 (holding that President Truman did not act within his constitutional power in seizing steel mills and affirming the district court's decision enjoining the Secretary of Commerce from carrying out the order); *Franklin*, 505 U.S. at 802-03.

We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and that the extraordinary remedy of enjoining the President is not appropriate here. *See Franklin*, 505 U.S. at 803. We therefore vacate the district court's injunction to the extent the order runs against the President, but affirm to the extent that it runs against the remaining "Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them."

E

The district court did err in enjoining the entirety of Sections 2 and 6, particularly the portions that pertain to interagency review, despite the Government's requests for clarification and requests to narrow the injunction to enjoin conduct that actually harms Plaintiffs. The district court abused its discretion in enjoining inward-facing agency conduct because enjoining this conduct would not remedy the harms asserted by Plaintiffs. Further, the district court abused its discretion in enjoining the President. We would not be able to affirm in full the preliminary injunction even if Plaintiffs were also likely to succeed on their constitutional claims, for reasons that enjoining internal review procedures does not remedy harms to Plaintiffs and because it is improper to enjoin the President without necessity. As we have affirmed the injunction in part on statutory grounds, and vacated certain parts on the basis of considerations governing the proper scope of an injunction, we need not consider the constitutional claims here.

VI

We affirm in part and vacate in part the district court's preliminary injunction order. As to the remaining Defendants, we affirm the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending USRAP for 120 days; and Section 6(b), capping the entry of refugees to 50,000 in the fiscal year 2017. We vacate the portions of the injunction that prevent the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it runs against the President. We remand the case to the district court with instructions to re-issue a preliminary injunction consistent with this opinion.[25]

AFFIRMED in part; VACATED in part; and REMANDED with instructions. Each party shall bear its own costs on appeal.

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[25] The Government's motion for a stay pending appeal is **DENIED** as moot.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

CV. NO. 17-00050 DKW-KSC

STATE OF HAWAIʻI AND ISMAIL ELSHIKH,
PLAINTIFFS

v.

DONALD J. TRUMP, ET AL.,
DEFENDANTS

[July 6, 2017]

ORDER DENYING PLAINTIFFS' EMERGENCY MOTION TO CLARIFY SCOPE OF PRELIMINARY INJUNCTION

On June 26, 2017, the United States Supreme Court granted certiorari in this matter, granted in part the Government's stay application, "and narrow[ed] the scope of the injunction[]" entered by this Court with respect to Sections 2(c), 6(a), and 6(b) of Executive Order 13,780.[1] *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 and 16-1540, slip op. at 11-12 (June 26, 2017) [hereinafter Slip. Op.] (per curiam). Plaintiffs State of Hawaiʻi and Ismail Elshikh, Ph.D. seek clarification from this Court regarding the Supreme Court's modification of the preliminary injunction, in light of the manner in which the Government began implementing the non-enjoined portions of EO-2 on June 29, 2017. *See* Pls.' Emergency Mot. to Clarify Scope of Prelim. Inj., ECF No. 293 [hereinafter Motion]; *see also* Pls.' Proposed Order Granting Mot., ECF No. 315-1 (reflecting consideration of "the preliminary injunction entered on March 29, 2017 (Dkt. No. 270), amended on June [1]9, 2017 (Dkt. No. 291), and modified by subsequent decision of the United States Supreme Court").

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[1] Executive Order 13,780 is entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter EO-2].

Upon careful consideration of the parties' submissions, it is evident that the parties quarrel over the meaning and intent of words and phrases authored not by this Court, but by the Supreme Court in its June 26, 2017 *per curiam* decision. That is, the parties' disagreements derive neither from this Court's temporary restraining order, this Court's preliminary injunction, nor this Court's amended preliminary injunction,[2] but from the modifications to this Court's injunction ordered by the Supreme Court. Accordingly, the clarification to the modifications that the parties seek should be more appropriately sought in the Supreme Court.[3]

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[2] *See Hawaii v. Trump*, — F. Supp. 3d —, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) (TRO); *Hawaii v. Trump*, — F. Supp. 3d —, 2017 WL 1167383 (D. Haw. Mar. 29, 2017) (Prelim. Inj.); Am. Prelim. Inj., *Hawaii v. Trump*, CV. NO. 17-00050 (D. Haw. June 19, 2017), ECF No. 291.

The Supreme Court stayed the preliminary injunction with respect to Section 2(c) in the following manner—

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that § 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO-2.

Slip Op. at 12.[4]

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[3] Federal Rule of Civil Procedure 62(c) allows this Court to issue further orders with respect to an injunction it issued, notwithstanding appeal. *See Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). "[A]n application with regard to an injunction ordinarily must be made in the first instance to the district court under Rule 62(c) and it is only if relief is not obtained there that the appellate court will consider acting under Rule 62(g)." 11 Wright, Miller, & Kane, Fed. Prac. & Proc. Civ. § 2904 (3d ed. 2013). That is perhaps the reason Plaintiffs opted to proceed here. However, where, as here, the challenges do not derive from this Court's *own* orders, the Court sees no reason why the starting point had to originate here, or even why it made sense to do so.

[4] The Supreme Court explained that the facts in the instant case and in No. 16-1436 (*IRAP*) "illustrate the sort of relationship that qualifies"—

In evaluating the Government's application for a stay, the Supreme Court observed that, "[i]n assessing the lower courts' exercise of equitable discretion, we

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> For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience.

Slip Op. at 12. With respect to enjoined portions of Section 6 relating to refugees, the Supreme Court reasoned that the "equitable balance struck [with respect to Section 2(c)] applies in this context as well." Slip Op. at 13. It held that—

> An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favor of the Government's compelling need to provide for the Nation's security.

> The Government's application to stay the injunction with respect to §§ 6(a) and (b) is accordingly granted in part. Section 6(a) may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may § 6(b); that is, such a person may not be excluded pursuant to § 6(b), even if the 50,000-person cap has been reached or exceeded.

Id. (citations omitted).

bring to bear an equitable judgment of our own." Slip Op. at 10 (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)). The Supreme Court's equitable judgment to "tailor a stay," *id.*, resulted in modifications to this Court's preliminary injunction. These modifications spurred the Government's subsequent efforts to interpret the stay and implement the non-enjoined portions of EO-2 by June 29, 2017. Plaintiffs' Motion challenges only the Government's interpretation of the Supreme Court's June 26, 2017 stay. To be clear, the standard Plaintiffs ask this Court to clarify—i.e., "a credible claim of a bona fide relationship with a person or entity in the United States," Slip Op. at 12—is not set forth in any order of this Court.[5]

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[5] Plaintiffs' briefs acknowledge as much. *See, e.g.*, Pls.' Mem. in Supp. 1, ECF No. 293-1 ("That standard, the Supreme Court made clear, protects any foreign national with a 'close familial relationship' with a person in the United States[.]" (citation omitted)); Pls.' Mem. in Supp. 2 ("This Court should clarify as soon as possible that the Supreme Court meant what it said, and that foreign nationals that credibly claim connections with this country cannot be denied entry under the President's illegal Order."); Pls.' Reply 1, ECF No. 303 ("The Government fundamentally misconstrues the Supreme Court's partial stay. The [Supreme] Court did not concoct an abstract 'bona fide relationship' standard that the Government can tailor to its liking[.]"); Reply 2 ("The Court should correct the Government's path, holding the Government to the clear terms of the Supreme Court's order." (footnote omitted)). *But see* Motion 3 ("The Government has indicated publicly that it will begin enforcing the non-enjoined portions of [EO-2] in a manner that conflicts with this Court's preliminary injunction, as well as the Supreme Court's June 26, 2017 ruling that [EO-2] may not be enforced against foreign nationals and refugees 'who have a credible claim of

Because Plaintiffs seek clarification of the June 26, 2017 injunction modifications authored by the Supreme Court, clarification should be sought there, not here. This Court will not upset the Supreme Court's careful balancing and "equitable judgment" brought to bear when "tailor[ing] a stay" in this matter. Slip Op. at 10. Nor would this district court presume to substitute its own understanding of the stay for that of the originating Court's "exercise of discretion and judgment" in "[c]rafting a preliminary injunction . . . dependent as much on the equities of a given case as the substance of the legal issues it presents." Slip Op. at 9. This Court declines to usurp the prerogative of the Supreme Court to interpret its own order and defers in the first instance. *See Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 388 (5th Cir. 1980) ("Great deference is due the interpretation placed on the terms of an injunctive order by the court who issued and must enforce it."); *cf. Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1202 (11th Cir. 2009) ("The district court is in the best position to interpret its own orders." (internal quotation marks omitted)).[6]

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a bona fide relationship with a person or entity in the United States.'" (quoting Slip Op. at 11, 13)).

[6] *See also Regents of the Univ. of Cal. v. Aisen*, No. 15-CV-1766, 2016 WL 4681177, at *1 (S.D. Cal. Sept. 7, 2016) ("The Supreme Court teaches that when questions arise as to the interpretation or application of an injunction order, a party should seek clarification or modification from the issuing court, rather than risk disobedience and contempt.") (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949)).

CONCLUSION

For the foregoing reasons, Plaintiffs' request for clarification is DENIED without prejudice to its re-filing with the Supreme Court.[7]

IT IS SO ORDERED.

Dated: July 6, 2017 at Honolulu, Hawai'i.

[SEAL]

/s/ DERRICK K. WATSON
DERRICK K. WATSON
United States District Judge

State of Hawaii, et al. v. Trump, et al.; Civil No. 17-00050 DKW-KSC; **ORDER DENYING PLAINTIFFS' EMERGENCY MOTION TO CLARIFY SCOPE OF PRELIMINARY INJUNCTION**

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[7] Of course, if the Supreme Court wishes for this Court to decide the merits of the issues raised by Plaintiffs' Motion in the first instance, this Court will promptly do so.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16366

D.C. No 1:17-cv-00050-DKW-KSC

District of Hawaii, Honolulu

STATE OF HAWAII; ISMAIL ELSHIKH,
PLAINTIFFS-APPELLANTS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT
OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF HOMELAND
SECURITY; U.S. DEPARTMENT OF STATE;
REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE; UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

[July 7, 2017]

ORDER

Before: HAWKINS, GOULD, and PAEZ, Circuit Judges.

This is an appeal of the district court's July 6, 2017 denial of Plaintiffs' "Emergency Motion to Clarify Scope of Preliminary Injunction." Plaintiffs requested that the district court "clarify the scope of the Court's June 19, 2017 amended preliminary injunction." The district court denied the clarification motion, explaining that, because it was the Supreme Court—not the district court—that issued the June 26, 2017 order staying in part the district court's preliminary injunction, clarification of the June 26 order must be sought from the Supreme Court. Plaintiffs have filed an emergency motion requesting that this court enjoin the Government from violating the Supreme Court's June 26 order or directing the district court to do so.

We lack jurisdiction to address Plaintiffs' appeal of the district court's order denying the motion to clarify the scope of the injunction. This court possesses jurisdiction to review only final judgments and a limited set of interlocutory orders. *See* 28 U.S.C. §§ 1291, 1292(a). The district court's order neither resulted in a final judgment nor engaged in action deemed immediately appealable in 28 U.S.C. § 1292(a). Specifically, the district court's order did not "grant[], continu[e], modify[], refus[e], or dissolv[e]" an injunction, or "refus[e] to dissolve or modify" an injunction. *Id.* § 1291(a)(1).

Nor do any of the various judicially-crafted bases for appellate jurisdiction apply under these circumstances. Because the "practical effect" of Plaintiffs' requested relief is declaratory in nature—not injunctive—we do not construe their clarification motion before the district court as one for injunctive relief. *See, e.g., Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1186 (9th Cir. 2004). And this scenario does not present an order of "practical finality" because—as discussed below—Plaintiffs may seek injunctive relief from the district court. *Cf. Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 856 n.5 (9th Cir. 2007); *All*

Alaskan Seafoods, Inc. v. M/V Sea Producer, 882 F.2d 425, 428 n.2 (9th Cir. 1989).

Because we lack jurisdiction to review the district court's order, this appeal is DISMISSED and Plaintiffs' "Emergency Motion under FRAP 8 and Circuit Rule 27-3 for Injunction Pending Appeal" is DENIED as moot.[1]

Finally, we note that although the district court may not have authority to *clarify* an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against, for example, a party's violation of the Supreme Court's order placing effective limitations on the scope of the district court's preliminary injunction. *Cf. United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79-80 (9th Cir. 1951). But Plaintiffs' motion before the district court was clear: it sought clarification of the Supreme Court's June 26 order, not injunctive relief. Because the district court was not asked to grant injunctive relief or to modify the injunction, we do not fault it for not doing so.

IT IS SO ORDERED.

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[1] Plaintiffs' emergency motion also seeks a writ of mandamus. Because the district court's denial of Plaintiffs' motion for clarification was not clear error, the extraordinary power of mandamus is not appropriate. *See Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). Plaintiffs' motion for a writ of mandamus is DENIED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

CV. NO. 17-00050 DKW-KSC

STATE OF HAWAIʻI AND ISMAIL ELSHIKH,
PLAINTIFFS

v.

DONALD J. TRUMP, ET AL.,
DEFENDANTS

[July 13, 2017]

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO ENFORCE, OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

INTRODUCTION

On June 26, 2017, the United States Supreme Court granted certiorari in this matter, granted in part the Government's stay application, "and narrow[ed] the scope of the injunction[]" entered by this Court with respect to Sections 2(c), 6(a), and 6(b) of Executive Order 13,780.[1] *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 (16A1190) and 16-1540 (16A1191), slip op. at 11-12 (U.S. June 26, 2017) [hereinafter Slip. Op.] (per curiam). Plaintiffs challenge the Government's implementation of the non-enjoined portions of EO-2, asking this Court to enforce or, in the alternative, to modify the scope of the existing preliminary injunction. *See* Pls.' Mot. to Enforce or, In the Alternative, to Modify Prelim. Inj., ECF No. 328 [hereinafter Motion].

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[1] Executive Order 13,780 is entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter EO-2].

Upon careful consideration of the parties' expedited submissions, the Court concludes that on the record before it, Plaintiffs have met their burden of establishing that the requested injunctive relief is necessary to preserve the status quo pending appeal regarding the definition of "close familial relationship" employed by the Government with respect to Sections 2(c), 6(a) and 6(b) of EO-2. Plaintiffs have similarly met their burden with respect to refugees with a formal assurance, as it relates to the Government's implementation of Sections 6(a) and 6(b) of EO-2, and participants in the Lautenberg Program. Plaintiffs' Motion is accordingly GRANTED in these respects and DENIED to the extent other relief is sought, for the reasons detailed below.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion.

I. Prior Proceedings

A. This Court's March 29, 2017 Preliminary Injunction

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of EO-2 nationwide ("TRO"). *See Hawaii v. Trump*, --- F. Supp. 3d ---, 2017 WL 1011673

(D. Haw. Mar. 15, 2017). Upon Plaintiffs' motion, full briefing, and a March 29, 2017 hearing, the Court converted the TRO into a preliminary injunction ("PI"). *Hawaii v. Trump*, — F. Supp. 3d —, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). The Government appealed the Court's ruling on March 30, 2017. Notice of Appeal, ECF No. 271.

B. The Ninth Circuit's June 12, 2017 Opinion

The Ninth Circuit's June 12, 2017 *per curiam* opinion affirmed the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending the U.S. Refugee Admissions Program ("USRAP") for 120 days; and Section 6(b), capping the entry of refugees to 50,000 in fiscal year 2017. *Hawaii v. Trump*, — F.3d —, 2017 WL 2529640, at *29 (9th Cir. June 12, 2017) (per curiam). The Ninth Circuit vacated the portions of the injunction that prevented the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it ran against the President. *Id.*, 2017 WL 2529640, at *29. The Ninth Circuit remanded to this Court with instructions to enter an amended injunction consistent with its opinion. This Court accordingly entered an amended injunction on June 19, 2017, upon issuance of the expedited mandate. Am. Prelim. Inj., *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. June 19, 2017), ECF No. 291.

II. The Supreme Court's June 26, 2017 Order

The Government petitioned for certiorari and filed an application to stay both the preliminary injunction entered in this case and the one entered by the District of Maryland in a case now consolidated on appeal. *Int'l Refugee Assistance Project v. Trump*, — F. Supp. 3d —, 2017 WL 1018235 (D. Md. Mar. 16, 2017) [hereinafter *IRAP*] (issuing preliminary injunction); *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. May 25, 2017) (No. TDC-17-0361, D. Md.; renumbered No. 17-1351, 4th Cir.). On June 26, 2017, the Supreme Court granted certiorari in both cases. Slip Op. at 9. The Supreme Court also granted "the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States," Slip Op. at 11-12.

More specifically, the Supreme Court stayed the preliminary injunctions relating to Section 2(c) in the following manner—

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO-2.

Slip Op. at 12. The Supreme Court explained that the facts in this case and in *IRAP* "illustrate the sort of relationship that qualifies"—

> For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family

> member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

Slip Op. at 12.

With respect to the enjoined portions of Section 6 relating to refugee admissions and the refugee cap, the Supreme Court reasoned that the "equitable balance struck [with respect to Section 2(c)] applies in this context as well." Slip Op. at 13. It held—

> An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favor of the Government's compelling need to provide for the Nation's security.

> The Government's application to stay the injunction with respect to §§6(a) and (b) is accordingly granted in part. Section 6(a) may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may §6(b); that is, such a person may not be excluded pursuant to §6(b), even if the 50,000-person cap has been reached or exceeded.

Id. (internal citations omitted).

III. Plaintiffs' Challenge To The Government's Implementation Of EO-2

The Government began enforcing the non-enjoined portions of EO-2 on June 29, 2017 at 8:00 p.m. EDT. In doing so, the Government published guidance to its agencies on the implementation and enforcement of EO-2, guidance that has been amended, and which the Government has indicated will be amended again, as circumstances warrant. *See* Katyal Decl., Exs. A-C, & F, ECF Nos. 329-1, 329-2, 329-3, & 329-6.

The Government's guidance defines "close familial relationship" as including a parent, parent-in-law, spouse, fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. These relationships are exempt from EO-2. The Government's definition does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law.[2] Plaintiffs challenge the Government's narrower construction.

With respect to refugee program guidance, the Government instructed agencies that, "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for that refugee with an entity in the United States." Katyal Decl., Ex. B, Dep't of State, *untitled guidance document* (received by Pls. June 29, 2017), ECF No. 329-2. The Government also initially indicated that it had not determined whether refugees with a "bona fide relationship with a person or entity in the United States" would be permitted to travel after July 6, 2017, and would issue further guidance. *See id.* Updated guidance from the State Department instructs its private voluntary agency partners that "[n]o new [advanced booking notifications ('ABNs')] for travel for cases with or without the required bona fide relationship to a person or entity in the United States may be requested at this time. We hope to allow new ABNs for such cases to resume in the very near future, once we clarify verification procedures." Katyal Decl., Ex. F, E-mail from Lawrence E. Bartlett, Dir., Office of Admissions, Bureau of Population, Refugees, & Migration, to Voluntary Agencies (July 3, 2017, 16:30 EDT), ECF No. 329-6. Plaintiffs contest this guidance, principally asserting that refugees with a formal assurance can credibly claim a bona fide relationship with a refugee resettlement agency.

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[2] The Government's first official guidance published on June 29, 2017, before enforcement of Sections 2(c), 6(a), and 6(b), indicated that fiancés would not be considered to be close family members for purposes of applying the Supreme Court's decision. That guidance was subsequently updated to include fiancés. *See* Katyal Decl., Ex. C, Dep't of State, *Exec. Order on Visas*, at 3 (June 29, 2017), ECF No. 329-3, *available at* https://travel.state.gov/content/travel/en/news/important-annoucement.html.

Plaintiffs additionally request that the Court recognize that certain client relationships with legal services organizations are protected by this Court's injunction, and that the participants in three specific refugee programs are categorically exempt from EO-2: "U.S.-affiliated Iraqis" at risk of persecution because of their contributions to the United States' combat mission in Iraq; participants in the Central American Minors Program; and participants in the Lautenberg Program, each of which, Plaintiffs argue, requires participants to have close family ties with the United States, a relationship with a "designated resettlement agency," or both. Plaintiffs ask the Court to issue an order either enforcing or modifying its amended preliminary injunction to reflect the scope of relief requested in the Motion.[3]

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[3] Plaintiffs request that the Court issue an order enforcing or modifying its preliminary injunction to reflect that

> (1) the injunction bars the Government from implementing the Executive Order against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States; (2) the injunction prohibits the Government from applying sections 6(a) and 6(b) to exclude refugees who: (i) have a formal assurance from a resettlement

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 62(c) allows this Court to issue further orders with respect to an injunction it issued, notwithstanding appeal, in order to preserve the status quo or ensure compliance with its earlier orders. *See Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).[4]

> agency within the United States (ii) have a bona fide client relationship with a U.S. legal services organization; or (iii) are in the U.S. Refugee Admissions Program ("USRAP") through the Iraqi Direct Access Program for "U.S.-affiliated Iraqis," the Central American Minors Program, or the Lautenberg Program; (3) the injunction bars defendants from suspending any part of the refugee admission process, including any part of the "Advanced Booking" process, for individuals with a bona fide relationship with a U.S. person or entity; and (4) the preliminary injunction prohibits the Government from applying a presumption that an applicant lacks "a bona fide relationship with a person or entity in the United States."

Mot. 1-2.

[4] *See also Hoffman for & on Behalf of N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (addressing situations in which a district court "has a continuing duty to maintain a status quo" and stating, "[w]e believe the rule should be, and we so hold that, in the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken"). The current status quo pending appeal is the preliminary injunction which enjoins defendants from

Pursuant to Rule 62(c), "[t]he court may modify or broaden the scope of its injunction under its continuing duty to supervise the relief granted if it is informed of new facts that require additional supervisory action."[5] *Nat'l Grange of the Order of Patrons of Husbandry v. Cal. State Grange*, 182 F. Supp. 3d 1065, 1074 (E.D. Cal. 2016) (citing, *inter alia*, *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647-48 (1961) (holding that a district court has "wide discretion" to modify an injunction based on changed circumstances or new facts); *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098-99 (9th Cir. 2002) (modification of injunction during pendency of appeal was proper to clarify the injunction and supervise compliance in light of new facts)).[6]

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enforcing portions of EO-2, as modified by the Supreme Court's June 26, 2017 order.

[5] *See also Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) ("A change in the law may constitute a changing circumstance requiring the modification of an injunction. An intervening judicial opinion may require modification of an injunction."), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

[6] Plaintiffs initially moved this Court to clarify the scope of the injunction, in light of the Supreme Court's June 26, 2017 modification (ECF. No. 293), a motion which the Court denied without reaching the merits. *See Hawaii v. Trump*, — F. Supp. 3d ----, 2017 WL 2882696 (D. Haw. July 6, 2017). On July 7, 2017, the Ninth Circuit dismissed Plaintiffs' appeal of that decision and denied as moot their motion for an injunction pending appeal. *See Hawaii v. Trump*, No. 17-16366, slip op. at 3 (9th Cir. July 7, 2017), ECF No. 3. The Ninth Circuit explained that although this Court does "not have authority to *clarify* an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against, for exam-

This Court is guided by the Supreme Court's instruction that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Slip. Op. at 9 (citations omitted).

With this framework in mind, the Court turns to Plaintiffs' specific requests for injunctive relief.

II. The Government's Implementation Of The Supreme Court's "Close Familial Relationship" Standard Is Unduly Restrictive

Plaintiffs request that the Court enjoin the Government from implementing EO-2 against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. The Supreme Court held that foreign nationals who claim a bona fide relationship with a person in the United States must have a "close familial relationship" in order to be excluded from the effects of EO-2, but the Supreme Court did not comprehensively define that phrase. Slip Op. at 12. The Government, in an effort to provide consular officials and agencies with the necessary guidance to implement the standard

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ple, a party's violation of the Supreme Court's order placing effective limitations on the scope of the district court's preliminary injunction." *Id.* Because Plaintiffs now seek such injunctive relief, the Court reaches the merits of their request, consistent with the Ninth Circuit's guidance. *See id.* ("Plaintiff's motion before the district court was clear: it sought clarification of the Supreme Court's June 26 order, not injunctive relief. Because the district court was not asked to grant injunctive relief or to modify the injunction, we do no fault it for not doing so.").

in a very short window of time, created a list of family relations it claims satisfies the standard. The Government's list includes only parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whether whole or half), and step relationships, principally in reliance on certain provisions within the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.*, applicable to family-based immigrant visas. *See, e.g.*, 8 U.S.C. §§ 1101(b)(1)-(2); 1151(b)(2); 1153(a); 1184(d).[7]

In its June 26, 2017 decision, the Supreme Court identified illustrative, but not exhaustive, examples of "close familial relationships." A spouse and a mother-in-law "clearly" qualify, but which other relationships meet this standard is less clear. *See* Slip Op. at 12. What is clear from the Supreme Court's decision is that this Court's analysis is to be guided by consideration of whether foreign nationals have a requisite "connection" or "tie" to this country. *See* Slip Op. at 11 (holding that the injunction is not to be enforced against foreign nationals with "no connection to the United States at all," those who "lack[] any connection to this country," and "when there is no tie between the foreign national and the United States."). Put another way, context matters. And when appropriately considered in the context of the June 26 order, the Government's narrowly defined list finds no support in the careful language of the Supreme Court or even in the immigration statutes on which the Government relies.

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[7] The Government contends that, to the extent it also relies on INA provisions that govern the "allocation of a numerically-limited number of visas . . . [,] all of these provisions draw lines in the context of determining which familial relationships are close enough to petition for a visa under the INA. That is exactly the type of line-drawing that the Supreme Court's opinion requires." Mem. in Opp'n 5 n.2 (citation omitted).

First, the Government's utilization of the specific, family-based visa provisions of the INA identified above constitutes cherry-picking and resulted in a predetermined and unduly restrictive reading of "close familial relationship." Other, equally relevant federal immigration statutes define a close family in a much broader manner. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 297, 310 (1993) (including "aunts, uncles, [and] grandparents" as among "close blood relatives") (quoting 8 C.F.R. § 242.24 (1992), recodified at 8 C.F.R. § 236.3(b)(1)(iii)); *see also* Fam. Sponsor Immigration Act of 2002, Pub. L. 107-150, § 2(a) (entitled "Permitting Substitution of Alternative Close Family Sponsor In Case of Death of Petitioner," and amending 8 U.S.C. § 1183a(f) to allow sisters-in-law, brothers-in-law, grandparents, and grandchildren to sponsor aliens for admission).[8]

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[8] Plaintiffs additionally identify other immigration laws that enable an individual to seek admission on behalf of "[g]randchild(ren)" and "[n]iece[s] or nephew[s]," 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016); to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in the United States, 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004); to apply for naturalization on behalf of a grandchild, 8 U.S.C. § 1433(a); and to qualify as a special immigrant if he is the "grandparent" of a person in the United States, *see* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) (2001).

Second, Defendants point to nothing in the Supreme Court's order that supports their truncated reading. In fact, the Supreme Court specifically included a mother-in-law within its definition of "close family" despite the exclusion of mothers-in-law from the statutes relied upon by the Government in crafting its guidance. The Supreme Court was clear that EO-2 may not be enforced against Dr. Elshikh's mother-in-law, not because she is merely the mother of his wife, but because she "clearly has such a [close familial] relationship" with Dr. Elshikh himself. Slip. Op. at 12. Had the Supreme Court intended to protect only immediate family members and parents-in-law, surely it could have said so. It did not.

Indeed, Supreme Court case law drawn from other contexts supports a broader definition of "close familial relationship" than that urged by the Government. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) (holding that the invalidation of a local housing ordinance was warranted, in part, because the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children has roots equally venerable and equally deserving of constitutional recognition"); *Troxel v. Granville*, 530 U.S. 57, 63-65 (2000) (plurality opinion) ("[D]emographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. . . . In many cases, grandparents play an important role.").[9]

In sum, the Government's definition of "close familial relationship" is not only not compelled by the Supreme Court's June 26 decision, but contradicts it. Equally problematic, the Government's definition represents the antithesis of common sense. Common sense, for instance, dictates that close family members be defined to include grandparents. Indeed, grandparents are the *epitome* of close family members. The Government's definition excludes them. That simply cannot be. *See generally Klayman v. Obama*, 142 F. Supp. 3d 172, 188 (D.D.C. 2015) (noting that courts should not "abandon all common sense" when considering injunctive relief).[10]

In light of the careful balancing of the hardships and the equitable considerations mandated by the Supreme Court, the Court finds that Plaintiffs have met their burden of establishing that the specific requested injunctive relief related to EO-2 is necessary to preserve the status quo pending appeal. Plaintiffs' Motion is accordingly granted with respect to this issue, and the Court will modify the injunction in the manner requested.

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[9] *See also Caldwell v. Brown*, No. C09-1332RSL, 2010 WL 3501839, at *2 (W.D. Wash. Sept. 3, 2010) ("[T]he grandparent-grandchild relationship is entitled to respect and some level of recognition in our society. As the United States Supreme Court has recognized, grandparents often play an 'important role' in the lives of their grandchildren. . . . The question is not whether grandparents are important members of the American family: they are." (quoting *Troxel*, 530 U.S. at 64)).

[10] Although the Government contends that its "reasonable construction" is entitled to deference (*see* Mem. in Opp'n 9), it offers no authority in support of that proposition.

III. The Government May Not Exclude Refugees With A Credible Claim Of A Bona Fide Relationship With A Person Or Entity In The United States

Plaintiffs ask the Court to modify the injunction with respect to Sections 6(a) and 6(b) in several respects, each of which is addressed in turn.

A. The Government May Not Exclude Refugees Covered By a Formal Assurance Between The Government And A United States Refugee Resettlement Agency

Plaintiffs seek to prevent the Government from implementing agency guidance that "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for the refugee with an entity in the United States." Katyal Decl., Ex. B, Dep't of State, *untitled guidance document* (received by Pls. June 29, 2017), ECF No. 329-1. Plaintiffs insist that a formal assurance issued by a resettlement agency satisfies the Supreme Court's bona fide relationship requirement due to the formal nature of the agreement and the extensive obligations it triggers on the part of the voluntary agency or affiliate.

The parties do not dispute that before *any* refugee is admitted to the United States under the USRAP, the Department of State must receive a commitment ("assurance") from a resettlement agency. *See* Mem. in Opp'n to Emergency Mot. to Clarify, Bartlett Decl.

¶¶ 14-19; ECF No. 301-1; *see id.* ¶ 16 ("All refugees receive a sponsorship assurance from a resettlement agency before they travel to the United States."). Once a particular refugee has been approved by the Department of Homeland Security and provides a satisfactory medical evaluation, the refugee is assigned to one of several Government-contracted resettlement agencies, which then submits an assurance agreeing to provide basic, required services if and when the refugee arrives in the United States. Bartlett Decl. ¶¶ 19-21, ECF No. 301-1. The Government quarrels with the effect of such an assurance. According to the Government, because the assurance is an agreement between the State Department and a resettlement agency, not an agreement between a resettlement agency and the refugee who benefits from the assurance, the assurance cannot evidence the type of bona fide relationship contemplated by the Supreme Court. Mem. in Opp'n 11. The Court disagrees.

Nothing in the Supreme Court's decision requires a refugee to enter into a contract with a United States entity in order to demonstrate the type of formal relationship necessary to avoid the effects of EO-2. An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved for entry by the Department of Homeland Security, and it is issued in the ordinary course, and historically has been for decades. *See* Slip Op. at 12. Bona fide does not get any more bona fide than that.[11] Accordingly, Plaintiffs' Motion is granted with respect to this specific request for injunctive relief.[12]

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[11] Even if the Government is correct that the resettlement agency providing an assurance typically does not have "direct contact" with the refugee prior to his or her arrival, no such "direct contact" is required anywhere in the Supreme Court's decision. Moreover, the resettlement agency's binding commitments arise when the agency provides a formal sponsorship assurance. *See* Bartlett Decl. ¶¶ 20-21, ECF No. 301-1; *see also* Suppl. Hetfield Decl. ¶¶ 4-5, ECF No. 336-3. The resettlement agency suffers a "concrete injury" in the form of lost resources when resettlement is thwarted by the very Government that approved that refugee's admission. *See Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 729, 731-732 (S.D. Ind.), *aff'd* 838 F.3d 902 (7th Cir. 2016); *see also Exodus Refugee Immigration, Inc. v. Pence*, No. 1:15-cv-01858-TWP-DKL, 2016 WL 1222265, at *5 (S.D. Ind. Mar. 29, 2016) (denying stay pending appeal pursuant to Rule 62(c), based, in part, on finding that the "State's conduct harms [the resettlement agency by] requir[ing] it to shift its resources to make up for the funding it will lose, [which] will have a detrimental effect on its Syrian and non-Syrian clients' resettlement and transition to life in the United States"), *aff'd* 838 F.3d 902 (7th Cir. 2016). A relationship that results in such concrete hardship to a United States entity is precisely the circumstance that the Supreme Court has found to be deserving of exclusion from the effects of EO-2. *See* Slip Op. at 13.

[12] Plaintiffs complain of travel procedures and booking dates that they assert the Government is using to flout this Court's injunction. *See, e.g.*, Suppl. Hetfield Decl. ¶¶ 4-5 & Ex. A (E-mail from Lawrence E. Bartlett, to Voluntary Agencies (July 8, 2017, 8:05 EDT)), ECF No. 336-3. As best the Court can discern, regardless of the booking date involved, these complaints all relate to refugees with formal assurances, who the Court has now determined have the requisite bona fide relationship contemplated by the Supreme Court, and who are therefore excluded from the application of EO-2. No further relief covering these refugees appears to be

B. No Modification With Respect To Legal Services Organizations Is Warranted

Plaintiffs request that the Court modify its injunction to specify that the Government is prohibited from applying Sections 6(a) and 6(b) to exclude refugees who have a bona fide client relationship with a United States legal services organization.

The Government previously noted that there currently is no applicable guidance regarding the treatment of legal services providers because the nature of such representational services varies significantly. *See* Mem. in Opp'n to Emergency Mot. to Clarify Prelim Inj. 20-21, ECF No. 301. The Court agrees. Plaintiffs, for instance, advocate that foreign nationals consulting abroad with "affiliates" of American legal services providers regarding United States immigration law qualify as having a credible claim of a bona fide relationship with a person or entity in the United States. That conclusion, while conceivable, appears to be nearly impossible to reach absent additional facts, such as with respect to the nature of the consultation and affiliation. A categorical exemption of the sort requested would run afoul of the Supreme Court's order, which provides at least one example of when such a legal services client relationship would not be protected. *See* Slip Op. at 12.

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necessary, and the Court denies any such request as moot. If this ruling and the related injunction modifications set forth in this Order do not resolve or do not address Plaintiffs' travel procedure concerns, an application offering further detail may be filed.

Accordingly, to the extent Plaintiffs seek injunctive relief on behalf of IRAP and similar legal services providers, they fail to meet their burden, and the Court declines to issue the categorical modification sought.

C. **Categorical Modifications Relating To U.S.-Affiliated Iraqis, The Central American Minors Program, And The Lautenberg Program**

Plaintiffs, joined by amici IRAP and HIAS, ask that the Court enforce or modify the injunction due to the Government's alleged refusal to recognize particular refugees who have the requisite relationship to a United States entity or close family member contemplated by the Supreme Court. More specifically, Plaintiffs seek relief on behalf of refugees who accessed the USRAP through the Iraqi Direct Access Program for U.S.-Affiliated Iraqis, the Central American Minors Program, and the Lautenberg Program. *See* Br. of IRAP *et al.* as Amici Curiae in Supp. of Pls.' Mot. 10-13, ECF No. 339.

1. **Direct Access Program For U.S.-Affiliated Iraqis**

Plaintiffs contend that refugee applicants in the Iraqi Direct Access Program for U.S.-Affiliated Iraqis are categorically exempt from Sections 6(a) and 6(b) because they necessarily have the requisite bona fide relationship with a United States person or entity. *See* Mem. in Supp. of Mot. 15 n.6; *see also* Br. of IRAP *et al.* as Amici Curiae in Supp. of Pls.' Mot. 11-12; Allen Decl. ¶¶ 17-24, ECF No. 336-5 (describing mechanics and goals of program). Under the program, Iraqis who believe they are at risk or have experienced serious harm as a result of associating with the United States Government since March 20, 2003 may apply directly for resettlement as refugees in the United States, upon "verifiable proof of U.S.-affiliated employment." *See* Dep't of State, Bureau of Population, Refugees, & Migration, *Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis* (Mar. 11, 2016), *available at* https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm ("The following individuals and their derivatives (spouse and unmarried children under age 21), with verifiable proof of U.S.-affiliated employment, may seek access through this program: 1. Iraqis who work/worked on a full-time basis as interpreters/translators for the U.S. Government (USG) or Multi-National Forces (MNF-I) in Iraq; 2. Iraqis who are/were employed by the USG in Iraq[.]"). Program applicants need not be current employees of the United States or a United States-affiliated entity.

The Government opposes this request because the "Iraqi Direct Access Program includes certain non-qualifying relationships with the U.S. Government itself, as well as past (not current) relationships." Mem. in Opp'n 15 n.6. The Court concurs. Although U.S-Affiliated Iraqis with verifiable past employment relationships with United States entities may qualify for participation in the program, these applicants are not necessarily exempt from EO-2. The Supreme Court's guidance, as it relates to Section 6, clearly contemplates relationships that are current and existing. That does not necessarily follow with respect to certain Iraqi Direct Access Program applicants.

Accordingly, on the record before the Court, categorical relief is not appropriate, and Plaintiffs' Motion is denied with respect to the Iraqi Direct Access Program for U.S.-Affiliated Iraqis.

2. Central American Minors Program

The Central American Minors ("CAM") program "protects Central Americans at risk by allowing lawfully present parents in the United States to request refugee status for their children in El Salvador, Honduras, and Guatemala via the U.S. Refugee Admissions Program." *See* Dep't of State, *Cent. Am. Minors Program* (Nov. 2014), *available at* https://www.state.gov/j/prm/ra/cam/index.htm. The Government argues that because the program also allows "caregivers" who are merely "related to" the in-country parent or qualifying child to apply to the program, these participants do not necessarily have a sufficiently close relationship to a United States-based parent to qualify as a "close family member." *See* Mem in Opp'n 15 n.6; *see also* Dep't of State, *Worldwide Refugee Admissions Processing System (WRAPS), CAM Frequently Asked Questions* (Nov. 2016), *available at* https://www.wrapsnet.org/s/CAM-Frequently-Asked-Questions-November-2016.docx.

While it appears that most of those eligible to participate in the program (*e.g.*, minors with parents lawfully in the United States) would fall within those excluded from EO-2, that is not categorically true for all of those in the program. Because caregivers need not have the requisite "close familial relationship" to the in-country parent, program-wide relief is not appropriate. Consequently, Plaintiffs' Motion is denied with respect to refugees who are in the USRAP through the CAM Program.

3. Lautenberg Program

The Lautenberg Program permits certain nationals of the former Soviet Union and other countries with "close family in the United States" to apply for refugee status. *See* Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016), *available at* https://www.state.gov/j/prm/releases/docsforcongress/261956.htm ("This Priority 2 designation applies to Jews, Evangelical Christians, and Ukrainian Catholic and Orthodox religious adherents identified in the Lautenberg Amendment, Public Law No. 101-167, § 599D, 103 Stat. 1261 (1989) (codified at 8 U.S.C. § 1157) as amended ('Lautenberg Amendment'), with close family in the United States.").

The Government opposes Plaintiffs' request for categorical relief with respect to the Lautenberg Program solely because the program includes grandparents and grandchildren as "close family." *See* Mem. in Opp'n 15 n.6 ("The Lautenberg Program . . . includes grandparents and grandchildren in the family relationship criteria for applicants."); *see also* Suppl. Hetfield Decl. ¶ 6, ECF No. 336-3. In light of the Court's determination that grandparents and grandchildren are within the penumbra of "close family" for purposes of the Supreme Court's June 26 decision, the Court rejects the Government's position with respect to the Lautenberg Program. That is, because all participants admitted through the Lautenberg Program, including grandparents and grandchildren, *must* have a "close familial relationship" as that term is used in the Supreme Court's stay order, the categorical relief requested by Plaintiffs is appropriate. As a result, Plaintiffs' Motion is granted with respect to refugees who are in the USRAP through the Lautenberg Program.

IV. No Modification Is Warranted With Respect To The Government's Alleged Use Of A "Presumption"

In their Motion, Plaintiffs request modification of the injunction to prevent the Government from applying a so-called presumption that an applicant lacks the requisite bona fide relationship identified by the Supreme Court. However, Plaintiffs present no substantive argument or authority in support of their request. *See* Mot. 2, ECF No. 328; Mem. in Supp. of Mot., ECF No. 328-1. In fact, even in the face of the Government's opposition, which correctly noted that Plaintiffs appear to have abandoned their presumption contention (*see* Mem. in Opp'n 2 n.1), Plaintiffs' reply brief remained silent (*see generally* Reply, ECF No. 342).

The Court accordingly finds that Plaintiffs have abandoned their presumption argument, notwithstanding the relief sought in their proposed orders. Because Plaintiffs present no discussion or authority in support of this request, there is no basis to award the injunctive relief sought, and the Motion is denied.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

The Court MODIFIES the preliminary injunction entered on March 29, 2017, amended on June 19, 2017, and partially stayed by a June 26, 2017 decision of the United States Supreme Court, to provide as follows:

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of Executive Order No. 13,780 across the Nation—except for those portions of Sections 2 and 6 providing for internal review procedures that do not burden individuals outside of the executive branch of the federal government. Enforcement of the enjoined provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

Defendants JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them are enjoined fully from the following:

1. Applying section 2(c), 6(a) and 6(b) of Executive Order 13,780 to exclude grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.
2. Applying Section 6(a) and 6(b) of Executive Order 13,780 to exclude refugees who: (i) have a formal assurance from an agency within the United States that the agency will provide, or ensure the provision of, reception and placement services to that refugee; or (ii) are in the U.S. Refugee Admissions Program through the Lautenberg Program.

IT IS SO ORDERED.

Dated: July 13, 2017 at Honolulu, Hawai'i.

[SEAL]

/s/ DERRICK K. WATSON
DERRICK K. WATSON
United States District Judge

State of Hawaii, et al. v. Trump, et al.; Civil No. 17-00050 DKW-KSC; **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO ENFORCE, OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAI‘I AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

DECLARATION OF ISMAIL ELSHIKH, PhD

DECLARATION OF ISMAIL ELSHIKH, PhD

I, Ismail Elshikh, PhD declare the following:

1. I am an American citizen of Egyptian descent, and a resident of Hawai‘i. I have been a resident of Hawai‘i for over a decade. My wife, Dana, who is of Syrian descent, and my five children are also American citizens and residents of Hawai‘i. I am proud to be an American citizen, and consider the United States to be my home country. Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from

now-six Muslim majority countries from entering the United States.

2. I am the Imam of the Muslim Association of Hawai'i. As Imam, I am a leader within the local Hawai'i Islamic community. I believe strongly in the First Amendment, religious equality, and that individuals of different faiths should be allowed to exercise their religious beliefs, free from government suppression, and in a way that does not harm others. The members of my Mosque consider Hawai'i to be home. They are integrated into local society and culture. They have friends and family within and outside of the local Islamic community.

3. My five children are 12, 10, 8, 5 and almost 2 years of age. They have all been United States citizens, and Hawai'i residents, since birth. All of my children were born at Kaiser Hospital in Honolulu, Hawai'i. My older children attend school in Honolulu, and they have many friends from all walks of life. They are aware of both President Trump's initial travel ban and of his modified travel ban issued Monday, March 6 and are deeply saddened by the message that both convey—that a broad travel-ban is "needed" to prevent people from certain Muslim countries from entering the United States. They are deeply affected by the knowledge that the United States—their own country—would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad. When my children go to school and see other kids with their

grandparents, they ask me: "Dad, how come we can't have our grandmother like our friends; is it because we are Muslims?"

4. The revised travel ban will have a direct personal effect on me, my wife, and my children because it creates an obstacle to the ability of my mother-in-law (and my children's grandmother) to visit them in Hawai'i. My wife's mother is a Syrian national, living in Syria, with a Syrian travel document. She has been making concrete plans to visit my family for many years. It is not easy for Syrian citizens or residents, like my wife's mother, to obtain visitor travel documentation from the American government permitting entry into the United States. My wife filed an I-130 Petition for Alien Relative, on behalf of her mother, with the United States government in September 2015. The Petition was approved in February 2016, and my wife's mother was eagerly anticipating the completion of the rest of her visa application process. On January 31, 2017—days after President Trump signed the first Executive Order putting in place the original travel ban—I called the National Visa Center to inquire as to whether the Executive Order would impact my mother-in-law's visa application. I was told that it would; namely that as a result of the Executive Order, her application for an immigrant visa was now on hold and would not proceed to the next stage in the process. On February 3, 2017, the District Court for the District of Washington temporarily enjoined the enforcement of the travel ban, and the Ninth Circuit denied the Government's application for a stay. On March 2, 2017, we received an email from the National Visa Center informing us that

my mother-in-law's visa application was now in fact proceeding to the next stage of the process, and her interview would be scheduled at an embassy overseas. No date was set, but the letter stated that most interviews are set within three months. On March 6, 2017, the President signed the new travel ban. From what I understand, this will put us exactly back in the position we were in on January 31—her application will now be put on hold, indefinitely.

5. My mother-in-law has been looking forward to visiting my family for years. She last visited Hawai'i in 2005, when she stayed for one month. She has not yet met two of my five children. Only my oldest child remembers meeting her grandmother.

6. President Trump's issuance of the new Executive Order banning Syrian nationals from entering the United States has directly impacted my family by complicating, once again, my mother-in-law's ability to visit Hawai'i to see, spend time with, and get to know her grandchildren. This is devastating to me, my wife and children. I believe that it is also devastating to my mother-in-law.

7. As an Imam, I work with many members of the Hawai'i Islamic community. Many members of my Mosque are upset about the revised travel ban, and some are very fearful. All feel that the travel ban targets Muslim citizens because of their religious views and national origin. The travel ban has a very real and direct impact upon their lives. Although many members of my Mosque consider Hawai'i to be home, many have family and friends still living in the countries affected by the revised travel ban. While the

travel ban remains in effect, these individuals live in forced separation from those family members and friends.

8. I personally know of more than 20 individuals who are members of my community and mosque, who have immediate relatives in the six designated countries under the new Executive Order. These persons will now be unable to receive visits from their relatives —including spouses, parents, and children.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, Mar. 8, 2017.

/s/ ISMAIL ELSHIKH, PhD
ISMAIL ELSHIKH, PHD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAI'I AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

SUPPLEMENTAL DECLARATION OF GEORGE SZIGETI

SUPPLEMENTAL DECLARATION OF GEORGE SZIGETI

I, GEORGE SZIGETI do declare and would competently testify as follows.

1. I am the President and Chief Executive Officer of the Hawaii Tourism Authority (HTA). I have served in this role since May 2015. From 2012 to 2015, I was the President and CEO of the Hawaii Lodging and Tourism Association, a private organization of Hawaii tourism industry leaders, which represents over 700 lodging properties and businesses across the State.

2. The HTA was established in 1998 as the lead state agency for Hawaii's tourism industry. The HTA is the state agency charged with the research, development, and fostering of tourism in Hawai'i. HTA's mission is to strategically manage Hawai'i tourism in a sustainable manner consistent with economic goals, cultural values, preservation of natural resources, community desires, and visitor industry needs.

3. This declaration supplements the information in my earlier declaration, dated February 2, 2017.

4. HTA maintains data regarding visitor arrivals and total visitor spending for various regions around the world.

5. The data maintained by our agency shows that 278 visitors arrived from the Middle East in January 2017. This is a decrease from 348 visitors from the same region in January 2016. The January 2017 data is estimated at present.

6. As our data is maintained, the region Middle East includes Iran, Syria, and Yemen.

7. The data maintained by our agency also shows that 89 visitors arrived from Africa during January 2017. This is a decrease from 141 visitors who arrived from Africa in January 2016. The January 2017 data is estimated at present.

8. As our data is maintained, the region Africa includes Libya, Somalia, and Sudan.

9. HTA also maintains data about the reasons why visitors come to Hawaii, such as vacation, business, or to visit family and friends.

10. Our data shows that in 2016, Hawai‘i hosted more than 8.8 million visitors by air. Of these over 8.8 million visitors, approximately 5.4 million visitors came from elsewhere in the United States; 1.5 million came from Japan; 478,000 came from Canada; 443,000 came from other Asian countries; 399,000 came from Oceania (including Australia and New Zealand); 142,000 came from Europe; 26,000 came from Latin America; and another 325,000 came from the rest of the world (including the Middle East and Africa).

11. Of the 8.8 million total visitors who came to Hawai‘i in 2016, 8.2% of them (more than 720,000) came to visit family and friends here. Of the 325,000 visitors who came to Hawai‘i in 2016 from the areas of the globe that include the Middle East and Africa, 12.3% of them (nearly 40,000) came to visit family and friends here.

12. Our data shows that in 2015, Hawai‘i hosted more than 8.5 million visitors by air. Of these over 8.5 million visitors, approximately 5.3 million visitors came from elsewhere in the United States; 1.5 million came from Japan; 512,000 came from Canada; 393,000 came from other Asian countries; 399,000 came from Oceania (including Australia and New Zealand); 145,000 came from Europe; 28,000 came from Latin America; and another 290,000 came from the rest of the world (including the Middle East and Africa).

13. Of the 8.5 million visitors who came to Hawai'i in 2015, 8.4% of them (more than 717,000) came to visit family and friends here. Of the 290,000 visitors who came from the areas of the globe that include the Middle East and Africa, 11.9% of them (around 34,000) came to visit family and friends here.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4th of Mar., 2017, in Honolulu, Hawai'i.

/s/ GEORGE SZIGETI
GEORGE SZIGETI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAIʻI AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

ORIGINAL DECLARATION OF GEORGE SZIGETI

DECLARATION OF GEORGE SZIGETI

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1. I am the President and Chief Executive Officer of the Hawaii Tourism Authority (HTA). I have served in this role since May 2015. From 2012 to 2015, I was the President and CEO of the Hawaii Lodging and Tourism Association, a private organization of Hawaii tourism industry leaders, which represents over 700 lodging properties and businesses across the State.

2. The HTA was established in 1998 as the lead state agency for Hawaii's tourism industry. The HTA is the state agency charged with the research, development, and fostering of tourism in Hawai'i. HTA's mission is to strategically manage Hawai'i tourism in a sustainable manner consistent with economic goals, cultural values, preservation of natural resources, community desires, and visitor industry needs.

3. The Tourism Special Fund was also established in 1998. It is a set percentage of the transient accommodations tax collections that is assessed on hotels, vacation rentals, and other accommodations. It is used by the HTA to market, develop, and support Hawaii's tourism economy.

4. Among its responsibilities, HTA is charged with:

    a. setting tourism policy and direction from a statewide perspective;

    b. developing and implementing the State's tourism marketing plan and efforts;

    c. supporting programs and initiatives that enhance and showcase Hawaii's diverse peoples, places, and cultures of the islands, in order to deliver an incomparable visitor experience, including supporting Native Hawaiian culture and community, signature events and festivals, and preservation and proper use of Hawaii's striking natural resources;

- d. managing programs and activities to sustain a healthy tourism industry for the State;
- e. coordinating tourism-related research, planning, promotional and outreach activities with the public and private sectors; and
- f. encouraging distribution of visitors across all of the Hawaiian Islands to balance capacity.

5. HTA maintains data regarding visitor arrivals and total visitor spending for various regions around the world

6. The data maintained by our agency shows the following for the last five years:

	2012	**2013**	**2014**	**2015**	**2016**
Total Visitor Expenditures (in Million $)	$14,364.8	$14,520.5	$14,973.3	$15,110.9	$15,745.7
Total arrivals (by air and cruise ships)	8,028,743	8,174,461	8,320,785	8,679,564	8,941,394
Arrivals by Air	7,867,143	8,003,474	8,196,342	8,563,018	8,832,598
Arrivals by cruise ship	161,600	170,987	124,443	116,546	108,796

The total visitor expenditures reported in this chart from 2012-2015 includes supplemental business expenditures. For 2016, the data is preliminary and the supplemental business expenditures have been estimated.

7. To translate, Hawaii's tourism industry brought well over $14 billion into the State during 2012 to 2014. In 2015 and 2016, it brought in over $15 billion. Tourism is the leading economic driver in the State.

8. As this data shows, airline travel is far and away the preferred method to travel to Hawai'i. In 2016, for example, a total of 8,941,394 people arrived in the islands. Only 108,796 of this total (1.2%) arrived by cruise ship.

9. Our data also shows that there is a steady flow of visitors from the Middle East and Africa. The data maintained by our agency shows the following for the last five years:

Visitor Arrivals	2012	2013	2014	2015	2016
Middle East	3,565	3,182	5,784	6,804	5,451
Africa	1,345	1,111	1,877	2,090	1,725

This data reflects visitor arrivals, in surveys taken for air arrivals. The 2016 data is preliminary.

10. As our data is maintained, the region Middle East includes Iran, Iraq, Syria, and Yemen.

11. As our data is maintained, the region Africa includes Libya, Somalia, and Sudan.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2 of Feb., 2017, in Honolulu, Hawaii.

/s/ GEORGE SZIGETI
GEORGE SZIGETI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAIʻI AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

SUPPLEMENTAL DECLARATION OF LUIS P. SALAVERIA

SUPPLEMENTAL DECLARATION OF LUIS P. SALAVERIA

I, LUIS P. SALAVERIA, do declare and would competently testify as follows.

1. I am the Director of the State of Hawaii Department of Business, Economic Development and Tourism (DBEDT). I have held this position since December 2014. Prior to this position, I served as the State's Deputy Director of Finance from 2011 to 2014.

2. As Director, I lead DBEDT's efforts to achieve a Hawaii economi that embraces innovation and is globally competitive and dynamic, providing opportunities for all Hawaii's citizens.

3. Through our attached agencies, we also foster planned community development, create affordable workforce housing units in high-quality living environments, and promote innovative job growth.

4. This declaration supplements the declaration I submitted to this Court earlier, dated February 2, 2017. In that declaration, I offered my observations about the potential impact President Trump's executive order, issued January 27, 2017, could have on Hawaii's economy, including our tourism industry. It is my understanding that this original executive order temporarily banned travel from seven Muslim-majority countries.

5. I am aware that on March 6, 2017, President Trump issued a new executive order. This order temporarily bans travel from six Muslim-majority countries, and does not apply to legal permanent residents or other designated, limited, and narrow categories of non-citizens.

6. The observations I made regarding the potential impact the first executive order could have on Hawaii apply just as much to the new executive order. Hawaii's financial and business interests in its tourist economy; Hawaii's well-earned reputation and brand as a place of wel-

come, inclusivity, and tolerance; and Hawaii's efforts to position itself as a hub of international business are all threatened by the new executive order in the same manner as they were by the first order.

7. I am also aware that the new executive order was issued after weeks of speculation and uncertainty, after the federal government represented on February 16, 2017 that a new order would be issued in the near future. The shifting and uncertain nature of federal policies regarding travel to the United States itself poses a problem for Hawaii.

8. I am aware that the new executive order expands the President's directive to the Department of Homeland Security to conduct a "worldwide review" about what information may be needed from "each foreign country" to determine whether nationals from that country should be granted a visa or otherwise admitted to the United States. I am aware that the executive order envisions a report from the Department of Homeland Security twenty days after the effective date of the order, with an indication of what additional information may be necessary from each country. This has the potential to introduce further uncertainty into planned and future international travel to the United States.

9. Hawaii has millions of visitors annually from all over the world. I expect, given the uncertainty the new executive order and its predecessor have caused to international travel generally,

that these changing policies may depress tourism, business travel, and financial investments in Hawaii.

10. Many of our visitors are tourists who travel here for vacation. Uncertainty regarding the future of federal policies impacting air travel may discourage visitors from undertaking the advance planning typically involved with a Hawaiian vacation. It may also cause would-be visitors to choose other destinations where such uncertainty is not an issue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6th of Mar., 2017, in Honolulu, Hawaii.

/s/ LUIS P. SALAVERIA
LUIS P. SALAVERIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAIʻI AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

ORIGINAL DECLARATION OF LUIS P. SALAVERIA

DECLARATION OF LUIS P. SALAVERIA

I, LUIS P. SALAVERIA, do declare and would competently testify as follows.

1. I am the Director of the State of Hawaii Department of Business, Economic Development and Tourism (DBEDT). I have held this position since December 2014. Prior to this position, I served as the State's Deputy Director of Finance from 2011 to 2014.

2. As Director, I lead DBEDT's efforts to achieve a Hawaii economy that embraces innovation

and is globally competitive and dynamic, providing opportunities for all Hawaii's citizens.

3. Through our attached agencies, we also foster planned community development, create affordable workforce housing units in high-quality living environments, and promote innovative sector job growth.

4. In my professional experience working for and promoting Hawaii, the ability for government and business leaders to travel to each other's respective countries is critical to maintaining Hawaii's tourism economy and to expand our local economy's potential beyond tourism.

5. The networking and trust-building that occurs as a result of travel is not something that can be replicated through phone calls, emails, or videoconferences. Meaningful relationships between government agencies, private businesses, and community organizations is best accomplished through direct interaction and face-to-face engagements.

6. I have recently traveled to Japan, Korea, and the Philippines to explore opportunities for collaborative engagements in renewable energy and to discuss Hawaii's renewable energy laws.

7. As a result of my trip to the Philippines, a delegation from that country came to Hawaii to participate in our annual Clean Energy Summit. They also participated in one of our business start-up accelerator programs and invested funds into the program. This outcome would

not have been possible if not for the willingness of these individuals to travel to Hawaii.

8. The State of Hawaii maintains a number of sister-state relationships with countries throughout world. Countries such as China, Indonesia, Japan, Philippines, and Taiwan are partners to Hawaii in this global economy, and these relationships are integral to maintaining Hawaii's position as a global destination and place of business. The ability to interact with these countries without concern of impeded travel by individuals from those countries is crucial to these relationships.

9. Through news coverage and through conversations with others in state government, I am aware of Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," which was issued by President Donald Trump on January 27, 2017. It is my understanding that the Executive Order temporarily bars entry into the United States of any person who is a citizen of any one of six countries: Iraq, Iran, Somalia, Sudan, Libya and Yemen. It is my understanding that the Executive Order indefinitely bars entry into the United States of any person who is a citizen of Syria. It is my understanding that this bar to travel to the United States applies regardless of whether the person in question poses a specific threat of violence or any connection to terrorist activities in any way.

10. I am also aware that a great deal of confusion and inconsistent implementation occurred as the Executive Order was placed into effect nationwide. I am generally aware of the news coverage regarding the Executive Order and how its impact is being felt around the world and here in Hawaii.

11. Based on my professional experience it is my opinion that this Executive Order has the potential to inhibit and impair Hawaii's relationships with foreign countries. Hawaii has millions of visitors annually from all over the world. I expect, given the instability it has caused to international travel generally, that this Executive Order may depress tourism, business travel, and financial investments in Hawaii. It is also my opinion that the confusion and difficulties brought about by the Executive Order may result in visitors who would choose to visit Hawaii to instead look at other destinations where travel will not be impeded.

12. In my experience as DBEDT director, Hawaii has always been viewed as a place of acceptance, hospitality, and cultural diversity. Any potential action that could jeopardize that reputation has the ability to do irreparable harm to our State's brand. For many of our visitors, Hawaii is a vacation destination, and people generally take vacations to places where they feel welcome, invited, and safe.

13. In addition to being a tourist destination, Hawaii has been positioning itself for many years as a

hub of international business, located midway between Asia and the continental United States. In my time in state government I have witnessed and been part of efforts to attract business and financial investments to Hawaii by emphasizing our inclusiveness and diversity. I believe that the Executive Order causes harm to this reputation and may negatively impact Hawaii's ability to attract future investments from countries that are not currently named in the Executive Order.

14. In my professional travel experience working to expand Hawaii's businesses, I have learned how important it is that Hawaii maintain its reputation as a place of inclusivity and welcome. I believe the Executive Order threatens this reputation.

15. There is no recent parallel to this situation and the Executive Order was recently issued. At this point, it is difficult to determine with precision how its effects will play out for Hawaii's air travelers. Hawaii is uniquely positioned geographically, in the middle of the Pacific Ocean. For the vast majority of our visitors, flying is the only way to travel here. Given the confusion, controversy, and shifting instructions from the federal government regarding the Executive Order, travelers may consider the current situation as a reason for not undertaking travel to Hawaii.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on $\underline{2^{nd}}$ of Febr., 2017, in Honolulu, Hawaii.

/s/ LUIS P. SALAVERIA
LUIS P. SALAVERIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAI‘I AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

SUPPLEMENTAL DECLARATION OF RISA E. DICKSON

SUPPLEMENTAL DECLARATION OF RISA E. DICKSON

I, Risa E. Dickson, do declare and would competently testify as follows.

1. I am Vice President for Academic Planning and Policy, at the University of Hawai‘i System. I began this role in February 2015. Previously, I worked at California State University, San Bernardino from 1991-2014. Among the positions I held there included Associate Provost for Academic Personnel. As Associate Prov-

ost, my office processed and monitored visa for international faculty.

2. As Vice President I have overall responsibility for leadership, planning, and intercampus coordination of academic affairs, student affairs, academic policy and planning, institutional research and analysis, international and strategic initiatives, and the Hawai'i P-20 Partnerships for Education. Given my current role with international and strategic initiatives, and my previous experience with recruitment of international faculty, I am well aware of the importance of the role of international faculty in the vibrancy of a healthy university.

3. This declaration supplements the declaration I previously filed with this court, dated February 1, 2017.

4. I am aware that President Trump issued an executive order on January 27, 2017, which temporarily banned travel from seven Muslim-majority countries. I am also aware that on March 6, 2017, President Trump issued a new executive order. This order temporarily bans travel from six Muslim-majority countries, and does not apply to legal permanent residents or other designated, limited, and narrow categories of non-citizens.

5. Despite these changes, many of the impacts of the new executive order will be the same on the University community as were caused by the old executive order. The new executive order

threatens the University's status as an international institution. As with all institutions of higher learning, the scholarship and community of the University rely upon the collaborative exchanges of ideas and research partnerships. The University relies upon faculty, teaching, research, conferences, and program activities that regularly require travel outside the United States. The new executive order will undermine the University's ability to fully engage in the international exchange of ideas and research partnerships. Affected individuals will be understandably reluctant to travel when their ability to return to Hawaii is uncertain. This uncertainty threatens the University's programs, which regularly require travel outside the United States.

6. The new executive order will also hinder the diversity of thought and experience that forms the backbone of any institution of higher education. A diverse student body is part of the educational experience for all students. Given my experience in higher education, I expect that the new executive order will deter students, scholars and faculty from attending our institution. Our experience with higher education indicates that the new executive order will have not just the direct impacts described here, but will likely deter students, scholars and faculty from *other* countries and communities from attending our institutions.

7. The executive order will directly impact the University of Hawai'i. The University presently has approximately 23 graduate students from the six countries included in the new Executive Order. These students attend our institution under valid visas issued by the United States government. They study and work alongside the University's many thousands of other students. The University also has employees including faculty from two of the designated countries, namely Iran and Sudan, who are here on immigrant visas. In addition, the University has at least 29 visiting faculty members and scholars with valid visas from the six countries affected by the new Executive Order. Given the new Executive Order, the University's ability to recruit and enroll students and graduate students, and recruit and hire visiting faculty from the six affected countries, is constrained. Were it not for the new Executive Order, I would expect these activities to take place both in the coming school year and in the near future.

8. Though it is too soon to determine the full impact of the new executive order and its predecessor on the University's future recruitment efforts, we are anticipating that recruitment for undergraduate students, graduate students, permanent faculty members, or visiting faculty members or scholars from the six affected countries may be impacted. Individuals who are neither legal permanent residents nor cur-

rent visa holders will be entirely precluded from considering our institution. This sort of recruitment of students, graduate students, scholars, and faculty—including those from the six designated countries—is important to the diversity of thought and ideas on campus, which the University seeks to foster. As outlined above, the University currently has a number of professors, scholars, and students from the affected countries, and an active program in Persian Language, Linguistics, and Culture. We will be unable to foster further growth in this population because the new executive order will prevent scholars or professors from those countries from considering employment in the United States and at the University of Hawai‘i. This may directly impact the University of Hawai‘i's ability to recruit and accept the most qualified students and faculty.

9. In addition, we are concerned that the environment caused by these federal orders might dissuade some of our current professors or scholars from continuing their scholarship in the United States and at our institution.

10. In observing the shifting federal policies on immigration from these countries, we stand by our previously stated concern that the new executive order will hinder the free flow of information and ideas, as did its predecessor.

11. As with the State of Hawai‘i generally, the University of Hawai‘i prides itself on a reputation of inclusiveness, tolerance, and diversity.

> The new executive order threatens this reputation, and our ability to fully embrace our priority as a global university and one of the most diverse institutions of higher education.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Mar. 8, 2017, in Honolulu, Hawaiʻi.

/s/ RISA E. DICKSON
RISA E. DICKSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAIʻI AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

ORIGINAL DECLARATION OF RISA E. DICKSON

I, Risa E. Dickson, do declare and would competently testify as follows.

1. I am Vice President for Academic Planning and Policy, at the University of Hawaiʻi system. I began this role in February 2015. Previously, I worked at California State University, San Bernardino from 1991-2014. Among the positions I held there included Associate Provost for Academic Personnel. As Associate Provost, my office processed and monitored visa for international faculty.

2. As Vice President I have overall responsibility for leadership, planning, and intercampus coordination of academic affairs, student affairs,

policy and planning, institutional research and analysis, international and strategic initiatives, and the Hawai'i P-20 Partnerships for Education. Given my current role with international and strategic initiatives, and my previous experience with recruitment of international faculty, I am well aware of the importance of the role of international faculty in the vibrancy of a healthy university.

3. The University of Hawai'i system was founded in 1907 and includes three universities, seven community colleges, and community-based learning centers across six of the Hawaiian Islands.

4. The University is a leading engine for economic growth and diversification in Hawai'i. The University stimulates the local economy with jobs, research, and skilled workers.

5. The University is a unique and important institution in our island State, and in our nation. Because of Hawai'i's unique geographic location, the University is able to offer unique research and employment opportunities in the fields of astronomy and oceanography.

6. Hawai'i's location in the Pacific Ocean, balanced between east and west, creates opportunities for international leadership and collaboration.

7. The University is an international institution. This is reflected in our diverse faculty, which includes approximately four hundred and seventy-seven international faculty members legally present in the United States. Throughout the

University system, we have study abroad or exchange programs in thirty-three different countries. Throughout the University system, we have 489 separate international agreements with 353 institutions in forty different countries, providing opportunities for learning and collaboration for our faculty and scholars.

8. The University has been apprised of the Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," which was issued by President Donald Trump on January 27, 2017. I have been informed that the Executive Order temporarily bars entry into the United States of any person who is a citizen of any one of seven countries: Syria, Iraq, Iran, Somalia, Sudan, Libya and Yemen. I have also been informed that this bar to travel to the United States applies regardless of whether the person in question poses any individualized threat of violence or any connection to terrorist activities in any way.

9. This Executive Order directly impacts the University of Hawai'i community. The University presently has approximately 27 graduate students from the seven countries affected by the Executive Order. These students attend our institution under valid visas issued by the United States government. These students study and work alongside the University's many thousands of other students, who hail from all over Hawai'i, the United States, and the world.

10. The University has permanent resident faculty from the same seven affected countries, namely Iran, Iraq and Sudan. I am aware of at least ten faculty members who fall within this category and are subject to the Executive Order. There may be more faculty members who fall within this category, because we do not actively track legal permanent residency.

11. In addition, the University also has visiting faculty and scholars who are directly affected by the Executive Order. The University has at least thirty faculty members with valid visas who are from the seven countries affected by this Executive Order As with all institutions of higher education, the scholarship and community of the University of Hawai‘i relies upon the collaborative exchange of ideas and research partnerships. The University relies upon faculty, teaching, research, conferences, and program activities that regularly require travel outside the United States.

12. The Executive Order will affect the ability for the faculty and students discussed above to have the freedom to fully engage in their fields of study, by effectively prohibiting travel outside the United States for those affected individuals who are present here today. It is anticipated that the Executive Order will negatively impact their development as scholars and professors; deprive them of the chance to visit family and friends in their countries of origin, or to attend significant personal events such as weddings

and funerals; and prevent their family and friends from being able to reunite with their families, visit Hawai‘i or move here permanently. I am aware of faculty who have planned trips to reunite with family members and are concerned about their ability to return to their work and home.

13. The Executive Order will also hinder the diversity of thought and experience that forms the backbone of any institution of higher education. A diverse student body is part of the educational experience for all students. This is immeasurably enriched by our international students and schools, including those from the seven countries targeted in the Executive Order.

14. The University of Hawaii stands with the higher education community nationwide in our concern over the impact the Executive Order has on the free flow of information and ideas. Our experience with higher education indicates that the Executive Order will have not just the direct impacts described here, but will also deter students, scholars and faculty from other affected countries and communities from attending our institutions.

15. The University of Hawai‘i and the State of Hawai‘i have been immeasurably strengthened through the diversity of the students and faculty we attract. The fundamental values of our nation and our State have long supported the welcoming of others to our Islands and embracing them into our communities.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawai'i, Feb. 1, 2017.

/s/ RISA E. DICKSON
RISA E. DICKSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil Action No. 1:17-cv-00050-DKW-KJM

STATE OF HAWAIʻI AND ISMAIL ELSHIKH, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

DECLARATION OF HAKIM OUANSAFI

DECLARATION OF HAKIM OUANSAFI

I, HAKIM OUANSAFI, do declare and would competently testify as follows.

1. I am the Chairman of the Muslim Association of Hawaii. I have held this position for approximately 15 years. I have been a resident of Hawaii since 1998.

2. I have personal knowledge of the matters set forth in this declaration.

3. The Muslim Association of Hawaii is the only formal Muslim organization in the State of Hawaii. The Association owns the Mosque on

Oahu. Dr. Elshik, the plaintiff in this case, is an employee of the Association.

4. As Chairman of the Muslim Association of Hawaii, I am the official contact person for any matters affecting the Association and the Muslim community.

5. Having lived in Hawaii for nearly 20 years, I know well the members of our Muslim community. Members of our congregation will direct newcomers and visitors to me, and it is part of my responsibility as Chairman to greet any newcomers and visitors.

6. Within the last two years, we have had 104 Friday prayer gatherings at the Mosque. Typically 300-400 people a week attend the Friday prayer gatherings. I attend every single one except when I am traveling.

7. I am aware that on March 6, 2017, President Trump issued a new executive order that temporarily bans travel from six Muslim-majority countries. My understanding is that the executive order does not apply to legal permanent residents or other specified limited categories of non-citizens.

8. On at least half a dozen occasions in the last two years (2015-2016), foreign nationals visiting Hawaii from at least one of the six countries in the March 6 executive order have attended our Friday prayer gatherings. I specifically recall having guests from Yemen and Libya.

9. In addition, I am aware of at least two families from Libya who were here in Hawaii while going for medical training at one of the local hospitals. They were here on visas, and have since moved. They attended the Mosque regularly.

10. In addition, I am also aware of at least one student from Sudan who attended the University of Hawaii for his Ph.D. studies in the last couple of years.

11. Our Mosque brings people together from all over the world, including individuals visiting or temporarily residing in Hawaii from the six countries in the March 6 executive order. The executive order, by telling such individuals they are no longer welcome in this country, has undermined the atmosphere in our entire community, and has also stymied the ability of members of our community to associate freely without retaliation.

12. The executive order has also increased fear, anxiety, and grief for families living permanently here in Hawaii who are unable to have their loved ones from the six designated countries visit them here.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Mar. 8, 2017 in Honolulu, Hawaii.

/s/ HAKIM OUANSAFI
HAKIM OUANSAFI

Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States

Release Date: March 21, 2017

Office of Public Affairs
Contact: 202-282-8010

Overview: Change to international travel carry-on items

Evaluated intelligence indicates that terrorist groups continue to target commercial aviation and are aggressively pursuing innovative methods to undertake their attacks, to include smuggling explosive devices in various consumer items. Based on this information, Secretary of Homeland Security John Kelly and Transportation Security Administration Acting Administrator Huban Gowadia have determined it is necessary to enhance security procedures for passengers at certain last point of departure airports to the United States.

These enhancements apply to 10 specific airports. The affected overseas airports are: Queen Alia International Airport (AMM), Cairo International Airport (CAI), Ataturk International Airport (IST), King Abdul-Aziz International Airport (JED), King Khalid International Airport (RUH), Kuwait International Airport (KWI), Mohammed V Airport (CMN), Hamad International Airport (DOH), Dubai International Airport (DXB), and Abu Dhabi International Airport (AUH).

The aviation security enhancements will include requiring that all personal electronic devices larger than a cell phone or smart phone be placed in checked baggage at

10 airports where flights are departing for the United States.

Impacted International Flights Bound for the United States

These enhanced security measures will only affect flights from 10 of the more than 250 airports that serve as last points of departure to the United States. A small percentage of flights to the United States will be affected, and the exact number of flights will vary on a day to day basis. Airlines will know in advance which flights are affected by these measures

Large Electronic Devices

Electronic devices larger than a cell phone/smart phone will not be allowed to be carried onboard the aircraft in carry-on luggage or other accessible property. Electronic devices that exceed this size limit must be secured in checked luggage. Necessary medical devices will be allowed to remain in a passenger's possession after they are screened.

The approximate size of a commonly available smartphone is considered to be a guideline for passengers. Examples of large electronic devices that will not be allowed in the cabin on affected flights include, but are not limited to:

- Laptops
- Tablets
- E-Readers
- Cameras
- Portable DVD players
- Electronic game units larger than a smartphone

- Travel printers/scanners

There is no impact on domestic flights in the United States or flights departing the United States. Electronic devices will continue to be allowed on all flights originating in the United States.

For more information and travel tips, please visit www.TSA.gov (https://www.TSA.gov).

# # #

Topics: Air (/topics/air)

Keywords: aviation security (/keywords/aviation-security, aviation (/keywords/aviation)

Last Published Date: March 21, 2017

Q&A: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States

Release Date: March 21, 2017

UPDATED: March 24, 2017 5:00 p.m. EST
Office of the Press Secretary
Contact: 202-282-8010

Q1: Why is the U.S. Government taking these steps now? Are these new policies in response to a specific terrorist threat or plot?

A1: The U.S. Government is concerned about terrorists' ongoing interest in targeting commercial aviation, including transportation hubs over the past two years, as evidenced by the 2015 airliner downing in Egypt, the 2016 attempted airliner downing in Somalia, and the 2016 armed attacks against airports in Brussels and Istanbul. Evaluated intelligence indicates that terrorist groups continue to target commercial aviation, to include smuggling explosive devices in various consumer items.

Based on this trend, the Transportation Security Administration (TSA), in consultation with relevant Departments and Agencies, has determined it is prudent to enhance security, to include airport security procedures for passengers at certain last point of departure airports to the United States. These enhancements include more stringent measures applied to 10 specific airports.

The enhancement in security will require that all personal electronic devices (PEDs) larger than a cell phone or smart phone be placed in checked baggage. These items will no longer be allowed to be carried onto aircraft at 10 select airports where flights are departing for the United States. Approved medical devices may be brought into the cabin after additional screening.

This security enhancement will be implemented through a Security Directive (SD)/Emergency Amendment (EA) process, which includes industry notification, to affected air carriers that will implement the requirements.

Q2: Why is DHS/TSA doing this now?

A2: The Department of Homeland Security, in close cooperation with our intelligence community partners, continuously assesses and evaluates the threat environment. While a number of existing security measures remain in place, others will be modified, as deemed necessary to protect travelers. DHS will continue to adjust its security measures to ensure the highest levels of aviation security without unnecessary disruption to travelers.

Q3: Is there a specific or credible threat to aviation?

A3: We have reason to be concerned about attempts by terrorist groups to circumvent aviation security and terrorist groups continue to target aviation interests. Implementing additional security measures enhances our ability to mitigate further attempts against the overseas aviation industry.

Q4: Did new intelligence drive a decision to modify security procedures?

A4: Yes, intelligence is one aspect of every security-related decision. The record of terrorist attempts to destroy aircraft in flight is longstanding and well-known. We continually re-assess old intelligence and collect new intelligence.

Q5: How did you select these airports and which ones are affected?

A5: DHS, in close cooperation with our intelligence community partners, selected these airports based on the current threat picture. The affected overseas airports are: Queen Alia International Airport (AMM), Cairo International Airport (CAI), Ataturk International Airport (IST), King Abdul-Aziz International Airport (JED), King Khalid International Airport (RUH), Kuwait International Airport (KWI), Mohammed V Airport (CMN), Hamad International Airport (DOH), Dubai International Airport (DXB), and Abu Dhabi International Airport (AUH).

Q6: Could more airports be added in the future, and might some of those be in the U.S.?

A6: As threats change, so too will TSA's security requirements.

Q7: How long will these new procedures remain in place?

A7: The new procedures remain in place until the threat changes. These are risk-based decisions and TSA continuously assesses security risks and seeks to balance necessary security requirements with their operational impact on the industry.

Q8: Why won't these procedures continue indefinitely, like the prohibition on bringing liquids through security screening?

A8: See above.

Q9: How are you defining, "larger than a smart phone?"

A9: The size and shape of smart phones varies by brand. Smartphones are commonly available around the world and their size is well understood by most passengers who fly internationally. Please check with your airline if you are not sure whether your smartphone is impacted.

Q10: Why does this only apply to large electronic devices? Why doesn't this apply to mobile phones?

A10: TSA seeks to balance risk with impacts to the traveling public and has determined that cell phones and smart phones will be allowed in accessible property at this time.

Q11: Is air travel safe?

A11: Yes. Today, all air travelers are subject to a robust security system that employs multiple layers of security, both seen and unseen, including:

- Intelligence gathering and analysis
- Cross-checking passenger manifests against watchlists
- Thorough screening at checkpoints
- Random canine team screening at airports
- Reinforced cockpit doors

- Federal air marshals
- Armed pilots
- A vigilant public

In combination, these layers provide enhanced security creating a much stronger and protected transportation system for the traveling public. TSA continually assesses and evaluates the current threat environment and adjusts security measures as necessary to ensure the highest levels of aviation security without unnecessary disruption to travelers.

Q12: How will TSA ensure foreign airports and air carriers are complying with the new procedures?

A12: TSA conducts assessments of foreign airports and inspections of airlines to ensure all U.S. regulations and International security standards are being met at last point of departures to the United States. TSA directly assesses the security posture of last points of departure airports under the Foreign Airport Assessment Program (FAAP) and evaluates the implementation of the internationally recognized International Civil Aviation Organization (ICAO) standards. TSA also utilizes its regulatory authorities over the air carriers which serve the United States to implement enhanced security measures at foreign locations. As an element of each air carrier's legally binding approval to operate to and from the United States, the airline agrees to meet all security requirements stipulated by TSA.

Q13: How does this affect the American public, either those traveling to/from these selected airports and those flying within the U.S.?

A13: All passengers flying through and from these locations will have to place electronic devices that are larger than a cell phone/smart phone in their checked bags regardless of the passenger's citizenship.

Q14: Will the security procedures continue to apply to both international and domestic passengers?

A14: This applies to all passengers traveling from 10 specific airports overseas.

Q15: Why are you only implementing these measures overseas, could the same tactics be used domestically?

A15: Electronic devices will still be allowed on all flights originating in the United States. Security procedures, both seen and unseen, are in place to mitigate the risk to flights in the United States.

Q16: Does TSA have to hire additional officers, or transfer some to the affected airports, to ensure the new screening procedures are followed?

A16: No additional TSA personnel are needed because TSA does not conduct screening at airports outside the United Sates.

Q17: Are the security measures introduced on July 2, 2014 still in place?

A17: A number of those implemented security measures remain in place while others may be modified as deemed necessary to protect travelers. Since July 2, 2014, a number of foreign governments have themselves enhanced aviation security, buttressing and replacing our own measures at these airports when it became routine at overseas airports for security officials to ask some passengers to turn on their electronic devices, including cell phones, before boarding flights to the United States.

Q18: How many flights does this affect?

A18: This will only impact flights from 10 of the more than 250 airports that serve as last points of departure to the United States. This will only impact a small percentage of flights to the United States. The exact number of flights will vary on a day to day basis.

Q19: How many passengers will be affected?

A19: These measures will apply to all passengers on flights from the 10 last points of departure airports, a small fraction of passengers traveling to the United States by air each day.

Q20: Will this affect passengers enrolled in trusted traveler programs?

A20: These measures will apply to all passengers on flights from certain locations regardless of trusted traveler status.

Q21: What do you recommend passengers do if they are flying out of one of the last point of departure airports?

A21: Passengers should pack large personal electronic devices in checked bags and contact their air carrier with additional questions.

Q22: How will this affect the screening process at the airport?

A22: Generally, passengers will be instructed to place large electronic devices in their checked bags when traveling from one of the last point of departure airports. We provided guidance to the airlines who will determine how to implement and inform their passengers.

Q23: How will this affect passengers with connections?

A23: TSA recommends passengers transferring at one of the 10 affected airports place any large personal electronic devices in their checked bags upon check-in at their originating airport.

Q24: Can you provide any examples of recent terrorist plotting against the aviation sector? Please highlight the trend you're concerned about.

A24: Although the U.S. has instituted robust aviation security measures since 9/11, our information indicates that terrorist groups' efforts to execute an attack against the aviation sector are intensifying given that aviation attacks provide an opportunity to cause mass casualties and inflict significant economic damage, as well as generate overwhelming media coverage.

We note that disseminated propaganda from various terrorist groups is encouraging attacks on aviation, to include tactics to circumvent aviation security. Terrorist propaganda has highlighted the attacks against aircraft in Egypt with a soda can packed with explosives in October 2015, and in Somalia using an explosives-laden laptop in February 2016.

Terrorists have historically tried to hide explosives in shoes in 2001, use liquid explosives in 2006, and conceal explosives in printers in 2010 and suicide devices in underwear in 2009 and 2012. Within the last year, we have also seen attacks conducted at airports to include in Brussels and Istanbul.

Q25: How were these countries informed?

A25: USG officials coordinated with their foreign counterparts to inform them of the changing threat. TSA has a formal process for notifying airlines through the EA/SD process. This process was used to notify affected airlines of the needed changes.

Q26: How will this be implemented?

A26: The Airlines will have 96 hours to implement. The manner of an EA/SD is to tell an airline the end result required (no electronic devices larger than a cell phone allowed in the cabin) and allow them the flexibility to implement within their business model.

Q27: Will U.S. direct hires/diplomats posted in these countries be told to take other routes/airlines?

A27: No. U.S. government employees in the affected countries have the option, but are not required, to modify their travel routes. The new routes must comply with all U.S. government travel regulations.

Q28: Will this apply to flights departure to affected countries?

A28: No. At this time, evaluated intelligence says that the threat exists at the 10 last point of departure airports.

Q29: Does this start tomorrow?

A29: Airlines were notified on March 21st at 3:00 a.m. EDT. They have 96 hours within which to comply.

Q30: How long will these enhanced security measures be in effect?

A30: These measures will be in effect indefinitely. However, DHS and TSA continue to evaluate our aviation security processes and policies based on the most recent intelligence.

Q31: What will happen to my checked bag with my electronic devices once I land in the United States?

A31: TSA will increase explosives detection screening of passenger luggage on select international inbound flights upon domestic arrival. The screening will occur prior to releasing the luggage back to passengers. It is possible that this process may result in delays for connecting luggage.

Q32: Once I arrive in the U.S. and retrieve my bag, what if I miss my connecting flight to my final U.S. destination?

A32: Contact your connecting airline on how best to rebook to your final U.S. destination. Additionally, consider contacting your airline prior to your flight to inquire about your connection time.

Q33: What U.S. domestic airports will be impacted?

A33: Atlanta (ATL), Boston (BOS), Chicago O'Hare (ORD), Dallas-Ft. Worth (DFW), Ft. Lauderdale (FLL), Houston Intercontinental (IAH), Los Angeles (LAX), Miami (MIA), Orlando (MCO), New York Kennedy (JFK), Philadelphia (PHL), San Francisco (SFO), Seattle-Tacoma (SEA), and Washington Dulles (IAD).

Q34: What do I do if my electronics are damaged or missing from my baggage when I arrive at my destination?

A34: Regardless of where you are flying to/from or what airline you are flying on, you should always contact your airline if there is an issue with your checked baggage.

Q35: Are U.S. government employees who are assigned U.S. government laptops also restricted from carrying their laptops in carry-on bags on these flights?

A35: The limits on the size of electronics in carry-on bags apply to all passengers, including U.S. government employees with U.S. government-issued laptops.

Q36: What is the procedure if something screens positive for explosives?

A36: TSA partners with local law enforcement officials at each airport and has protocols in place for proper response when a bag triggers an alarm during screening.

# # #

Topics: Air (/topics/air)

Keywords: aviation (/keywords/aviation) , aviation security (/keywords/aviation-security)

Last Published Date: March 24, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

No. 1:17-cv-00050-DKW-KJSC

STATE OF HAWAIʻI, PLAINTIFF

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA, DEFENDANTS

DECLARATION OF LAWRENCE E. BARTLETT

Judge: Hon. Derrick K. Watson

DECLARATION OF LAWRENCE E. BARTLETT

I, Lawrence E. Bartlett, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a career member of the Senior Executive Service and currently serve as the Director of the Refugee Admissions Office within the Bureau of Populations, Refugees and Migration at United States Department of State. I have been in this position for six years. The statements contained in this declaration are based on my personal knowledge or on information provided to me in my official capacity.

2. In Fiscal Year 2017 to date, 38,484 refugees have arrived and been resettled in the United States. Of that number, 3 were resettled in Hawaii.

3. In Fiscal Year 2016, 84,994 refugees arrived and were resettled in the United States. Of that number, none were resettled in Hawaii.

4. In Fiscal Year 2015, 63,933 refugees arrived and were resettled in the United States. Of that number, 7 were resettled in Hawaii.

5. In Fiscal Year 2014, 69,987 refugees arrived and were resettled in the United States. Of that number, 2 were resettled in Hawaii.

6. In Fiscal Year 2013, 92,926 refugees arrived and were resettled in the United States. Of that number, 6 were resettled in Hawaii.

7. In Fiscal Year 2012, 58,238 refugees arrived and were resettled in the United States. Of that number, one was resettled in Hawaii.

8. In Fiscal Year 2011, 56,424 refugees arrived and were resettled in the United States. Of that number, none were resettled in Hawaii.

9. In Fiscal Year 2010, 73,311 refugees arrived and were resettled in the United States. Of that number, one was resettled in Hawaii.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of Mar., 2017.

/s/ LAWRENCE E. BARTLETT
LAWRENCE E. BARTLETT
Director of the Office of Admissions
Bureau of Populations, Refugees and Migration
United States Department of State

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF HAWAI'I

CIVIL ACTION NO. 1:17-CV-00050-DKW-KSC

HAWAII, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF REBECCA HELLER, DIRECTOR OF THE INTERNATIONAL REFUGEE ASSISTANCE PROJECT

DECLARATION OF REBECCA HELLER

I, Rebecca Heller, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Director and co-founder of the International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc. I have been with IRAP since August 2008.

2. As IRAP's Director, I oversee all of IRAP's operations and activities, including programming and development. I am in constant, regular communication with my staff who provide legal representation to vulnerable individuals and consult with pro bono attorneys and law students working on IRAP cases. I also represent a number of refugee and visa cases myself, consult with numerous attorneys work-

ing on related cases, monitor field conditions on the ground in the Middle East/North Africa Region, liaise with the U.S. government and the United Nations around refugee and visa processing issues, and coordinate partnerships with numerous NGOs working with and advocating for refugees and immigrants in the U.S. and abroad.

3. Throughout my eight and a half years working on Middle East refugee issues, I have overseen, consulted on and/or represented thousands of cases. I also teach a seminar on refugee law and practice at Yale Law School. Founded in 2008, IRAP's mission is to provide and facilitate free legal services for vulnerable populations around the world, including refugees, who seek to escape persecution and find safety in the United States and other Western countries. IRAP has a staff of over 25 individuals based in offices in New York, Lebanon, and Jordan. IRAP works with 29 law school chapters and over 75 firms to provide pro bono assistance to persecuted individuals around the world. IRAP relies on the volunteer and pro bono assistance to meet the needs of its client base.

4. IRAP lawyers provide legal assistance to refugees and other immigrants to the United States throughout the resettlement process. IRAP also assists many individuals (including refugees, asylees, Lawful Permanent Residents and U.S. Citizens) inside the United States who need assistance filing family reunification peti-

tions for family members overseas. IRAP has provided legal counseling and assistance to nearly 20,000 individuals.

5. Since its inception, IRAP has helped to resettle over 3,200 individuals from 55 countries of origin, with the majority resettled to the United States.

6. IRAP's client base includes refugees from Iraq, Afghanistan, Egypt, Eritrea, Ethiopia, Iran, Jordan, Kuwait, Libya, Pakistan, Palestine, Somalia, Sudan, Syria, Turkey, and Yemen. Of IRAP's current 606 open cases, 421 families are from one of the six countries or are refugees from other countries and targeted in the new Executive Order.

7. Many of IRAP's clients have been referred to the US for resettlement by UNHCR. UNHCR only refers the most vulnerable refugees for resettlement, such as unaccompanied minors, women-at-risk, and individuals with urgent medical or protection concerns. Less than 1% of refugees worldwide are referred for resettlement by UNHCR. If UNHCR refers an individual to USRAP, they are likely extremely vulnerable and have strong, pre-vetted refugee claims. Further, once UNHCR refers a refugee to USRAP, it precludes them from referring the refugee to another country until the USRAP process is completed.

8. IRAP works with some of the most vulnerable individuals in the world, including US..-

affiliated refugees, LGBTI refugees, women who have survived trafficking, sexual and gender-based violence, and children with emergency medical needs.

9. As the refugee resettlement process is quite intricate, some background on the various programs will help explain the importance of recognizing the attorney-client relationship between a refugee and a legal services provider as well as how many refugees have a de facto bona fide relationship with a person or entity in the United States.

The U.S government's interpretation of the Supreme Court decision contradicts the basic mechanics of the U.S. Refugee Admissions Program, as all refugees must eventually form a direct relationship to a U.S. entity in order to be resettled to the United States.

10. Refugees are resettled to the United States through three "priority" streams, which are different ways to access the U.S. Refugee Admissions Program ("USRAP"). Though the names of these categories are "Priority 1," "Priority 2," and "Priority 3" (or P-1, P-2, and P-3), these names do not indicate the order of priority.

11. Priority 1 (P-1) referrals are individuals who are referred based on particular, individual needs. These cases may be referred to the U.S. Refugee Assistance Program ("USRAP") by the United Nations High Commissioner for Refugees ("UNHCR"), or, in much smaller numbers, by a U.S. Embassy or a qualified NGO.

Although not required, some refugees referred by UNHCR have close family members in the United States, including grandparents, aunts, uncles, and cousins.

12. Refugees who access USRAP via a U.S. Embassy are often personally known to the embassy. State Department guidance in the Foreign Affairs Manual gives examples of these individuals such as prominent members of a political opposition or religious minority, well-known journalists, or LGBTI individuals. Similarly, NGOs which refer refugees to USRAP must have been trained by the Departments of State and Homeland Security and work with the State Department's regional refugee coordinator to make the referral.

13. One of IRAP's P-1 clients is a transgender Sudanese activist who fled to Egypt as a result of severe persecution because of her LGBTI work. She became known to the U.S. Embassy in Sudan which referred her to the State Department and she was given access to USRAP. She has been now waiting in limbo for a USCIS interview to be scheduled and remains in danger in Cairo where transgender individuals are routinely harassed, assaulted, and persecuted.

By definition, refugees in the Central American Minors Program, the Lautenberg religious minorities program, and the Direct Access Program for U.S.-affiliated Iraqis and Syrians must have a direct relationship with a U.S. person or entity to access USRAP.

14. Priority 2 (P-2) referrals are individuals who are eligible for resettlement based on a State Department determination that they belong to a group of "special humanitarian concern" to the United States. Several P-2 groups exist including Refugee Processing for Religious Minorities in the Former Soviet Union and in Iran (known as the Lautenberg Amendment), the Central American Minors Program, and the Direct Access Program for U.S.-affiliated Iraqis and Syrians. All of these P-2 categories require a direct U.S. tie in order to access the U.S. refugee resettlement program.

15. The P-2 group for religious minorities in the Former Soviet Union and in Iran (authorized by the Lautenberg Amendment), requires a U.S.-based resettlement agency to initiate the application for the refugee, thereby immediately establishing a direct relationship between a U.S. entity and the refugee. Religious minorities in the Former Soviet Union include Jews, Evangelical Christians, Ukrainian Orthodox, and Catholics. A spouse, parent, child, sibling, or grandparent can initiate the application through the resettlement agency by filing an Affidavit of Relationship. Those same categories of family members are eligible to apply for refugee status. Religious minorities in Iran include Christians, Jews, Mandeans, Baha'is, and Zorastrians, and a U.S. relative or friend may initiate the application.

16. Another P-2 group, the Central American Minors ("CAM") program, exists for refugee children from El Salvador, Guatemala, and Honduras who have parents lawfully in the United States. The program was founded to give children an alternative to the dangerous journey that some children had attempted without authorization. The purpose of the program is to reunite families in a safe manner. The program requires the minors to demonstrate a relationship to their parents via DNA testing and filing an Affidavit of Relationship.

17. One of the larger P-2 groups is known as the Direct Access Program for U.S.-affiliated Iraqis and Syrians ("DAP"). The Direct Access Program allows Iraqis and Syrians who have a U.S. tie, either by family or employment, to come to the United States through the refugee program.

18. In 2008, the bipartisan Refugee Crisis in Iraq Act was signed into law, allowing six categories of Iraqis to access USRAP based on work for the US government or a US-based entity or family connections with individuals in the United States. In order to access USRAP through employment, Iraqis must have either worked as an interpreter for the U.S. Government or Multi-National Forces in Iraq, been employed by the U.S. government in Iraq, been employed by a U.S. funded organization or entity, or been employed by a U.S.-based media organization or NGO. Before being inter-

viewed by USCIS, the State Department must verify the employment relationship through contracts, HR letters, badges of employment, and letters of recommendation from U.S. supervisors.

19. Both Iraqi and Syrian nationals with an approved I-130 petition are also eligible for the DAP. This program allows participants to obtain travel documents before their visa priority date would otherwise become current, thereby allowing them to join their families sooner in the United States. Both groups, in all circumstances, will satisfy the bona fide relationship test because the program requires a direct relationship with a U.S. entity or family member to access the program. At least 50,000 individuals are waiting for interviews in the Iraqi program; we estimate that 60,000 total individuals may be waiting for admission under the Iraqi and Syrian DAP.

20. Our P-2 refugee clients face extreme danger while they wait to be processed. For example, one of our clients completed his pre-screening interview on June 12, 2017 and is awaiting his USCIS interview. As he waits, he hides in his apartment in Baghdad, Iraq, with his wife and children. If they leave their apartment, they are in danger of being killed by radical Shiite militia known as the Mahdi Army. The Mahdi Army already killed one of his brothers and has tortured another because of the family's behalf of the U.S. government. They are intent on

killing IRAP's client as well and is only means of true safety is resettlement to the United States.

21. Another P-2 IRAP client is a 36-year-old Syrian refugee who fled to Yemen and then Saudi Arabia with her husband and two young children. Her sister is a U.S. Citizen, living in the United States, who filed an I-130 petition for her to come to the United States. The petition has been proved the client has accessed USRAP through DAP. She cannot return to Syria, where she was persecuted for her religion. Her and her family's lives continue to be in grave danger in Saudi Arabia, where she lives near the Yemeni border and is exposed to frequent rocket attacks and ongoing military conflict.

Refugees in family reunification programs clearly demonstrate their bona fide relationship to a U.S. person because the U.S.-based relative is required to access USRAP.

22. Priority 3 (P-3) referrals are individuals with close relatives—parents, children, and spouses —recently admitted to the United States as a refugee or asylee and require DNA testing to access USRAP. P-3 submissions have four procedural requirements: (1) affidavit of relationship (AOR); (2) minimum age; (3) five-year filing; and (4) DNA testing. To initiate a P-3 case, a local resettlement agency must submit an Affidavit of Relationship ("AOR") on behalf of the P-3 applicant. In order to complete the

form, the principal relative must upload current digital photographs of all family members, derivatives, and add-ons. Once completed, the local agency will submit the AOR to a Refugee Processing Center, which will then refer it to USCIS for case creation, processing, and adjudication. P-3 applications require DNA relationship testing between the principal relative and their biological parents or biological children. The principal relative bears the initial costs of DNA testing. We estimate that 2,000 individuals are awaiting admission in the P-3 program.

23. Alternatively, an individual who has been granted asylum or refugee status in the United States and who was also the principal applicant for his or her family may petition to have his or her spouse and/or unmarried child(ren) under the age of 21 "follow-to-join" him or her in the United States. A Form I-730 Refugee/Asylee Relative Petition must be filed for each qualifying family member within two years of the principal applicant's admission as a refugee or grant of asylum.

The U.S. Refugee Admissions Program requires that all refugees have a direct relationship to a U.S. entity in order to be resettled.

24. Refugees who do not have a family member in the U.S. or a relationship with a U.S. entity prior to their referral to USRAP, will necessarily develop a relationship with a U.S. entity at some point in the processing. Two particu-

lar points in processing may lead to such a relationship.

25. First, once a refugee has completed multiple interviews assessing their eligibility for refugee status, his or her name is submitted to any one of the nine non-profit agencies that contract with the U.S. government to provide resettlement (specifically reception and placement services) and integration services. These voluntary resettlement agencies, called "volags," receive names of refugees cleared for travel, and then provide "assurances," or a guarantee that they will provide their services to that individual when they arrive. Assurances typically happen close to the last stages of the resettlement process, which is the arrival notice. As of June 26, 2017, there were 26,353 assured (but not arrived) individuals in the USRAP pipeline. Some, but not all, of the services volags provide include picking refugees up at the airport, providing them with culturally appropriate meals, securing them with long-term housing, accessing benefits and healthcare, and providing job training.

26. These assurances constitute a direct tie to a U.S. entity. However, the government has indicated that they will not resettle all currently assured refugees after July 6, 2017, despite their direct relationships with U.S. entities. There are assured refugees booked for travel to the United States through July 27, 2017, and

resettlement agencies across the United States have been preparing tirelessly for their arrival.

27. Second, an individual may have legal representation from a U.S.-based organization; IRAP is the primary organization that provides legal representation to refugees in the USRAP.

28. Furthermore, many P-1 refugees who do have close family ties in the United States would not qualify for resettlement under the government's current interpretation of a "bona fide relationship" under the Supreme Court decision.

29. For example, a Ukranian refugee who is currently scheduled for travel to the United States after July 6, 2017, would no longer be allowed to enter the United States because her the closest family member she has in the United States is her grandmother.

30. As a result of the government's current interpretation of the Supreme Court's decision, many refugees—those who lack any of the family relationships that the government currently recognizes—would have their applications delayed by months or years. These long delays could result from the 120-ban because security and medical checks only line up for a short window, after which the applicant must restart the security check process. Additionally, with a lowered refugee cap of 50,000, there are fewer resettlement slots available this fiscal year, adding to the delays in resettlement.

See Ex. __). Yet all of these clients have a strong relationship with IRAP itself.

Representation by legal service providers, such as IRAP, constitute an attorney-client relationship and qualify as a bona fide relationship between a refugee and a U.S. person or entity.

31. Because of the complexity of the refugee resettlement process, IRAP lawyers and *pro bono* legal teams work closely with their clients to bring them to safety. The representation that IRAP provides is intensive and includes multiple forms of assistance. For example, IRAP has offices in Amman, Jordan and Beirut, Lebanon which are staffed with U.S.-barred attorneys where they regularly meet with refugee clients, prep them for and accompany them to interviews, and assist them with psychosocial, educational, and medical referrals to local partner organizations. IRAP also has case workers on staff, such as individuals trained in social work, who provide non-legal support to our clients.

32. The intake and screening process itself establishes a strong relationship between the organization and the client. This process can take several weeks to months, with IRAP attorneys or volunteers spending hours each day interviewing a client, establishing the facts underpinning his or her application, and preparing a declaration and application on the basis of those facts.

33. After an intensive and exhaustive intake process, IRAP may take on a refugee's case for representation after signing a formal representation agreement. These cases frequently require two to three years of representation, if not longer. IRAP attorneys assist refugees through the process by conducting extensive fact finding to corroborate their clients' claims, drafting legal submissions before UNHCR and the U.S. government advocating for their client's case, and preparing their clients for the adjudication interviews which can last for hours. Additionally, IRAP attorneys monitor their clients' medical and protection needs and will request the relevant agency to expedite processing if there is urgency in the case. For P-2 DAP employment cases, IRAP attorneys will assist with verifying the client's affiliation with the U.S. government, a U.S.-funded NGO, or a U.S. media organization. For P-2 DAP family cases, IRAP attorneys assist the U.S.-based family member with filing a Form I-130 to USCIS and then continues representing the refugee client once they access USRAP.

34. If an application is denied by UNHCR, IRAP staff will assist clients by submitting an appeal. If the U.S. government denies a client refugee status, IRAP attorneys prepare a Request for Review ("RFR") on behalf of the client and also file Freedom of Information Act ("FOIA") requests to supplement their RFR. They conduct further client interviews to prepare sup-

plemental declarations, draft the request itself, and help the client prepare for the interview.

35. Moreover, IRAP attorneys have provided guidance and advice to their refugee clients entering the United States and have filed habeas petitions for clients who have been unlawfully detained trying to enter the United States.

36. During this process, IRAP also provides other forms of practical assistance. For example, IRAP has worked with partner organizations to provided safe housing for clients whose lives are in immediate danger while they await the outcomes of USRAP. IRAP has also worked with psychologists and psychiatrists to provide counseling and evaluations to refugees who have suffered from severe persecution and trauma and are in need of mental health treatment.

The U.S. government's interpretation of the Supreme Court decision reflects a fundamental misunderstanding of USRAP and an attempt to dismantle a lifeline for persecuted individuals. The government's actions continue to take a toll on IRAP's clients and resources.

37. The government's interpretation of the injunction will also continue the significant backlog in the USRAP that resulted from the first Executive Order, delaying the processing of many of IRAP's clients' cases. This delay will force IRAP to exhaust more of its resources, as the average lifespan of a case now grows significantly. IRAP has a legal department com-

posed of staff attorneys who advise and provide consultation to its network of pro bono legal volunteers on their casework. Because of delays in processing, IRAP's attorneys must spend significantly more time on each case, providing guidance about alternative routes to safety and possible exemptions. In addition to IRAP's staff attorneys' existing and ongoing responsibilities, they must now also draft and review additional submissions to State and to the Department of Homeland Security ("DHS"), such as waiver requests for admission to the United States for their clients, which will be reviewed by a case-by-case basis under the new Executive Order. Further, IRAP's field staff must largely give up their work on refugee case processing and focus primarily on ensuring the local safety of refugees who thought their lives would be saved for resettlement, and who are now caught in life-threatening limbo.

38. As a result of the government's narrow interpretation, IRAP attorneys must also counsel their own clients about the changes in law as well as pursue other resettlement options for them, even though many were already being processed in the U.S. Refugee Admissions Program ("USRAP"). The first Executive Order has already wasted significant resources (typically hundreds of hours of legal representation over the course of many years navigating USRAP), forcing IRAP and our clients to make the Hobson's choice between starting the pro-

cess over with another country, attempting to shelter in place in spite of life-threatening circumstances, or undertaking dangerous journeys to reach safety across other borders.

39. I am deeply concerned by the U.S. government's interpretation of the Supreme Court decision. In addition to many refugees in USRAP accessing the program through a bona fide relationship to a U.S. person or entity, all refugees develop a bona fide relationship to a U.S.-based entity once a resettlement agency assures their reception and placement in the United States. Thus, to deny refugees in USRAP admission to the United States based on a lack of bona fide ties is contrary to the functioning of the refugee resettlement program.

40. Moreover, I believe that the government's actions reflect an attempt to dismantle USRAP. For example, in June 2017, I learned of denials of 50 Somali refugee cases out of Kenya even though USCIS had not yet interviewed any of those families. In other words, they were denied before a U.S. immigration officer even looked at their case. Having worked with refugees for nearly a decade, I have never seen this type of denial en masse before, and I fear that the government is seeking to block entire nationalities from coming to the United States through USRAP.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: June 30, 2017

/s/ REBECCA HELLER
REBECCA HELLER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil Action No. 1:17-CV-00050-DKW-KSC

STATE OF HAWAIʻI, PLAINTIFF

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC.

DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC.

I, Mark Hetfield, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the President and Chief Executive Officer of HIAS, Inc.

2. HIAS was founded in 1881 as the Hebrew Immigrant Aid Society to assist Jews fleeing pogroms in Russia and Eastern Europe. It is the world's oldest —and only Jewish—national refugee resettlement agency. Today, HIAS serves refugees and persecuted people of all faiths and nationalities around the globe. Since HIAS's founding, the organization has helped more than 4.5 million refugees start new lives. In 2016 alone, HIAS provided services to more than 350,000 refugees and asylum seekers globally.

3. HIAS has offices in twelve countries worldwide, including its headquarters in Silver Spring, Maryland, its principal place of business, and additional domestic offices in New York City and Washington, D.C.

4. HIAS's refugee resettlement work is grounded in, and an expression of, the organization's sincere Jewish beliefs. The Torah, Judaism's central and most holy text, commands followers to welcome, love, and protect the stranger. The Jewish obligation to the stranger is repeated in various ways throughout the Torah, more than any other teaching or commandment. HIAS believes that this religious commandment demands concern for and protection of persecuted people of all faiths. The Torah also teaches that the Jewish people are to welcome, protect, and love the stranger because "we were strangers in the land of Egypt" (Leviticus 19:34). Throughout their history, violence and persecution have made the Jewish people a refugee people. Thus, both our history and our values lead HIAS to welcome all refugees in need of protection. A refusal to aid persecuted people of any one faith, because of stigma attached to that faith, violates HIAS's deeply held religious convictions.

5. HIAS's client base includes refugees and their families abroad and those located in the United States. Hundreds of these clients hail from the six countries singled out in Section 2(c) of the March 6 Executive Order, including Syria, Iran, Sudan, Somalia, and Yemen. Other clients, who will also be affected by the 120-day ban on refugees in Section 6(a) of the Order, hail from countries that include Iraq, Ukraine, Bhutan, the Democratic Republic of the Congo, Afghanistan,

Eritrea, Tanzania, Ethiopia, Central African Republic, Burundi, South Sudan, Uganda, Russia, Belarus, Burma, and El Salvador. Its overseas clients are seeking refugee status, and do so precisely because they face a real risk of persecution at home. They remain in precarious situations often in third countries.

6. The refugee resettlement process typically begins with the office of the United Nations High Commissioner for Refugees ("UNHCR"), which interviews and screens the applicant and determines whether the applicant may qualify as a refugee, and where the applicant may resettle. In certain circumstances, specially trained non-governmental organizations will identify the refugee and begin this process. Some refugee-clients of HIAS started the application process without a referral from the UNHCR or entity. Some of these refugees are close relative of asylees and refugees already in the United States; others belong to specific groups identified in by statute or the U.S. Department of State as eligible for direct access to the refugee and resettlement program.

7. The U.S. Department of State or U.S. Citizenship and Immigration Services will then assign the refugee to a Resettlement Support Center ("RSC"). HIAS is one of five agencies that operate RSCs. These relationships are formal, documented, and formed in the ordinary course of HIAS's business. None of these relationships were formed for the purpose of evading the refugee ban.

8. The RSC operated by HIAS in Austria is primarily intended for Iranian refugees who fled religious persecution in Iran. Every one of those Iranian refu-

gees has a relationship with a person in the United States who is the "anchor" for that case, who initiates the resettlement application, and who provides a "Care and Maintenance deposit" to ensure that the applicant will be able to cover his or her living expenses while waiting to be processed in Austria. None of the relationships between the U.S. anchor and the applicant was arranged for the purpose of evading the refugee ban. Under the policy of the U.S. Refugee Admissions Program, the U.S. anchor may or may not be a close relative of the refugee applicant.

9. The RSCs are responsible for organizing the physical processing of refugee applicants, educating the applicant about the process, and preparing the physical case file. The RSC will also interview the applicant and enter the relevant application document into the Department of State's Worldwide Refugee Admission Processing System ("WRAPS"), cross reference and verify the data, and send information required for a background check to other U.S. agencies.

10. Even before many individuals are referred to an RSC, HIAS provides intensive psychosocial, legal and livelihood assistance to vulnerable refugees around the world. It works closely with the UN refugee agency to identify cases that cannot secure durable solutions in the countries to which they have fled. HIAS staff develop in-depth relationships with clients who receive psychosocial assistance, including individual counseling and group therapy. Staff also develop bonds with refugees through our legal work which includes asylum preparation and through our livelihoods and employment services. Through HIAS' comprehensive pro-

gramming, staff come to understand all of the challenges that these individuals experience either because of the persecution they have faced in their countries of origin or because of the issues they deal with in the countries of asylum. HIAS build relationships with individual clients as well as other family members ensuring that they are able to access protection services and durable solutions.

11. HIAS staff involved in referring cases for resettlement are in close contact with the UN refugee agency to determine the progress of clients that are referred through the United States Refugee Admissions Program (USRAP). HIAS staff is often in contact with refugees after they have been resettled to the United States to find out how they are faring and obtain feedback on how we can improve our services. Because of the intensive work that HIAS has done with clients through direct services, HIAS is able to maintain ties after they are no longer in the countries of first asylum.

12. Clients referred to the USRAP must fall into certain categories of vulnerability. As such, HIAS builds up these ties through the close support that we provide to clients particularly by way of the psychosocial and mental health services HIAS offer which help refugees recover from trauma and move on with their lives. For those refugees who simply cannot access the protection that they need to stay safe, HIAS assists them to secure durable solutions, thus developing strong ties with individuals through the provided support.

13. The RSC process can often take 18-24 months or longer, during which time the RSC serves as the pri-

mary point of contact as the refugee undergoes the extensive background checks and processing required by U.S. governmental entities. The RSC will also work with the refugee applicant to address any changes related to application that occur in the course of the process, such as whether refugee's application needs to be considered for expedited consideration, or if there is a change to the family composition, such as a birth, death, divorce, or marriage.

14. Should the application proceed, applicants must complete a cultural orientation course and a medical screening, the results of which are also entered into WRAPS.

15. If the case is cleared, resettlement agency representatives, who meet weekly to review WRAPS information, will determine where to resettle the refugee. Should the applicant be assigned to the United States, the applicant will be subject to further screening from United States Customs and Border Protection, and the Transportation Administration's Secure Flight Program.

16. Once all refugee processing is complete, refugee clients are assigned via the State Department's allocation process to one of nine non-profit agencies that contract with the United States government as resettlement agencies. HIAS is one of the nine resettlement agencies. To serve these refugees, HIAS currently holds sub-agreements with 18 local organizations ("affiliates") who operate and oversee 21 resettlement sites across the country. Once a refugee is approved for resettlement, they are matched to a local affiliate, who then provides an "assurance," which is a

guarantee that the affiliate will provide services to the individual when he/she arrives.

17. As a resettlement agency, HIAS and its affiliates are required to arrange for the reception and placement of refugees in the United States and offer appropriate assistance during their initial resettlement in the United States; provide refugees with basic necessities and core services during their initial period of resettlement; and in coordination with publicly supported refugee service and assistance programs, assist refugees in achieving economic self-sufficiency through employment as soon as possible after their arrival in the United States. These relationships are formal, documented, and formed in the ordinary course of HIAS's business. None of these relationships were formed for the purpose of evading the refugee ban.

18. After a refugee has been given an assurance, but before the refugee has been issued a visa, HIAS and its affiliates begin the involved process of arranging for the reception, placement, and appropriate initial resettlement assistance for the refugee. Refugees typically travel 2 to 6 weeks after receiving an assurance by one of the affiliates.

19. As a resettlement agency, HIAS and its affiliates ensure that the arriving refugees assigned to it are met at the airport of final destination and transported to furnished living quarters and provided culturally appropriate, ready-to-eat food and seasonal clothing as necessary to meet immediate needs.

20. HIAS and its affiliates also find housing for the refugee or refugee family, provides them with money

for rent and utilities for up to three months, and supplies them with initial food and medical care before government-funded benefits begin. In addition, HIAS and its affiliates' case management services include providing initial safety orientation followed by weeks of extensive cultural orientation to adjust them to life in America, and HIAS and its affiliates assist the refugee or refugee family in enrolling in ESL classes, school, employment services, and benefits programs (including Medicare, food stamps and Supplemental Security Income for the elderly and disabled).

21. During this time, HIAS and its affiliates develop a close relationship with the refugee or refugee family, as they provide critical support during this vulnerable and challenging time. For example, local affiliates work to provide many of the things the family is likely to need immediately upon their arrival, including finding housing and furnishing it, stocking the pantry, a and making the family a welcome meal for their first night. When the refugees arrive, the affiliates often greet them at the airport, along with needed translators and caseworkers. After the refugees arrive, the affiliates will help with transportation and facilitate conversation while the refugees learn English, and even provide babysitting services so that the refugees can undertake the necessary steps to transition to life in America, like taking an English placement test or getting social security cards.

22. If HIAS and its affiliates are not able to resettle individuals who are already approved or assured, they will not only lose the $950 per capita funding they are allocated through their cooperative agreement with the

Department of State, impacting staff capacity, but they will also lose the resources and monies expended securing the necessities they are required to provide by the cooperative agreement.

23. In FFY 2016, HIAS's cooperative agreement with the Department of State provided that HIAS and its affiliates would resettle 3,768 refugees and Special Immigrants Visas ("SIVs") in the United States. However, as the number of refugees and SIV's approved for admission increased, HIAS eventually resettled 4,191 individuals that year. The Department of State, aware that it would significantly increase capacity for refugees in FFY 2017, then requested that HIAS apply for higher numbers of arrivals as the refugee program expanded. As a result, in its cooperative agreement for FFY 2017, HIAS was engaged to resettle 4,794 refugees and SIVs.

24. Of the hundreds of clients worldwide who have been vetted, approved for refugee status, and allocated and assured to a HIAS site, only a small number are currently scheduled for travel. Of those, 2 families of 8 total refugees are from the six banned countries and at least 6 lack a US tie as recognized by the State Department's current guidance. Many of these individuals will be prevented from travel as a direct result of the Executive Order, leaving them in precarious situations.

25. Additionally, the federal government is only committing to allowing refugees to travel through July 6, even though other refugees have travel dates booked beyond that date.

26. As a result of the Federal Government's interpretation of the Supreme Court's stay, many of these individuals will still be prevented or delayed from entering the United States, despite the fact that they have a bona fide relationship with a person or entity in the United States. Because security and medical clearances have expiration dates, it is likely that some refugees would lose their readiness for travel during the suspension period and lengthy checks would need to be repeated. Every day that these individuals' entry is delayed, they remain in precarious situations.

27. Because of the extensive time this interview process takes, stopping interviews can delay refugee admissions for next year since the approval process requires several steps and includes several time limited now it delays admission even next year despite living under the new cap. In order for refugees to be cleared to travel, the refugees need travel documents, medical clearance and current security clearance. Delays can cause any one of these pieces to expire, rendering the refugee unable to travel and requiring renewals. Refugees remain in precarious, stressful situations while waiting for final resettlement and family reunification.

28. Many of HIAS's clients abroad whose refugee status has been approved but have yet to be scheduled for travel, including clients from the six banned countries, belong to a category of refugees who, by definition, have a bona fide relationship with a United States entity or a close family relationship.

29. This includes individuals whose family members have petitioned, applied, or sponsored them for refugee

status (often through HIAS and its affiliates as the very first step in initiating a resettlement case.). Refugees seeking entry under Priority 3 or P-3 status have either a parent, child, or spouse who has been recently admitted to the United States as a refugees or asylee. HIAS and its affiliates have pending applications for clients seeking to enter the United States under the P-3 (Priority Three) program.

30. Some HIAS clients have been approved as refugee status through the Central American Minors program, which permits U.S. relatives of persecuted children in Central America to petition for these children to immigrate here. These children remain in vulnerable and dangerous situations in their home countries, despite having been approved for refugee status, and their U.S. family members are forced to endure continued separation from and concern for these children. Other refugee categories are similar in that the characteristics permitting individuals to apply for refugee status under the program guidelines themselves establish a bona fide relationship with a person or entity in the United States, such as for example, the Priority 2 or P-2 program for individuals in Eurasia, the Baltics, El Salvador, Guatemala, and Honduras.

31. Also under the Direct Access Program for Iraqis (DAP for Iraqis) and the Direct Access Program for Syrians (DAP for Syrians), individuals can apply directly with USRAP without the need for a referral from UNHCR. This is based on these individual's current or prior relationship with a U.S. entity. Individuals who are eligible to apply for DAP include those who are at risk of or have experienced serious harm as

a result of their association with the U.S. government or a U.S. entity. This includes individuals who have worked in Iraq or Syria for the U.S. government as interpreters or translators, those employed by U.S. media organization or U.S. non-governmental organizations. Refugees applying through DAP have by definition established a relationship that is "formal, documented, and formed in the ordinary course" because establishing such a relationship is what qualifies them to apply through DAP in the first instance.

32. All beneficiaries of a Form I-730 Refugee/Asylee Relative Petitions have a family member in the United States who has petitioned on their behalf. HIAS represents clients in their family petitions and currently represents at least one client whose family member is from one of the banned countries.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ MARK HETFIELD
MARK HETFIELD

Executed this 30 day of June 2017

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI‘I

Civil Action No. 1:17-CV-00050-DKW-KSC

STATE OF HAWAI‘I, PLAINTIFF

v.

DONALD TRUMP, ET AL., DEFENDANTS

SUPPLEMENTAL DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC.

SUPPLEMENTAL DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC.

I, Mark Hetfield, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the President and Chief Executive Officer of HIAS, Inc.

2. This declaration supplements my prior declaration in this case, signed June 30, 2017.

3. The positions the federal government has taken in interpreting the Supreme Court's limited stay order threaten concrete and significant harm to HIAS and its clients. This declaration will highlight some of our clients who are or will be affected by the government's interpretation of the Supreme Court order of June 26,

2017 that refugees with a bona fide relationship with an entity or person in the United States be exempt from the entry restrictions in the Executive Order of March 6.

4. I am aware that the government asserted after June 26 that the fact of an assurance by a refugee resettlement organization like HIAS for a refugee does not establish a bona fide relationship to a U.S. entity for refugees. HIAS and our affiliates have currently assured that we can and will resettle several hundred specific refugees who not yet been admitted to the United States. All of these assurances were given, and these individuals became our clients, prior to when the Supreme Court entered the partial stay on June 26, 2017. Some of these clients have no relatives in the United States as far as HIAS knows. Preventing these clients of HIAS from traveling would waste the efforts and resources HIAS and its affiliates have already expended to prepare for their reception in the United States.

5. Several of HIAS's assured clients were already authorized by the U.S. government for travel after July 12, but under the government's new policy will no longer be permitted to travel unless the government is convinced they have a "close family member" in the United States or a bona fide relationship with a U.S. entity. That policy is reflected in an email HIAS received from the U.S. Department of State on July 10, 2017. A true and correct copy of the email, with names and email addresses redacted, is attached as Exhibit A to this declaration. We have identified nine HIAS clients who have not yet been admitted to the United States, who are currently booked for travel after July 12,

2017, and who have no family members in the United States of which HIAS is aware. Based on the guidance of the July 10 email, travel will be cancelled for ten of HIAS' refugee clients.

6. The government's narrow new interpretation of "close familial relationship" in the Supreme Court limited stay order contradicts its previous interpretations and will also adversely impact HIAS's clients. In HIAS's experience, the close relatives which a refugee may have in the United States (grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law) will often not be covered by the government's new interpretation of "close family member." For example, we have identified HIAS clients whose only family in the United States to HIAS's knowledge are, respectively: a grandmother; a grandfather; a grandson; an aunt; an uncle; a cousin; a niece and a nephew; and a sister-in-law. One of the refugees assured by HIAS whose travel will be cancelled is an individual who was approved as a refugee through the Lautenberg program. His qualifying family tie in the United States is with his grandmother and he was also expecting to join his two aunts and uncle in this country. According to the Federal Government's current interpretation of the Supreme Court ruling, a grandparent or a grandchild is not a "close family member." Yet in the official instructions issued earlier by the Department of State about the very same Lautenberg program for refugees from the former Soviet Union, the Department of State specifies that "Immediate relatives include spouses, parents, children, sib-

lings, grandparents and grandchildren of legal U.S. residents."

7. The government has so far refused to recognize that individuals in several refugee programs, including the Central American Minor and Lautenberg programs for certain nationals of Iran and the former Soviet republics, are exempt from the ban by virtue of these refugee programs' pre-existing eligibility requirements of having U.S. ties. Currently, HIAS has more than 140 refugee clients who already established ties to the U.S. and who have been approved for the U.S. Refugee Admissions Programs through the Central American Minor and Lautenberg programs. Assessing their ties to the United States on a case-by-case basis will result in possible errors and needless delays that could exacerbate or heighten risks to refugees who continue to be in danger in the countries in which they are located due to protection concerns or needed acute medical care. This is also putting considerable stress and strain on HIAS staff whose workload has increased with the added requirement of explaining these changed requirements to applicants and documenting and establishing 'bona fide relationships' for these categories of cases.

8. Any additional delay in any of these cases, which should be exempt under the Supreme Court's order, will seriously harm HIAS clients. For example, one approved refugee client booked for travel after July 12 is in need of urgent hypertension treatment in the United States. HIAS is concerned that any delay will exacerbate this individual's medical condition. Other clients remain in precarious situations including remaining in physical danger and living in uncertain situations in third coun-

tries while they wait for final travel arrangements. I am aware of one refugee family HIAS has assured that fled Syria, where family members had been killed, to Jordan. In Jordan, they do not have work permission and rely on friends and family for support, but are falling behind on rent and bills and face eviction. A United States citizen family friend is prepared to assist them in their integration into the United States.

9. HIAS and its partners have already taken concrete steps on behalf of many of these individuals, For example, I am aware of a Syrian family lacking family ties in the United States which HIAS had assured for resettlement in New York. A synagogue and a church had partnered in cooperation with HIAS to welcome and support the refugee family and assist them in their integration into the United States. In order to do so, the congregations had raised funds and rented and furnished an apartment, but because of the government's interpretation of the Supreme Court ruling the family is now in limbo in spite of the relationship with HIAS and faith-based entities.

10. Even a relatively short delay of weeks or a month caused by additional processing time for refugees, particularly for those already assured, could cause current security checks to expire, potentially adding years of waiting in dangerous situations before the refugees can travel to safety in the United States.

11. Prior to receiving assurances to travel to the United States, all refugee applicants are subject to numerous security and vetting checks. Refugees must successfully clear all of these checks in order to be approved for resettlement and granted an assurance by

a resettlement agency. Several of these checks can take months or years to complete.

12. First, refugees must clear a Consular Lookout and Support System ("CLASS") check, run by the Department of State Refugee Processing Center. The CLASS check is valid for 15 months.

13. Second, refugees must receive an approved Security Advisory Opinion ("SAO") from the Department of State for *every* identity document possessed by *every* member of the case. This means that a family of four who each has a passport and national identification card must receive eight separate SAOs. Further, none of the SAOs may be obtained concurrently—they must be issued one at a time. Each SAO is valid for a period of 15 months.

14. Third, refugees must undergo an Inter-Agency Check ("IAC") which varies from six months to two years to complete. The IAC involves numerous U.S. intelligence agencies all running the refugees' names, identification documents, and biometrics against proprietary databases (meaning that each agency must run the data check separately). It expires after 33 months.

15. Finally, a Department of Homeland Security officer takes fingerprints which are valid for 15 months.

16. Prior to being assured, each refugee also undergoes a medical check, which is valid for six months.

17. Each of these checks is only valid for certain periods of time. Once the time elapses, the checks "expire" and must be re-initiated.

18. Determining whether refugees have a bona fide relationship on a case-by-case basis will likely result in many refugees having at least one clearance expire during that additional processing time.

19. The expiration of a single clearance often creates a snowball effect because while the first check is being re-run, others will sequentially expire. For that reason, any appreciable delay in processing can result in a refugee's resettlement to the United States being delayed for months or years.

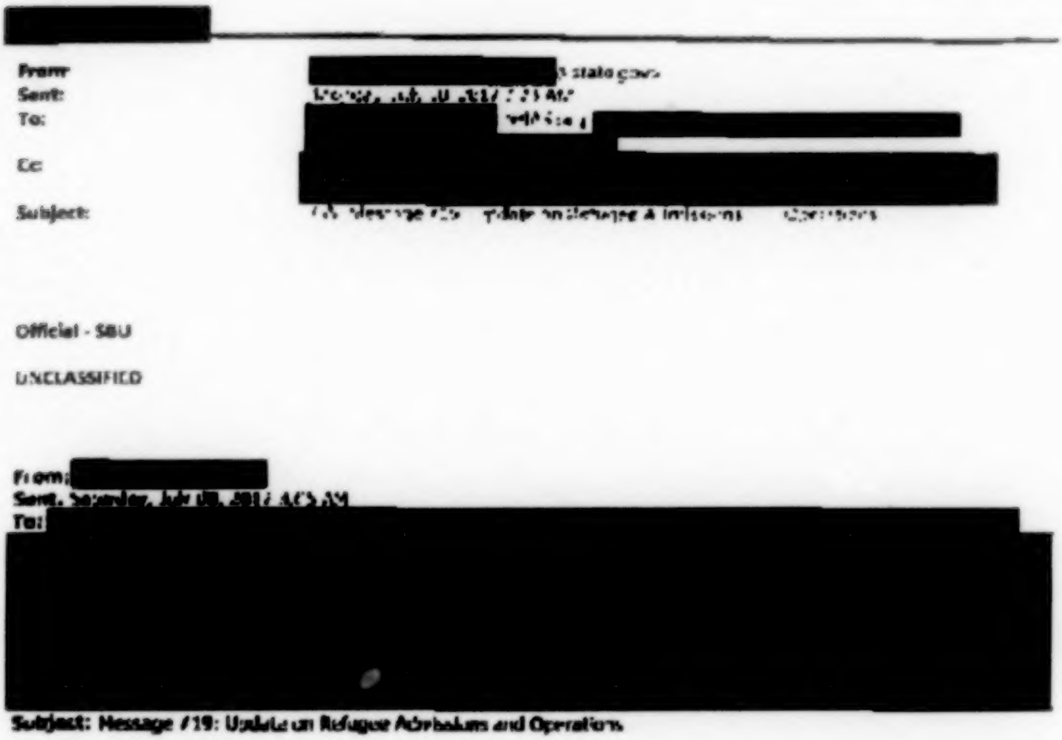
20. The government has instructed that refugee interviews that have already been scheduled should be cancelled unless the applicant "has a claim to a bona fide relationship with an individual in the U.S." *See* Exhibit A. The instructions do *not* make an exception for individuals with a bona fide relationship to an *entity* in the United States, meaning that interviews for those individuals will be cancelled under current guidance.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ MARK HETFIELD
MARK HETFIELD

Executed this 10th day of July 2017

EXHIBIT A to Supplemental Declaration of Mark Hetfield, President and CEO of HIAS, Inc.



[redacted]

From: [redacted]@state.gov

Sent: [illegible]

To: [redacted] [illegible] [redacted]

Cc: [redacted]

Subject: [illegible]

Official - SBU

UNCLASSIFIED

From: [redacted]

Sent: Saturday, July 08, 2017 [illegible]

To: [redacted]

Subject: Message #19: Update on Refugee Admissions and Operations

Dear colleagues,

Thank you all for the quick turnaround on collecting bona fide relationship (BFR) documentation from passengers on ABN for travel next week. PRM has sent back a number of responses to the RSCs confirming the validity of these relationships and we are actively working through the rest.

Please see below for additional detailed guidance:

1. We have been informed that all passengers traveling on July 11 and July 12 may proceed as planned, whether or not they have a credible claim to a bona fide relationship with an individual or entity in the United States. Effective July 13, only cases with a credible claim to a bona fide relationship to a person or entity in the

U.S. may travel until the end of the 120-day pause.

2. RSCs are asked to immediately begin reaching out to all passengers currently on ABN for any travel date, in the order of the closest to departure, to confirm whether any case member has a credible claim to a bona fide relationship with an individual or entity in the U.S., as defined in Message #17. Please see the below list of relevant documentation types (Annex A).

3. RSCs do not need to include documentation for the following category of refugee: I-730 (Visa 93), Syrian and Iraqi beneficiaries of approved I-130s, P3 family reunification, and CAM (unless a caregiver is included in the application). These cases may travel and do not need to appear on lists submitted to PRM/A Program Officers.

4. Once BFR documentation is received from the applicant, the RSC should scan and upload it to WRAPS with the document type of "Bona Fide Relationship Evidence" following WRAPS SOPs. [Note: This document type was recently added to WRAPS. If the evidence is a document that is already attached to the case, attach an additional copy of the document and select BFR Evidence as the document type.] Past BFR documentation that has been uploaded without using these labels should be re-scanned and re-uploaded with the correct labels.

5. Once documentation is uploaded for all passengers on a given travel day, the list must be sent

to your PRM/A Program Officer, copied to the Overseas Section Chief. RSCs with fewer passengers may group passengers traveling over multiple days together on one list. Each list should contain at least all passengers departing on a given day (in other words, please do not break up passengers into multiple lists for a single departure day). Lists should be sent at least daily until further notice, unless multiple travel days are included on a single list.

6. RSCs should only send cases that claim a qualified BFR to PRM/A. Cases that do not claim a qualified BFR may not travel. Once BFR documentation is sent to PRM/A, RSCs should enter the following case comment in WRAPS, "Requested PRM BFR Credible Claim Determination." If the case does not claim a qualified BFR, the RSC should enter the following case comment, "RSC determines no Credible Claim to BFR."

7. RSCs are responsible for canceling the travel of all cases that do not have a credible claim to a BFR in the U.S. RSCs should work with IOM regional offices to ensure this travel is cancelled. RPC will issue further guidance on tracking and labeling cases that have been approved or placed on hold in the coming week.

8. When compiling lists of passengers with qualifying BFRs, RSCs should check all cross-references (hard and soft) to determine whether any of the cross-references has a qualifying relationship with the first case. In other words, case A is cross-

referenced with case B. If case A's arrival in the United States would create a qualifying BFR for case B, the RSC should include case B together with case A on the list of cases sent to their PRM/A Program Officer for review, noting the relationship between A and B. Anyone on case B may have the relationship with anyone on case A.

9. In cooperation with DHS/USCIS, PRM/A Program Officers will provide confirmation of the credible claim to the BFR by email back to the RSC. These emails must be scanned and uploaded into WRAPS and the decision should be noted in case comments as "PRM BFR Credible Claim Determination Received: Qualified" or "PRM BFR Credible Claim Determination Received: Not Qualified." Once confirmation is received, the applicant may travel.

10. When the BFR is first claimed by the applicant, RSCs must check what information is already in WRAPS on this relationship. Normally the BFR should already appear in the family tree. The minimum information about the BFR required in WRAPS is name, qualifying relationship, and city and state in the U.S. Thus, if the applicant claims a BFR that does not appear in WRAPS at all, or if the location is listed as Unknown, the RSC must enter this additional BFR documentation in WRAPS. These additions will trigger an IAC bio-diff. If the RSC receives additional information from the applicant on a claim to a BFR in the U.S., such as phone number or email

address, this should be entered into WRAPS as well.

11. DHS/USCIS is preparing to conduct circuit rides in quarter four. For scheduled circuit rides, RSCs should reach out to all applicants scheduled for interview to confirm whether any case member has a claim to a bona fide relationship with an individual in the U.S. Only those making a claim (and qualifying cross-references per #7 above) should remain on the schedule for interview. RSCs should ensure BFR documentation is uploaded into WRAPS following the above guidance and included in the case file prior to interview.

12. RSCs should contact all applicants to request BFR documentation as applicants reach the following stages (the documentation only needs to be collected once, depending on which stage the person is currently at):

    i. When scheduled for an upcoming circuit ride

    ii. When scheduled for I-590 stamping (if not already done at point i)

    iii. When RFD (if not already done at point i or ii)

13. We are still confirming the types of relationships with U.S. entities that will qualify as bona fide relationships under the Supreme Court ruling. Assurances alone do not qualify, nor does the fact that the case is an embassy referral.

Please flag any potential relationships with entities in the U.S. to your PRM/A Program Officer for guidance.

14. PRM will issue guidance the week of July 10 on when new ABNs may be scheduled for new cases with bona fide relationships.
15. Public messaging and updated text for RSC websites will be forthcoming.

Annex A: Relevant documentation to establish a credible claim to a bona fide relationship with an individual in the United States:

- birth certificates
- marriage certificates
- pending/approved I-130 petitions
- pending/approved I-730s
- RSC and UNHCR family trees (including the family tree of the family member in the United States)
- Affidavits of Relationship
- sworn affidavits (by applicant, family members in U.S., other family members, entity in the United States)
- databases (e.g. CCD, CLAIMS, CIS, WRAPS)
- testimony
- previous statements to RSC or UNHCR
- DNA

- any other documentation/evidence that corroborates the relationship

Official

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EXHIBIT D

DECLARATION OF GENERAL JOHN R. ALLEN

I, John R. Allen, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a retired U.S. Marine Corps four-star general and former commander of the International Security Assistance Force (ISAF) in Afghanistan. I am currently a senior fellow and co-director of the Center for 21st Century Security and Intelligence at the Brookings Institute.

2. Prior to joining the Brookings Institute, I served as the Special Presidential Envoy for the Global Coalition to Counter ISIL. I served in the military for nearly 38 years in a variety of positions in the Marine Corps and the Joint Force. I commanded at every level in the Marine Corps through the Marine Expeditionary Brigade. I served as the G-3 operations officer of the 2nd Marine Division. I was the aide de camp and military secretary to the 31st commandant of the Marine Corps.

3. As the commander of the NATO ISAF and United States Forces in Afghanistan from July 2011 to February 2013, I commanded the 150,000 U.S. and NATO forces in Afghanistan. During this time, we recovered the 33,000 U.S. surge forces, moved the Afghan National Security Forces into the lead for combat operations, and pivoted NATO forces from being a conventional combat force into an advisory command.

4. Prior to my time in Afghanistan I served in Iraq from 2006-2008. I served as Deputy Command-

ing General, II Marine Expeditionary Force and Commanding General, 2nd Marine Expeditionary Brigade, deploying to Iraq for Operation Iraqi Freedom and serving as the Deputy Commanding General of Multi-National Forces West and II MEF (Forward) in Al Anbar Province, Iraq. As Deputy Commanding General, I worked closely with and relied heavily on our Iraqi allies.

5. The U.S. military's Iraqi employees, contractors, and sub-contractors have close relationships with U.S. entities and were essential to U.S. military operations in Iraq. All military operations depend on robust and trustworthy relationships with local partners. In Iraq, the U.S. military worked with Iraqis, either through direct employment or through contract or subcontract relationships, to provide essential services, such as translation and interpretation, base support, security, logistics and maintenance, construction, transportation, or communication support.

6. Local national Iraqis worked closely with U.S. military officials, U.S. contractors, or U.S. subcontractors to complete projects that were vital to the success of the U.S. mission. For example, I personally worked closely with Iraqi interpreters to communicate with local Iraqi leaders in Al Anbar Province in Iraq. The accurate interpretation and cultural understanding that my interpreter provided was essential to our work of providing security to the province.

7. The U.S. military required documentation from and vetted all local Iraqi employees, contractors,

sub-contractors, and vendors. Our Iraqi allies were vetted and screened throughout their employment. The U.S. military's local national employees and vendors were all required to be vetted through security background checks, which were implemented to prevent anyone who was a threat to the U.S. mission from being employed or given access to a U.S. base.

8. The U.S. military used intelligence databases, including information from Iraqi government records and biometric data such as fingerprints, to both screen and periodically rescreen all local nationals who would have had access to a U.S. base or have worked closely with the U.S. mission. Iraqis who had access to bases or sensitive locations were issued badges required for entry and had to follow strict security protocols. Iraqis who failed to follow protocols or who were deemed to be a threat to security were fired and tracked in such databases.

9. Because of their close relationship with the U.S. mission, U.S.-affiliated Iraqis and their families were and continue to be under an ongoing, serious threat of being killed by our enemies. Our Iraqi allies risk their lives to support the U.S. mission. The enemies of the U.S. mission in Iraq have targeted and killed, and will continue to target and kill, Iraqis who are affiliated with the U.S. through employment as an interpreter or a contractor.

10. There are significant numbers of enemy actors who target U.S.-affiliated Iraqis. This most nota-

bly includes ISIS, but there are many other militias and groups, of multiple religious sects, political affiliations, and locations within Iraq, that seek to harm U.S.-affiliated Iraqis. Because of the large number of threats, a targeted U.S.-affiliated Iraqi may not find safety in any part of Iraq.

11. Mere evidence of an U.S. affiliation, such as a badge to enter a U.S. base, can put an Iraqi at risk. When the enemies are unable to target individuals directly, they will target family members of U.S.-affiliated Iraqis.

12. U.S. affiliated Iraqis face extreme danger while they wait to be processed. Local national interpreters and contractors have been killed while working alongside U.S. forces, and they have also been killed at their homes or while traveling to U.S. bases.

13. As a result of these threats, every extra day our allies must wait for refugee applications to be processed can literally mean life or death.

14. For the U.S. military, the Priority 2 Direct Access Program for U.S.-Affiliated Iraqi refugees (P2-DAP) is a promise to help our Iraqi allies that ensures their safety and their continued support for the U.S. mission. When the Refugee Crisis in Iraq Act, also known as the Kennedy Act, was signed into law, it was a promise by the United States to provide protection to our Iraqi allies who were vital to our missions' safety and success.

15. Specifically, the Refugee Crisis in Iraq Act was signed into law on January 28, 2008. It commit-

ted the United States to a more ambitious set of programs to provide US.-affiliated Iraqis facing danger inside Iraq routes of escape to the United States. One program that the Act established allowed Iraqis with demonstrated work for the U.S. government (USG), contractors, or U.S.-based NGOs or media organizations, to directly access the U.S. refugee admissions program. This is known as the Priority 2 Direct Access Program for U.S.-Affiliated Iraqis (P-2 DAP). Today, this is the path by which wartime allies who served alongside us in Iraq can find safe passage to the United States.

16. As this program is crucial for the success of our military operations in Iraq and our future military operations abroad (including Afghanistan), ensuring its vitality is key. The program is strictly reserved for Iraqis and their family members who have documented ties with U.S. entities and U.S. citizens from their work supporting the U.S. mission in Iraq. A detailed background on the specific aspects of this program will explain the redundancy in having refugees in this program prove they have a de facto bona fide relationship with a person or entity in the United States and show the need to exempt refugees in this program from the refugee freeze.

17. The U.S. government agencies administering P2-DAP verify the documentation and relationship with the U.S. military or U.S. entity that employed the Iraqi applicant or family member, as well as the threat in Iraq due to that relationship. The

Iraqi P2-DAP applicants at issue[1] must have been employed by an entity affiliated with the U.S. mission in Iraq, or be a family member of an employee; that relationship must be documented, and that documentation must be submitted to the U.S. government, reviewed by the Department of State, and verified for an application to proceed.

18. The Refugee Crisis in Iraq Act established "Direct Access" for a designated class of Iraqi refugees, those who have experienced severe harm, or who believe they are at risk of serious harm, as result of their association with the USG. In order to qualify, an applicant must have to have been an employee of the USG, an interpreter/translator for the USG or Multi-National Forces, an employee of U.S.-affiliated organization or entity closely associated with the U.S. mission in Iraq that has received USG funding, an employee of an U.S. NGO or media organization, or a spouse, children, parent, sibling of someone with the qualifying work.

19. In order to apply to the program, applicants must email the International Organization for Migra-

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[1] The Iraqi P2-DAP program also includes Iraqis with a U.S. affiliation based on a family member in the United States who has filed and received approval of an I-130 immigration petition on their behalf. The administration has indicated that all of those applicants will be considered to have close family relationships and therefore will not be subject to the refugee ban. The discussion of "Iraqi P2-DAP applicants" in this declaration is therefore limited to Iraqis who were employed by U.S.-affiliated entities and their family.

tion (IOM), which operates aspects of the program for the Department of State, with their basic biographic data and copies of documents related to their U.S.-affiliated work, including but not limited to their badges, letters of recommendation, and contracts that prove USG funding. In addition, applicants are required to have a point of contact at their qualifying employer verify the applicant's employment with the company.

20. IOM collects and reviews the information. The Department of State reviews and determines whether the U.S. affiliation has been independently verified. After verifying that applicants have qualifying ties to the USG and its mission in Iraq, IOM schedules applicants for a pre-screening interview to further assess the applicants' eligibility for the program.

21. Once IOM decides that the basic requirements appear to be met, applicants interview with the Department of Homeland security personnel, to further demonstrate that they meet the U.S refugee definition in addition to providing additional evidence that they are a member of the designated P-2 population.

22. This means that, by definition, any Iraqi refugee with a pending application in the Iraqi DAP program has already been adjudicated by the United States to have a concrete, bona fide and documented relationship with a U.S. entity.

23. Requiring Iraqi P-2 DAP applicants to again prove their previously verified bona fide relationship

needlessly and senselessly delays the process, risks the deaths of our allies and their families, and harms the U.S. military's reputation and operations overseas. I am deeply concerned by the U.S. government's interpretation of the Supreme Court decision, as it will unnecessarily delay processing and may shut down the entire program. These delays and shutdowns have life threatening impacts on our allies who already risked their lives to advance our mission.

24. Iraqi P2-DAP applicants must have a bona fide relationship with a U.S. entity based on their or a family member's employment. That relationship was independently verified in order to allow them access to apply for P2-DAP and again, in-person, during the refugee application process. To put these applications on hold pending further verification of a bona fide relationship is to put our allies and their families needlessly and senselessly in harm's way.

25. Military operations depend on robust and trustworthy relationships with local partners. If the United States wishes to continue achieving success in current and future operations overseas, it must protect those who help enable that success. U.S. partners in other conflict zones, including Afghanistan (where thousands of U.S. troops are currently deployed), are watching to see how the United States treats its networks in Iraq. Maintaining the promises made to those Iraqis who served with us is not only principled but will improve our military's effectiveness in other

regions; it will instill confidence and loyalties where local supporters are needed. The effectiveness of future missions depends on the United States' willingness and ability to safeguard those individuals, and their families, who risk their lives in support of U.S. missions.

26. Military service instills in a person certain values: Loyalty. Duty. Honor. Integrity. These values apply universally; to each other, to our nation, and also to all those who stood by our sides when we needed their assistance. Many of us can point to a moment when one of our foreign allies saved our lives—often by taking up arms against our common enemies. They acted because they believed in America, in our mission, and in the promise that was given. We should keep that promise, and among the ways we do this is to continue the P-2 DAP program for those Iraqi allies.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Signature: /s/ JOHN R. ALLEN, GEN. USMC (RET.)

Executed this 10th day of July, 2017

July 11, 2017

CWS Declaration

Church World Service (CWS), a humanitarian agency that brings together 37 Protestant, Anglican and Orthodox member communions. The CWS constituency represents more than 30 million people in the United States who affirm the importance of refugee resettlement as a private-public partnership that has broad support from communities across the country.

I, Erol Kekic, am the executive director of the CWS Immigration and Refugee Program (IRP). I have worked in the field of refugee protection and resettlement for more than 21 years, leading CWS's work in humanitarian protection and development of durable solutions that bridge the gap between disaster relief and development. Before serving as the associate director and then executive director of CWS IRP, I served as the associate director for the Lutheran Family and Community Service Immigration and Refugee Program and assistant director for resettlement for the Lutheran Immigration and Refugee Service, both in New York. I have a Bachelor of Science degree in chemical engineering at the University of Sarajevo and have done graduate work at The University of Detroit-Mercy in Michigan and at Oxford University Refugee Study Centre in the UK.

The United States Refugee Admissions Program (USRAP) works with nine agencies to resettle refugees into communities across the country; one of these agencies is CWS, which agreed to serve 8,687 individuals in FY 2017. Of this number, CWS has already resettled 6,664 refugees and has an additional 3,626 individuals in its assured-not-yet-arrived overseas pipeline (some of whom may arrive next year); all of whom have been waiting for years to flee from harm and the chance to live in safety.

U.S. Ties Who Are Not "Bona fide relationships" Under the Administration's Interpretation

Of the 3,626 currently in the CWS pipeline who have been assured and have a U.S. tie, 1,072 individuals do not have what the Administration considers to be a "bona fide relationship". In its interpretation of the Supreme Court's decision on this case, the Administration is asserting that refugees who have expected to join their grandmothers, aunts, uncles, cousins, nieces, nephews and friends do not have a "bona fide relationship" with an individual in the United States.

Among the group of individuals being impacted by the Administration's interpretation of a bona fide relationship is a 93 year old grandmother resettled to the US, who three years ago filed family reunification applications for her daughter and granddaughter from Ukraine, both of whom are booked to arrive in the United States in two weeks' time. Unfortunately, neither the mother nor the daughter, who are both, importantly, religious minorities, a group that the State Department has prioritized for resettlement, will be allowed to depart for the U.S. Their cases are "hard-cross-referenced", which means one cannot travel without the other, and as the granddaughter does not have what is considered to be a "bona fide relationship" to her U.S. tie (i.e.: her grandmother), the mother —who has a bona fide relationship—will also be prevented from travel. As a result, this 93 year old grandmother may never be reunited with her daughter or granddaughter.

"Cross-Referenced" Family Members

Resettlement Support Centers (RSCs), which prescreen refugees referred to the US program regularly process refugees as "cross-referenced" cases if a refugee identifies a need to travel and/or live in the same location with a family member or friend. These decisions are often vulnerability or dependency based. Guidance from the federal government to RSCs on cross-referencing specifies that "a cross-reference is a link between cases for the purpose of travel and resettlement. Cross-referenced cases are those that have an established association with each other[1]."

If they need to be processed together (travel and live together), the RSC will hard-cross-reference (HCR) them to ensure they go through each step in the process together. If they want to resettle together, but one case has more urgent needs, the RSC will normally soft-cross-reference (SCR) their cases. Soft-cross referencing ensures that they will eventually be reunited in the same location in the U.S.

Implementation of this recognizes that many refugee families are not commonly that of a nuclear family, but that grandparents, cousins, aunts and uncles frequently play a role in raising children and that familial relationships do not end at the "bona fide" level as currently defined by the Administration. CWS has hundreds of individuals who may not have a "bona fide" relationship to a U.S. tie as currently defined by the Administration, but whose cases are cross-referenced to cases of family or friends who have already arrived in the U.S.

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[1] RSC SOP 2: Pre-screening. This SOP describes minimum standards set forth by PRM and RPC, and guides local implementation by RSCs within their regional coverage.

Refugees "Without US ties"

CWS also has **1,384** refugees in its assured-not-yet-arrived pipeline who do not have a U.S. tie, but who have no option to return home or be integrated into their host country. Among these individuals is a displaced Somali family of ten. Their children have been diagnosed as malnourished and continue to live in unsafe conditions. One of them was, in fact, attacked on his way to his interview with the resettlement support staff and suffered severe head trauma. Their mother suffers from strokes that have left half her body paralyzed. After having spent the past 19 years in a desolate refugee camp along the border of Kenya and Somalia, they finally were meant to arrive in the U.S. this week but their travel has been cancelled. "If these and other refugees are denied entry, families like this—who face an existential threat every day—will be in limbo indefinitely. Their medical exams and security checks will expire, they will not receive adequate treatment for their serious medical conditions; their children will remain malnourished and unable to attend school, and their future uncertain. Despite being told that they were approved for admission to the U.S., the promise of resettling safely in the U.S. will now be revoked, for no fault of their own.

I declare under penalty of perjury that the foregoing is true and correct. Executed on Thursday, July 13th, 2017.

Respectfully,

/s/ EROL KEKIC
EROL KEKIC
Executive Director, Immigration and Refugee Programs
Church World Service

Declaration of John Feruzi

1. My name is John Feruzi. I am around 21 years old. I do not know the exact day and month that I was born, but I do know I was born in 1995. I was born in the Congo. Now I live in Dzaleka Refugee Camp in Malawi.

2. I cannot say anything about my birth parents because never knew them. I went to live with my uncle, Mwenda Watata, when I was very young. I do not consider him my uncle. He is my father. I call him "Baba," which means "Dad" in Swahili. His wife is like my mother. She raised me, too. She breastfed me as a child. I call my aunt "Mom." I do not refer to them as my uncle and aunt. They are my parents.

3. Dad is the only father I have ever known. He means everything to me. I love him very much. He brought me up. I have loved living with him. He has always been there for me.

4. I lived with Dad and Mom ever since I was a child, ever since I can remember. Dad always says I am his child, even though I am listed as his nephew on paperwork. He refers to me when he talks about his sons, because he has always considered me to be his son. Though we are cousins by birth, his birth children and I consider each other brothers and sisters. I am considered born into the family, not just a cousin.

5. My dad means everything to me. He took me to school. He gave me advice just as he did to his birth children. He took care of me when I was

sick. He treated me exactly the same as his other children. We always ate together as a family.

6. When I was about 14 years old, Congo soldiers attacked our house and our family. I do not remember many details, but I remember that our family was on the run until we reached Malawi. That is really all I can remember. I was about 14 at the time. I believe we came to Malawi around October of 2009. We applied for refugee status around that time.

7. Our whole family started the application process together. We filed together. I was included because I was considered one of his children, even though I am listed as his nephew in the application. We went through all the steps together. We were fingerprinted at the same time. We took our photos at the same time. We all went to the interviews together. We completed our forms together and turned them in together. We finished the process together. We made travel arrangements together. Our cases progressed together. Dad handled everything and told us children what we needed to do.

8. Dad and Mom never officially adopted me. We just never thought it was necessary. Mom breastfed me. I was their kid. It was never a question. I was listed as their nephew on the paperwork, but we were all still processed together as a family. The fact that I was their nephew by birth never came up in my interview. It never was an issue until we all got to the airport to travel to the United States and they divided us. I never

expected it to be an issue. We always thought I would be resettled with the rest of the family.

9. On the 4th of July, 2017, our whole family went to the airport together. We were all going to be resettled in Arkansas in the United States.

10. I expected that we would travel together and live together in the United States. All of a sudden, we got to the airport and I was told to stay behind. I think maybe this was because I was not considered family. I do not understand this system. I feel like I don't understand anything anymore. All the people I grew up with are gone. This is my family. This is my Dad. This is my Mom. These are my brothers and sisters. I am separated from the people I love most in the world. My family is in the U.S. now without me. They are all there, except me. I am in the refugee camp without them.

11. I am not someone who cries easily. After this happened, I cried more than ever before in my life. I'm not in a good situation emotionally. All the people I care about are gone. My father who took care of me my whole life is gone. My whole family is all gone. I can't wrap my head around what happened. I don't understand why it happened. I'm scared I'll never get to join them. I'm afraid I'll never see Dad, Mom, and my brothers and sisters again.

12. I am providing this declaration in the hopes that somehow it might help my family and I be together again.

13. If anyone can get in touch with my dad, please tell him I'm thinking of him and the family. Please tell my dad I love him and miss him so much. If there is anything I can do to help move this process along, I'll do it. I'll do whatever I can. I just want to be with my family again.

14. I authorize Marissa Ram, attorney with the International Refugee Assistance Project ("IRAP") to sign this declaration on my behalf. I live in Dzaleka Refugee Camp and I do not have access to a printer. I would have to go out and pay to use one. Unfortunately, I do not have any money. Dad helped provide for me and now that he is gone I do not have any money. If my signature is needed at a later date and someone can pay for mailing service, I can and will sign the declaration myself. This declaration has been read to me in Swahili, a language I understand and am fluent in. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 13 of July, 2017
New York, New York
/s/ MARISSA RAM

Marissa Ram, Attorney with the International Refugee Assistance Project, on behalf of **John Feruzi**

Interpreter Certification

I, Nancy Wallace, certify that I am fluent in the English and Swahili languages, and that the verbal translation I provided to the declarant of the above document from English into Swahili is complete, true, and accurate to the best of my abilities.

Executed on 13 of July, 2017
Davis, California
/s/ NANCY WALLACE
NANCY WALLACE

Declaration of Mwenda Watata

1. My name is Mwenda Watata. I was born in Mboko in the Democratic Republic of Congo on January 20, 1956. In my culture, we say our family name first, then our given name. In my paperwork for the United States, my name is written in reverse order, with my given name first and my family name last. U.S. documents list my name as Watata Mwenda.

2. I am fluent in several languages, including Swahili and French.

3. I have eleven children. I have eight biological sons, two biological daughters, and my son John Fernzi. In terms of defining family, I have always seen John as my own son.

4. I don't know the exact day that John was born, but it was sometime in August of 1995. To my knowledge, he is listed as 21 years old on official paperwork.

5. John is the biological son of my younger brother, who is now deceased.

6. When John was just about one month old, my younger brother left him with me. Cholera was rampant during this time. Many people died from it. My younger brother and his wife died, too. John came to live with us. My wife, Nyasa Safi, had just had a baby boy about a month ago, too. They were around the same age. We think they might even be just a few days apart.

7. My wife breastfed them together. It was as if she had given birth to two babies. We raised them together. We raised them as both our children. We treated them both exactly the same.

8. My role as a father was the same with all my children. I never discriminated or treated my children differently from one another. Two of my biological children have a different mom than Nyasa. I loved them all the same. John is my child. He is my son.

9. I just never saw the need to legally adopt John. He was our son. He didn't know his biological mother and father. My wife breastfed him just as she did with his brother. We raised them together. He has never lived with anyone else except us.

10. I also didn't see the need to adopt him because that is just not necessary in our culture. In our cultural tradition, these distinctions between family aren't important. We're related by blood. We're a family. If someone passes away, you take care of their children. Their children become your children. My brother's son became my son. I raised John since he was a baby. He is my child. I was and am responsible for him. There is just no need to legally adopt in our culture.

11. In 2009, we were attacked by Congo soldiers outside our home. They wanted to take my life. So we had to flee. We eventually reached Malawi and in or around October 2009, we applied for refugee status there.

12. Throughout our life in the DRC and Malawi, I have never left anyone behind, even when we had to flee. It was very important to me to keep the family together. That includes my son John.

13. I just can't understand why John was made to stay behind. I truly don't understand. We went through every step of process together, fingerprints, photos, interviews. To my understanding John was being considered our child throughout the process, even though legally he is my nephew. This never came up as a problem during the interviews. Nothing seemed strange about the process. We were honest in our answers. There were no weird questions. No one ever asked us why we didn't adopt John.

14. We were all expecting to move together. So I don't understand why this happened in the end. I don't understand why we were separated from him.

15. On July 4, 2017, officers from Dzaleka Refugee Camp accompanied us from the camp to the airport. When we arrived at the airport, they called out the names of the travelers. One by one all of our names were called. Except my son John. Despite going through the whole process together as a family and arranging our travel together, he was not on that list.

16. It was very confusing. It's hard to wrap my head around what happened.

17. One of the officers from the refugee camp told us not to worry about it. He said maybe John would join us in a week and told us to go on ahead. They

didn't give us any reason. We all cried about it. But it seemed like our tears didn't help at all.

18. It's been more than a week and we are still separated. John's still not here. It doesn't seem like he is coming now. And no one can tell us why.

19. I understand John's belief that he was left behind because he's not considered family. The only difference between him and all my other children that are here with me is that he is legally my nephew. All my sons are here. Except John. When he was left behind at the airport, it was like leaving my son.

20. John's mom is just devastated. One of her children is not with her. There is a gap in our family. It's not the same anymore. John has been with us his whole life. His siblings are depressed. There is something missing. I'm heartbroken because John is not sitting next to me like the rest of my sons. All my sons are here, except John. I want to see him. I miss him. I want him to be here with me. We need him home with us.

21. I am very worried about John because I don't even know if he's safe. What if he's been attacked? He's in a refugee camp. Anything can happen there and now he's all alone.

22. I'm worried about his health. Is he eating? Does he even have enough to eat? I always made sure all my kids had good, healthy food. I made sure they all had enough to eat, even when times were hard. I provided everything for my children.

23. If I could speak with John right now, I would tell him to please not to lose hope. There are people trying to help. I believe something good can come out of this. I believe we will be together again.

24. If there is anything anyone can do to help reunite me with my son, I hope someone will let me know.

25. This declaration has been read to me in French, a language I understand and am fluent in. I declare under penalty of perjury that the foregoing is true and correct.

Executed on 13 of July, 2017
Fayetteville, Arkansas
/s/ MWENDA WATATA
MWENDA WATATA

Interpreter Certification

I, Shezza Dallal, certify that I am fluent in the English and French languages, and that the verbal translation I provided to the declarant of the above document from English into French is complete, true, and accurate to the best of my abilities.

Executed on 13 of July, 2017
New York, New York
/s/ SHEZZA DALLAL
SHEZZA DALLAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15589

STATE OF HAWAII, ET AL., PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, ET AL.,
DEFENDANTS-APPELLANTS

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

SECOND SUPPLEMENTAL DECLARATION OF RISA E. DICKSON

I, Risa E. Dickson, do solemnly swear and would competently testify as follows.

1. I am Vice President for Academic Planning and Policy at the University of Hawai'i System. I began this role in February 2015. As Vice President, I have overall responsibility for leadership, planning, and intercampus coordination of academic affairs, student affairs, and academic policy and planning, among other things.

2. On April 20, 2017, the University of Hawai'i ("University") posted a story on-line about the number of international students admitted to the University for the 2017-2018 school year. *UH a popular destination for international students,*

UH News (Apr. 20, 2017), http://www.hawaii.edu/news/2017/04/20/uh-a-popular-destination-for-international-students/.

3. As reported in the story, as of that date, 11 graduate students, each of whom are from one of the six countries affected by the March 6, 2017 executive order, had received offers of admission from their respective programs at the University, for the 2017-2018 school year, and an additional 21 total graduate students from the six affected countries were still being considered for admission by their respective programs.

4. Since this on-line story was posted, as of May 12, 2017, the University's records reflect that at least three graduate applicants, each from one of the six affected countries, have accepted their respective offers of admission and thus committed to attend the University in the Fall. The University's records reflect that each of these students is a national of one of the six affected countries.

5. In addition, since the on-line story was posted, as of May 12, 2017, the University's records reflect that three additional offers of admission were extended to graduate applicants, each of whom is from one of the six affected countries. Therefore, as of May 12, 2017, there are 11 graduate applicants, each from one of the six designated countries, with pending offers of admission for the 2017-2018 school year.

6. Classes begin for the upcoming school year on August 21, 2017. All students, campus-wide, need to be present by at least that date to begin their classes. Additionally, many students at UH have mandatory orientation, registration, or other activities that begin before the classes start.

7. Campus-wide graduate student orientation begins August 14, 2017, but is optional. However, each program has its own requirements for when new graduate students must arrive on campus. Of the three students who have accepted their offers of admission noted above, at least one of them must be on campus by August 1, 2017 and another must be on campus by August 10, 2017.

8. In general, graduate student applicants who receive offers of admission are asked to respond within 30 days of receipt of the offer letter. However, graduate programs may extend that deadline. As a result, the process of admitting new graduate students extends over the summer until classes begin.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, May 18, 2017.

/s/ RISA E. DICKSON
RISA E. DICKSON

Protecting the Nation from Foreign Terrorist Entry into the United States

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Purpose.* The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United

States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 2. *Policy.* It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. *Implementing Uniform Screening Standards for All Immigration Programs.* (a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest —including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ DONALD J. TRUMP
DONALD J. TRUMP

THE WHITE HOUSE,

Jan. 27, 2017.

Protecting the Nation from Foreign Terrorist Entry into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the

United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: "(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists." 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the "political branches are far better equipped to make appropriate distinctions" about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State's *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran.* Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya.* Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia.* Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan.* Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria.* Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen.* Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview

Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ DONALD J. TRUMP
DONALD J. TRUMP

THE WHITE HOUSE,

Mar. 6, 2017.

Presidential Documents

Memorandum of June 14, 2017

Effective Date in Executive Order 13780

Memorandum for the Secretary of State[,] the Attorney General[,] the Secretary of Homeland Security[, and] the Director of National Intelligence

This memorandum provides guidance for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence in light of two preliminary injunctions that bar enforcement of certain provisions of Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States" (Mar. 6, 2017). The preliminary injunction entered by the United States District Court for the District of Maryland, and affirmed in substantial part by the United States Court of Appeals for the Fourth Circuit, bars enforcement of section 2(c) of the Executive Order. The portions of the preliminary injunction entered by the United States District Court for the District of Hawaii that were affirmed by the recent decision of the United States Court of Appeals for the Ninth Circuit bar enforcement of certain provisions of sections 2 and 6 of the Executive Order.

Various provisions of sections 2 and 6 of the Executive Order (as well as sections 3 and 12(c), which delineate the scope of the suspension contained in section 2(c)), refer to the Order's effective date. Section 14 of the Executive Order provides that the Order was effective at 12:01 a.m., eastern daylight time on March 16, 2017. Sections 2 and 6, however, were enjoined before that effective date, and the courts of appeals have affirmed the injunctions with respect to certain provisions of sections 2 and 6. As a result, under the terms of the Executive Order, the effective date of the enjoined provisions (as well as related provisions of sections 3 and 12(c)) is delayed or tolled until those injunctions are lifted or stayed.

In light of questions in litigation about the effective date of the enjoined provisions and in the interest of clarity, I hereby declare the effective date of each enjoined provision to be the date and time at which the referenced injunctions are lifted or stayed with respect to that provision. To the extent it is necessary, this memorandum should be construed to amend the Executive Order.

Because the injunctions have delayed the effective date of section 12(c), no immigrant or nonimmigrant visa issued before the effective date of section 2(c) shall be revoked pursuant to the Executive Order.

I hereby direct the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to jointly begin implementation of each relevant provision of sections 2 and 6 of the Executive Order 72 hours after all applicable injunctions are lifted or stayed with respect to that provision, to ensure an orderly and proper implementation of those provisions. Prior to that time, consular officers may issue valid visas to, and the Secretary of Homeland Security may admit, otherwise eligible aliens without regard to sections 2 and 6. If not otherwise revoked, visas and other travel documents issued during this period remain valid for travel as if they were issued prior to the effective date.

/s/ DONALD J. TRUMP
DONALD J. TRUMP

THE WHITE HOUSE,
Washington, June 14, 2017

RECORD
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Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of certain foreign nationals of six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, pending a review of screening and vetting procedures to assess what information is needed from foreign governments. Section 6(a) suspends for 120 days decisions on refugee applications and travel under the U.S. Refugee Admission Program for aliens from any country, pending a similar review of that program, and Section 6(b) reduces to 50,000 the maximum number of refugees who may be admitted in Fiscal Year 2017. The court of appeals in No. 16-1436 held that Section 2(c) likely violates the Establishment Clause and affirmed a preliminary injunction barring its enforcement against any person worldwide. The court of appeals in No. 16-1540 held that Sections 2(c), 6(a), and 6(b) likely exceed the President's authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and affirmed a preliminary injunction barring their enforcement against any person worldwide.

The questions presented are:

1. Whether respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s temporary refugee suspension, and Section 6(b)'s refugee cap are justiciable.

2. Whether respondents' challenges to Section 2(c) became moot on June 14, 2017.

3. Whether Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA.

4. Whether Sections 2(c), 6(a), and 6(b) violate the Establishment Clause.

5. Whether the global injunctions are impermissibly overbroad.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) in No. 16-1436 are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; the Department of State; the Office of the Director of National Intelligence; Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security[*]; Rex W. Tillerson, in his official capacity as Secretary of State; and Daniel R. Coats, in his official capacity as Director of National Intelligence.

Respondents (plaintiffs-appellees below) in No. 16-1436 are the International Refugee Assistance Project, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, Inc., on behalf of itself and its clients; the Middle East Studies Association of North America, Inc., on behalf of itself and its members; Muhammed Meteab; Paul Harrison; Ibrahim Ahmed Mohomed; John Doe #1; Jane Doe #2; and John Doe #3.

Petitioners (defendants-appellants below) in No. 16-1540 are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; the Department of State; Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America.

Respondents (plaintiffs-appellees below) in No. 16-1540 are the State of Hawaii and Dr. Ismail Elshikh.

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[*] Former Secretary of Homeland Security John F. Kelly was originally named as a defendant in both cases. Upon becoming the Acting Secretary of Homeland Security on July 31, 2017, Acting Secretary Elaine C. Duke was automatically substituted under this Court's Rule 35.3.

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OPINIONS BELOW

The amended opinion of the court of appeals in No. 16-1436 (J.A. 170-385) is reported at 857 F.3d 554. The opinion of the district court (J.A. 116-166) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1018235. The order of the district court entering a preliminary injunction (J.A. 167-169) is not published.

The opinion of the court of appeals in No. 16-1540 (J.A. 1164-1237) is reported at 859 F.3d 741. The order of the district court entering a temporary restraining order (TRO) (J.A. 1102-1142) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1011673. The order of the district court converting the TRO to a preliminary injunction (J.A. 1143-1163) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1167383.

JURISDICTION

The amended judgment of the court of appeals in No. 16-1436 was entered on May 31, 2017. The petition for a writ of certiorari was filed on June 1, 2017, and the petition was granted on June 26, 2017.

The judgment of the court of appeals in No. 16-1540 was entered on June 12, 2017. The government's supplemental brief in support of its application for a stay was filed on June 15, 2017. On June 26, 2017, this Court construed the supplemental brief as a petition for a writ of certiorari and granted the petition on that date.

In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, at 1a-90a.

STATEMENT

The Constitution and Acts of Congress confer on the President broad authority to suspend or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950);

8 U.S.C. 1182(f), 1185(a)(1). Exercising that authority, and after consulting with the Secretaries of State and Homeland Security and the Attorney General, the President placed a temporary 90-day pause (subject to individualized waivers) on the entry of certain foreign nationals of six countries that are sponsors or shelters of terrorism—and that Congress or the Executive previously had designated as presenting heightened terrorism-related risks—pending a worldwide review of screening and vetting procedures to assess what information is needed from foreign governments. The President also placed a 120-day pause on decisions and travel under the U.S. Refugee Admission Program (Refugee Program) pending a similar review, and limited the number of refugees who may enter the United States in Fiscal Year 2017 to 50,000.

The lower courts in these cases entered global preliminary injunctions barring enforcement of the President's actions. The district court in No. 16-1436 enjoined the six-country entry suspension, and the Fourth Circuit affirmed, concluding that it likely violates the Establishment Clause. J.A. 116-246. The district court in No. 16-1540 enjoined both the six-country entry suspension and the refugee-related provisions, and the Ninth Circuit affirmed in relevant part on the basis that those provisions likely exceed the President's statutory authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* J.A. 1143-1237. This Court granted the government's petitions for certiorari and also granted its stay applications with respect to foreign nationals who lack a credible claim of a bona fide relationship with persons or entities in the United States. *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087-2089 (2017) (per curiam) (*IRAP*).

A. Legal Framework

"The exclusion of aliens is a fundamental act of sovereignty" that both is an aspect of the "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation." *Knauff*, 338 U.S. at 542; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972). Congress has addressed entry into the United States in the INA, which vests the Executive with broad authority to suspend or restrict the entry of aliens abroad.

1. Under the INA, admission to the United States normally requires a valid visa or other valid travel document. See 8 U.S.C. 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. Applying for a visa typically requires an in-person interview and results in a decision by a Department of State consular officer. 8 U.S.C. 1201(a)(1), 1202(h), 1204; 22 C.F.R. 41.102, 42.62. Although a visa normally is necessary for admission, it does not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. 1201(h), 1225(a).

Congress has enabled nationals of certain countries to seek temporary admission without a visa under the Visa Waiver Program. 8 U.S.C. 1182(a)(7)(B)(iv); 8 U.S.C. 1187 (2012 & Supp. III 2015). In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or recent visitors to Iraq or Syria, where "[t]he Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force," as well as dual nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).[1]

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[1] U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), https://goo.gl/40GmOS; see 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. III 2015); J.A. 176 n.4.

Congress also has authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in the country, and "whether the presence of an alien in the country * * * increases the likelihood that the alien is a credible threat to" U.S. national security. 8 U.S.C. 1187(a)(12)(D)(i) and (ii) (Supp. III 2015). Applying those criteria, in February 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Visa Waiver Program.[2]

2. Congress also has accorded the President broad discretion to suspend or restrict the entry of aliens. Section 1182(f) of Title 8 of the United States Code provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Section 1185(a)(1) of Title 8 further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry of aliens, "subject to such limitations and exceptions as [he] may prescribe."

3. The INA also establishes a procedure for setting the maximum number of refugees who may be admitted

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[2] DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://goo.gl/OXTqb5; J.A. 176 n.4.

each fiscal year. See 8 U.S.C. 1157. Section 1157 provides that "the number of refugees who may be admitted" in any fiscal year "shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation." 8 U.S.C. 1157(a)(2). The statute prescribes a process for "appropriate consultation" among Cabinet-level officials and Congress. 8 U.S.C. 1157(e). If an "unforeseen emergency refugee situation" arises mid-year, the President may (after appropriate consultation) set a higher maximum. 8 U.S.C. 1157(b).

B. The Executive Orders

1. The January Order

On January 27, 2017, the President issued Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (January Order) (J.A. 1404-1415). The January Order directed the Secretary of Homeland Security, in consultation with other agencies, to assess current screening procedures to determine whether they are sufficient to detect individuals seeking to enter this country to do it harm. J.A. 1405-1406 (§ 3(a) and (b)). While that review was ongoing, the January Order suspended for 90 days entry of foreign nationals of the seven countries already designated as posing heightened terrorism-related concerns in the context of the Visa Waiver Program, subject to case-by-case exceptions. J.A. 1406 (§ 3(c) and (g)). Other provisions addressed the Refugee Program. J.A. 1409-1411 (§ 5); see 8 U.S.C. 1101(a)(42), 1157.

On February 3, 2017, a district court in Washington enjoined enforcement nationwide of the 90-day entry suspension and various refugee-related provisions. *Washington* v. *Trump*, No. 17-141, 2017 WL 462040 (W.D. Wash.). On February 9, 2017, a Ninth Circuit panel declined to stay that injunction pending appeal, concluding that the January Order likely violated procedural due process. *Washington* v. *Trump*, 847 F.3d 1151, 1164-1167 (per curiam). The Ninth Circuit denied reconsideration en banc *sua sponte*, over the dissent of five judges who issued three separate opinions. *Washington* v. *Trump*, 858 F.3d 1168, 1171-1174 (2017) (Kozinski, J., dissenting); *id.* at 1174-1185 (Bybee, J., dissenting); *id.* at 1185-1188 (Bea, J., dissenting).

2. The Order

On March 6, 2017, responding to the Ninth Circuit panel's decision, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), J.A. 1416-1440, with an effective date of March 16, 2017, J.A. 1439 (§ 14). The Order was adopted in accordance with a formal recommendation of the Secretary of Homeland Security and the Attorney General, who "urge[d]" the President to order a "thorough and fresh review of the particular risks to our Nation's security from our immigration system" and a "temporary pause on the entry of nationals from certain countries to allow this review to take place."[3] They expressed

> particular concerns about our current screening and vetting processes for nationals of certain countries that are either state sponsors of terrorism, or that have active conflict zones in which the central government has lost control of territory to terrorists or terrorist organizations, such as ISIS, core al-Qa'ida, and their regional affiliates.[4]

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[3] See Letter from Jefferson B. Sessions III, Att'y Gen., & John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump 1-2 (Mar. 6, 2017), https://goo.gl/H69g8I (March 6 Letter).

[4] *Id.* at 2.

The Order revoked the January Order, J.A. 1439 (§ 13), replacing it with significantly revised provisions. At issue here are Sections 2(c), 6(a), and 6(b).

a. Section 2 directs the Secretary of Homeland Security, in consultation with the Secretary of State and Director of National Intelligence, to conduct a worldwide review of screening and vetting procedures to determine whether and what additional information may be needed from foreign countries to assess whether their nationals seeking entry pose a security threat. J.A. 1425 (§ 2(a)). The Order directs the agencies to report their findings to the President within 20 days and instructs the Secretary of State to request that each foreign government supply the needed information within 50 days thereafter. J.A. 1425-1426 (§ 2(b) and (d)). The agencies are then to recommend to the President "prohibit[ions on] the entry of appropriate categories of foreign nationals of countries that have not provided the information requested," have not adopted an "adequate plan to do so," and have not "adequately shared information through other means." J.A. 1427 (§ 2(e)).

During this worldwide review, Section 2(c) places a temporary, 90-day pause on entry of certain nationals of six countries that Congress or the Executive had previously identified as presenting heightened terrorism-related concerns: Iran, Libya, Somalia, Sudan, Syria, and Yemen. J.A. 1426. The Order explains that each of the six countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," which is why Congress or the Executive previously designated them. J.A. 1419-1420 (§ 1(d)); see J.A. 1416-1417 (§ 1(b)(i)). The Order further details the circumstances of each country that give rise to "heightened risks" of terrorism and diminish their governments' "willingness or ability to share or validate important information about individuals" needed to screen their nationals. J.A. 1419-1422 (§ 1(d) and (e)).[5]

"[I]n light of the[se] national security concerns," and invoking his authority under 8 U.S.C. 1182(f) and 1185(a), the President determined "that the unrestricted entry into the United States" of those six countries' nationals during the 90 days "would be detrimental to the interests of the United States." J.A. 1426 (§ 2(c)). The President also adopted the suspension "[t]o temporarily reduce investigative burdens on relevant agencies during the review period," "to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals," and "to ensure that adequate standards are established to prevent infiltration by foreign terrorists." *Ibid.*[6]

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[5] See March 6 Letter 2. Although the January Order's suspension had included Iraq, the Order omits Iraq from the suspension because of "the close cooperative relationship between" the U.S. and Iraqi governments, and because, since the January Order, "the Iraqi government has expressly undertaken steps" to supply information necessary to help identify possible threats. J.A. 1423-1424 (§ 1(g)); see J.A. 1431 (§ 4).

[6] Addressing concerns courts had raised regarding the January Order, the Order clarifies that the suspension applies only to aliens who (1) were outside the United States on the Order's effective date, (2) did not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the January Order. J.A. 1428 (§ 3(a)). It also expressly excludes other categories of aliens that had concerned courts addressing the January Order, such as lawful permanent residents. J.A. 1428-1429 (§ 3(b)).

The Order includes a detailed provision permitting case-by-case waivers from Section 2(c)'s entry suspension when denying entry "would cause undue hardship" and "entry would not pose a threat to national security and would be in the national interest." J.A. 1429 (§ 3(c)). It provides a nonexhaustive list of circumstances in which a waiver could be appropriate, including when the applicant seeks entry "to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa." J.A. 1430 (§ 3(c)(iv)). Waivers can be requested, and are decided by a consular officer, "as part of the visa issuance process," or by the Commissioner of U.S. Customs and Border Protection (or his delegee). J.A. 1429 (§ 3(c)).[7]

b. Section 6 of the Order addresses refugees. Section 6(a) directs the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to conduct a review of the Refugee Program and "determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." J.A. 1433. Pending that review, Section 6(a) suspends decisions on applications under the Refugee Program and travel of refugees for 120 days. *Ibid.* The suspension does not apply to refugee applicants who were formally scheduled for transit to the United States before the Order's effective date. *Ibid.*

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[7] See Bureau of Consular Affairs, U.S. Dep't of State, *Executive Order on Visas* (Mar. 22, 2017), https://goo.gl/HoNiNz; DHS, *Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States* (Mar. 6, 2017), https://goo.gl/WtVwTu.

Section 6(b) of the Order limits to 50,000 the number of refugees who may be admitted in Fiscal Year 2017, based on the President's determination under 8 U.S.C. 1182(f) that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." J.A. 1434. Section 6(b) accordingly "suspend[s] any entries in excess of that number until such time as [the President] determine[s] that additional entries would be in the national interest." *Ibid.* Section 6(c) provides for case-by-case waivers. *Ibid.*

C. Procedural History

1. The IRAP *litigation (No. 16-1436)*

a. Respondents in *IRAP* are six individuals and three organizations that challenged (as relevant here) Section 2(c) of the Order under the INA and the Establishment Clause. J.A. 127-128. The individual *IRAP* respondents are U.S. citizens or lawful permanent residents who claimed that the Order would prevent or delay a foreign-national family member from entering the United States. Four individuals—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—alleged that Section 2(c) would prevent family members from obtaining visas. J.A. 54-55, 95-100, 102-103. The other two—Muhammed Meteab and Ibrahim Ahmed Mohomed—alleged that family members would be denied or delayed admission under the Refugee Program. J.A. 55-56, 100-101, 103-104.

One organization, the Middle East Studies Association of North America, Inc. (MESA), alleged that Section 2(c) would prevent its members abroad from traveling to the United States for conferences, deter U.S. members from conducting work abroad, and prevent foreign scholars from attending MESA's annual meeting in the

United States. J.A. 53-54, 92-95. The other two—the International Refugee Assistance Project (IRAP) and HIAS, Inc.—principally provide services to refugees and asserted injury based on the refugee provisions. J.A. 49-53, 82-92.

b. After expedited briefing and argument, the district court enjoined Section 2(c). J.A. 116-166. It held that three individual respondents (Does #1, #2, and #3) had standing to challenge Section 2(c) on statutory grounds. J.A. 129-134. The court held, however, that respondents were likely to succeed only in part on their statutory challenge, which could not support enjoining Section 2(c) in its entirety. J.A. 138-145. The court therefore proceeded to address respondents' constitutional challenge.

The district court held that three respondents (Doe #1, Doe #3, and Meteab) had standing to assert an Establishment Clause claim and were likely to succeed on the merits. J.A. 134-137, 145-161. It declined to consider whether Section 2(c)'s express national-security basis is a "facially legitimate and bona fide reason" under *Mandel*, 408 U.S. at 770. J.A. 159-160. Instead, it evaluated respondents' claim under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). J.A. 145-146. While acknowledging that the Order "is facially neutral in terms of religion," the court held—based primarily on campaign statements made by then-candidate Donald Trump and subsequent statements by the President's aides—that the Order was adopted for an improper "religious purpose" of preventing Muslim immigration. J.A. 153; see J.A. 147-153. The court entered a global preliminary injunction barring any enforcement of Section 2(c) and denied a stay. J.A. 167-169.

c. The government appealed and sought a stay. The court of appeals *sua sponte* ordered initial hearing en banc, and in a divided decision largely affirmed the injunction and denied a stay. J.A. 170-385.

i. The majority held that one respondent, Doe #1, had standing to assert an Establishment Clause claim based on the anticipated application of Section 2(c) to his wife (an Iranian national) combined with his allegation that Section 2(c) sends a "state-sanctioned message condemning his religion." J.A. 196. On the merits, the court reasoned that, although the Order's "stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry," J.A. 214, *Mandel* provides only "the starting point for [the] analysis," J.A. 208. Because the majority concluded that Doe #1 had made "an affirmative showing of bad faith," it "look[ed] behind" the government's "facially legitimate justification." J.A. 212-213 (citation and internal quotation marks omitted); see J.A. 215-217. Relying primarily on statements made by then-candidate Trump in 2015 and 2016, the majority concluded that the Order was "motivated" by a "desire to exclude Muslims from the United States." J.A. 222; see J.A. 219-223.

Although the majority held only that Doe #1 could assert an Establishment Clause claim, it affirmed the global injunction except as against the "President himself." J.A. 244; see J.A. 236-245. The majority held that the violation of respondents' Establishment Clause rights itself "constitutes irreparable injury" and is not outweighed by harm to the government and public interest. J.A. 237 (citation omitted); see J.A. 236-243. The majority further held that nationwide relief was appropriate because respondents "are dispersed throughout the United States," the immigration laws "should be enforced vigorously and uniformly," and "enjoining [Section 2(c)] only as to [respondents] would not cure the constitutional deficiency." J.A. 244 (citation and emphasis omitted).

ii. Four judges filed concurring opinions. J.A. 247-320. Judge Traxler concurred in the judgment. J.A. 247. Judges Keenan, Thacker, and Wynn, each writing separately, agreed to varying degrees with the majority's constitutional analysis and opined that the Order also likely violated various provisions of the INA. J.A. 248-320.

iii. Judges Agee, Niemeyer, and Shedd filed dissents, with each judge joining each dissent. J.A. 321-385. Judge Agee opined that respondents' Establishment Clause claim is not justiciable. J.A. 368-385. "[T]he imagined future denial of a visa to [Doe #1's] wife is simply too vague and speculative" to confer standing, he concluded, and Doe #1's alleged "stigma" from the Order "is not a cognizable injury" but "simply a subjective disagreement with a government action." J.A. 374-375. Judge Niemeyer opined that the majority's Establishment Clause analysis "plainly violates" *Mandel*, and its "extratextual search for evidence suggesting bad faith" both "radically extends" this Court's precedents and "has no rational limit." J.A. 332, 341, 346. Judge Shedd opined that the district court "totally failed to respect" the deference due to the Executive's national-security judgments, and the "shortcomings" in its "selectively negative interpretation of political campaign statements" are "obvious." J.A. 358-359.

d. On June 1, 2017, the government sought certiorari and a stay from this Court. On June 24, 2017, the *IRAP* respondents informed the Court that Doe #1's wife had received an immigrant visa. *IRAP*, 137 S. Ct. at 2086 n.*.

2. *The* Hawaii *litigation (No. 16-1540)*

a. Respondents in *Hawaii* are the State of Hawaii and Dr. Ismail Elshikh. J.A. 1102-1103. The *Hawaii* respondents claimed that Sections 2 and 6 of the Order violate the INA and the Due Process and Establishment Clauses. J.A. 1040-1047. Hawaii alleged that the Order would adversely affect students and faculty at its state-run educational institutions, reduce tourism, and hinder its efforts to assist in resettling refugees. J.A. 1005-1009. Dr. Elshikh is a Muslim U.S. citizen who lives in Hawaii with his wife and children (who are also U.S. citizens). J.A. 1009. He claimed that his Syrian mother-in-law lacked a visa to enter the country and thus would be delayed in joining him and his family in Hawaii. *Ibid.*

b. After expedited briefing and argument, the district court entered a global TRO barring enforcement of Sections 2 and 6 in their entirety—including provisions requiring internal review of the government's screening and vetting procedures. J.A. 1102-1142. It held that Hawaii and Dr. Elshikh had standing to challenge those provisions under the Establishment Clause. J.A. 1117-1125. On the merits, the court acknowledged that the Order "does not facially discriminate for or against any particular religion," but it held—based primarily on campaign statements made by then-candidate Trump and subsequent statements by his aides—that "religious animus dr[ove] the promulgation of the [Order]." J.A. 1129, 1132.

In subsequently converting the TRO to a preliminary injunction based on the same considerations, the district court declined to evaluate the Order under *Mandel*. J.A. 1155-1157. The court also declined to limit the injunction to Section 2(c)'s temporary suspension on entry for nationals of six countries and declined to stay the injunction pending appeal. J.A. 1160-1163.

c. The court of appeals heard argument on May 15, 2017. Because the court had not ruled when the government sought certiorari in *IRAP*, the government also requested a stay of the *Hawaii* district court's injunction from this Court pending disposition of the appeal. *IRAP*, 137 S. Ct. at 2085.

Before this Court ruled on that stay request, the court of appeals affirmed the injunction in part and vacated it in part. The court expressly declined to reach respondents' Establishment Clause challenge, J.A. 1178, instead resting its decision on statutory grounds, J.A. 1178-1223. It held that Dr. Elshikh and Hawaii had standing to challenge Sections 2 and 6, their claims are ripe and fall within the zone of interests protected by the statute, and their claims are not barred by consular nonreviewability. J.A. 1178-1193.

On the merits, the court of appeals primarily held that Section 2(c)'s 90-day suspension of entry, Section 6(a)'s 120-day suspension of decisions and travel under the Refugee Program, and Section 6(b)'s refugee cap exceed the President's authority under 8 U.S.C. 1182(f). J.A. 1194-1209. The court acknowledged the President's power under Section 1182(f) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" "[w]henever the President finds that" such entry "would be detrimental to the interests of the United States." J.A. 1195 (quoting 8 U.S.C. 1182(f)). But it held that "[t]here is no sufficient finding in [the Order] that the entry of the excluded classes would be detrimental to the interests of the United States." J.A. 1197.

The court of appeals also held that Section 2(c) violates 8 U.S.C. 1152(a)(1)(A), which bars "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa" on various bases, including an alien's "nationality." J.A. 1209-1210 (citation omitted). The court held that, although Section 1152(a)(1)(A) addresses only issuance of visas, it also "cabins the President's authority under [Section] 1182(f)" to restrict entry of aliens. J.A. 1213; see J.A. 1209-1216. And although Section 1152(a)(1)(A) does not address nonimmigrant visas, the court declined to limit the injunction to immigrant visas. J.A. 1233 n.24.

The court of appeals further held that Section 6(b)'s lowering of the refugee cap for Fiscal Year 2017 to 50,000 violates 8 U.S.C. 1157. J.A. 1216-1221. Section 1157 authorizes the President, in consultation with congressional leadership, to establish at the start of each fiscal year the maximum number of refugees who may be admitted. The court held that the President could not subsequently direct that a lower number be permitted to enter. *Ibid.*

The court of appeals held that respondents are likely to suffer irreparable harm that is not outweighed by the injury to the government, and that the public interest supports an injunction. J.A. 1223-1229. It further declined to limit the injunction to respondents. J.A. 1233-1235. The court held, however, that the district court abused its discretion in enjoining the "internal review procedures" of Sections 2 and 6 and in enjoining the President himself. J.A. 1230-1231. The court denied the government's request for a stay. J.A. 1237 n.25.

d. This Court directed the parties to submit supplemental briefs addressing the court of appeals' decision. The government requested that the Court construe its stay application as a petition for a writ of certiorari and grant the petition. 16-1540 Gov't Cert. Supp. Br. 2, 30.

3. This Court's June 26 ruling

On June 26, 2017, this Court granted certiorari in both cases and consolidated them for argument. *IRAP*, 137 S. Ct. at 2086. The Court also directed the parties to address "[w]hether the challenges to [Section] 2(c) became moot on June 14, 2017," *id.* at 2087, *i.e.*, 90 days after the Order was initially intended to take effect. The Court further granted a partial stay of both injunctions. *Id.* at 2087-2089. With respect to Section 2(c), the Court stated:

> The injunctions remain in place only with respect to parties similarly situated to [Doe #1], Dr. Elshikh, and Hawaii. In practical terms, this means that [Section] 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of [the Order].

Id. at 2088. The Court granted a similar partial stay as to Section 6(a) and (b): those provisions "may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States," but "[a]s applied to all other individuals, the provisions may take effect." *Id.* at 2089.

Justice Thomas, joined by Justices Alito and Gorsuch, concurred in part and dissented in part and would have stayed the injunctions in full. *IRAP*, 137 S. Ct. at 2089-2090.

4. The Hawaii *district court's modification of its injunction*

In light of this Court's June 26, 2017, stay ruling, the Departments of State and Homeland Security began implementing the previously enjoined provisions. *Hawaii* D. Ct. Doc. 301, at 6 (July 3, 2017). The *Hawaii* respondents challenged the agencies' interpretation of the scope of this Court's stay in several respects, and the *Hawaii* district court ultimately modified its preliminary injunction in two relevant ways. First, it held that every refugee as to whom the Department of State has obtained an assurance agreement from a resettlement agency has a qualifying bona fide relationship with a U.S. entity, and therefore is exempt from Section 6(a) and (b) of the Order. J.A. 1263-1265. Second, the court held that the government's interpretation of "close familial relationship" was too narrow. J.A. 1249; see J.A. 1258-1263. This Court stayed the district court's modification with respect to refugees covered by a formal assurance pending resolution of the government's appeal of that ruling to the Ninth Circuit. 16-1540 Order (July 19, 2017).

SUMMARY OF ARGUMENT

The courts of appeals nullified a formal national-security directive of the President of the United States acting at the height of his power. That conclusion cannot be squared with established rules of judicial review, statutory and constitutional interpretation, and equitable relief. Especially in cases like this one that spark such passionate public debate, it is all the more critical that courts faithfully adhere to those fundamental rules, which transcend this debate, this Order, and this constitutional moment.

I. Respondents' challenges to the Order are foreclosed by the general rule that federal courts may not second-guess the political branches' decisions to exclude aliens abroad. The Court has permitted limited review only where a U.S. citizen contends that exclusion of an alien violates the citizen's own constitutional rights. That principle forecloses review of respondents' statutory challenges. And respondents do not assert a cognizable violation of their own rights under the Establishment Clause. Doe #1's and Dr. Elshikh's claimed injuries based on delay in entry of family members never stemmed from any violation of their own rights, and in any event those claimed injuries are now moot. Their claimed injuries based the Order's purportedly stigmatizing message also are not cognizable under this Court's precedent. Hawaii has no Establishment Clause rights and no sovereign interest in entry of aliens abroad.

II. The challenges to Section 2(c)'s 90-day entry suspension did not become moot on June 14, 2017. Background legal principles and common sense preclude construing the suspension to end before it was allowed to begin. A memorandum issued by the President on June 14 eliminates any uncertainty. If the challenges are moot, however, the injunctions as to Section 2(c) should be vacated.

III. The Order does not violate the INA. Congress expressly authorized the President to "suspend the entry of all aliens or any class of aliens" whose entry he "finds" would be "detrimental" to the Nation's interests, 8 U.S.C. 1182(f), and to "prescribe" "limitations and exceptions" on entry, 8 U.S.C. 1185(a)(1). Sections 2(c)'s entry suspension, Section 6(b)'s refugee suspension, and Section 6(b)'s refugee cap fall comfortably within that expansive authority and rest on the President's express findings that those measures are warranted to safeguard the Nation. The Ninth Circuit erred in construing the INA to require more.

Section 2(c)'s entry suspension does not violate 8 U.S.C. 1152(a)(1)(A)'s bar on nationality-based discrimination or preferences in the issuance of immigrant visas. Section 1152(a)(1)(A) does not compel issuance of visas to aliens who are independently ineligible to receive them. Nor does Section 2(c) conflict with 8 U.S.C. 1182(a)(3)(B), which renders inadmissible aliens with certain links to terrorist activity or groups. Nothing prevents the President from suspending entry of aliens under Section 1182(f) for reasons related to one of the inadmissibility grounds in Section 1182(a). And Section 6(b)'s refugee cap does not violate 8 U.S.C. 1157, which establishes a procedure for setting the maximum number of refugees who may be admitted each year, but does not set a minimum number who must be admitted.

IV. Respondents' Establishment Clause challenge is governed by, and fails under, *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), which requires upholding the Executive's decision to exclude aliens abroad so long as it rests on a "facially legitimate and bona fide reason." *Id.* at 770. Sections 2(c), 6(a), and 6(b) of the Order rest squarely on a national-security determination by the President that is legitimate on its face and supported by extensive factual findings. *Mandel* therefore precludes "look[ing] behind" the President's rationale. *Ibid.* The Fourth Circuit's holding that courts "*may* 'look behind'" the Executive's stated reason to determine if it was given in bad faith, J.A. 212 (emphasis added; citation omitted), is flatly inconsistent with *Mandel*.

The Order's challenged provisions are valid even under the domestic Establishment Clause case law on which the Fourth Circuit relied. The Order's text and operation are entirely religion-neutral. The Fourth Circuit erred by discounting those objective indicia of the Order's purpose based largely on campaign statements made by then-candidate Trump before taking office. This Court's precedent prohibits such "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005). The Fourth Circuit's approach is also standardless and unworkable, and it threatens to chill campaign speech and interfere with the President's conduct of foreign affairs. Without the campaign statements, the Fourth Circuit's ruling invalidating the Order is unsupportable. But even if those statements are considered, they cannot overcome the objective indicia of the Order's express national-security purpose.

V. Both courts of appeals compounded their errors by affirming global injunctions that are vastly overbroad. Article III and principles of equity require that injunctive relief be no broader than necessary to redress irreparable injuries to the parties before the court. Even if respondents had shown any irreparable, cognizable injury, relief limited to enjoining application of the Order to the specific aliens whose entry respondents seek would have fully redressed those harms.

ARGUMENT

I. RESPONDENTS' CHALLENGES TO THE ORDER ARE NOT JUSTICIABLE

It is a fundamental separation-of-powers principle, long recognized by Congress and this Court, that the political branches' decisions to exclude aliens abroad generally are not judicially reviewable. That firmly established principle bars any review of respondents' statutory claims. This Court has permitted limited review only when a U.S. citizen asserts a cognizable claim that exclusion of an alien abroad infringes the citizen's own constitutional rights. Although respondents have invoked the Establishment Clause, they assert no cognizable violation of their *own* rights under that Clause.

A. The Denial Of Entry To An Alien Abroad Is Reviewable Only For A Violation Of A U.S. Citizen's Own Constitutional Rights

1. "The exclusion of aliens is a fundamental act of sovereignty" that the Constitution entrusts to the political branches. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). "The right to" exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Ibid.* This Court accordingly "ha[s] long recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

As Justice Jackson explained for the Court in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Id.* at 588-589. "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 589. The Court has since made clear that "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Fiallo*, 430 U.S. at 796 (citation omitted).

Of course, Congress generally "may, if it sees fit, * * * authorize the courts to" review decisions to exclude aliens. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of exclusion of aliens outside the United States is ordinarily unavailable. "Whatever the rule may be concerning deportation of persons who have gained entry into the United States," this Court has explained, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543; see *id.* at 542-547 (holding that the Attorney General's decision to exclude the alien wife of a U.S. citizen "for security reasons" was "final and conclusive"). Aliens detained at a port of entry traditionally could obtain limited review through habeas corpus, see *Nishimura Ekiu*, 142 U.S. at 660, but that avenue for judicial review obviously is unavailable for aliens abroad, who are not in custody.

Courts have applied the fundamental and longstanding principle of nonreviewability to conclude that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Courts have referred to that principle as "the doctrine of consular nonreviewability," *ibid.*, but the shorthand label merely reflects the context in which the principle most often arises—*i.e.*, challenges to decisions by consular officers adjudicating visa applications. The principle underlying that doctrine applies regardless of the manner in which the Executive decides to deny entry to an alien abroad.

2. Congress has declined to provide for judicial review of decisions to exclude aliens abroad. It has not authorized any judicial review of visa denials—even by the alien affected, much less by third parties like respondents here. *E.g.*, 6 U.S.C. 236(f) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."); see 6 U.S.C. 236(b)(1) and (c)(1). Congress also has expressly forbidden "judicial review" of visa revocations (subject to a narrow exception for aliens in removal proceedings where the only ground of revocation is removal, an exception inapplicable to aliens abroad). 8 U.S.C. 1201(i).

Indeed, when this Court held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress intervened to foreclose such review. Congress expressly precluded APA suits challenging exclusion orders and permitted review only through habeas corpus—a remedy that is unavailable to an alien seeking entry from abroad. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653 (codified at

8 U.S.C. 1105a(b) (1994)).[8] In short, Congress maintained the bar to judicial review of the denial of entry to aliens abroad. See *Saavedra Bruno*, 197 F.3d at 1157-1162 (recounting history).[9]

3. Although Congress has not authorized judicial review of Executive decisions to exclude aliens abroad, it has not "clear[ly]" "preclude[d] judicial review of constitutional claims" by persons asserting violations of their own constitutional rights. *Webster* v. *Doe*, 486 U.S. 592, 603 (1987). The exclusion of aliens abroad typically raises no constitutional questions because aliens abroad lack any constitutional rights regarding entry. "[A]n alien who seeks admission to this country may not do so under any claim of right"; instead, "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government," and "only upon such terms as the United States shall prescribe." *Knauff*, 338 U.S. at 542; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972).

This Court, however, has twice engaged in limited judicial review when a U.S. citizen contended that the denial of a visa to an alien abroad violated the citizen's *own* constitutional rights. In *Mandel*, the Court reviewed a claim that the denial of a waiver of visa-ineligibility to a Belgian national who wished to speak on communism violated U.S. citizens' own First Amendment right to receive information. 408 U.S. at 756-759, 762-770. As the Court explained, the alien himself could not seek review because he "had no constitutional right of entry to this country." *Id.* at 762. The Court addressed (and rejected on the merits) only the claim of U.S. citizens that the alien's exclusion violated their own constitutional rights. *Id.* at 770. And in *Kerry* v. *Din*, the Court considered but denied a claim by a U.S. citizen that the exclusion of her husband violated her own due-process rights. 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *id.* at 2139 (Kennedy, J., concurring in the judgment) (assuming without deciding that U.S. citizen had protected liberty interest in husband's visa application). Limited review was available in each case only because the plaintiffs asserted violations of their own constitutional rights as U.S. citizens.

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[8] Congress subsequently replaced 8 U.S.C. 1105a (1994) with 8 U.S.C. 1252, which similarly curtails review (of what are now termed removal orders) outside a specific process established by statute.

[9] Although Congress has created in the APA "a general cause of action" for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,'" *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (citation omitted), that cause of action does not permit review of matters like the exclusion of aliens abroad because the APA does not displace the general rule barring review of decisions to exclude aliens abroad. See *Saavedra Bruno*, 197 F.3d at 1157-1162; see also 5 U.S.C. 701(a), 702(1).

B. Respondents Cannot Assert Any Establishment Clause Rights Of Their Own In Challenging The Order

The longstanding rule barring judicial review of the political branches' exclusion of aliens abroad plainly forecloses respondents' statutory challenges to the Order. The Ninth Circuit seriously departed from that foundational rule by second-guessing and enjoining the President's exercise of the authority expressly conferred on him by Congress to suspend the entry of aliens. Although respondents also invoke the Establishment Clause, they have not asserted violations of their own rights. The courts of appeals held that two individual respondents (Doe #1 in *IRAP* and Dr. Elshikh in *Hawaii*) have standing to challenge the Order because Section 2(c) would delay entry of a family member. But those alleged injuries never stemmed from a violation of Doe #1's or Dr. Elshikh's *own* constitutional rights. In any event, those claimed injuries are now moot because Doe #1's wife and Dr. Elshikh's mother-in-law have received visas. The Fourth Circuit and the *Hawaii* district court also held that the individual respondents were injured because the Order sends a message that condemns their Islamic faith. That reasoning is irreconcilable with this Court's precedent and would eviscerate settled rules of justiciability. Finally, the Ninth Circuit held that Hawaii is injured by the Order, but Hawaii has no Establishment Clause rights and cannot assert any rights of its residents.[10]

1. Doe #1's and Dr. Elshikh's delay-in-entry injuries are not cognizable

The Fourth Circuit held that Doe #1 was injured by Section 2(c) because it would delay "his wife's entry into the United States" and thereby "prolong their separation." J.A. 196. The Ninth Circuit reached the same conclusion as to Dr. Elshikh and his mother-in-law. J.A. 1181-1182.

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[10] The Fourth Circuit correctly did not hold that any other respondent in *IRAP* has a live, cognizable Article III injury from Section 2(c), the only provision enjoined in that case. Harrison's fiancé and Doe #3's wife were issued visas and so are not affected by the Order. *IRAP* Gov't C.A. Br. 19 n.6; *IRAP* Resps. C.A. Supp. App. 819. Jane Doe #2 is petitioning for her sister, but there is a multi-year backlog for immigrant-visa numbers for U.S. citizens' siblings. *IRAP* Gov't C.A. Br. 19 & n.7. The remaining individual plaintiffs, along with organizational plaintiffs IRAP and HIAS, seek admission for refugees, J.A. 184-186—a process not affected by Section 2(c). And the remaining organizational plaintiff, MESA, asserts standing based on a member's alleged inability to attend a meeting in November 2017, after the 90-day suspension was originally scheduled to end. See pp. 7-8, 11-12, *supra*; *IRAP* Gov't C.A. Br. 25. None of the organizations identified a member or client whom Section 2(c) would bar from entering.

a. The claimed injuries to Doe #1 and Dr. Elshikh were never cognizable because they did not stem from any alleged infringement of their *own* religious freedoms. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), this Court held that individuals who are indirectly injured by alleged religious discrimination against others generally may not sue, because they have not suffered violations of their own rights under the Free Exercise Clause or the Establishment Clause. *Id.* at 429-430. The Court concluded in *McGowan* that the plaintiffs, employees of a store subject to a State's Sunday-closing law, lacked standing to challenge that law on free-exercise grounds because they "d[id] not allege any infringement of their own religious freedoms." *Id.* at 429; see *Smith* v. *Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc), cert. denied, 565 U.S. 820 (2011).[11] Similarly, in *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1 (2004), the Court held that a non-custodial parent could not challenge recitation of the Pledge of Allegiance at his daughter's school because his "standing derive[d] entirely from his relationship with his daughter," not from a violation of his own rights. *Id.* at 15-18 & n.8. Likewise here, in challenging the application of Section 2(c) to family members, U.S. citizens like Doe #1 and Dr. Elshikh are not asserting violations of their own constitutional rights. They are instead seeking to vindicate the interests of third parties whose entry is suspended. They therefore cannot seek the limited review afforded in *Mandel* and *Din*.

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[11] *McGowan* held that the plaintiffs could assert an Establishment Clause challenge to the state law at issue only because they suffered "direct * * * injury, allegedly due to the imposition on them of the tenets of the Christian religion": they were subjected to (indeed, prosecuted under) a Sunday-closing law, which regulated their own conduct. See 366 U.S. at 430-431; see also *id.* at 422. By contrast, indirect injury from alleged discrimination against others is not a violation of one's own Establishment Clause rights under *McGowan*, and therefore it does not provide a basis for challenging the exclusion of an alien abroad under *Mandel* and *Din*.

b. Even if these injuries were once cognizable, they are now moot. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). Here, Doe #1's wife and Dr. Elshikh's mother-in-law have now received visas. *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2086 n.* (2017) (per curiam) (*IRAP)*; 16-1540 Resps. Letter (July 20, 2017). Regardless of whether Doe #1's and Dr. Elshikh's claimed family-member injuries were ever justiciable, those injuries do not confer "a legally cognizable interest in the outcome" today. *Already*, 568 U.S. at 91 (citation omitted).[12]

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[12] If this Court agrees and further finds that none of respondents' other asserted injuries and claims is justiciable, it should "vacate the judgment[s] below and remand with a direction to dismiss" under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see pp. 37-38, *infra*.

2. *Doe #1's and Dr. Elshikh's "message" injuries are not cognizable*

The Fourth Circuit held that Section 2(c) also injured Doe #1 by sending a "message" that condemns Islam, J.A. 199, 202, and the district court in *Hawaii* reached the same conclusion as to Dr. Elshikh. J.A. 1123-1125, 1151-1152. Even the Fourth Circuit, however, did not hold that purported "message" injury sufficient by itself to make a claim justiciable. J.A. 202-203 n.11 (holding Doe #1's claim justiciable based on the combination of that purported message and the effect of Section 2(c) on his wife). And for good reason: respondents' asserted "message" injury is not cognizable because it likewise does not result from a violation of respondents' own constitutional rights.

a. This Court has "ma[de] clear" that "the stigmatizing injury often caused by racial [or other invidious] discrimination * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (citation omitted). The Court has applied that same rule to Establishment Clause claims: "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that supports standing to sue, "even though the disagreement is phrased in [Establishment Clause] terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982); *id.* at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").

To be sure, a plaintiff may suffer a "spiritual" injury from the violation of his own Establishment Clause rights where he himself has been "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486-487 n.22. But neither of those exists here. First, Section 2(c) does not expose Doe #1 or Dr. Elshikh to a religious message: it says nothing about religion, and does not subject them to any religious exercise. *A fortiori*, Section 6(a) and (b) cannot impose any such injury, because they apply to refugees from every country worldwide. Second, all three provisions apply only to aliens abroad and are not targeted at respondents. The Fourth Circuit tried to sidestep this problem by asserting that, in addressing justiciability, it had to "assume the merits" of Doe #1's argument that Section 2(c) "sends a sufficiently religious message such that it violates the Establishment Clause." J.A. 200 n.9. But *Valley Forge*'s rule required the court to determine whether (not merely assume that) a religious message was directed to respondents in a way that causes them cognizable injury.

b. The D.C. Circuit correctly has rejected the notion that a putative Establishment Clause plaintiff may "re-characterize[]" an abstract injury flowing from "government *action*" directed against others as a personal injury from "a governmental *message* [concerning] religion" directed at the plaintiff. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009). If that were permissible, the D.C. Circuit explained, it would "eviscerate well-settled standing limitations." *Ibid.* The challengers in *Valley Forge* and other cases "could have obtained standing to sue simply by targeting not the government's action, but rather the government's alleged 'message' of religious preference communicated through that action." *Ibid.*

The Fourth Circuit attempted to distinguish *Valley Forge* and *Navy Chaplaincy* on the ground that "Doe #1 *is* directly affected by the government action—both its message and its impact on his family." J.A. 202-203 n.11. But the abstract "message" Doe #1 (like Dr. Elshikh) alleges could be asserted by any Muslim in the country—indeed, perhaps by anyone offended by the Order's perceived message. The Fourth Circuit's only purported basis for limiting its conclusion to Doe #1—the speculative delay in the entry of his wife—is now moot, and in any event that asserted injury never stemmed from Doe #1's religion or any violation of his own Establishment Clause rights. See pp. 29-30, *supra.* The same is true of Dr. Elshikh. Neither Doe #1 nor Dr. Elshikh has a cognizable injury under the Establishment Clause, and thus neither can invoke *Mandel* and *Din* to evade the general rule of nonreviewability.

3. *Hawaii does not assert any violation of its own constitutional rights*

Hawaii's inability to assert a cognizable claim is even more fundamental. Hawaii has no rights to assert under the Establishment Clause and therefore cannot come within *Mandel* and *Din.* Hawaii argued below (*Hawaii* Resps. C.A. Br. 17 (No. 17-15589)) that the Clause originally protected state establishments of religion from the federal government, citing Justice Thomas's concurrence in *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 677-680 (2002). But Hawaii does not seek here to establish its own religion, which it no longer may do in light of the Fourteenth Amendment. *Id.* at 679 n.4. And although Hawaii's residents have Establishment Clause rights, Hawaii "does not have standing as *parens patriae* to bring an action against the Federal Government" to protect its residents from alleged discrimination. *Alfred L.*

Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

Notably, neither the district court nor the Ninth Circuit held that Hawaii had standing based on any injury to putative Establishment Clause rights of the State. Rather, both courts relied on purported injuries to Hawaii's universities, tax revenue from tourism, and efforts to assist in resettling refugees. J.A. 1118-1121, 1150-1151, 1182-1187. But those alleged injuries—which were speculative, not actual or imminent, when respondents filed suit—do not stem from the violation of any constitutional right for which Hawaii might seek limited review under *Mandel* and *Din*. Nor do those alleged injuries even result from application of the Order to the State itself. They are instead merely the incidental effects of the United States' application of federal law to aliens outside the United States.

Although Hawaii also claimed a sovereign interest in applying its own laws to persons once they are present in the State, it has no sovereign or other cognizable interest in regulating or compelling the entry of aliens from abroad in the first instance. "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." *Arizona* v. *United States*, 567 U.S. 387, 409-410 (2012) (citation omitted). In short, under the INA, Hawaii has no "legally and judicially cognizable" interest, *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997), in the federal government's determination whether to allow an alien abroad to enter the United

States, either on a visa or as a refugee. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).[13]

* * * * *

The courts of appeals in both cases strained to reach the merits despite the absence of any cognizable injury to respondents' own constitutional rights. This Court has not hesitated to overturn lower-court rulings that have similarly disregarded settled justiciability principles to reach significant constitutional issues. See, *e.g.*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340-354 (2006); *Raines*, 521 U.S. at 818-830. The Court should do the same here. The importance of the legal issues implicated by respondents' challenges to the Order does not warrant disregarding foundational rules of nonjusticiability.

II. RESPONDENTS' CHALLENGES TO SECTION 2(C) DID NOT BECOME MOOT ON JUNE 14, 2017

In granting certiorari, this Court directed the parties "to address * * * '[w]hether the challenges to [Section] 2(c) became moot on June 14, 2017,'" *i.e.*, 90 days after the Order's intended effective date of March 16, 2017. *IRAP*, 137 S. Ct. at 2087. They did not become moot at that time, but if the Court concludes otherwise it should vacate the judgments below and remand with instructions to dismiss.

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[13] Nor may Hawaii assert third-party standing on behalf of aliens who would seek admission as students, faculty, tourists, or refugees. Aliens abroad have no Establishment Clause rights, see *Verdugo-Urquidez*, 494 U.S. at 265, and no constitutional rights at all regarding entry into the country, see p. 26, *supra*. Hawaii cannot assert purported rights on behalf of third parties that those third parties do not possess. Moreover, Hawaii has not shown a "close relationship with" the third parties or a "hindrance" to the third parties' "ability to protect [their] own interests." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129-131 (2004) (citations and internal quotation marks omitted).

A. Section 2(c) of the Order directs that the entry into the United States of nationals of the six listed countries "be suspended for 90 days from the effective date of th[e] [O]rder." J.A. 1426. That effective date was supposed to be March 16, 2017. J.A. 1439 (§ 14). The injunctions in these cases, however, prevented Section 2(c) from becoming "effective" and "suspend[ing]" entry for 90 days after March 16. Because Section 2(c) was enjoined before it could take effect, the 90-day suspension did not begin to run until the injunctions barring its enforcement were stayed by this Court on June 26, 2017. The injunctions thus effectively delayed or tolled the Order's effective date for purposes of Section 2(c) and the other enjoined provisions. As a matter of both background legal principles and common sense, the 90-day period could not elapse before it was ever permitted to begin to run.

Contrary to the *IRAP* respondents' assertion (Stay Opp. 18), the government did not take a different position below. In its stay motion in the court of appeals, the government stated that Section 2(c)'s 90-day suspension "expires in early June." *IRAP* Gov't C.A. Mot. for Stay 11. The government was addressing the assertion by respondent MESA that it had standing because Section 2(c) might interfere with a meeting scheduled for November 2017, five months after Section 2(c)'s suspension was set to expire. *Id.* at 10-11. The government's point was that, if Section 2(c) had been permitted to go into effect *as originally scheduled*, MESA would not have suffered any cognizable injury. See *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing inquiry "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). The government's statement did not address the effect of the injunctions on the running of the 90-day period, much less endorse the odd notion that Section 2(c)'s suspension could end before it had begun.

B. In any event, a memorandum issued by the President on June 14, 2017, puts the issue to rest. See J.A. 1441-1443 (82 Fed. Reg. 27,965 (June 19, 2017)). The June 14 memorandum provides that each provision's effective date is "the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." J.A. 1442. It further provides that, "[t]o the extent it is necessary, this memorandum should be construed to amend the Executive Order." *Ibid.* Section 2(c)'s 90-day suspension thus did not begin to run until this Court stayed the injunctions on June 26, 2017. The *IRAP* respondents conceded (Br. in Opp. 14) that "the President can unilaterally revise" the Order's temporal scope "at any time." Because the President did so, the appeals did not become moot on June 14, 2017.

C. If the *IRAP* respondents were correct that the appeals are moot, the appropriate course would be to vacate the courts of appeals' judgments upholding the injunctions barring enforcement of Section 2(c) with instructions to dismiss the underlying challenges. This Court's "established practice" when a federal civil case "has become moot while on its way here or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see Stephen M. Shapiro et al., *Supreme Court Practice* § 19.5, at 970-971 (10th ed. 2013).

No exception to that general rule counsels against vacatur here. If respondents' challenges to Section 2(c) are moot, that resulted from the "happenstance" that litigation and appellate review of those challenges spanned longer than 90 days—not because of any "settlement" or other "unilateral" post-judgment action by the government. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); see *Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009) (directing vacatur of lower-court judgment with instructions to dismiss because the case "more closely resemble[d] mootness through 'happenstance' than through 'settlement'—at least the kind of settlement that the Court considered in *Bancorp*"). Consistent with its established practice, if the Court concludes that the challenges to Section 2(c) are moot due to the passage of time during this litigation, it should vacate the relevant portions of the courts of appeals' judgments.[14]

III. THE ORDER DOES NOT VIOLATE THE INA

The Ninth Circuit held that Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA in several respects. Judicial review of the Order on statutory grounds is precluded for the reasons set forth above. See Part I.A, *supra*. In any event, the Ninth Circuit's ruling rests on a fundamental misunderstanding of the statute and allows for impermissible judicial second-guessing of national-security determinations made by the President.

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[14] Likewise, the *Hawaii* respondents' challenge to Section 6(a)'s 120-day Refugee Program suspension did not become moot on July 14, 2017 (120 days after March 16, 2017), but if it did, vacatur would be appropriate. Section 6(b)'s refugee cap does not present a similar question because its duration is not linked to the Order's effective date, but instead to the end of Fiscal Year 2017, *i.e.*, September 30, 2017. J.A. 1434 (§ 6(b)).

A. Sections 2(c), 6(a), And 6(b) Are Expressly Authorized By 8 U.S.C. 1182(f) And 1185(a)(1)

The Ninth Circuit principally held that Sections 2(c), 6(a), and 6(b) exceed the President's authority to suspend entry under 8 U.S.C. 1182(f) because, in the court's view, the President failed to make a sufficient finding of harm to the national interest. J.A. 1195-1209. The *Hawaii* respondents never advanced that theory in the court of appeals, and for good reason: it has no basis in the statute, contradicts historical practice, and improperly disregards the Order's express findings.

1. *Sections 1182(f) and 1185(a)(1) grant the President broad discretion to suspend entry of aliens in the national interest*

a. Section 1182(f) provides in pertinent part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. 1182(f). By its terms, Section 1182(f) grants the President broad authority and confirms his discretion at every turn. It reserves to the President the decisions (1) whether, when, and on what basis to suspend entry "by proclamation" ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); (2) whose entry to suspend ("all aliens or any class of aliens," whether as "immigrants

or nonimmigrants"); (3) for how long ("for such period as he shall deem necessary"); (4) and on what terms ("he may * * * impose on the entry of aliens any restrictions he may deem to be appropriate"). *Ibid.*

As courts have recognized, Section 1182(f) confers a "sweeping proclamation power" to suspend entry of aliens. *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987); see *Allende* v. *Shultz*, 845 F.2d 1111, 1117-1118 (1st Cir. 1988). This Court, for example, deemed it "perfectly clear that [Section] 1182(f) * * * grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993). The breadth of this authority reflects that, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "is implementing an inherent executive power." *Knauff*, 338 U.S. at 542.

Section 1185(a)(1) further makes it "unlawful" for an alien to "enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. 1185(a)(1). The Ninth Circuit did not separately analyze Section 1185(a)(1), stating that it "does not grant the President a meaningfully different authority than [Section] 1182(f)." J.A. 1196 n.10. But Section 1185(a)(1)'s additional, express grant of authority to the President confirms his expansive discretion in this area. The plain text of Sections 1182(f) and 1185(a)(1) leaves no doubt that the President may suspend or restrict the entry of the classes covered by Sections 2(c), 6(a), and 6(b).

b. The court of appeals erroneously read into Section 1182(f) a requirement that, when suspending entry, the President must articulate a detailed factual basis—satisfactory to courts—to "support the conclusion that entry of all nationals" whose entry he suspends "would be harmful to the national interest." J.A. 1197. That requirement turns the statute on its head. Section 1182(f)'s language authorizing the President "by proclamation" to suspend or restrict entry "[w]henever [he] finds that [it] would be detrimental to the interests of the United States," 8 U.S.C. 1182(f), does not *constrain* the President's authority. To the contrary, it confirms the breadth of his discretion. Congress placed no restrictions on which "interests" count or what "detriment[s]" suffice for the President to invoke his suspension authority, committing all of those matters to the President's judgment and discretion. And the statute expressly contemplates that he may make these determinations on a broad scale, authorizing him to "suspend the entry of all aliens or any class of aliens." *Ibid.*

The only prerequisite Congress imposed is that the "President find[]" that entry would be detrimental to the Nation's interests, 8 U.S.C. 1182(f)—and the President indisputably made such a finding here. See J.A. 1426, 1433-1434 (§§ 2(c), 6(a) and (b)). By its terms, Section 1182(f) does not impose any further requirements on how the President articulates such findings. In *Doe*, *supra*, confronted with a statute that similarly granted the Director of Central Intelligence authority to terminate an employee if he "*deem*[*s*] such termination necessary or advisable in the interests of the United States," this Court held that judicial review of termination decisions was unavailable under the APA because the Court "s[aw] no basis on which a reviewing court could properly assess an Agency termination decision." 486 U.S. at 600 (citation omitted). So too here, Section 1182(f) "fairly exudes deference to the [President]" and "appears * * * to foreclose the application of any meaningful judicial standard of review." *Ibid.* Indeed, the President's decisions are not "reviewable for abuse of discretion under the APA" at all. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992); see *Dalton* v. *Specter*, 511 U.S. 462, 474-476 (1994) (courts may not second-guess determinations vested in the President's discretion). Because neither the APA nor any other statute provides for review, the President's determination "is not subject to review." *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380 (1940); see *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-112 (1948).

Deference is especially warranted when the President's determinations concern whether to suspend the entry of aliens—decisions that directly implicate his foreign-affairs and national-security powers and responsibilities. The President generally need not "disclose" his "reasons for deeming nationals of a particular country a special threat," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AAADC*), which may rest on classified or sensitive material. And when the President does disclose his reasons for deeming such nationals to present a risk to national security, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Ibid.*

Moreover, as this Court recently underscored, "[n]ational-security policy is the prerogative of the Congress and President," and "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citation and internal quotation marks omitted). Courts thus accord "deference to what the Executive Branch has determined is essential to national security." *Ibid.* (ellipsis, citation, and internal quotation marks omitted). The court of appeals fundamentally erred in holding that Section 1182(f) subjects the President's assessment of harm to the Nation's interests to judicial review, under a standard of the court's creation akin to review of agency action under the APA.

c. Historical practice also refutes the Ninth Circuit's misreading of the statute. Presidential orders dating back decades have invoked Section 1182(f) to suspend or restrict entry without a detailed explanation for the finding that entry of particular aliens would be detrimental to this Nation. Some have explained the President's rationale in one or two sentences that broadly declare the Nation's interests.[15] Indeed, the court of appeals acknowledged that some orders have suspended or restricted entry "*not* because of a particular concern that entry of the individuals themselves would be detrimental, but rather, as retaliatory diplomatic measures." J.A. 1201-1202 n.13 (emphasis added); see, *e.g.*, Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986) (suspending entry as immigrants of "all Cuban nationals," with certain exceptions, based on decision by the "Government of Cuba * * * to suspend" execution of an "immigration agreement between the United States and Cuba"); cf. *AAADC*, 525 U.S. at 491 ("The Executive should not have to disclose its 'real' reasons * * * for simply wishing to antagonize a particular foreign country by focusing on that country's nationals[.]"). This practice confirms the wide latitude that Section 1182(f) accords the President to determine that suspending entry is in the national interest.

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[15] See, *e.g.*, Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988).

2. *The Order is a valid exercise of the President's broad suspension power under Section 1182(f)*

The Order clearly finds that the temporary suspensions and refugee cap are in the national interest. That should be the end of the matter. Regardless, the Order amply satisfies any requirement Section 1182(f) imposes.

a. Section 2 is designed to assess what information is needed from foreign governments, whether they are furnishing it, and what further steps are needed. While that review is ongoing, Section 2(c) suspends entry of nationals of six countries that may be especially unwilling or unable to supply needed information, based on extensive findings set forth in the Order. The fact that each of the countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," both (1) creates a heightened risk that "conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States," where they thereafter may be difficult to "remove," and (2) "diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States." J.A. 1419-1420 (§ 1(d)). Each of the countries already had been designated by

Congress or the Executive as presenting heightened concerns in connection with the Visa Waiver Program. See pp. 4-5, *supra*.

After detailing the deteriorating conditions in each country, J.A. 1420-1422 (§ 1(e)), the President concluded that, "until the assessment of current screening and vetting procedures required by [S]ection 2" is completed, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high," J.A. 1423 (§ 1(f)). On that basis—and to reduce investigative burdens while the review of existing procedures is ongoing —the President determined in consultation with Cabinet officials that entry from the six countries (absent an individual waiver) "would be detrimental to the interests of the United States." J.A. 1426 (§ 2(c)). Simply put, because of serious concerns that these foreign governments that sponsor or shelter terrorism may be unable or unwilling to provide needed information, the President placed a 90-day pause on entry of certain of their nationals while the Departments of State and Homeland Security review existing procedures.

In addition, Section 2(c) serves the important goal of helping to persuade foreign countries to supply needed information about their nationals. The history of the Order illustrates this interest: after issuance of the January Order, which included a temporary suspension that encompassed the same six countries plus Iraq, "the Iraqi government * * * expressly undert[ook] steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." J.A. 1423-1424 (§ 1(g)). One purpose of the Order is to persuade other countries to do the same, because after the Departments of State and Homeland Security complete their worldwide review, the President will determine what steps to take with regard to countries that do not provide information necessary to properly screen their nationals. J.A. 1427 (§ 2(e)).

b. Section 6(a)'s Refugee Program suspension and Section 6(b)'s refugee cap similarly rest on the President's judgment that those measures are called for by the national interest. The President determined that the Refugee Program is a means of entry would-be terrorists may seek to exploit. As the Order explains, the January Order it replaced had "temporarily suspended the [Refugee Program] pending a review of our procedures for screening and vetting refugees" because "[t]errorist groups have sought to infiltrate several nations through refugee programs." J.A. 1418 (§ 1(b)(iii)). The Order also notes that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation" and some have been "convicted of terrorism-related crimes." J.A. 1424 (§ 1(h)). Section 6(b)'s reduction of the maximum number of refugees who may be admitted in Fiscal Year 2017 similarly rests on an express finding that entry of more than 50,000 "would be detrimental to the interests of the United States." J.A. 1434. This is more than sufficient to support the President's conclusion that the refugee provisions are in furtherance of the national interest.

3. The Ninth Circuit's reasons for deeming the Order's determinations insufficient lack merit

a. The Ninth Circuit deemed the national-security justification for Section 2(c)'s entry suspension inadequate because the Order does not find "that nationality alone renders entry of" the covered individuals "a heightened security risk." J.A. 1200. "The Order," the court held, "does not tie these nationals" to "terrorist organizations," "identify these nationals as contributors to active conflict," or show a "link between an individual's nationality and their propensity to commit terrorism." J.A. 1200-1201. The court also cited a purported leaked "draft DHS report" stating that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." J.A. 1226 n.23 (citation omitted); see J.A. 1173-1174; see also J.A. 225; 16-1540 Resps. Cert. Supp. Br. 23. Section 1182(f), however, does not require an individualized risk determination as to each alien covered by a suspension. It expressly authorizes the President to suspend entry of "all aliens or any class of aliens," 8 U.S.C. 1182(f), which cannot sensibly be understood to require an assessment of the risks posed by each individual alien.

More fundamentally, the Ninth Circuit misunderstood the basis for the Order. The President did not determine that all nationals of the six countries are likely terrorists. Rather, given his assessment of future threats and risk tolerance, he determined that certain foreign governments—especially those that sponsor or shelter terrorism—may not be able and willing to provide sufficiently complete and reliable information needed to "tie" their nationals to "terrorist organizations," "identify" them "as contributors to active conflict," or establish a "link" between them and "their propensity to commit terrorism." J.A. 1200-1201. A principal purpose of the 90-day pause—and the accompanying review and report of screening and vetting for all foreign nations, J.A. 1419-1420, 1425-1426 (§§ 1(d), 2(a) and (b))—is thus to gather some of the information that the court of appeals faulted the President for not already possessing.

The Ninth Circuit deemed that concern insufficient to justify Section 2(c) because the Order did not affirmatively find that existing information-sharing procedures are in fact inadequate. J.A. 1203-1204. In the court's view, the government currently has sufficient tools at its disposal to ensure the reliability of such information. *Ibid.* The court also cited the opinions of former national-security officials that Section 2(c) was unnecessary to address any terrorism threat extant at the close of the prior Administration. J.A. 1226 n.23; see J.A. 225. But under Section 1182(f), the *current* President is entitled to look at the same information relied upon by the prior Administration or Congress in deciding that the six countries at issue were of special concern, and to make his own judgment as to how much risk to tolerate.

The President's "[p]redictive judgment[s]" in this area warrant the utmost deference. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527-529 (1988). Especially "when it comes to collecting evidence and drawing factual inferences" in the national-security context, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (*HLP*) (citation omitted). The President was entitled to assess the situation and reach a different conclusion than the court of appeals or his predecessors. The Ninth Circuit's decision, in contrast, subjugates the Executive's national-security judgment to that of courts and freezes into place the policy judgments made by prior Administrations.[16]

b. The Ninth Circuit gave equally short shrift to the Order's assessment of risks related to Section 6's refugee provisions, which the *Hawaii* respondents barely mentioned in originally seeking to restrain the Order. As to Section 6(a), the court stated that the Order "does not reveal any threat or harm to warrant suspension of" the Refugee Program or find that "present vetting and screening procedures are inadequate," and that the Order's stated goal of facilitating a review "do[es] not support a finding that the travel and admission of refugees would be detrimental to the interests of the United States." J.A. 1207-1208. As with Section 2(c), however, a principal purpose of Section 6(a)'s suspension is to allow a review precisely to determine whether adequate screening is in place. J.A. 1433-1434 (§ 6(a)). The Order notes that terrorist groups have entered other countries through refugee programs and that hundreds of persons who originally entered this country as refugees are or have been the subjects of counterterrorism investigations (and some have been convicted of terrorism-related crimes). J.A. 1418, 1424 (§ 1(b)(iii) and (h)). The President acted well within his authority in determining that potential terrorist infiltration of refugee programs warranted a temporary pause in refugee admissions while the government assessed that threat.

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[16] It is no answer to say, as the court of appeals did, that the Order is overinclusive and underinclusive, because it encompasses some nationals who currently lack significant ties to their home countries, while omitting other aliens who are not nationals of, but have close ties to, the listed countries. J.A. 1202-1203. Whatever finding of a detriment to the national interest Section 1182(f) might be construed to require, nothing in the statute requires that the means the President adopts be narrowly tailored or authorizes second-guessing his determination of the appropriate scope of a suspension. In any event, the line Section 2(c) draws reflects the President's determination that information is needed from foreign governments about their own nationals. Indeed, the Order expressly excludes dual nationals traveling on a passport not issued by one of the six countries. J.A. 1428 (§ 3(b)(iv)).

The Ninth Circuit similarly believed that the Order fails to justify limiting the number of refugees to 50,000. J.A. 1208-1209. But after reciting the number of refugee-related counterterrorism investigations, the Order expressly states "that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." J.A. 1434 (§ 6(b)). Section 1182(f) required nothing more. The court apparently believed that Section 6(b) is invalid because, having already recited refugee-related risks, the Order does not provide sufficient detail why those refugee-related risks justify a cap of 50,000 refugees. But when the Executive adopts "a preventive measure * * * in the context of international affairs and national security," it "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *HLP*, 561 U.S. at 35. All Section 1182(f) required is that the President find that entry of more than 50,000 refugees would be "detrimental" to the Nation's interests. That is precisely what he did.

B. Section 2(c) Is Consistent With 8 U.S.C. 1152(a)

The Ninth Circuit also held that Section 2(c)'s entry suspension of certain nationals of six countries violates 8 U.S.C. 1152(a)(1)(A), which prohibits "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa" for various reasons, including because of an alien's "nationality." J.A. 1209-1216 (citation omitted). The Ninth Circuit's holding is wrong. And even if it were right, it could not support the injunction the court affirmed.

1. There is no conflict between Section 1152(a) and the President's exercise of his authority under Sections 1182(f) and 1185(a)(1)

According to the Ninth Circuit, Section 2(c)'s entry suspension violates Section 1152(a)(1)(A) because the suspension is implemented by denying visas to certain nationals of the six countries who do not qualify for a waiver. J.A. 1209-1212. The Ninth Circuit reasoned that Section 1152(a)(1)(A) must "cabin[] the President's authority under [Section] 1182(f)," because otherwise the President could invoke his suspension authority to "circumvent the limitations set by [Section] 1152(a)(1)(A)." J.A. 1212-1213. That reasoning creates a conflict between the statutes where none exists, disregards settled historical practice, and raises serious questions about Section 1152(a)(1)(A)'s constitutionality.

a. "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (citation omitted). Only when statutes are "in 'irreconcilable conflict' in the sense that there is a positive repugnancy between them or that they cannot mutually coexist" may courts construe one provision as implicitly superseding the other. *Ibid.* (citation omitted). Here, there is no conflict between Sections 1152(a)(1)(A) and 1182(f) because Section 1152(a)(1)(A) does not compel the issuance of a visa to an alien who is validly barred from entering the country, including under a suspension proclamation issued pursuant to Section 1182(f).

Visas are issued by consular officers, and a visa allows an alien to "obtain transportation to the United States" and seek admission at a port of entry. 1 Charles Gordon et al., *Immigration Law and Procedure* § 8.04[1] (2016). But Congress has directed that a visa may not be issued if the applicant "is ineligible to receive a visa * * * under [S]ection 1182." 8 U.S.C. 1201(g). Section 1182 lists many such grounds for ineligibility—among them health, criminal history, and terrorist affiliation. Whatever the relevant underlying ground in any individual case, the alien is denied a visa because he is "ineligible" to enter "under [S]ection 1182." *Ibid.*

That is true of aliens who are ineligible to enter because they are subject to a suspension of entry under Section 1182(f)—including aliens subject to Section 2(c) of the Order. The Department of State treats aliens covered by exercises of the President's Section 1182(f) authority as ineligible for visas. See U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016). Thus, if an alien is subject to Section 2(c) and does not qualify for a waiver, he is denied an immigrant visa because he is ineligible to receive one as someone barred from entering the country under Section 1182(f)—not because he is suffering the type of nationality-based discrimination prohibited by Section 1152(a)(1)(A). Section 1152(a)(1)(A) is concerned with the allocation of visas among aliens who are eligible to receive them. Moreover, it would make little sense to issue a visa to an alien who the consular officer already knows is barred from entering the country, only for the alien to be denied entry upon arrival at this Nation's borders. A visa does not entitle the alien to be admitted if, upon arrival, "he is found to be inadmissible." 8 U.S.C. 1201(h).

b. History strongly supports this relationship between the statutes. Section 1152(a) has never been viewed as a constraint on the President's suspension authority, and Presidents have invoked Section 1182(f) to draw distinctions based in part on nationality. For example, President Reagan invoked Section 1182(f) to "suspend entry into the United States as immigrants by all Cuban nationals," subject to exceptions. Proclamation No. 5517, 51 Fed. Reg. at 30,470. He and other Presidents also invoked it to suspend entry of members and officials of particular foreign governments. See, *e.g.*, Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996) (Sudanese government officials); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988) (Nicaraguan government officials). And this Court has deemed it "perfectly clear" that Section 1182(f) would authorize a "naval blockade" against illegal migrants from a particular country. *Haitian Ctrs. Council*, 509 U.S. at 187.

In addition, the other statute that the Order invokes for Section 2(c)'s suspension, 8 U.S.C. 1185(a)(1), subjects aliens' entry "to such limitations and exceptions as the President may prescribe." That provision likewise has been understood to authorize distinctions based on nationality. Thus, in 1979, the Office of Legal Counsel construed it as authorizing the President to "declare that the admission of Iranians or certain classes of Iranians would be detrimental to the interests of the United States." *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979). Two weeks later, President Carter invoked Section 1185(a) to direct the Secretary of State and the Attorney General to adopt "limitations and exceptions" regarding "entry" of "Iranians holding nonimmigrant visas." Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (Nov. 26, 1979); see *Nademi* v. *INS*, 679 F.2d 811, 814 (10th Cir.), cert. denied, 459 U.S. 872 (1982). President Carter subsequently amended that directive to make it applicable to all Iranians. See Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 7, 1980).

As the history makes clear, both Sections 1182(f) and 1185(a)(1) allow the President to determine that certain aliens will not be permitted to enter the United States, including for reasons of nationality. Section 1152(a)(1)(A), by contrast, addresses the aliens who *are* otherwise eligible for a visa—and for those aliens, the government may not discriminate in issuing immigrant visas on grounds such as race, sex, or nationality. The Ninth Circuit was simply mistaken in believing that Section 1152(a)(1)(A)'s rule for immigrant-visa issuance applies to aliens whom the President has validly suspended from entry under Section 1182(f).

c. The Ninth Circuit's contrary conclusion raises serious constitutional questions that this Court must avoid if possible. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Construing Section 1152(a)(1)(A) to prevent the President from exercising his statutory power to suspend entry based in part on nationality would undermine the President's Article II authority as Commander-in-Chief and his power over foreign affairs. For example, the court of appeals' holding means that, as a statutory matter, the President cannot temporarily suspend the entry of aliens from a specific country, even if he is aware of a grave threat from unidentified nationals of that country or the United States is on the brink of war with that country. Section 1152(a)(1)(A) can and should be construed to avoid that serious constitutional question.

2. *In the event of a conflict, the President's exercise of his authority under Sections 1182(f) and 1185(a)(1) prevails*

Even if Section 1152(a)(1)(A) did conflict with Section 1182(f), the Ninth Circuit's conclusion that the latter must yield to the former still is incorrect for at least two reasons.

First, Section 1152(a)(1)(A) contains no clear indication that Congress intended its limitation on immigrant-visa issuance by consular officers to supersede the *President's* authority to suspend entry. "While a later enacted statute * * * can sometimes operate to amend or even repeal an earlier statutory provision[,] * * * repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (brackets in original; citation and internal quotation marks omitted). The same is true of "implied amendments," which "are no more favored than implied repeals." *Id.* at 664 n.8. Although Section 1152(a)(1)(A) was enacted later in time (in 1965) than Section 1182(f) (in 1952), nothing in Section 1152(a)(1)(A)'s text—which does not mention entry or the President—demonstrates a "clear and manifest" congressional intent to narrow Section 1182(f)'s special grant of authority. *Id.* at 662 (citation omitted).

Second, although Section 1152(a)(1)(A) was enacted later in time, Section 1182(f) is more specific. Whereas Section 1152(a)(1)(A) sets a general rule prohibiting discrimination or preferences on various grounds in the issuance of immigrant visas, Section 1182(f) confers special power on the President to suspend or restrict entry of particular classes of aliens when he finds that their entry would be detrimental to the Nation's interests. That unique grant of authority to the President himself to bar entry of aliens, and thereby render them ineligible for visas, is more specific than Section 1152(a)(1)(A)'s general rule. Moreover, Section 1152(a)(1)(A) was adopted before Section 1185(a)(1) was modified to its current form in 1978—leaving Section 1185(a)(1) as the latest provision in time and thus the controlling one even on respondents' approach. See Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993 (1978).

3. *Even if Section 1152(a) prevails, it cannot justify the present injunction*

Even if the Ninth Circuit's statutory interpretation were correct, it would not support enjoining all enforcement of Section 2(c). Courts may find an implied repeal "only to the minimum extent necessary" to "make the later enacted law work." *Radzanower*, 426 U.S. at 155 (brackets and citation omitted). The court of appeals' ruling contravenes that principle in two ways.

First, if Section 1152(a)(1)(A) did prohibit the government from declining to issue immigrant visas to aliens covered by Section 2(c), in no event can it be construed to forbid the President from denying them *entry*. Any possible concern that denying visas to aliens covered by Section 2(c) constitutes "circumvent[ion]" of Section 1152(a)(1)(A) (J.A. 1212) would be fully addressed by an injunction requiring the issuance of such visas to aliens who otherwise qualify for them. There is no basis in the statute to go further by enjoining Section 2(c)'s entry suspension itself.

Second, Section 1152(a)(1)(A) is expressly limited to "immigrant visa[s]." 8 U.S.C. 1152(a)(1)(A). It thus cannot justify enjoining Section 2(c) as to aliens seeking *nonimmigrant* visas. Over the last two fiscal years, more than two-thirds of visas issued to nationals of the six countries covered by the Order were nonimmigrant visas.[17] Even on its own terms, then, the court of appeals' statutory analysis cannot support the injunction as to the vast majority of aliens affected by Section 2(c). See J.A. 1233 n.24 (noting but declining to address this issue in light of court's holding that Section 2(c) violates Section 1182(f)). Section 1152(a)(1)(A) thus provides no independent basis for enjoining Section 2(c) wholesale.

C. Section 2(c) Is Consistent With 8 U.S.C. 1182(a)

The *Hawaii* respondents also have pressed (Cert. Supp. Br. 20-22) an additional statutory argument that the Ninth Circuit did not reach: that Section 2(c) violates 8 U.S.C. 1182(a)(3)(B), which provides that aliens who have engaged in terrorist activity or have certain ties to terrorist groups are inadmissible. According to respondents, the President has impermissibly augmented Congress's standard for the admissibility of aliens with ties to terrorism. J.A. 1221. That argument lacks merit.

First, as respondents' own authority confirms, the President may invoke Section 1182(f) to suspend entry for reasons that are related to ineligibility grounds in Section 1182(a). As then-Judge Ginsburg explained for the D.C. Circuit in *Abourezk*, Section 1182(f)'s "sweeping proclamation power * * * provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in

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[17] See Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office 2016*, Tbl. III, XVIII, https://goo.gl/vIqklv (all undated Internet sites last visited Aug. 10, 2017); Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office 2015*, Tbl. III, XVIII, https://goo.gl/9BbEFt.

[S]ection 1182(a)." 785 F.2d at 1049 n.2; accord *Allende*, 845 F.2d at 1118 & n.13. The *Hawaii* respondents conceded below that the President may invoke Section 1182(f) to exclude aliens "who present concerns similar to" one of Section 1182(a)'s categories, so long as he does not exclude one of the exact same categories under a different "burden of proof." *Hawaii* D. Ct. Doc. 191, at 12 (Mar. 14, 2017).

The Order complies with respondents' own test. In Section 1182(a)(3)(B), Congress addressed the admissibility of aliens who have been linked *individually* to terrorist activity or groups. But the President suspended entry of a different "class of cases": aliens attempting to enter the United States from *countries* that shelter or sponsor terrorism. *Abourezk*, 785 F.2d at 1049 n.2. And he did so to guard against a "danger" that is "not covered" by Section 1182(a)(3)(B): the risk that those countries' hostile or unstable governments are not providing complete and reliable information regarding their nationals. *Ibid.* The Order does not alter Section 1182(a)(3)(B)'s "burden of proof" by suspending the entry of covered aliens based on a determination they are all "potential terrorists." *Hawaii* Resps. C.A. Br. 32 (No. 17-15589). Rather, the Order states that conditions in the six countries warrant temporarily suspending entry of certain of those countries' nationals pending a review of screening and vetting procedures. J.A. 1419-1423 (§ 1(d)-(f)). Nothing in Section 1182(a) precludes that judgment.

Second, construing Section 1182(a)(3)(B) to preclude the President from suspending entry under Section 1182(f) based on terrorism-related risks would render Section 1182(f) largely impotent. Section 1182(a) sets forth numerous grounds of inadmissibility, including grounds relating to "[h]ealth[]," "[c]riminal" history, "[s]ecurity," and "[f]oreign policy." 8 U.S.C. 1182(a)(1), (2), (3), and (3)(C). Given the breadth and variety of those grounds, few exercises of the President's Section 1182(f) authority could not be characterized as touching a topic addressed in Section 1182(a). Indeed, the Executive frequently has suspended entry of aliens under Section 1182(f) for reasons similar to statutory grounds for inadmissibility.[18] So too here, the exclusion for any particular alien who has "engaged in" or "is likely to engage" in "terrorist activity" does not bar the President from temporarily suspending entry by a class of aliens to assess whether existing procedures are adequate to detect potential terrorists.

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[18] For example, Congress identified certain crimes that render aliens inadmissible, 8 U.S.C. 1182(a)(2) (crimes "involving moral turpitude" or drug-related offenses), yet Presidents have invoked Section 1182(f) to suspend the entry of aliens whose conduct does or likely would constitute other crimes. See, *e.g.*, Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015) (certain "malicious cyber-enabled activities" abroad that would harm the United States); Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 14, 2004) (public corruption). Similarly, Congress rendered inadmissible aliens who have participated in certain human-rights violations, including "genocide," "torture," and "extrajudicial killing," 8 U.S.C. 1182(a)(3)(E)(ii)-(iii), yet Presidents have invoked Section 1182(f) to suspend entry of aliens linked to other human-rights abuses. See, *e.g.*, Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (aliens who participated in "conduct that constitutes a serious abuse or violation of human rights" in Venezuela); Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (operation of technology or networks used to assist in "serious human rights abuses" by Iran or Syria); Proclamation No. 8697, 76 Fed. Reg. 49,277 (Aug. 9, 2011) (aliens who participated in "war crimes, crimes against humanity or other serious violations of human rights"); Proclamation No. 8015, 71 Fed. Reg. 28,541 (May 16, 2006) ("human rights abuses" and other activities by officials in Belarus).

D. Section 6(b) Is Consistent With 8 U.S.C. 1157

The Ninth Circuit also incorrectly held that Section 6(b)'s reduction of the refugee cap for Fiscal Year 2017, which the *Hawaii* respondents barely addressed below, violates 8 U.S.C. 1157. J.A. 1216-1221. Section 1157 establishes a procedure for setting the maximum number of refugees who may be admitted each fiscal year. 8 U.S.C. 1157(a)(2). It provides that "the number of refugees who *may* be admitted" in any fiscal year "shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation." *Ibid.* (emphasis added). The statute prescribes a process for "appropriate consultation," involving in-person meetings among Cabinet-level officials and congressional leaders, to set that annual ceiling. 8 U.S.C. 1157(e). If an "unforeseen emergency refugee situation" arises mid-year, the President may (after "appropriate consultation") set a higher ceiling. 8 U.S.C. 1157(b).

The Ninth Circuit held that Section 6(b) violates Section 1157 because the maximum number of refugees for Fiscal Year 2017 was previously set at 110,000, and Section 6(b) reduced that number without "appropriate consultation." J.A. 1216-1221. Section 1157(a)(2), however, sets only the number who "may be admitted," not a number who *must* be admitted. Although the President cannot *increase* mid-year the number of refugees who may be admitted without "appropriate consultation," nothing in the statute requires that the maximum number of refugees set at the beginning of the fiscal year actually be admitted or prohibits the President from allowing only a smaller number.

That makes perfect sense. Congress wanted refugee admissions to be limited, with its leadership involved in setting an annual ceiling on refugee admissions and in deciding whether to exceed that limit mid-year due to unanticipated events. "[C]onsultation with Congress with respect to numbers of refugees admitted is only required when the [statutory] limit is exceeded." H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979). In any given year, however, a smaller number than the annual ceiling might be admitted for many reasons—such as budgetary constraints, logistical concerns, or foreign-relations issues. Indeed, the number of refugees actually admitted routinely falls well below the predetermined cap. For example, from 2001 to 2012, the number of refugees admitted fell short of the annual cap by an average of nearly 21,000, and in 2002 and 2003 fewer than half of the then-authorized 70,000 refugees were admitted.[19] Nothing in Section 1157 mandates admitting a fixed number of refugees—especially where the President determines under Section 1182(f) that the national interest requires admitting a smaller number.

The Ninth Circuit misconstrued Section 1157(a) to set not only a ceiling on refugee admissions, but also a "floor." J.A. 1218. The court stated that "the number of refugees who may be admitted *shall be* the number determined by the President" after appropriate consultation, *ibid.*, but it glossed over the critical discretionary language: "may be admitted." The court also asserted that a contrary view would render Section 1157's procedures superfluous. *Ibid.* That is wrong: if the President desires to *increase* the ceiling mid-year, he must utilize Section 1157's protocol. The Ninth Circuit further asserted that Section 1157 supersedes Section 1182(f) because it is later in time and more specific. J.A. 1218-1221. Those attributes are immaterial because the provisions do not conflict. Section 1182(f) authorizes the President to suspend or restrict entry. That is entirely consistent with Section 1157, which merely sets a cap on refugee admissions.

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[19] See Refugee Processing Ctr., Bureau of Population, Refugee & Migration, U.S. Dep't of State, *Cumulative Summary of Refugee Admissions* (May 31, 2017), https://goo.gl/LyoOl1; see also Migration Policy Inst., *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, https://goo.gl/0XI98I.

IV. THE ORDER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

In *IRAP*, the court of appeals held that Section 2(c)'s temporary suspension likely violates the Establishment Clause. J.A. 207-236. In *Hawaii*, respondents have contended, and the district court held, that Section 2(c), Section 6(a)'s refugee suspension, and Section 6(b)'s refugee cap are invalid on the same basis. J.A. 1128-1139, 1154-1157. Under this Court's precedent, however, the President's national-security determinations provide "a facially legitimate and bona fide reason" for the Order's exclusion of aliens. *Mandel*, 408 U.S. at 770. That should end the inquiry. The lower courts reached a contrary conclusion by disregarding *Mandel*'s deferential standard and looking instead to inapposite domestic Establishment Clause cases. But the Order is valid under that improper approach as well. This Court's decisions and respect for a coordinate branch forbid invalidating the President's religion-neutral action not because of what it says or does, but because of what courts speculate motivated the President in issuing it.

A. The Order Is Constitutional Under *Mandel* And *Din*

1. a. The Fourth Circuit acknowledged that the *IRAP* respondents' Establishment Clause challenge to the exclusion of aliens abroad is governed by *Mandel*'s

test, J.A. 208—a test this Court recently described as "minimal scrutiny (rational-basis review)." *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), slip op. 15; accord J.A. 210 n.14 (collecting cases that have "equated" *Mandel* with "rational basis review"); see also *Washington* v. *Trump*, 858 F.3d 1168, 1179 (2017) (Bybee, J., dissenting).

In *Mandel*, the Executive denied admission to a Belgian journalist, Ernest Mandel, who wished to speak about communism. 408 U.S. at 756-759. This Court upheld the Executive's action—and rejected a First Amendment challenge by U.S. citizens who wished to hear Mandel speak—because the Attorney General (through his delegee) gave "a facially legitimate and bona fide reason" for Mandel's exclusion: Mandel had violated the conditions of a previous visa. *Id.* at 770; see *id.* at 759, 769. When the Executive supplies such a reason, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. *Id.* at 770.

That deferential standard reflects the Constitution's "exclusive[]" allocation of power over the admission of aliens to the "political branches." *Mandel*, 408 U.S. at 765 (citation omitted); see *Fiallo*, 430 U.S. at 792-796 (applying *Mandel*'s test to equal-protection challenge to statute governing admission of aliens). It also reflects that aliens seeking admission from abroad have no constitutional rights at all regarding entry into the country. In this context, *Mandel*'s test of "a facially legitimate and bona fide reason" for exclusion, 408 U.S. at 770, is necessary to respect the several constitutional values at stake, even if a further assessment might be called for in certain purely domestic contexts. See

Demore v. *Kim*, 538 U.S. 510, 521 (2003) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (citation omitted)).

Mandel's test has particular force here for three reasons. First, courts are generally "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the Executive's "reasons for deeming nationals of a particular country a special threat." *AAADC*, 525 U.S. at 491. Those limitations make it especially appropriate to apply *Mandel's* objective "rational-basis" standard, *Morales-Santana*, slip op. 15, which does not entail probing government officials' subjective intentions or second-guessing the Executive's national-security determinations. See *Western & S. Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-672 (1981) (Rational-basis standard does not ask "whether *in fact* [a] provision will accomplish its objectives," but whether the government "*rationally could have believed*" that it would do so.).

Second, in Sections 1182(f) and 1185(a)(1), Congress expressly granted the President expansive authority to suspend entry of classes of aliens abroad. The President's exercise of that power is parallel to Congress's legislative determinations regarding admissibility of classes of aliens, see 8 U.S.C. 1182(a), which are reviewed under the "facially legitimate and bona fide reason" test, see *Fiallo*, 430 U.S. at 794-795. It is therefore entitled to the same standard of judicial review as well.

Third, Congress vested that expansive authority directly in the President himself, in recognition of his unique role in the constitutional structure over matters of foreign affairs and national security. Congress's expansive grant of authority means that the President's power "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083-2084 (2015) (citation omitted).

b. *Mandel* compels rejecting respondents' constitutional challenges. The Fourth Circuit accepted that Section 2(c)'s entry suspension rests on a facially legitimate reason: protecting national security. J.A. 214. And the Order supplies a bona fide factual basis for that reason: Section 1(d) explains that Congress or the Executive previously designated the six listed countries as presenting terrorism-related concerns that "diminish[] the foreign government's willingness or ability to share or validate important information about" its nationals. J.A. 1419-1420. Section 1(e) then details, country by country, why each poses "heightened risks." J.A. 1420-1422. Neither the *IRAP* respondents nor the Fourth Circuit contested these determinations.

On that basis, Sections 1(f) and 2(c) then set forth the President's judgment that a temporary pause in entry is needed to "prevent infiltration by foreign terrorists" and "reduce investigative burdens" while a review of the Nation's screening and vetting procedures is ongoing. J.A. 1426; see J.A. 1422-1423. Moreover, as Section 2(e) contemplates, and as the example of Iraq's response to the January Order illustrates, the six-country suspension enhances the government's leverage in persuading foreign nations to supply needed information. Section 2(c) readily satisfies *Mandel*'s test.

Section 6(a)'s Refugee Program suspension and Section 6(b)'s refugee cap likewise are valid under *Mandel*. In light of past efforts by terrorist groups to infiltrate countries through refugee programs and the presence of hundreds of persons in the United States who entered as refugees and are currently the subject of counterterrorism investigations, J.A. 1418, 1424 (§ 1(b)(iii) and (h)), the President made a national-security judgment to suspend decisions and travel under the Refugee Program (subject to individualized waivers) for 120 days. That pause allows for a review "to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." J.A. 1433 (§ 6(a)). For the same reasons, Section 6(b) limits the number of refugees entering in Fiscal Year 2017 based on an express determination that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." J.A. 1434 (§ 6(b)).

2. The Fourth Circuit failed to accord the deference to the Executive that *Mandel* requires. It noted that the political branches' decisions in the immigration context are still "subject to important constitutional limitations." J.A. 211 (citation omitted). But *Mandel* establishes how those limitations apply with respect to the exclusion of aliens abroad.[20] The Fourth Circuit mistakenly treated *Mandel*'s "bona fide" requirement as a license to examine whether the President's stated reason was given "in good faith." J.A. 212. Under *Mandel*, courts indeed can ensure that the reason is facially bona fide as well as facially legitimate, *i.e.*, that there is a "rational[]" basis for the government's action,

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[20] *Mandel*'s standard applies to respondents' challenges here to decisions to deny entry by aliens from abroad. It does not govern every issue concerning immigration—such as post-removal-order detention of aliens in the United States, *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), or the procedure for exercising legislative power over the suspension of deportation of aliens present in the United States, *INS* v. *Chadha*, 462 U.S. 919 (1983).

Morales-Santana, slip op. 15. *Mandel*, however, explicitly rejected "look[ing] behind" the government's stated reason. 408 U.S. at 770. Indeed, the Court declined Justice Marshall's invitation in dissent to take "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver," which he asserted was a "sham." *Id.* at 778. The court of appeals' approach cannot be squared with what *Mandel* said or what it did.

The Fourth Circuit based its approach on a statement in Justice Kennedy's concurrence in *Din* addressing a markedly different situation. J.A. 212-215. There, a U.S. citizen claimed that she had a due-process right to receive a more extensive explanation for a consular officer's denial of a visa to her husband. 135 S. Ct. at 2131 (opinion of Scalia, J.). In rejecting that claim, Justice Kennedy (joined by Justice Alito) observed that the government's citation of a statutory ground of inadmissibility involving terrorism "indicates it relied upon a bona fide *factual basis* for denying [the] visa." *Id.* at 2140 (emphasis added). Justice Kennedy concluded that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed." *Ibid.*

That statement cannot plausibly be read as approving a wide-ranging search for pretext in reviewing a consular officer's visa-refusal decision—let alone a formal national-security determination by the President to suspend entry of classes of aliens. Rather, Justice Kennedy posited a far narrower scenario: the statutory ground of inadmissibility in 8 U.S.C. 1182(a)(3)(B) "specifies discrete factual predicates." 135 S. Ct. at 2141. Ordinarily, a citation of the statute alone will suffice to indicate that those predicates have been found. But in an extreme case, where a citizen makes an "affirmative showing" that a consular officer had no "bona fide factual basis" for determining that an applicant has ties to terrorism, due process might entitle the citizen to "additional factual details" about the basis of the consular officer's decision (provided the information is not classified). *Id.* at 2140-2141.

That type of inquiry would be inapposite here for two independent reasons. First, neither of the statutes that authorize the President's suspension specifies *any* particular factual predicates. Under Section 1182(f), the President need only determine that, in his judgment, entry "would be detrimental to the interests of the United States." And Section 1185(a)(1) imposes no prerequisites at all, but simply mandates compliance with "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." Second, the Fourth Circuit did not question that the terrorism-related grounds set forth in the Order provide an adequate factual basis for Section 2(c)'s temporary suspension. The Fourth Circuit held instead that national security was not the "primary" purpose of the Order. See J.A. 224-226. But nothing in *Mandel* or *Din* permitted looking behind the President's determination *notwithstanding* its sufficient factual basis, in a search for a contrary subjective motivation.

After reading *Din* to authorize an inquiry into the President's motives, the Fourth Circuit then relied on domestic Establishment Clause decisions as further justification for setting aside Section 2(c). J.A. 216-217. That unprecedented approach is deeply flawed. It defeats *Mandel*'s central point that the exclusion of aliens abroad, over which the political branches have broad authority, calls for especially deferential review. 408 U.S. at 769-770. And domestic case law—involving local religious displays, subsidies for religious schools, and the like—has no sensible application to the President's foreign-policy, national-security, and immigration judgments. The "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world." *Washington*, 858 F.3d at 1178 n.6 (Bybee, J., dissenting). This Court should reject such "intrusion of the judicial power into foreign affairs" committed to the political branches. *Id.* at 1172 n.2 (Kozinski, J., dissenting).

Moreover, the Fourth Circuit did not need to reach any of this. Even if *Din* could fairly be read to allow a bad-faith inquiry that turns on a consular officer's subjective motive, and even assuming such an inquiry applies to a national-security directive of the President, it would at least require the clearest affirmative showing of bad faith by the President and Cabinet officials. Respondents have not cleared that high bar. To the contrary, the President's actions in response to concerns raised by courts regarding the January Order demonstrate *good faith*. For instance, as the Order explains, the January Order contained two provisions aimed at aiding victims of religious persecution. J.A. 1419 (§ 1(b)(iv)). The President removed them to make clear that national security, not religion, is the Order's focus. That response to courts' concerns is the opposite of bad faith.

B. The Order Is Constitutional Under Domestic Establishment Clause Precedent

After rejecting *Mandel*'s deferential standard of review, the Fourth Circuit held that Section 2(c) likely violates the Establishment Clause by reaching back in time to campaign statements long before development of the Order, and the *Hawaii* district court reached the same conclusion as to Section 6(a) and (b). That approach is impermissible under any legal standard. Section 2(c) is not a so-called "Muslim ban," and campaign comments cannot change that basic fact. Section 6(a) and (b) are not even arguably related to religion.

1. Even assuming that domestic Establishment Clause precedent were applicable—and further assuming that the secular-purpose prong of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the "endorsement" test, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), provide the relevant standard—courts deciding whether official action has an improper religious purpose look to "the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (citation omitted). They should not engage in "judicial psychoanalysis of a drafter's heart of hearts." *Ibid.* Searching for purpose outside the operative terms of governmental action makes no sense in the Establishment Clause context, because it is only an "official objective" of favoring or disfavoring religion that implicates the Clause. *Ibid.*

The Order is valid under that standard. Section 2(c)'s text does not refer to or draw any distinction based on religion. And the suspension's "operation," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S.

520, 535 (1993) (*Lukumi*), confirms that it is religion-neutral: it applies to six countries based on national-security risk, and it applies to certain nationals of those countries without regard to their religion. Each of the countries had previously been identified as presenting heightened terrorism-related concerns in connection with the Visa Waiver Program. See pp. 4-5, *supra*. Section 6's refugee provisions have no connection to religion whatsoever. Both Section 6(a)'s temporary refugee suspension and Section 6(b)'s refugee cap apply to nationals of all countries worldwide.

2. The Fourth Circuit held that statements by the President—nearly all before assuming office, while still a private citizen and political candidate—and informal remarks of his aides imply that Section 2(c)'s entry suspension is intended to target Muslims. J.A. 219-223. In the court's view, those statements "are the exact type of 'readily discoverable fact[s]'" courts "use in determining a government action's primary purpose." J.A. 222 (quoting *McCreary*, 545 U.S. at 862) (brackets in original). The *Hawaii* district court enjoined Sections 2(c), 6(a), and 6(b) on substantially the same basis. J.A. 1154-1157; see J.A. 1128-1139. That reasoning is wrong.

Of course it is readily discoverable whether the campaign and other statements occurred as a matter of fact. But the relevant question is whether those statements demonstrate that the President's later action after taking office was motivated by an impermissible purpose. Resolving that question would require precisely the type of "judicial psychoanalysis" that *McCreary* forecloses. 545 U.S. at 862. Probing the President's grounds for suspending the entry of foreign nationals would thrust "ill equipped" courts into the untenable position of evaluating the "adequacy" and "authenticity" of the Executive's reasons underlying its foreign-affairs and national-security judgments. *AAADC*, 525 U.S. at 491. And it would invite impermissible intrusion on privileged internal Executive Branch deliberations, see *United States* v. *Nixon*, 418 U.S. 683, 708 (1974), and potentially litigant-driven discovery that would disrupt the President's execution of the laws, see *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749-750 (1982). Indeed, the plaintiffs in *Washington* have indicated that they desire nearly a year of discovery, including up to 30 depositions of White House staff and Cabinet-level officials. See Joint Status Report & Discovery Plan at 5-13, *Washington* v. *Trump*, No. 17-141 (W.D. Wash. Apr. 5, 2017) (D. Ct. Doc. 177). This Court should reject a rule that invites such probing of the Chief Executive's subjective views. See *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 616-617 (2007) (Kennedy, J., concurring).

To the government's knowledge, the Fourth Circuit's ruling is the first appellate decision to hold that a provision of federal law—neutral on its face and in its operation —violates the Establishment Clause based on speculation about its drafters' supposedly illicit purpose. Certainly this Court has never done so. *McCreary* involved a display of the Ten Commandments, 545 U.S. at 850, which are explicitly religious speech. In determining whether the display had a secular purpose despite its religious content, the Court held that the final display's "purpose * * * need[ed] to be understood in light of context," and the context of the counties' prior official actions made their objective clear. *Id.* at 874. The Court's analysis centered on the text of the county resolutions authorizing the displays, objective features of those displays, and materials that government actors deliberately made part of the official record—such as statements by the county executive's pastor at the display's official unveiling. *Id.* at 868-874. The other cases the Fourth Circuit invoked also did not depend on anything like the campaign statements at issue here.[21]

3. Even if a court may look beyond a law's text and operation in some circumstances, it should not consider campaign-trail comments. Here, virtually all of the President's statements on which the Fourth Circuit relied were made before he assumed office, see J.A. 179-183, 219-223—before he took the prescribed oath to "preserve, protect and defend the Constitution," U.S. Const. Art. II, § 1, Cl. 8, and formed a new Administration, including Cabinet-level officials who recommended adopting the Order. Taking that oath marks a profound transition from private life to the Nation's highest public office, and manifests the singular responsibility and independent authority to protect the security and welfare of the Nation that the Constitution reposes in the President.

Moreover, "[b]ecause of their nature, campaign statements are unbounded resources by which to find intent of various kinds." J.A. 345 (Niemeyer, J., dissenting). "They are often short-hand for larger ideas" and "are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise." *Ibid.* They often are made without the benefit of advice from an as-yet-unformed Administration. And they cannot bind elected officials who later conclude that a different course is warranted. See *Republican Party of Minn.* v. *White*, 536 U.S. 765, 780 (2002) ("[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment."); *Washington*, 858 F.3d at 1173 (Kozinski, J., dissenting).

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[21] In *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), it was "undisputed" that the legislature knew when it created a special school district that its boundaries were drawn specifically to include only members of one religious sect. *Id.* at 699 (opinion of Souter, J.); *id.* at 729 (Kennedy, J., concurring in the judgment) (law constituted "explicit religious gerrymandering"). Likewise, *Lukumi* held that the local ordinances' "text" and "operation" showed that they were a "religious gerrymander." 508 U.S. at 535 (citation omitted).

Here, for example, the Fourth Circuit relied on statements as early as December 2015 (more than 13 months before the inauguration and 15 months before the Order) referring to immigration by "Muslims." J.A. 219 (citation omitted). But as the court noted, months later, candidate Trump advocated restrictions based on "territory," and specifically "nation[s] that ha[ve] been compromised by terrorism." J.A. 220 (citation omitted). Similarly, in remarks in June 2016, he explained his plan to "suspend immigration from areas of the world where there's a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats."[22] And on that and other occasions, candidate Trump stated that his focus was on combatting the threat of "radical Islamic terrorism."[23] Then, after taking the oath of office, forming an Administration, and consulting with Members of his newly formed Cabinet, the President adopted an Order that follows a territory-based approach and limits entry of nationals of six countries that sponsor or shelter terrorism. Disagreement about the meaning of prior campaign statements only highlights the dangers in "opening the door" to campaign comments. J.A. 346 (Niemeyer, J., dissenting).

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[22] Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time.com, June 13, 2016, https://goo.gl/cSHJyD.

[23] The American Presidency Project, Donald J. Trump, *Remarks at Youngstown State University in Youngstown, Ohio* (Aug. 15, 2016), https://goo.gl/T5xRvu.

Allowing consideration of campaign statements also "has no rational limit," raising questions about whether courts may consider "statements from a previous campaign, or from a previous business conference, or from college." J.A. 346 (Niemeyer, J., dissenting). The Fourth Circuit did not deny that its approach might permit considering an official's "college essay," asserting only that such far-removed statements would "rarely" be "reveal[ing]." J.A. 232. That ad hoc approach would mean "the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate." *Washington*, 858 F.3d at 1174 (Kozinski, J., dissenting). And it would "mire [courts] in a swamp of unworkable litigation," with no principled rules governing how to assess particular past statements made before a candidate assumes office. *Id.* at 1173. That approach also threatens to "chill campaign speech," to which "our most basic free speech principles have their fullest and most urgent application." *Ibid.* (citation and internal quotation marks omitted).

All of these concerns are heightened where, as here, the statements at issue implicate issues of foreign relations. By attempting to delve into the President's supposed motives, the Fourth Circuit injected itself into sensitive matters of foreign affairs and risked "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (quoting *Baker* v. *Carr*, 369 U.S. 186, 217, 226 (1962)). In an address earlier this year to a gathering of Middle East leaders in Saudi

Arabia, the President urged that the global fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[24] The President decried "the murder of innocent Muslims" by terrorist groups, and called for "tolerance and respect * * * no matter [one's] faith or ethnicity."[25] Yet the court of appeals invalidated Section 2(c) as rooted in "religious intolerance, animus, and discrimination." J.A. 171. The Fourth Circuit's pronouncement—that the President of the United States took official action based on animus toward one of the world's major religions, notwithstanding his own official statements to the contrary—plainly carries the potential to undermine the Executive's ability to conduct foreign relations for and protect the security of the Nation.

4. Excluding campaign statements from the analysis confirms that the Fourth Circuit erred. The few post-inauguration remarks it cited do not demonstrate an impermissible purpose. The court cited statements by the President and aides made between the January Order and the Order—describing the Order as pursuing "the same basic policy outcomes," reflecting the same "principles," or constituting a "watered down version" of the January Order. J.A. 221 (citations omitted). But as the Order explains, both Orders aimed at the same national-security objective: facilitating a review of existing screening and vetting procedures. J.A. 1416-1425 (§ 1(b)-(i)). The Order pursues that objective through substantially

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[24] Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2.

[25] *Ibid.*

revised provisions; the differences are clear on the Order's face.

The court of appeals also held that a passing remark by the President when signing the January Order signaled an improper motive. After reading its title—"Protecting the Nation From Foreign Terrorist Entry into the United States," J.A. 1416—he stated, "[w]e all know what that means." J.A. 221 (citation omitted). Minutes earlier, however, in the presence of the newly sworn-in Secretary of Defense, the President had said, "I am establishing new vetting measures to keep radical Islamic terrorists out of the United States of America. * * * We want to ensure that we are not admitting into our country the very threats our soldiers are fighting overseas."[26] In context, the President's passing remark is reasonably understood to refer to terrorist groups like ISIL and al Qaeda, not all Muslims. It is at least ambiguous, and the court erred in setting aside an Executive Order of the President based on an offhand, six-word comment made in connection with a prior directive.

5. Even if it was appropriate for the Fourth Circuit to consider various campaign comments, the court erred in concluding that those comments refute the Order's religion-neutral text and operation, its explicit national-security rationale, and the recommendations of members of the President's Cabinet. The stark disconnect between the campaign comments on which the Fourth Circuit relied and the actual terms of the Order—which do not relate to Islam in any way—confirm that the statements lack probative value.

At a minimum, the Fourth Circuit should have resolved any uncertainty in favor of, not against, the

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[26] Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists,'* CNN.com (Jan. 30, 2017), https://goo.gl/dMZEvO.

Arabia, the President urged that the global fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[24] The President decried "the murder of innocent Muslims" by terrorist groups, and called for "tolerance and respect * * * no matter [one's] faith or ethnicity."[25] Yet the court of appeals invalidated Section 2(c) as rooted in "religious intolerance, animus, and discrimination." J.A. 171. The Fourth Circuit's pronouncement—that the President of the United States took official action based on animus toward one of the world's major religions, notwithstanding his own official statements to the contrary—plainly carries the potential to undermine the Executive's ability to conduct foreign relations for and protect the security of the Nation.

4. Excluding campaign statements from the analysis confirms that the Fourth Circuit erred. The few post-inauguration remarks it cited do not demonstrate an impermissible purpose. The court cited statements by the President and aides made between the January Order and the Order—describing the Order as pursuing "the same basic policy outcomes," reflecting the same "principles," or constituting a "watered down version" of the January Order. J.A. 221 (citations omitted). But as the Order explains, both Orders aimed at the same national-security objective: facilitating a review of existing screening and vetting procedures. J.A. 1416-1425 (§ 1(b)-(i)). The Order pursues that objective through substantially

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[24] Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2.

[25] *Ibid.*

revised provisions; the differences are clear on the Order's face.

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[26] Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists,'* CNN.com (Jan. 30, 2017), https://goo.gl/dMZEvO.

Order's validity. The "presumption of regularity" that attaches to all federal officials' actions, *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14 (1926), carries the utmost force with respect to the President himself. The presumption, which is magnified here by respect for the head of a coordinate Branch, counsels crediting the Order's stated national-security purpose absent the clearest showing to the contrary. In light of these principles, the Fourth Circuit erred in refusing to credit the Order's stated objective of combatting terrorism and instead determining that it is based on animosity towards Islam or Muslims generally.

V. THE GLOBAL INJUNCTIONS ARE OVERBROAD

A. The courts of appeals further erred in upholding global preliminary injunctions that categorically bar enforcement of a national-security directive of the President without any finding (or basis for finding) that such sweeping relief is necessary to redress cognizable injuries to respondents themselves.

1. Both constitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries. Article III requires that "a plaintiff must demonstrate standing * * * for each form of relief that is sought." *Town of Chester* v. *Laroe Estates, Inc.*, No. 16-605 (June 5, 2017), slip op. 5 (citation omitted). "The remedy" sought therefore must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). "The actual-injury requirement would hardly serve [its] purpose * * * of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administra-

tion, the court were authorized to remedy *all* inadequacies in that administration." *Ibid.*; see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Equitable principles independently require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

2. In *IRAP*, the Fourth Circuit upheld a global injunction against Section 2(c) based on two purported injuries to a *single* respondent, Doe #1: the putative delay in "his wife's entry into the United States," and an alleged "state-sanctioned message condemning his religion." J.A. 196; see J.A. 203-204. Even before his wife received a visa, an injunction limited to Doe #1's wife would have fully redressed the former alleged injury. Now that she has received a visa, that purported injury has evaporated. *IRAP*, 137 S. Ct. at 2086 n.*.

That leaves only Doe #1's alleged "message" injury. The Fourth Circuit reasoned that, because Section 2(c) supposedly sends a message of condemnation to Muslims, the provision had to be enjoined worldwide—lest any application communicate that message to Doe #1. J.A. 199-200. The court's reasoning places in stark relief how respondents' message theory would eviscerate limitations on standing *and* equitable relief. By recharacterizing Section 2(c) as government speech directed at U.S. citizens, rather than government conduct directed at aliens abroad, any U.S. citizen apparently could obtain a global injunction against Section 2(c)—or any other allegedly discriminatory immigration law—to silence the supposed message.

The Fourth Circuit attempted to draw back from that radical holding. It disclaimed that "all Muslims in the United States" could sue, and it deemed Doe #1's claim justiciable based on the combination of Section 2(c)'s purported message and its then-hypothetical (now-nonexistent) effect on his wife. J.A. 202-203 n.11. But combining two different asserted injuries, neither of which justifies global relief, does not change the analysis. Any delay in the entry of Doe #1's wife could have been redressed by an injunction limited to her. See *Lewis*, 518 U.S. at 357. Only Doe #1's condemnation injury could possibly have been the basis for expanding the injunction. And if that is sufficient to ground global relief, there is no reason why a plaintiff also would need to allege an effect on a family member. Under the Fourth Circuit's reasoning, all Muslims in the United States *can* sue—along with potentially all non-Muslims who are equally offended by Section 2(c)'s alleged message.

3. In *Hawaii*, the Ninth Circuit upheld the injunction against Sections 2(c), 6(a), and 6(b) based on injuries to Dr. Elshikh and Hawaii, J.A. 1180-1187, 1223-1224, but those purported injuries likewise cannot justify the global relief imposed.

a. The court of appeals held that Dr. Elshikh would suffer irreparable harm based solely on the alleged delay in his mother-in-law's entry. J.A. 1223-1224; see J.A. 1180-1182. But as with Doe #1's wife, any harm to Dr. Elshikh's mother-in-law was redressable by an injunction limited to her—an injunction that is now unnecessary because she has received a visa. The district court also relied on Dr. Elshikh's asserted "message" injury. For the reasons given above, that injury cannot justify enjoining application of Section 2(c) as to any person worldwide. It also cannot plausibly support enjoining Section 6(a) and (b), which apply to refugees from every country worldwide.

In addition, even if this Court were to hold (as the Ninth Circuit did) that Sections 2(c), 6(a), and 6(b) are unlawful on the ground that they violate the INA, Dr. Elshikh's claimed "message" injury could not support any injunction as to those provisions. That purported harm flows from the Order's alleged violation of the Establishment Clause; it has nothing to do with the Order's compliance with federal immigration statutes. An injunction cannot be upheld on the basis that a plaintiff is likely to succeed on the merits of one legal theory (*i.e.*, the Order violates the INA), but has suffered irreparable injury based on another legal theory (*i.e.*, the Order violates the Establishment Clause by sending an exclusionary message).

b. The court of appeals also held that Hawaii would suffer irreparable harm based on alleged "constraints to recruiting and attracting students and faculty members to the University of Hawai'i, decreased tuition revenue," and its claimed "inability to assist in refugee resettlement." J.A. 1223. Even if those interests constitute cognizable injuries, but see p. 34, *supra*, they cannot plausibly justify enjoining Sections 2(c), 6(a), and 6(b) worldwide. Any injuries to Hawaii's university system, for example, could be fully redressed by an injunction tailored to particular, identified students or faculty whom Hawaii has enrolled or hired.

Likewise, even if Hawaii could claim a cognizable stake in providing assistance to refugees after their arrival, at most that might warrant enjoining the Order as to specific refugees who have been determined to meet the requirements for refugee admission and who have concrete plans to resettle in Hawaii. As the court of appeals noted, Hawaii has resettled only approximately 20 refugees in the past seven years and only three in the current fiscal year. J.A. 1232. Redressing Hawaii's interest in resettling a handful of refugees by enjoining Section 6(a) and (b) as to *thousands* of refugees with no connection to the State is a drastic overextension of equity.

B. None of the other justifications the courts of appeals gave for global injunctive relief withstands scrutiny. Both courts stated that categorical relief was necessary because a more limited injunction would not cure the alleged legal defects in the Order, and the enjoined provisions' application to nonparties would be equally unlawful. J.A. 244, 1234. That conflates the scope of respondents' legal theory (*i.e.*, that the enjoined provisions are invalid on their face) with the scope of relief they personally may obtain. Regardless of the nature of respondents' legal challenge, they may not obtain relief beyond what it is necessary to redress their own cognizable injuries. The Fourth Circuit also noted that the *IRAP* respondents "are dispersed throughout the United States," apparently referring to the refugee organizations' clients. J.A. 244. But it did not hold that any respondent besides Doe #1 had standing—and even his claimed injury has been eliminated.

Both courts of appeals also concluded that categorical relief is appropriate because "Congress has made clear that 'the immigration laws of the United States should be enforced vigorously and uniformly.'" J.A. 244 (emphasis omitted) (quoting *Texas* v. *United States*, 809 F.3d 134, 187-188 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016)); J.A. 1233 (same). The courts' preference for uniform enforcement is a curious rationale for barring *any* enforcement of Sections 2(c), 6(a), and 6(b) based on injury to at most a handful of individuals. Proper respect for uniform enforcement and for a coordinate branch compel leaving those provisions in place, with individualized exceptions for particular plaintiffs who demonstrate cognizable, irreparable harm.

The Order's express severability clause compels the same approach. Section 15(a) of the Order provides that, if "the application of any provision to any person or circumstance[] is held to be invalid," then "the application of [the Order's] other provisions to any other persons or circumstances shall not be affected." J.A. 1439. Once the courts of appeals concluded that the application of Section 2(c), 6(a), or 6(b) was invalid as to any person, the Order's express terms required severing that application. Such tailored relief would have posed far less interference with federal policy than enjoining the President's directive wholesale based on alleged injuries to a few respondents.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 6 U.S.C. 236 provides in pertinent part:

Visa issuance

* * * * *

(b) In general

Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except as provided in subsection (c) of this section, the Secretary—

(1) shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provisions of such Act [8 U.S.C. 1101 et seq.], and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State), which authorities shall be exercised through the Secretary of State, except that the Secretary shall not have authority to alter

or reverse the decision of a consular officer to refuse a visa to an alien; and

(2) shall have authority to confer or impose upon any officer or employee of the United States, with the consent of the head of the executive agency under whose jurisdiction such officer or employee is serving, any of the functions specified in paragraph (1).

(c) Authority of the Secretary of State

(1) In general

Notwithstanding subsection (b) of this section, the Secretary of State may direct a consular officer to refuse a visa to an alien if the Secretary of State deems such refusal necessary or advisable in the foreign policy or security interests of the United States.

* * * * *

(f) No creation of private right of action

Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.

* * * * *

3. 8 U.S.C. 1152(a) provides:

Numerical limitations on individual foreign states

(a) Per country level

(1) Nondiscrimination

(A) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

(2) Per country levels for family-sponsored and employment-based immigrants

Subject to paragraphs (3), (4), and (5), the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 1153 of this title in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

(3) Exception if additional visas available

If because of the application of paragraph (2) with respect to one or more foreign states or dependent areas, the total number of visas available under both subsections (a) and (b) of section 1153 of this title for a calendar quarter exceeds the number of qualified immigrants who otherwise may be issued such a visa, paragraph (2) shall not apply to visas made available to such states or areas during the remainder of such calendar quarter.

(4) Special rules for spouses and children of lawful permanent resident aliens

(A) 75 percent of 2nd preference set-aside for spouses and children not subject to per country limitation

(i) In general

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, 75 percent of the 2-A floor (as defined in clause (ii)) shall be issued without regard to the numerical limitation under paragraph (2).

(ii) "2-A floor" defined

In this paragraph, the term "2-A floor" means, for a fiscal year, 77 percent of the total number of visas made available under section 1153(a) of this title to immigrants described in section 1153(a)(2) of this title in the fiscal year.

(B) Treatment of remaining 25 percent for countries subject to subsection (e)

(i) In general

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, the remaining 25 percent of the 2-A floor shall be available in the case of a state or area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign state or area is less than the subsection (e) ceiling (as defined in clause (ii)).

(ii) "Subsection (e) ceiling" defined

In clause (i), the term "subsection (e) ceiling" means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants who are natives of the state or area under section 1153(a)(2) of this title consistent with subsection (e).

(C) Treatment of unmarried sons and daughters in countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, the number of immigrant visas that may be made available to natives of the state or area under section 1153(a)(2)(B) of this title may not exceed—

(i) 23 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e), or

(ii) the number (if any) by which the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e) exceeds the number of visas issued under section 1153(a)(2)(A) of this title,

whichever is greater.

(D) Limiting pass down for certain countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(a)(2) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(a)(2) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying paragraphs (3) and (4) of section 1153(a) of this title under subsection (e)(2) all visas shall be deemed to have been required for the classes specified in paragraphs (1) and (2) of such section.

(5) Rules for employment-based immigrants

(A) Employment-based immigrants not subject to per country limitation if additional visas available

If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 1153(b) of this title for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

(B) Limiting fall across for certain countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(b) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(b) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 1153(b) of this title.

4. 8 U.S.C. 1157 provides:

Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e) of this section), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(b) Determinations by President respecting number of admissions for humanitarian concerns

If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

(2)(A) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

(B) An unmarried alien who seeks to accompany, or follow to join, a parent granted admission as a refugee under this subsection, and who was under 21 years of age on the date on which such parent applied for refugee status under this section, shall continue to be classified as a child for purposes of this paragraph, if the alien attained 21 years of age after such application was filed but while it was pending.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be

granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission.

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) of this section or with respect to the admission of refugees in response to an emergency refugee situation

under subsection (b) of this section, the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a) of this section, a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b) of this section, that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

(f) Training

(1) The Attorney General, in consultation with the Secretary of State, shall provide all United States officials adjudicating refugee cases under this section with the same training as that provided to officers adjudicating asylum cases under section 1158 of this title.

(2) Such training shall include country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country between the nature of and treatment of various religious practices and believers.

5. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds

(A) In general

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;[1]

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

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[1] So in original. The semicolon probably should be a comma.

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(C) Exception from immunization requirement for adopted children 10 years of age or younger

Clause (ii) of subparagraph (A) shall not apply to a child who—

(i) is 10 years of age or younger,

(ii) is described in subparagraph (F) or (G) of section 1101(b)(1) of this title;[1] and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

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[1] So in original. The semicolon probably should be a comma.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) **Exception**

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State "has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) **Commission of acts of torture or extrajudicial killings**

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) **Association with terrorist organizations**

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) **Recruitment or use of child soldiers**

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is inadmissible.

* * * * *

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(B) Nonimmigrants

(i) In general

Any nonimmigrant who—

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam and Northern Mariana Islands visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (*l*).

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

* * * * *

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

* * * * *

6. 8 U.S.C. 1185(a) provides:

Travel control of citizens and aliens

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

7. 8 U.S.C. 1187 (2012 & Supp. III 2015) provides:

Visa waiver program for certain visitors

(a) Establishment of program

The Secretary of Homeland Security and the Secretary of State are authorized to establish a program (hereinafter in this section referred to as the "program") under which the requirement of paragraph (7)(B)(i)(II) of section 1182(a) of this title may be waived by the Secretary of Homeland Security, in consultation with the Secretary of State and in accordance with this section, in the case of an alien who meets the following requirements:

(1) Seeking entry as tourist for 90 days or less

The alien is applying for admission during the program as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) for a period not exceeding 90 days.

(2) National of program country

The alien is a national of, and presents a passport issued by, a country which—

(A) extends (or agrees to extend), either on its own or in conjunction with one or more other countries that are described in subparagraph (B) and that have established with it a common area for immigration admissions, reciprocal privileges to citizens and nationals of the United States, and

(B) is designated as a pilot program country under subsection (c) of this section.

(3) Passport requirements

The alien, at the time of application for admission, is in possession of a valid unexpired passport that satisfies the following:

(A) Machine readable

The passport is a machine-readable passport that is tamper-resistant, incorporates document authentication identifiers, and otherwise satisfies the internationally accepted standard for machine readability.

(B) Electronic

Beginning on April 1, 2016, the passport is an electronic passport that is fraud-resistant, contains relevant biographic and biometric information (as determined by the Secretary of Homeland Security), and otherwise satisfies internationally accepted standards for electronic passports.

(4) Executes immigration forms

The alien before the time of such admission completes such immigration form as the Secretary of Homeland Security shall establish.

(5) Entry into the United States

If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier, including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations[1] which has entered into an agreement with the Secretary of Homeland Security pursuant to subsection (e). The Secretary of Homeland Security is authorized to require a carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a domestic corporation conducting operations under part 91 of that title, to give suitable and proper bond, in such reasonable amount and containing such conditions as the Secretary of Homeland Security may deem sufficient to ensure compliance with the indemnification requirements of this section, as a term of such an agreement.

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[1] So in original. Probably should be followed by a comma.

(6) Not a safety threat

The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(7) No previous violation

If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(8) Round-trip ticket

The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Secretary of Homeland Security under regulations or the alien is arriving at the port of entry on an aircraft operated under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations).

(9) Automated system check

The identity of the alien has been checked using an automated electronic database containing information about the inadmissibility of aliens to uncover any grounds on which the alien may be inadmissible to the United States, and no such ground has been found.

(10) Electronic transmission of identification information

Operators of aircraft under part 135 of title 14, Code of Federal Regulations, or operators of noncommercial aircraft that are owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, carrying any alien passenger who will apply for admission under this section shall furnish such information as the Secretary of Homeland Security by regulation shall prescribe as necessary for the identification of any alien passenger being transported and for the enforcement of the immigration laws. Such information shall be electronically transmitted not less than one hour prior to arrival at the port of entry for purposes of checking for inadmissibility using the automated electronic database.

(11) Eligibility determination under the electronic system for travel authorization

Beginning on the date on which the electronic system for travel authorization developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States. Upon review of such biographical information, the Secretary of Homeland Security shall determine whether the alien is eligible to travel to the United States under the program.

(12) Not present in Iraq, Syria, or any other country or area of concern

(A) In general

Except as provided in subparagraphs (B) and (C)—

(i) the alien has not been present, at any time on or after March 1, 2011—

(I) in Iraq or Syria;

(II) in a country that is designated by the Secretary of State under section 4605(j) of title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of title 22, section 2371 of title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) in any other country or area of concern designated by the Secretary of Homeland Security under subparagraph (D); and

(ii) regardless of whether the alien is a national of a program country, the alien is not a national of—

(I) Iraq or Syria;

(II) a country that is designated, at the time the alien applies for admission, by the Secretary of State under section 4605(j) of title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of title

22, section 2371 of title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) any other country that is designated, at the time the alien applies for admission, by the Secretary of Homeland Security under subparagraph (D).

(B) Certain military personnel and government employees

Subparagraph (A)(i) shall not apply in the case of an alien if the Secretary of Homeland Security determines that the alien was present—

(i) in order to perform military service in the armed forces of a program country; or

(ii) in order to carry out official duties as a full time employee of the government of a program country.

(C) Waiver

The Secretary of Homeland Security may waive the application of subparagraph (A) to an alien if the Secretary determines that such a waiver is in the law enforcement or national security interests of the United States.

(D) Countries or areas of concern

(i) In general

Not later than 60 days after December 18, 2015, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall determine whether the requirement under subparagraph (A) shall apply to any other country or area.

(ii) Criteria

In making a determination under clause (i), the Secretary shall consider—

(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States;

(II) whether a foreign terrorist organization has a significant presence in the country or area; and

(III) whether the country or area is a safe haven for terrorists.

(iii) Annual review

The Secretary shall conduct a review, on an annual basis, of any determination made under clause (i).

(E) Report

Beginning not later than one year after December 18, 2015, and annually thereafter, the Secretary of Homeland Security shall submit to the Committee on Homeland Security, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, the Select Committee on Intelligence, and the Committee on the Judiciary of the Senate a report on each instance in which the Secretary exercised the waiver authority under subparagraph (C) during the previous year.

(b) Waiver of rights

An alien may not be provided a waiver under the program unless the alien has waived any right—

(1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

(c) Designation of program countries

(1) In general

The Secretary of Homeland Security, in consultation with the Secretary of State, may designate any country as a program country if it meets the requirements of paragraph (2).

(2) Qualifications

Except as provided in subsection (f), a country may not be designated as a program country unless the following requirements are met:

(A) Low nonimmigrant visa refusal rate

Either—

(i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during—

(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and

(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or

(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.

(B) Passport program

(i) Issuance of passports

The government of the country certifies that it issues to its citizens passports described in subparagraph (A) of subsection (a)(3), and on or after April 1, 2016, passports described in subparagraph (B) of subsection (a)(3).

(ii) Validation of passports

Not later than October 1, 2016, the government of the country certifies that it has in place mechanisms to validate passports described in subparagraphs (A) and (B) of subsection (a)(3) at each key port of entry into that country. This requirement shall not apply to travel between countries which fall within the Schengen Zone.

(C) Law enforcement and security interests

The Secretary of Homeland Security, in consultation with the Secretary of State—

(i) evaluates the effect that the country's designation would have on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(ii) determines that such interests would not be compromised by the designation of the country; and

(iii) submits a written report to the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Homeland Security of the House of Representatives and the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs of the Senate regarding the country's qualification for designation that includes an explanation of such determination.

(D) Reporting lost and stolen passports

The government of the country enters into an agreement with the United States to report, or make available through Interpol or other means as designated by the Secretary of Homeland Security, to the United States Government information about the theft or loss of passports not later than 24 hours after becoming aware of the theft or loss and in a manner specified in the agreement.

(E) Repatriation of aliens

The government of the country accepts for repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued not later than three weeks after the issuance of the final order of removal. Nothing in this subparagraph creates any duty for the United States or any right for any alien with respect to removal or release. Nothing in this subparagraph gives rise to any cause of action or claim under this paragraph or any other law against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(F) Passenger information exchange

The government of the country enters into an agreement with the United States to share information regarding whether citizens and nationals of that country traveling to the United States represent a threat to the security or welfare of the United States or its citizens, and fully implements such agreement.

(G) Interpol screening

Not later than 270 days after December 18, 2015, except in the case of a country in which there is not an international airport, the government of the country certifies to the Secretary of

Homeland Security that, to the maximum extent allowed under the laws of the country, it is screening, for unlawful activity, each person who is not a citizen or national of that country who is admitted to or departs that country, by using relevant databases and notices maintained by Interpol, or other means designated by the Secretary of Homeland Security. This requirement shall not apply to travel between countries which fall within the Schengen Zone.

(3) Continuing and subsequent qualifications

For each fiscal year after the initial period—

(A) Continuing qualification

In the case of a country which was a program country in the previous fiscal year, a country may not be designated as a program country unless the sum of—

(i) the total of the number of nationals of that country who were denied admission at the time of arrival or withdrew their application for admission during such previous fiscal year as a nonimmigrant visitor, and

(ii) the total number of nationals of that country who were admitted as nonimmigrant visitors during such previous fiscal year and who violated the terms of such admission,

was less than 2 percent of the total number of nationals of that country who applied for admission as nonimmigrant visitors during such previous fiscal year.

(B) New countries

In the case of another country, the country may not be designated as a program country unless the following requirements are met:

(i) Low nonimmigrant visa refusal rate in previous 2-year period

The average number of refusals of nonimmigrant visitor visas for nationals of that country during the two previous full fiscal years was less than 2 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years.

(ii) Low nonimmigrant visa refusal rate in each of the 2 previous years

The average number of refusals of nonimmigrant visitor visas for nationals of that country during either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year.

(4) Initial period

For purposes of paragraphs (2) and (3), the term "initial period" means the period beginning at the end of the 30-day period described in subsection (b)(1) of this section and ending on the last day of the first fiscal year which begins after such 30-day period.

(5) Written reports on continuing qualification; designation terminations

(A) Periodic evaluations

(i) In general

The Secretary of Homeland Security, in consultation with the Secretary of State, periodically (but not less than once every 2 years)—

(I) shall evaluate the effect of each program country's continued designation on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(II) shall determine, based upon the evaluation in subclause (I), whether any such designation ought to be continued or terminated under subsection (d) of this section;

(III) shall submit a written report to the Committee on the Judiciary, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on Homeland Security, of the House of Representatives and the Committee on the Judiciary, the Committee on Foreign Relations, the Select Committee on Intelligence and the Committee on Homeland Security and Governmental Affairs of the

Senate regarding the continuation or termination of the country's designation that includes an explanation of such determination and the effects described in subclause (I);

(IV) shall submit to Congress a report regarding the implementation of the electronic system for travel authorization system under subsection (h)(3) and the participation of new countries in the program through a waiver under paragraph (8); and

(V) shall submit to the committees described in subclause (III), a report that includes an assessment of the threat to the national security of the United States of the designation of each country designated as a program country, including the compliance of the government of each such country with the requirements under subparagraphs (D) and (F) of paragraph (2), as well as each such government's capacity to comply with such requirements.

(ii) Effective date

A termination of the designation of a country under this subparagraph shall take effect on the date determined by the Secretary of Homeland Security, in consultation with the Secretary of State.

(iii) Redesignation

In the case of a termination under this subparagraph, the Secretary of Homeland Security shall redesignate the country as a program country, without regard to subsection (f) of this section or paragraph (2) or (3), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that all causes of the termination have been eliminated.

(B) Emergency termination

(i) In general

In the case of a program country in which an emergency occurs that the Secretary of Homeland Security, in consultation with the Secretary of State, determines threatens the law enforcement or security interests of the United States (including the interest in enforcement of the immigration laws of the United States), the Secretary of Homeland Security shall immediately terminate the designation of the country as a program country.

(ii) Definition

For purposes of clause (i), the term "emergency" means—

(I) the overthrow of a democratically elected government;

(II) war (including undeclared war, civil war, or other military activity) on the territory of the program country;

(III) a severe breakdown in law and order affecting a significant portion of the program country's territory;

(IV) a severe economic collapse in the program country; or

(V) any other extraordinary event in the program country that threatens the law enforcement or security interests of the United States (including the interest in enforcement of the immigration laws of the United States) and where the country's participation in the program could contribute to that threat.

(iii) **Redesignation**

The Secretary of Homeland Security may redesignate the country as a program country, without regard to subsection (f) of this section or paragraph (2) or (3), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that—

(I) at least 6 months have elapsed since the effective date of the termination;

(II) the emergency that caused the termination has ended; and

(III) the average number of refusals of nonimmigrant visitor visas for nationals of that country during the period of termination under this subparagraph was less than 3.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during such period.

(iv) Program suspension authority

The Director of National Intelligence shall immediately inform the Secretary of Homeland Security of any current and credible threat which poses an imminent danger to the United States or its citizens and originates from a country participating in the visa waiver program. Upon receiving such notification, the Secretary, in consultation with the Secretary of State—

(I) may suspend a country from the visa waiver program without prior notice;

(II) shall notify any country suspended under subclause (I) and, to the extent practicable without disclosing sensitive intelligence sources and methods, provide justification for the suspension; and

(III) shall restore the suspended country's participation in the visa waiver program upon a determination that the threat no longer poses an imminent danger to the United States or its citizens.

(C) Treatment of nationals after termination

For purposes of this paragraph—

(i) nationals of a country whose designation is terminated under subparagraph (A) or (B) shall remain eligible for a waiver under subsection (a) of this section until the effective date of such termination; and

(ii) a waiver under this section that is provided to such a national for a period described in subsection (a)(1) of this section shall not, by such termination, be deemed to have been rescinded or otherwise rendered invalid, if the waiver is granted prior to such termination.

(6) Computation of visa refusal rates

For purposes of determining the eligibility of a country to be designated as a program country, the calculation of visa refusal rates shall not include any visa refusals which incorporate any procedures based on, or are otherwise based on, race, sex, or disability, unless otherwise specifically authorized by law or regulation. No court shall have jurisdiction under this paragraph to review any visa refusal, the denial of admission to the United States of any alien by the Secretary of Homeland Security, the Secretary's computation of the visa refusal rate, or the designation or nondesignation of any country.

(7) Visa waiver information

(A) In general

In refusing the application of nationals of a program country for United States visas, or the applications of nationals of a country seeking entry into the visa waiver program, a consular officer shall not knowingly or intentionally classify the refusal of the visa under a category that is not included in the calculation of the visa refusal rate only so that the percentage of that country's visa refusals is less than the percentage limitation applicable to qualification for participation in the visa waiver program.

(B) Reporting requirement

On May 1 of each year, for each country under consideration for inclusion in the visa waiver program, the Secretary of State shall provide to the appropriate congressional committees—

(i) the total number of nationals of that country that applied for United States visas in that country during the previous calendar year;

(ii) the total number of such nationals who received United States visas during the previous calendar year;

(iii) the total number of such nationals who were refused United States visas during the previous calendar year;

(iv) the total number of such nationals who were refused United States visas during the previous calendar year under each provision of this chapter under which the visas were refused; and

(v) the number of such nationals that were refused under section 1184(b) of this title as a percentage of the visas that were issued to such nationals.

(C) Certification

Not later than May 1 of each year, the United States chief of mission, acting or permanent, to each country under consideration for inclusion in the visa waiver program shall certify to the appropriate congressional committees that the information described in subparagraph (B) is accurate and provide a copy of that certification to those committees.

(D) Consideration of countries in the visa waiver program

Upon notification to the Secretary of Homeland Security that a country is under consideration for inclusion in the visa waiver program, the Secretary of State shall provide all of the information described in subparagraph (B) to the Secretary of Homeland Security.

(E) Definition

In this paragraph, the term "appropriate congressional committees" means the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on International Relations of the House of Representatives.

(8) Nonimmigrant visa refusal rate flexibility

(A) Certification

(i) In general

On the date on which an air exit system is in place that can verify the departure of not less than 97 percent of foreign nationals who exit through airports of the United States and the electronic system for travel authorization required under subsection (h)(3) is fully operational, the Secretary of Homeland Security shall certify to Congress that such air exit system and electronic system for travel authorization are in place.

(ii) Notification to Congress

The Secretary shall notify Congress in writing of the date on which the air exit system under clause (i) fully satisfies the biometric requirements specified in subsection (i).

(iii) Temporary suspension of waiver authority

Notwithstanding any certification made under clause (i), if the Secretary has not notified Congress in accordance with clause (ii) by June 30, 2009, the Secretary's waiver authority under subparagraph (B) shall be suspended beginning on July 1, 2009, until such time as the Secretary makes such notification.

(iv) Rule of construction

Nothing in this paragraph shall be construed as in any way abrogating the reporting requirements under subsection (i)(3).

(B) Waiver

After certification by the Secretary under subparagraph (A), the Secretary, in consultation with the Secretary of State, may waive the application of paragraph (2)(A) for a country if—

(i) the country meets all security requirements of this section;

(ii) the Secretary of Homeland Security determines that the totality of the country's security risk mitigation measures provide assurance that the country's participation in the program would not compromise the law enforcement, security interests, or enforcement of the immigration laws of the United States;

(iii) there has been a sustained reduction in the rate of refusals for nonimmigrant visas for nationals of the country and conditions exist to continue such reduction;

(iv) the country cooperated with the Government of the United States on counterterrorism initiatives, information sharing, and preventing terrorist travel before the date of its designation as a program country, and the Secretary of Homeland Security and the Secretary of State determine that such cooperation will continue; and

(v)(I) the rate of refusals for nonimmigrant visitor visas for nationals of the country during the previous full fiscal year was not more than ten percent; or

(II) the visa overstay rate for the country for the previous full fiscal year does not exceed the maximum visa overstay rate, once such rate is established under subparagraph (C).

(C) Maximum visa overstay rate

(i) Requirement to establish

After certification by the Secretary under subparagraph (A), the Secretary and the Secretary of State jointly shall use information from the air exit system referred to in such subparagraph to establish a maximum visa overstay rate for countries participating in the program pursuant to a waiver under subparagraph (B). The Secretary of Homeland Security shall certify to Congress that such rate would not compromise the law enforcement, security interests, or enforcement of the immigration laws of the United States.

(ii) Visa overstay rate defined

In this paragraph the term "visa overstay rate" means, with respect to a country, the ratio of—

(I) the total number of nationals of that country who were admitted to the United States on the basis of a nonimmigrant visa whose periods of authorized stays ended during a fiscal year but who remained unlawfully in the United States beyond such periods; to

(II) the total number of nationals of that country who were admitted to the United States on the basis of a nonimmigrant visa during that fiscal year.

(iii) Report and publication

The Secretary of Homeland Security shall on the same date submit to Congress and publish in the Federal Register information relating to the maximum visa overstay rate established under clause (i). Not later than 60 days after such date, the Secretary shall issue a final maximum visa overstay rate above which a country may not participate in the program.

(9) Discretionary security-related considerations

In determining whether to waive the application of paragraph (2)(A) for a country, pursuant to paragraph (8), the Secretary of Homeland Security, in consultation with the Secretary of State, shall take into consideration other factors affecting the security of the United States, including—

(A) airport security standards in the country;

(B) whether the country assists in the operation of an effective air marshal program;

(C) the standards of passports and travel documents issued by the country; and

(D) other security-related factors, including the country's cooperation with the United States' initiatives toward combating terrorism and the country's cooperation with the United States intelligence community in sharing information regarding terrorist threats.

(10) Technical assistance

The Secretary of Homeland Security, in consultation with the Secretary of State, shall provide technical assistance to program countries to assist those countries in meeting the requirements under this section. The Secretary of Homeland Security shall ensure that the program office within the Department of Homeland Security is adequately staffed and has resources to be able to provide such technical assistance, in addition to its duties to effectively monitor compliance of the countries participating in the program with all the requirements of the program.

(11) Independent review

(A) In general

Prior to the admission of a new country into the program under this section, and in conjunction with the periodic evaluations required under subsection (c)(5)(A), the Director of National Intelligence shall conduct an independent intelligence assessment of a nominated country and member of the program.

(B) Reporting requirement

The Director shall provide to the Secretary of Homeland Security, the Secretary of State, and the Attorney General the independent intelligence assessment required under subparagraph (A).

(C) Contents

The independent intelligence assessment conducted by the Director shall include—

(i) a review of all current, credible terrorist threats of the subject country;

(ii) an evaluation of the subject country's counterterrorism efforts;

(iii) an evaluation as to the extent of the country's sharing of information beneficial to suppressing terrorist movements, financing, or actions;

(iv) an assessment of the risks associated with including the subject country in the program; and

(v) recommendations to mitigate the risks identified in clause (iv).

(12) Designation of high risk program countries

(A) In general

The Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, shall evaluate program countries on an annual basis based on the criteria described in subparagraph (B) and shall identify any program country, the admission of nationals from which under the visa waiver program under this section, the Secretary determines presents a high risk to the national security of the United States.

(B) Criteria

In evaluating program countries under subparagraph (A), the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, shall consider the following criteria:

(i) The number of nationals of the country determined to be ineligible to travel to the United States under the program during the previous year.

(ii) The number of nationals of the country who were identified in United States Government databases related to the identities of known or suspected terrorists during the previous year.

(iii) The estimated number of nationals of the country who have traveled to Iraq or Syria at any time on or after March 1, 2011 to engage in terrorism.

(iv) The capacity of the country to combat passport fraud.

(v) The level of cooperation of the country with the counter-terrorism efforts of the United States.

(vi) The adequacy of the border and immigration control of the country.

(vii) Any other criteria the Secretary of Homeland Security determines to be appropriate.

(C) Suspension of designation

The Secretary of Homeland Security, in consultation with the Secretary of State, may suspend the designation of a program country based on a determination that the country presents a high risk to the national security of the United States under subparagraph (A) until such time as the Secretary determines that the country no longer presents such a risk.

(D) Report

Not later than 60 days after December 18, 2015, and annually thereafter, the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, shall submit to the Committee on Homeland Security, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, the Select Committee on Intelligence, and the Committee on the Judiciary of the Senate a report, which includes an evaluation and threat assessment of each country determined to present a high risk to the national security of the United States under subparagraph (A).

(d) **Authority**

Notwithstanding any other provision of this section, the Secretary of Homeland Security, in consultation with the Secretary of State, may for any reason (including national security) refrain from waiving the visa requirement in respect to nationals of any country which may otherwise qualify for designation or may, at any time, rescind any waiver or designation previously granted under this section. The Secretary of Homeland Security may not waive any eligibility requirement under this section unless the Secretary notifies, with respect to the House of Representatives, the Committee on Homeland Security, the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Appropriations, and with respect to the Senate, the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Appropriations not later than 30 days before the effective date of such waiver.

(e) Carrier agreements

(1) In general

The agreement referred to in subsection (a)(4) is an agreement between a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title and the Secretary of Homeland Security under which the carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title agrees, in consideration of the waiver of the visa requirement with respect to a nonimmigrant visitor under the program—

(A) to indemnify the United States against any costs for the transportation of the alien from the United States if the visitor is refused admission to the United States or remains in the United States unlawfully after the 90-day period described in subsection (a)(1)(A) of this section,

(B) to submit daily to immigration officers any immigration forms received with respect to nonimmigrant visitors provided a waiver under the program,

(C) to be subject to the imposition of fines resulting from the transporting into the United States of a national of a designated country without a passport pursuant to regulations promulgated by the Secretary of Homeland Security, and

(D) to collect, provide, and share passenger data as required under subsection (h)(1)(B) of this section.

(2) Termination of agreements

The Secretary of Homeland Security may terminate an agreement under paragraph (1) with five days' notice to the carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title for the failure by a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title to meet the terms of such agreement.

(3) Business aircraft requirements

(A) In general

For purposes of this section, a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations[2] that owns or operates a noncommercial aircraft is a corporation that is organized under the laws of any of the States of the United States or the District of Columbia and is accredited by or a member of a national organization that sets business aviation standards. The Secretary of Homeland Security shall prescribe by regulation the provision of such information as the Secretary of Homeland

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[2] So in Original. Probably should be followed by a comma.

Security deems necessary to identify the domestic corporation, its officers, employees, shareholders, its place of business, and its business activities.

(B) Collections

In addition to any other fee authorized by law, the Secretary of Homeland Security is authorized to charge and collect, on a periodic basis, an amount from each domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, for nonimmigrant visa waiver admissions on noncommercial aircraft owned or operated by such domestic corporation equal to the total amount of fees assessed for issuance of nonimmigrant visa waiver arrival/departure forms at land border ports of entry. All fees collected under this paragraph shall be deposited into the Immigration User Fee Account established under section 1356(h) of this title.

(f) Duration and termination of designation

(1) In general

(A) Determination and notification of disqualification rate

Upon determination by the Secretary of Homeland Security that a program country's disqualification rate is 2 percent or more, the Secretary of Homeland Security shall notify the Secretary of State.

(B) Probationary status

If the program country's disqualification rate is greater than 2 percent but less than 3.5 percent, the Secretary of Homeland Security shall place the program country in probationary status for a period not to exceed 2 full fiscal years following the year in which the determination under subparagraph (A) is made.

(C) Termination of designation

Subject to paragraph (3), if the program country's disqualification rate is 3.5 percent or more, the Secretary of Homeland Security shall terminate the country's designation as a program country effective at the beginning of the second fiscal year following the fiscal year in which the determination under subparagraph (A) is made.

(2) Termination of probationary status

(A) In general

If the Secretary of Homeland Security determines at the end of the probationary period described in paragraph (1)(B) that the program country placed in probationary status under such paragraph has failed to develop a machine-readable passport program as required by section[3] (c)(2)(C), or has a disqualification rate of 2 percent or more, the Secretary of Homeland Security shall terminate the designation of the country as a program country. If the Secretary of Homeland Security determines that the program country has developed a machine-readable passport program and has a disqualification rate of less than 2 percent, the Secretary of Homeland Security shall redesignate the country as a program country.

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[3] So in original. Probably should be "subsection".

(B) Effective date

A termination of the designation of a country under subparagraph (A) shall take effect on the first day of the first fiscal year following the fiscal year in which the determination under such subparagraph is made. Until such date, nationals of the country shall remain eligible for a waiver under subsection (a) of this section.

(3) Nonapplicability of certain provisions

Paragraph (1)(C) shall not apply unless the total number of nationals of a program country described in paragraph (4)(A) exceeds 100.

(4) "Disqualification rate" defined

For purposes of this subsection, the term "disqualification rate" means the percentage which—

(A) the total number of nationals of the program country who were—

(i) denied admission at the time of arrival or withdrew their application for admission during the most recent fiscal year for which data are available; and

(ii) admitted as nonimmigrant visitors during such fiscal year and who violated the terms of such admission; bears to

(B) the total number of nationals of such country who applied for admission as nonimmigrant visitors during such fiscal year.

(5) Failure to report passport thefts

If the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not reporting the theft or loss of passports, as required by subsection (c)(2)(D) of this section, the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(6) Failure to share information

(A) In general

If the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not sharing information, as required by subsection (c)(2)(F), the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(B) Redesignation

In the case of a termination under this paragraph, the Secretary of Homeland Security shall redesignate the country as a program country, without regard to paragraph (2) or (3) of subsection (c) or paragraphs (1) through (4), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that the country is sharing information, as required by subsection (c)(2)(F).

(7) Failure to screen

(A) In general

Beginning on the date that is 270 days after December 18, 2015, if the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not conducting the screening required by subsection (c)(2)(G), the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(B) Redesignation

In the case of a termination under this paragraph, the Secretary of Homeland Security shall redesignate the country as a program country, without regard to paragraph (2) or (3) of subsection (c) or paragraphs (1) through (4), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that the country is conducting the screening required by subsection (c)(2)(G).

(g) Visa application sole method to dispute denial of waiver based on a ground of inadmissibility

In the case of an alien denied a waiver under the program by reason of a ground of inadmissibility described in section 1182(a) of this title that is discovered at the time of the alien's application for the waiver or through the use of an automated electronic database required under subsection (a)(9) of this section, the alien may apply for a visa at an appropriate consular office outside the United States. There shall be no other means of administrative or judicial review of such a denial, and no court or person otherwise shall have jurisdiction to consider any claim attacking the validity of such a denial.

(h) Use of information technology systems

(1) Automated entry-exit control system

(A) System

Not later than October 1, 2001, the Secretary of Homeland Security shall develop and implement a fully automated entry and exit control system that will collect a record of arrival and departure for every alien who arrives and departs by sea or air at a port of entry into the United States and is provided a waiver under the program.

(B) Requirements

The system under subparagraph (A) shall satisfy the following requirements:

(i) Data collection by carriers

Not later than October 1, 2001, the records of arrival and departure described in subparagraph (A) shall be based, to the maximum extent practicable, on passenger data collected and electronically transmitted to the automated entry and exit control system by each carrier that has an agreement under subsection (a)(4) of this section.

(ii) Data provision by carriers

Not later than October 1, 2002, no waiver may be provided under this section to an alien arriving by sea or air at a port of entry into the United States on a carrier unless the carrier is electronically transmitting to the automated entry and exit control system passenger data determined by the Secretary of Homeland Security to be sufficient to permit the Secretary of Homeland Security to carry out this paragraph.

(iii) Calculation

The system shall contain sufficient data to permit the Secretary of Homeland Security to calculate, for each program country and each fiscal year, the portion of nationals of that country who are described in subparagraph (A) and for whom no record of departure exists, expressed as a percentage of the total number of such nationals who are so described.

(C) Reporting

(i) Percentage of nationals lacking departure record

As part of the annual report required to be submitted under section 1365a(e)(1) of this title, the Secretary of Homeland Security shall include a section containing the calculation described in subparagraph (B)(iii) for each program country for the previous fiscal year, together with an analysis of that information.

(ii) System effectiveness

Not later than December 31, 2004, the Secretary of Homeland Security shall submit a written report to the Committee on the Judiciary of the United States House of Representatives and of the Senate containing the following:

(I) The conclusions of the Secretary of Homeland Security regarding the effectiveness of the automated entry and exit control system to be developed and implemented under this paragraph.

(II) The recommendations of the Secretary of Homeland Security regarding the use of the calculation described in subparagraph (B)(iii) as a basis for evaluating whether to terminate or continue the designation of a country as a program country.

The report required by this clause may be combined with the annual report required to be submitted on that date under section 1365a(e)(1) of this title.

(2) Automated data sharing system

(A) System

The Secretary of Homeland Security and the Secretary of State shall develop and implement an automated data sharing system that will permit them to share data in electronic form from their respective records systems regarding the admissibility of aliens who are nationals of a program country.

(B) Requirements

The system under subparagraph (A) shall satisfy the following requirements:

(i) Supplying information to immigration officers conducting inspections at ports of entry

Not later than October 1, 2002, the system shall enable immigration officers conducting inspections at ports of entry under section 1225 of this title to obtain from the system, with respect to aliens seeking a waiver under the program—

(I) any photograph of the alien that may be contained in the records of the Department of State or the Service; and

(II) information on whether the alien has ever been determined to be ineligible to receive a visa or ineligible to be admitted to the United States.

(ii) Supplying photographs of inadmissible aliens

The system shall permit the Secretary of Homeland Security electronically to obtain any photograph contained in the records of the Secretary of State pertaining to an alien who is a national of a program country and has been determined to be ineligible to receive a visa.

(iii) Maintaining records on applications for admission

The system shall maintain, for a minimum of 10 years, information about each application for admission made by an alien seeking a waiver under the program, including the following:

(I) The name or Service identification number of each immigration officer conducting the inspection of the alien at the port of entry.

(II) Any information described in clause (i) that is obtained from the system by any such officer.

(III) The results of the application.

(3) Electronic system for travel authorization

(A) System

The Secretary of Homeland Security, in consultation with the Secretary of State, shall develop and implement a fully automated electronic system for travel authorization (referred to in this paragraph as the "System") to collect such biographical and other information as the Secretary of Homeland Security determines necessary to determine, in advance of travel, the eligibility of, and whether there exists a law enforcement or security risk in permitting, the[4] alien to travel to the United States.

(B) Fees

(i) In general

No later than 6 months after March 4, 2010, the Secretary of Homeland Security shall establish a fee for the use of the System and begin assessment and collection of that fee. The initial fee shall be the sum of—

(I) $10 per travel authorization; and

(II) an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary.

(ii) Disposition of amounts collected

Amounts collected under clause (i)(I) shall be credited to the Travel Promotion Fund established by subsection (d) of section 2131 of title 22. Amounts collected under clause (i)(II) shall be transferred to the general fund of the Treasury and made available to pay the costs incurred to administer the System.

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[4] So in original. Probably should be "an".

(iii) Sunset of Travel Promotion Fund fee

The Secretary may not collect the fee authorized by clause (i)(I) for fiscal years beginning after September 30, 2020.

(C) Validity

(i) Period

The Secretary of Homeland Security, in consultation with the Secretary of State, shall prescribe regulations that provide for a period, not to exceed three years, during which a determination of eligibility to travel under the program will be valid. Notwithstanding any other provision under this section, the Secretary of Homeland Security may revoke any such determination or shorten the period of eligibility under any such determination at any time and for any reason.

(ii) Limitation

A determination by the Secretary of Homeland Security that an alien is eligible to travel to the United States under the program is not a determination that the alien is admissible to the United States.

(iii) Not a determination of visa eligibility

A determination by the Secretary of Homeland Security that an alien who applied for authorization to travel to the United States through the System is not eligible to travel under the program is not a determination of eligibility for a visa to travel to the United States and shall not preclude the alien from applying for a visa.

(iv) Judicial review

Notwithstanding any other provision of law, no court shall have jurisdiction to review an eligibility determination under the System.

(D) Fraud detection

The Secretary of Homeland Security shall research opportunities to incorporate into the System technology that will detect and prevent fraud and deception in the System.

(E) Additional and previous countries of citizenship

The Secretary of Homeland Security shall collect from an applicant for admission pursuant to this section information on any additional or previous countries of citizenship of that applicant. The Secretary shall take any information so collected into account when making determinations as to the eligibility of the alien for admission pursuant to this section.

(F) Report on certain limitations on travel

Not later than 30 days after December 18, 2015, and annually thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the Committee on Homeland Security, the Committee on the Judiciary, and the Committee on Foreign Affairs of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, and the Committee on Foreign Relations of the Senate a report on the number of individuals who were denied eligibility to travel under the program, or whose eligibility for such travel was revoked during the previous year, and the number of such individuals determined, in accordance with subsection (a)(6), to represent a threat to the national security of the United States, and shall include the country or countries of citizenship of each such individual.

(i) Exit system

(1) In general

Not later than one year after August 3, 2007, the Secretary of Homeland Security shall establish an exit system that records the departure on a flight leaving the United States of every alien participating in the visa waiver program established under this section.

(2) System requirements

The system established under paragraph (1) shall—

(A) match biometric information of the alien against relevant watch lists and immigration information; and

(B) compare such biometric information against manifest information collected by air carriers on passengers departing the United States to confirm such aliens have departed the United States.

(3) Report

Not later than 180 days after August 3, 2007, the Secretary shall submit to Congress a report that describes—

(A) the progress made in developing and deploying the exit system established under this subsection; and

(B) the procedures by which the Secretary shall improve the method of calculating the rates of nonimmigrants who overstay their authorized period of stay in the United States.

8. 8 U.S.C. 1201 (2012 & Supp. III 2015) provides:

Issuance of visas

(a) Immigrants; nonimmigrants

(1) Under the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, a consular officer may issue

(A) to an immigrant who has made proper application therefor, an immigrant visa which shall consist of the application provided for in section 1202 of this title, visaed by such consular officer, and shall specify the foreign state, if any, to which the immigrant is charged, the immigrant's particular status under such foreign state, the preference, immediate relative, or special immigrant classification to which the alien is charged, the date on which the validity of the visa shall expire, and such additional information as may be required; and

(B) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 1101(a)(15) of this title of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required.

(2) The Secretary of State shall provide to the Service an electronic version of the visa file of each alien who has been issued a visa to ensure that the data in that visa file is available to immigration inspectors at the United States ports of entry before the arrival of the alien at such a port of entry.

(b) Registration; photographs; waiver of requirement

Each alien who applies for a visa shall be registered in connection with his application, and shall furnish copies of his photograph signed by him for such use as may be by regulations required. The requirements of this subsection may be waived in the discretion of the Secretary of State in the case of any alien who is within that class of nonimmigrants enumerated in sections 1101(a)(15)(A), and 1101(a)(15)(G) of this title, or in the case of any alien who is granted a diplomatic visa on a diplomatic passport or on the equivalent thereof.

(c) Period of validity; renewal or replacement

(1) Immigrant visas

An immigrant visa shall be valid for such period, not exceeding six months, as shall be by regulations prescribed, except that any visa issued to a child lawfully adopted by a United States citizen and spouse while such citizen is serving abroad in the United States Armed Forces, or is employed abroad by the United States Government, or is temporarily abroad on business, shall be valid until such time, for a period not to exceed three years, as the adoptive citizen parent returns to the United States in due course of his service, employment, or business.

(2) Nonimmigrant visas

A nonimmigrant visa shall be valid for such periods as shall be by regulations prescribed. In prescribing the period of validity of a nonimmigrant visa in the case of nationals of any foreign country who are eligible for such visas, the Secretary of State shall, insofar as practicable, accord to such nationals the same treatment upon a reciprocal basis as such foreign country accords to nationals of the United States who are within a similar class; except that in the case of aliens who are nationals of a foreign country and who either are granted refugee status and firmly resettled in another foreign country or are granted permanent residence and residing in another foreign country, the Secretary of State may prescribe the period of validity of such a visa based upon the treatment granted by that other foreign country to alien refugees and permanent residents, respectively, in the United States.

(3) Visa replacement

An immigrant visa may be replaced under the original number during the fiscal year in which the original visa was issued for an immigrant who establishes to the satisfaction of the consular officer that the immigrant—

(A) was unable to use the original immigrant visa during the period of its validity because of reasons beyond his control and for which he was not responsible;

(B) is found by a consular officer to be eligible for an immigrant visa; and

(C) pays again the statutory fees for an application and an immigrant visa.

(4) Fee waiver

If an immigrant visa was issued, on or after March 27, 2013, for a child who has been lawfully adopted, or who is coming to the United States to be adopted, by a United States citizen, any statutory immigrant visa fees relating to a renewal or replacement of such visa may be waived or, if already paid, may be refunded upon request, subject to such criteria as the Secretary of State may prescribe, if—

(A) the immigrant child was unable to use the original immigrant visa during the period of its validity as a direct result of extraordinary circumstances, including the denial of an exit permit; and

(B) if such inability was attributable to factors beyond the control of the adopting parent or parents and of the immigrant.

(d) Physical examination

Prior to the issuance of an immigrant visa to any alien, the consular officer shall require such alien to submit to a physical and mental examination in accordance with such regulations as may be prescribed. Prior to the issuance of a nonimmigrant visa to any alien, the consular officer may require such alien to submit to a physical or mental examination, or both, if in his opinion such examination is necessary to ascertain whether such alien is eligible to receive a visa.

(e) Surrender of visa

Each immigrant shall surrender his immigrant visa to the immigration officer at the port of entry, who shall endorse on the visa the date and the port of arrival, the identity of the vessel or other means of transportation by which the immigrant arrived, and such other endorsements as may be by regulations required.

(f) Surrender of documents

Each nonimmigrant shall present or surrender to the immigration officer at the port of entry such documents as may be by regulation required. In the case of an alien crewman not in possession of any individual documents other than a passport and until such time as it becomes practicable to issue individual documents, such alien crewman may be admitted, subject to the provisions of this part, if his name appears in the crew list of the vessel or aircraft on which he arrives and the crew list is visaed by a consular officer, but the consular officer shall have the right to deny admission to any alien crewman from the crew list visa.

(g) Nonissuance of visas or other documents

No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law: *Provided*, That a visa or other documentation may be issued to an alien who is within the purview of section 1182(a)(4) of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: *Provided further*, That a visa may be issued to an alien defined in section 1101(a)(15)(B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

(h) Nonadmission upon arrival

Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted[1] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law. The substance of this subsection shall appear upon every visa application.

(i) Revocation of visas or documents

After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: *Provided*, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. There shall be no means of judicial review (including review pursuant to section 2241 of title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title.

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[1] So in original. Probably should be followed by "to".

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

—v.—

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether plaintiffs have standing to challenge Section 2(c) of the Executive Order where the Order subjects them to religious condemnation in a particularized manner and interferes with their ability to be reunited with family members.

2. Whether, in light of the overwhelming evidence that the Executive Order was enacted to fulfill President Trump's promise of a Muslim ban, the Fourth Circuit correctly held that Section 2(c) likely violates the Establishment Clause's prohibition against government condemnation of a particular religion.

3. Whether Section 2(c)'s ban on more than 180 million noncitizens from six countries violates the Immigration and Nationality Act.

4. Whether a nationwide injunction was an appropriate exercise of discretion in light of the dispersed location of plaintiffs throughout the country, the nationwide scope of the Executive Order, and the nature of plaintiffs' claims and injuries.

5. Whether the challenges to Section 2(c) became moot on June 14, 2017.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents refer the Court to the disclosures made in their Brief in Opposition.

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STATEMENT

1. On his eighth day in office, the President signed an unprecedented executive order banning hundreds of millions of people from entering the United States for 90 days. Effective immediately, it banned nationals of seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) whose combined population is more than 97% Muslim. J.A. 1404-1415. The ban bore no resemblance, in scale or justification, to any prior presidential immigration order.

The President issued the order "without consulting the relevant national security agencies," including the Department of Homeland Security ("DHS"), the Department of Defense, and the Department of State. J.A. 157-158, 224. The White House "actively shielded" the Acting Attorney General from learning its contents until after it was issued. J.A. 306.

Because of the order, the State Department summarily revoked 60,000 valid immigrant and nonimmigrant visas, including visas held by people in the United States. J.A. 609-610. Individuals were prevented from boarding planes abroad. Those who managed to reach the United States were detained at airports and land crossings.

2. The executive order enacted President Trump's campaign promise to ban Muslims from entering the United States.

In December 2015, then-candidate Trump released a "statement on preventing Muslim immigration" calling for "a total and complete shutdown of Muslims entering the United States." J.A. 1050.[1] Mr. Trump repeatedly reaffirmed his ban proposal, asserting that "Islam hates us" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 766, 772.

In May 2016, Mr. Trump announced that he was putting together an "immigration commission," headed by Rudolph Giuliani, that would "look at the 'Muslim ban,' or 'temporary ban' as we call it."[2] The day after the ban was issued, Mr. Giuliani was asked how the President had decided to ban nationals from the seven countries listed in the January order. Mr. Giuliani confirmed that, as a candidate, Mr. Trump had asked him to form a commission to come up with a way to "legally" implement a "Muslim ban," and the commission recommended using territory as a proxy for religion. J.A. 754.

In the months after the creation of the "commission," Mr. Trump explained that he would use geography as a proxy for religion. He said that he was now "talking territories instead of Muslim," because "[p]eople were so upset when I used the word Muslim." J.A. 700-701. When questioned about the constitutionality of a Muslim ban, he replied, "So you call it territories. OK? We're gonna do territories." J.A. 150, 181, 220. And when asked whether he was "changing [his] position," Mr. Trump responded: "No. Call it whatever you want. We'll call it territories, OK?"[3] He denied that focusing on territories was a "rollback" of his proposed Muslim ban.[4]

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[1] The statement remained on President Trump's continuously-updated website well into the administration. It was selectively removed on May 8, the day this case was argued in the Fourth Circuit. J.A. 179-180 n.5.

[2] https://www.youtube.com/watch?v=abXAx_wCSoE&feature=youtu.be&t=3m9s; *see also id.* at 5:27 (agreeing that "it's a ban on Muslims, with exceptions").

Following his election, but before his inauguration, President-elect Trump was asked whether he still planned on banning Muslims. He responded: "You know my plans. All along, I've proven to be right. 100% correct." J.A. 750.[5]

3. The January 27 executive order ("EO-1")[6] "appeared to take th[e] exact form" that President Trump had promised as a candidate. J.A. 220. It operated on the basis of territory and targeted only countries that were overwhelmingly Muslim.

The order twice mentioned "'honor' killings," a "well-worn tactic for stigmatizing and demeaning Islam" that President Trump had repeatedly employed as a candidate and has nothing to do with international terrorism. J.A. 224 n.17. The order also provided preferential treatment for religious minorities in refugee processing. J.A. 1409-1410. The President explained on the day he signed the order that it was designed to give Christians priority over Muslims. J.A. 182; J.A. 307 (Thacker, J.). At the signing ceremony, President Trump read the title aloud, looked out at the audience, and said, "We all know what that means." J.A. 149, 182.

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[3] https://www.cbsnews.com/news/60-minutes-trump-pence-republican-ticket/.

[4] *See also* https://youtu.be/YRez1hHA9Vg?t=2m52s ("talking about territories" because "[p]eople didn't want me to say Muslim").

[5] *Cf. Read Donald Trump's Speech on the Orlando Shooting*, Time.com (June 13, 2016) ("I called for a ban after San Bernardino and was met with great scorn and anger but now . . . many are saying that I was right to do so."), http://ti.me/1XSQ8YS.

[6] J.A. 1404-1415 (*Protecting the Nation from Foreign Terrorist Entry Into the United States*).

EO-1 was challenged by many parties. A district court in Washington enjoined the ban on February 3. On February 9, the Ninth Circuit declined to stay the Washington injunction, finding the order invalid principally on due process grounds. The Ninth Circuit also noted "significant constitutional questions" under the Establishment Clause and equal protection. *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (per curiam).

President Trump announced that, rather than defend his initial ban, he would issue a revised one. He explained, "I keep my campaign promises," J.A. 494, and said the revised version would "get just about everything" that was in EO-1, "in some ways, more." J.A. 532. Senior White House officials echoed the President, explaining that the revised order would constitute the "same basic policy" and that the "principles" would "remain the same." J.A. 842, 545.

4. President Trump signed the revised executive order on March 6, 2017, with an effective date of March 16. J.A. 1416-1440 ("EO-2" or "the Order").

The two orders share a title, J.A. 1404, 1416; a list of banned countries (with the exception of Iraq), J.A. 1406, 1426 (§ 2(c)); a 90-day entry ban on individuals from those countries, *id.*; a worldwide review of vetting information provided by other countries, J.A. 1405-1407, 1425-1428 (§ 2); a mechanism to impose an indefinite ban following that review process, J.A. 1407, 1427 (§ 2(e)); a discretionary waiver provision, J.A. 1407, 1429-1431 (§ 3(c)); refugee-related provisions, J.A. 1409-1411, 1433-1435 (§ 6); and directions to publish the number of "honor killings" committed in the United States by foreign nationals, J.A. 1414, 1437 (§ 11(a)(iii)).

Like EO-1, EO-2 expressly linked the 90-day ban to the review of vetting information. J.A. 1405-1406, 1425-1426 (§§ 2(a), (c)). EO-1 had directed the DHS Secretary to initiate the first step of the review process described in both versions of the order "immediately" and submit a report to the President "within 30 days of the date of th[e] order" with a "list of countries that do not provide adequate information." J.A. 1405-1406 (§§ 3(a), (b)). The review and report provisions of EO-1 were never enjoined and remained in effect for 48 days, until the revised order took effect. DHS did not complete the study or submit the mandated report. *See* 4th Cir. Oral Arg. 7:55-8:45.[7] Without explanation, EO-2 restarted the ban and review periods from the beginning. J.A. 1426, 1433 (§§ 2(c), 6(a)).

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[7] https://www.c-span.org/video/?427706-1/fourth-circuit-hears-oral-argument-travel-ban.

EO-2 also exempted several categories of persons from the ban who had been the focus of the Ninth Circuit's due process ruling. President Trump explained that the revision was a strategic litigation decision and that he would prefer to "go back to the first one," describing EO-2 as "a watered-down" and "politically correct" version that he had signed at the urging of "the lawyers."[8]

5. Before issuing EO-2, President Trump directed the relevant agencies to "compile additional factual support," Gov't Stay Reply at 2-3, Doc. 102, No. 17-1351 (4th Cir. filed Apr. 5, 2017), to justify the ban. However, DHS's reports concluded that nationality is "unlikely to be a reliable indicator of potential terrorist activity," J.A. 1051, and that increased visa vetting is unlikely to reduce the risk of terrorism because an overwhelming majority of noncitizens who commit attacks are radicalized years after immigrating, J.A. 1059-1060. Those reports were not mentioned in EO-2. EO-2 also did not identify any deficiencies in existing visa vetting procedures.

Instead, EO-2 summarized information published in 2016 about conditions in the banned countries in 2015 relating to terrorism. J.A. 1420-1422 (§ 1(e)). It noted that Congress had recently revised entry requirements to require recent visitors to the six countries (and Iraq), as well as dual nationals of Syria, Iran, Sudan, and Iraq, to obtain visas for any entry to the United States. J.A. 1416-1417 (§ 1(b)(i)); J.A. 176 n.4; 8 U.S.C. § 1187(a)(12). (Previously, those individuals were eligible in certain circumstances to come to the United States without applying for visas, under the Visa Waiver Program.) And EO-2 cited one instance of terrorism-related crime involving a national of a banned country: a Somali who entered the United States as a three-year-old and was convicted 16 years later. J.A. 1424 (§ 1(h)); *United States v. Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016).[9]

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[8] J.A. 183, 1202; Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128; Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017), https://www.facebook.com/DonaldTrump/videos/10159253902870725/; *Read President Trump's Response to the Travel Ban Ruling*, Time.com (Mar. 16, 2017), http://ti.me/2o09ixe.

6. The day the President signed EO-2, the Attorney General and Secretary of Homeland Security submitted a letter to the President recommending a "temporary pause" in the entry of nationals of "certain countries" while vetting procedures were reviewed. *See* Br. 7 n.3. As the Fourth Circuit observed, the reasons given in the letter "largely echo" those set out in EO-2 itself. J.A. 229. The letter—which EO-2 does not mention—did not name any particular countries whose nationals should be banned. The next day, the Secretary of Homeland Security said that there were "probably 13 or 14 countries, not all of them Muslim countries, not all of them in the Middle East, that have questionable vetting procedures" but were not included in the ban. J.A. 590; *see also* J.A. 755.

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[9] EO-2 also cited another case involving Iraqis, but Iraq is not among the countries banned by EO-2.

7. The plaintiffs are U.S. citizens and lawful permanent residents whose relatives are beneficiaries of visa petitions or refugee applications and three organizations suing on behalf of themselves and their clients or members: the International Refugee Assistance Project ("IRAP"), HIAS, and the Middle East Studies Association ("MESA").

On March 16, the district court preliminarily enjoined Section 2(c) of EO-2—the 90-day entry ban. The district court found that extensive evidence established that "the purpose of [EO-2] remains the realization of the long-envisioned Muslim ban." J.A. 148-153. The court noted that the government did not "directly contest that this record of public statements reveals a religious motivation for the travel ban" and explained that "[i]n this highly unique case," the record established that any national security justification for the Order, even if legitimate, was secondary to its anti-Muslim purpose, and that as a result Section 2(c) likely violated the Establishment Clause. J.A. 157.[10]

The en banc Fourth Circuit affirmed the injunction in relevant part on May 25, by a 10-3 vote. The majority opinion, joined in full by seven judges and in substantial part by two more, applied the "facially legitimate and bona fide" standard of *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), as explained by Justice Kennedy's controlling concurrence (joined by Justice Alito) in *Kerry v.*

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[10] The district court did not reach the plaintiffs' equal protection claim. J.A. 161.

Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment).

The court held that the plaintiffs had presented "ample evidence" that the reason "proffered by the government is not 'bona fide.'" J.A. 214-215. The majority concluded that EO-2's "primary purpose is religious," in violation of the Establishment Clause. J.A. 219. It found a "direct link" between the President's statements "promising a Muslim ban that targets territories," the first order signed "only one week into office executing that exact plan," and EO-2. J.A. 232-233.

Three judges who concurred in the majority's Establishment Clause holding wrote separately to explain that EO-2 also violated the Immigration and Nationality Act ("INA"). J.A. 249, 254-255 (Keenan, J.) (concluding that the Order "fail[s] to satisfy the threshold requirement" of 8 U.S.C. § 1182(f), as it "fails to articulate a basis for the President's conclusion that entry by any of the approximately 180 million individuals subject to the ban 'would be detrimental to the interests of the United States'"); J.A. 262-300 (Wynn, J.) (applying the constitutional avoidance canon to conclude that the Order exceeds the authority granted to the President by Congress); J.A. 301-320 (Thacker, J.) (concluding that the Order violates the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1)(A), and that it violates the Establishment Clause even looking solely to post-inauguration evidence).

In parallel litigation (No. 16-1540), a panel of the Ninth Circuit affirmed on June 12 the Hawai'i district court's preliminary injunction as to Section

2(c) and two refugee-related provisions in Section 6. The Ninth Circuit held, in relevant part, that Section 2(c) violated the INA for reasons similar to those given by Judges Keenan and Thacker, and accordingly did not reach the constitutional claims. J.A. 1195-1205; 1209-1216. The court also vacated portions of the Hawai'i preliminary injunction that had halted the review procedures set forth in other parts of Sections 2 and 6. J.A. 1236.

8. The government petitioned for certiorari and moved for a stay of the injunction. Plaintiffs noted in their opposition that the ban would expire on June 14—90 days from the "effective date" of the Order. In response, President Trump issued a memorandum on June 14 declaring that "the effective date of each enjoined provision" of EO-2 would "be the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." J.A. 1442.

The provisions of Section 2 relating to review and reporting went into effect on June 19, when the Ninth Circuit's mandate issued. Accordingly, the report required under Section 2(b) was completed on or about July 9.[11] And the 50-day period for countries to "begin providing" additional information under Section 2(d) ended on August 28.

On June 26, this Court granted certiorari, consolidated this case with No. 16-1540, and partially stayed the preliminary injunctions in both cases. The Court held that the injunctions appropriately "covered not just respondents, but parties similarly situated to them," and stayed the injunctions only to the extent they applied to "foreign nationals abroad who have no connection to the United States at all." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-2088 (2017). Pursuant to the June 14 memorandum, the government began implementing the Section 2(c) ban 72 hours later. J.A. 1442.

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[11] *See U.S. Demands Nations Provide More Traveler Data or Face Sanctions*, Reuters (Jul. 13, 2017), http://live.reuters.com/Event/Live_US_Politics/1012197528 (reproducing July 12, 2017 State Department cable stating that report had been completed).

SUMMARY OF ARGUMENT

One of the central promises of the President's campaign was his proposal to ban Muslims. When criticized for explicitly calling for a Muslim ban, he explained that he would do so by "talking territories" instead of using "the word Muslim." A week after taking office, and without consulting any of the relevant agencies, he did just that, barring nationals of a list of overwhelmingly Muslim countries for 90 days, and explaining on national television that the order was designed to favor Christians over Muslims. When that order was enjoined, he issued the revised order at issue here, EO-2. Section 2(c) of EO-2 likewise bans over 180 million people for 90 days—nearly all of them Muslim. The courts below correctly found that this unprecedented use of the immigration power to condemn a religion violates the Establishment Clause.

The government does not dispute that a ban based on religion violates the Establishment Clause. And it cannot really contest that the record in this case demonstrates that Section 2(c) is just such a ban. But according to the government, no one can sue over the President's ban, no court can evaluate its legality, and if a court were to consider the ban at all, it would have to ignore the evidence demonstrating that its purpose was to single out Muslims. That vision of a President immune from judicial review, and free to override Congress's immigration judgments by proclamation, is fundamentally contrary to the Constitution, the INA, and this Court's precedent.

I. Plaintiffs' claims are justiciable. Muslim lawful permanent residents and citizens in the United States have sued because EO-2 violates their own rights under the Establishment Clause and exceeds the President's authority under the INA. EO-2 condemns plaintiffs' religion in a personal and particularized manner: It isolates and excludes them from the community, jeopardizes their visa petitions, separates their families, and upends their life plans. That is more than sufficient to support standing.

The organizational plaintiffs also have standing, both on behalf of their clients and members, and because the Order imposes concrete injuries on the organizations themselves. And, contrary to the government's contention, no principle of nonreviewability deprives this Court of power to decide plaintiffs' statutory claims; indeed, because the Court indisputably has authority to review plaintiffs' constitutional claims provided they have standing, it must also have authority to determine whether the President's actions are statutorily authorized.

Plaintiffs' claims did not become moot on June 14, because the President changed Section 2(c)'s effective date. A partial ban is currently in effect, and the government still seeks to ban those protected by the injunctions, including relatives, clients, and members of the plaintiffs. And even if the case were moot, vacatur would be inappropriate, because the case's mootness would be attributable to the government's choices.

II. The Order violates the Establishment Clause. As the district court and court of appeals found, the extraordinary record in this case demonstrates that Section 2(c) has the purpose and effect of banning Muslims from the United States. The Establishment Clause does not allow the government to erect a "Beacon [of intolerance] on our Coast." *Engel v. Vitale*, 370 U.S. 421, 432 n.16 (1962) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, II Writings of Madison, at 188 (June 20, 1785)) (internal quotation marks omitted). Government condemnation of a particular religion strikes at the very heart of the Constitution's guarantees of religious liberty and equality.

This Court's decisions in *Mandel* and *Din* confirm that the Court can and should look behind the face of the Order. Plaintiffs have made an "affirmative showing" that the President acted in "bad faith." The government urges the Court to ignore voluminous and remarkable evidence of intent. But this Court has repeatedly looked to comparable evidence in assessing the validity of government action under the Establishment Clause, and for good reason. Plaintiffs and the rest of the country cannot close their eyes to the

President's condemnation of Islam; this Court should not either.

III. The Court need not reach the constitutional question because Section 2(c) also violates the INA. The authority the President invokes, 8 U.S.C. § 1182(f), does not authorize him to reverse Congress's considered immigration policy judgments simply because he disagrees. Congress expressly considered the very concerns addressed by Section 2(c) and chose to subject nationals of the banned countries to the existing visa vetting process—not to ban them. *See* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)) (2015). Moreover, the ban operates by denying visas based on nationality, despite Congress's decision to prohibit such discrimination. 8 U.S.C. § 1152(a). The President cannot simply rewrite the parts of the INA he disagrees with.

IV. The nationwide injunction is appropriate. Enjoining the President's nationwide condemnation of Islam only as to individual plaintiffs would be as inadequate as ordering a city to cover a religious display only when the plaintiff walks by. Moreover, it would be nearly impossible to fashion a limited injunction that would address the widespread and varied injuries of the organizational plaintiffs and their clients and members.

ARGUMENT

I. THE PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

Plaintiffs have standing to challenge the Order, and this Court has authority to review their claims. The Order, which the President has made clear was designed to implement a "Muslim ban," disparages the religion of the individual plaintiffs—citizens and lawful permanent residents who are Muslim. It isolates them as Muslims from the community, sending the message to them and others that their religion makes them outsiders. It also interferes with their petitions to bring their relatives here and injects uncertainty into their family relationships and life decisions. These injuries are more than sufficient to give the individual plaintiffs standing to sue. And the organizational plaintiffs have standing based both on similar injuries to their clients and members in the United States and on the severe harms the Order inflicts on the organizations themselves.

Contrary to the government's suggestion, plaintiffs are not asserting the rights of those outside the United States. Plaintiffs' *own* rights have been violated, because the Order singles out their own religion, their own visa petitions, and their own relatives. Their ability to sue to protect those rights is well established.

The government additionally argues that, even if courts can review plaintiffs' constitutional claims, they cannot review plaintiffs' statutory claims. But the government's sweeping proposed nonreviewability "principle" has never been adopted by any court, cannot be reconciled with this Court's precedent, and would raise grave separation-of-powers concerns. Moreover, it would force the Court to reach plaintiffs' constitutional claims even if their statutory claims resolved the case.

A. The Plaintiffs Have Standing.

1. When the government conveys disfavor for one or more faiths—either expressly, by openly condemning one religion, or implicitly, by favoring others—the message of disparagement imposes injuries on members of the excluded faiths that are sufficiently real and concrete to establish Article III standing. This Court has, therefore, repeatedly reached the merits in Establishment Clause cases involving the claim that promotion of a particular religion implicitly treated nonadherents as outsiders, including in challenges to a crèche in a courthouse, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 580 (1989), a Ten Commandments monument on the grounds of the state capitol, *see Van Orden v. Perry*, 545 U.S. 677, 681 (2005), and Bible readings and recitations of the Lord's Prayer in public schools, *School District of Abington Township v. Schempp*, 374 U.S. 203, 205, 224 n.9 (1963)*; see also Santa Fe Independent School District v. Doe,* 530 U.S. 290, 309-310 (2000) (policy permitting prayer at football game which would be perceived as approved by school sent message of exclusion). In these cases, the plaintiffs were exposed to an official message of religious exclusion based on the government's promotion of a particular faith. *See McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 860 (2005) (citing *Santa Fe*, 530 U.S. at 309-310). Governmental

condemnation of a particular religion is an even starker and more targeted violation of the constitutional guarantees of religious liberty, and has no conceivable legitimate purpose. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (collecting cases).

The unrebutted record evidence demonstrates that the Order has inflicted pain and undermined plaintiffs' dignity as full members of the community. The hostility engendered by the Order affects plaintiff Meteab and his family in their daily lives and has even made his wife, who wears the hijab, reluctant to leave the house. J.A. 446-447. Similarly, the Order has made plaintiff John Doe #3 "question whether I even belong in this country." J.A. 443. The other individual plaintiffs, and many clients and members of the organizational plaintiffs, have experienced similar injuries through their contact with the Order. *See, e.g.*, J.A. 432 (Muslim MESA members understand the Order "to be an attack on Islam"); J.A. 415 ("HIAS's Muslim clients have been marginalized in their communities as a result of the Executive Order.").[12] Those injuries are cognizable under the Establishment Clause.

Plaintiffs have been personally affected by the Order in a way that members of the general public—even Muslim members of the general public—have not. The Order injected itself into the plaintiffs' lives: It directly jeopardized the visa petitions they filed in order to reunite with family members and threatened to delay or prevent those reunions. *See* 8 U.S.C. § 1154(a) (statutory right of persons in the United States to petition for visas for family members abroad). It threw their most fundamental plans—including, in some cases, their plans to continue living in the United States—into question. *See, e.g.*, J.A. 438 ("The ban forces me to choose between my career and being with my wife . . . ."), 441 ("We are delayed in starting our lives together and building our family."), 448-449 (ban threatens to prolong plaintiff's sister's exposure to life-threatening conditions).

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[12] The government does not contest that IRAP, HIAS, and MESA may assert the rights of their clients and members, including their Muslim clients and members inside the United States. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 553 (1996); J.A. 395-396, 415-416, 433.

The government's reliance on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is therefore misplaced. The *Valley Forge* plaintiffs sought to challenge a property transfer in Pennsylvania, hundreds of miles from their homes, which they had read about in a press release. *Id.* at 486-487. They were complete strangers to the challenged conduct, "abstractly disagreeing" with a transfer of property they had never seen, J.A. 202, and they claimed no injury of isolation, exclusion, or condemnation, 454 U.S. at 485. The plaintiffs in this case could not be more different; they have been condemned because of their faith by "the highest elected office in the nation," J.A. 201, and are personally affected by the operation of the Order, *cf. Awad v. Ziriax*, 670 F.3d 1111, 1122-1123 (10th Cir. 2012) (recognizing standing to challenge condemnation by a state constitutional amendment singling out Sharia law for disfavor); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc) (holding that Catholics in San Francisco had standing to challenge a municipal resolution critical of Catholic doctrine based on their "daily experience of contact with a government that officially condemns [their] religion").[13]

2. Plaintiffs are and always have been "asserting violations of their own constitutional rights," Br. 26, and seeking redress for their own injuries, J.A. 56, 81, 95-104.

The government is wrong to suggest that because EO-2 denies visas to the plaintiffs' relatives, it cannot injure the plaintiffs themselves, or violate the plaintiffs' own rights. This Court has repeatedly decided the claims of individuals in the United States who allege that the government is injuring *them* and violating *their* rights through its use of the immigration power, even when the government does so by refusing to allow foreign nationals abroad to travel to the United States. *See*

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[13] For these reasons, *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), is inapposite. The plaintiffs in that case, who asserted no condemnation injury, were in no way affected by the challenged action and acknowledged that on their theory anyone, even a judge on the panel, would have standing. J.A. 202-203 n.11. *See also Allen v. Wright*, 468 U.S. 737, 755 (1984) (injury in an *equal protection* case is "personal[] deni[al of] equal treatment") (citation and quotation marks omitted); *Smith v. Jefferson County Board of School Commissioners*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc) (no condemnation injury asserted).

Mandel, 408 U.S. at 764-765; *Din*, 135 S. Ct. at 2040-2042; *cf.* Oral Arg., *Washington v. Trump*, No. 17-35105, 2017 WLNR 4070578 (9th Cir. Feb. 7, 2017) (conceding that "a U.S. citizen with a connection to someone seeking entry" would have standing to challenge EO-1).

This Court has also recognized that injuries resulting from government regulation targeting others are cognizable under the Establishment Clause. In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961), the plaintiff company had standing to challenge a Sunday closing law, even though only the company's employees—not the company itself—had been regulated, prosecuted, and fined for violating the law. *Id.* at 585-586. Contrary to the government's suggestion, the companion case, *McGowan v. Maryland*, 366 U.S. 420 (1961), does not say that only direct regulation can cause an Establishment Clause injury. Instead, it explains that the plaintiffs in that case could not allege that their Free Exercise Clause rights were violated where they never even explained what their religious beliefs were. *Id.* at 429. And it goes on to find that plaintiffs *did* have standing to raise their Establishment Clause claims, since they had suffered a "direct economic injury" under the challenged law. *Id.* at 430. *McGowan* and *Two Guys* underscore that the question is whether the challenged action *injures* the plaintiff, not whether it directly regulates him or her.[14] The Order plainly injures these plaintiffs.

3. The government contends that its issuance of visas to Doe #1's wife and Doe #3's wife, pursuant to the preliminary injunction in this case, renders their claims moot. The visas do not fully redress the injuries that these plaintiffs would suffer in the absence of the injunction. Section 2(c) would still condemn their religion and isolate them from the community. And, if the injunction were lifted, that condemnation would be directed with particular force at the plaintiffs and their families; the clear message to Does #1 and #3 would be that their spouses do not belong here and that they should have been excluded.

And other plaintiffs still have applications pending, including Mr. Mohomed, Jane Doe #2, and clients of the organizational plaintiffs in the United States and abroad. J.A. 387-88, 393-94, 410, 451, 453-54. The government notes that some of the other plaintiffs' relatives seek refugee status and so are subject to the refugee suspension in Section 6. Br. 28 n.10. But that is no answer: They are also from the six banned countries, and so also subject to Section 2(c). Because these plaintiffs' relatives are barred by both provisions—each of which the plaintiffs in this case have challenged—they have standing to challenge both. *See Vill. of Arlington*

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[14] *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 16-17 (2004), is far afield from this case. In *Newdow*, the Court held as a prudential matter that a father could not sue on behalf of his daughter where it appeared that California's domestic relations law did not give him the right to do so.

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261 (1977) (standing to challenge "barrier" even where its removal would not "guarantee" ultimate success).

Moreover, all the plaintiffs, regardless of the stage of their relatives' applications, remain singled out by the Order's condemnation in a personal and particularized way. *Cf. Santa Fe*, 530 U.S. at 313-314 (policy facially enjoined despite "no certainty" that any prayer would occur because the policy's "mere passage" with religious purpose was an "equally important[] constitutional injur[y]").[15]

4. The government ultimately concedes that dignitary injuries are cognizable under some circumstances. Br. 31-32 (acknowledging "'spiritual'" injuries). But it posits without any reasoned justification that such injuries are not cognizable here because the Order "says nothing about religion, and does not subject [plaintiffs] to a religious exercise."

The law is clear, though, that the Establishment Clause "extends beyond facial discrimination." *Lukumi*, 508 U.S. at 534.[16] Official condemnation of a particular religion "cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.*; *see also Santa Fe*, 530 U.S. at 307 n.21; *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 699 (1994). That the President sought to express an anti-Muslim message without using the word "Muslim" in the Order itself does not alter plaintiffs' standing. Nor are the Establishment Clause's strictures limited to government involvement in religious *exercises*. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 690 (law creating separate school district, without any religious exercise, violated the Establishment Clause).

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[15] The plaintiffs have filed a motion to add two individuals as plaintiffs in this case. Those individuals were and still are similarly situated to Doe #1 at the time the Fourth Circuit issued its opinion. Should the Court be in any doubt as to the standing of the current plaintiffs, it would be fair and appropriate to grant the motion and "remove the matter from controversy." *Mullaney v. Anderson*, 342 U.S. 415, 416 (1952).

[16] *Lukumi*, decided under the Free Exercise Clause, drew heavily on and further developed the Court's Establishment Clause jurisprudence.

The government dismisses *Lukumi* and *Kiryas Joel* as involving "religious gerrymandering." Br. 73 n.21 (internal quotation marks omitted). But the Order is a religious gerrymander too. The countries selected for the ban are overwhelmingly Muslim, J.A. 173 n.2; direct evidence, including the President's own statements, demonstrates that nationality was used as a proxy for religion, *cf. Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266-1268 (2015) (considering direct evidence of racial gerrymandering); and the face of the Order reflects "anti-Islamic dog-whistling," J.A. 224 n.17. And, in any event, no case suggests that a facially neutral law can *only* violate the Establishment Clause if it is a "religious gerrymander."

5. Section 2(c) also inflicts direct injuries on the organizational plaintiffs that do not derive from their relationship with their clients and members. The Order cognizably injures MESA, for example, by causing MESA members from the six

banned countries not to attend its annual conference. J.A. 429-430, 432-435. This undermines MESA's mission and imposes concrete financial harms. *Id.*; *see also Hawai'i v. Trump*, No. 17-16426, 2017 WL 3911055, at *12 (9th Cir. Sept. 7, 2017) (recognizing that interference with "organizational purpose" can confer standing). The government's only response is that the ban was originally intended to end before MESA's November conference. Br. 28 n.10. But the government ignores both the significant advance planning necessary to obtain a visa and arrange to attend an overseas conference and the unrebutted record evidence demonstrating that the Order has already discouraged MESA's Muslim members from traveling to the United States. *See* J.A. 432-433; *see also id.* at 434 (as of March, MESA received 133 fewer submissions to its conference than in 2014 as a result of the Order, representing a financial loss of $18,000); *Hawai'i*, 2017 WL 3911055, at *11-12.

The Order also injures IRAP and HIAS. Both organizations have clients from the six banned countries seeking to immigrate to the United States (as well as clients from those countries already in the United States). J.A. 387-388, 398-399. Not only will the ban frustrate each organization's purpose, *see* J.A. 387, 392-393, 397-398 (HIAS's religious commitment to "welcome, love and protect the stranger"), but these organizations will also be forced to divert resources to address its impact, waste unrecoverable resources already expended in responding to their clients' needs, and endure future financial losses, including the loss of grant funds, J.A. 388-391, 402-

403, 405-408; *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Hawai'i*, 2017 WL 3911055, at *11-12.

B. This Court Can Review the Plaintiffs' Statutory Claims.

The government concedes that, if standing is established, the Court may review plaintiffs' constitutional claims. Br. 23 (agreeing that a claim "For A Violation Of A U.S. Citizen's Own Constitutional Rights" is justiciable), 26-27. But it advances the sweeping contention that courts cannot review whether executive branch policies governing visas or entry comply with statutory law. Br. 22-27. No court has ever adopted that view, and no statute remotely compels it.

1. There is no rule that entry policies are wholly immune from review of statutory claims. In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court considered the claim that a presidential proclamation barring entry under 8 U.S.C. § 1182(f), the same statute at issue here, violated the INA. *Id.* at 165-166, 172 & n.27. The Court rejected the government's arguments—strikingly similar to those advanced here—that the Court lacked authority to review the President's entry ban and reviewed the statutory claim on the merits. *Id.* at 170-189; *see* U.S. Br. 13-18 & n.9, 55-57, 1992 WL 541276, Reply Br. 1-4, 1993 WL 290141, *Sale v. Haitian Ctrs. Council, Inc.* (No. 92-344); *see also Dames & Moore v. Regan*, 453 U.S. 654, 669-688 (1981) (reviewing on the merits whether an executive order with major foreign policy implications complied with statute); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S.

189, 196 (2012) (even in foreign affairs context, deciding whether the interpretation of a statute is correct is "a familiar judicial exercise").

Moreover, because the government's theory of nonreviewability goes only to the statutory claims, it would force courts to reach constitutional questions, contrary to the "well-established principle" that courts should not "decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. District No. One v. Holder*, 557 U.S. 193, 205 (2009) (internal quotation marks omitted). As then-Judge Ginsburg and Judge Bork agreed, where courts have authority to decide a constitutional challenge to a visa denial, they must also be able to decide whether Congress has authorized the denial before reaching the constitutional question. *Abourezk v. Reagan*, 785 F.2d 1043, 1052 (D.C. Cir. 1986) (Ginsburg, J.) (holding that statutory claim against exclusion decision was reviewable); *accord id.* at 1062 n.1 (Bork, J., dissenting) (disagreeing on merits, but concluding: "When the actions of the executive branch are challenged as violative of constitutional rights, the issue of the scope and source of executive authority necessarily becomes part of the analysis in which a court is required to engage.").

2. The government does not even acknowledge *Sale* or the reviewability analysis in *Abourezk*. It does not cite a single case (from this Court or any other) holding that entry or visa *policies* cannot be reviewed, as opposed to individual consular decisions. It points to no statute precluding review of entry policies. Instead, it invokes two lines of cases that come

nowhere near justifying the sweeping and ill-considered theory it asks this Court to announce.

The government first points to cases emphasizing the breadth of substantive congressional power to regulate admissions. Br. 23-24. But in several of those cases the Court actually reviewed statutory claims brought against exclusion policies *on the merits*. For instance, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court reviewed two statutory claims against a presidential proclamation and regulations governing entry. *Id.* at 544-547 (rejecting, on the merits, the petitioner's challenge to her exclusion under the War Brides Act and a statute delegating authority to bar entry during a national emergency); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 583 & n.4 (1952) (rejecting, on the merits, claim that deportation proceedings violated the Administrative Procedure Act ("APA")).

The government also cites a lower court decision holding that individual consular decisions to deny visas abroad are usually nonreviewable. Br. 24-25 (citing *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)). This Court has never endorsed that doctrine. Moreover, even the lower courts have applied it only to an individual "consular official's decision to issue or withhold a visa," *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008) (internal quotation marks omitted), not to statutory challenges to executive orders or policy directives, *see Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988); *Int'l Union of Bricklayers*

& Allied Craftsmen v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985).[17]

3. The government invokes statutes declining to create a cause of action to challenge individual visa denials or grants, restricting judicial review of individual visa revocations, and foreclosing APA suits challenging individual exclusion orders (but not suits challenging visa denials). Br. 25-26. But none of these provisions address the claims at issue here. More fundamentally, the government's claim that Congress has not "authorized any judicial review of visa denials" is beside the point. Br. 25. The question is whether Congress has manifested a "clear and convincing" intent to "restrict access to judicial review" for statutory challenges to a broad policy denying entry or visa issuance. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986) (internal quotation marks omitted). The government has cited no provision remotely barring such challenges. *Cf. Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471-472 (D.C. Cir. 1995) (holding that visa petitioners could challenge policy, and explaining that individuals personally

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[17] The lower court cases rely on Congress's delegation of uniquely broad discretion to *consular officers*, who make millions of individual visa decisions each year, in most cases thousands of miles from the United States—circumstances that, at least historically, presented logistical challenges. *See, e.g.*, *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929); *Saavedra Bruno*, 197 F.3d at 1156; 8 U.S.C. §§ 1104(a)(1), 1201(a)(1); 6 U.S.C. § 236(b)(1). This case involves no similar problems.

connected to nonimmigrant visa applications can also sue) (citing *Abourezk*, 785 F.2d at 1050-1051), *vacated on other grounds*, 519 U.S. 1 (1996).

4. Finally, the government suggests that there is no cause of action to challenge the ban, because the President is not subject to the APA. Br. 41-42. But neither of the injunctions against Section 2(c) applies to the President himself, only to the agencies that would carry out the ban. J.A. 245, 1235. Their actions are clearly subject to review. *See* 5 U.S.C. § 702. That there is law to be applied is clear as well. *See infra* (addressing the INA's limitations on the President's proclamation authority). And even if the APA were inapplicable, injunctive relief would still be available. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384-1385 (2015) (describing "a long history of judicial review of illegal executive action" in equity); *Dames & Moore*, 453 U.S. at 669-688 (reviewing statutory claims against executive order). In short, the government has not overcome "the strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289 & n.9, 298 (2001) (collecting cases). As this Court did in *Sale*, and as the D.C. Circuit did in *Abourezk*, the Court may determine whether the executive's action complies with the INA.

C. The Case Is Not Moot, and in Any Event the Court Should Not Vacate the Judgment Below.

This case is not moot. As plaintiffs previously explained, Section 2(c) would have expired on June 14. *See* BIO 13-15. However, the President signed a memorandum that day directing that the effective date for each separate provision would be the date and time an injunction of that provision is stayed or lifted. J.A. 1442. And a partial ban is currently in effect. The dispute therefore remains live.

The memorandum and ongoing litigation in this case underscore that the government intends to impose as much of the Section 2(c) ban as it can, whenever it can. Whether it does so under EO-2 as currently amended, or amends it further in response to further court orders, the "gravamen" of plaintiffs' injuries remains, and a decision declaring Section 2(c) invalid is necessary. *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 662 (1993); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (case was not moot where defendant indicated intention to reenact provision if the injunction were vacated on mootness grounds).

If the Court nonetheless does find the appeal is moot, it should not vacate the judgment below. Vacatur is an "equitable remedy" that is available only to "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (internal quotation marks omitted); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). The government did not seek to obtain judgment in this Court before June 14. Were the Court to hold that the case became moot on June 14, that outcome would be entirely attributable to the government's choices in drafting the Order and in litigating this case. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513

U.S. 18, 26 (1994) ("voluntary forfeiture of review" disentitled party from "the extraordinary remedy of vacatur").

II. THE ORDER VIOLATES THE ESTABLISHMENT CLAUSE.

The principles of the Establishment Clause are "fundamental to freedom" and "rooted in the foundation soil of our Nation." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). Its "clearest command . . . is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The Framers knew well the dangers of religious favoritism and exclusion. In the colonial era, Georgia attempted to exclude Catholics, and Virginia "enacted a law banning the unreasonable and turbulent sort of people, commonly called Quakers." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2129, 2163 (2003) (internal quotation marks omitted).

As James Madison, the architect of the Establishment Clause, explained, and this Court later echoed, "the first step . . . in the career of intolerance" is to place "a Beacon on our Coast, warning" the "persecuted and oppressed of every Nation and Religion" that they must "seek some other haven." *Engel*, 370 U.S. at 432 n.16 (1962) (quoting James Madison, *Memorial and Remonstrance against Religious Assessments*, at 188) (internal quotation marks omitted).

President Trump's Order is a 21st century version of the "Beacon on our Coast" that the Framers foreswore. It seeks to keep Muslims out based on the belief that, in the President's own words, "Islam hates us." J.A. 766.

A. The Order Is Invalid Under the Establishment Clause Regardless of Whether the Court Applies *Mandel*.

1. The Establishment Clause creates both an individual right and a structural constraint on governmental power. *See Engel*, 370 U.S. at 430 (Establishment Clause "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not"); *McCreary*, 545 U.S. at 876 (warning of "the civic divisiveness that follows when the government weighs in on one side of religious debate"); *McGowan*, 366 U.S. at 430.

Moreover, as *Engel* reminds us in quoting Madison, there has always been a special nexus between immigration and principles of religious neutrality. *See* McConnell, 44 Wm. & Mary L. Rev. at 2186 ("The animating purpose of the Puritan migration to America was, after all, religious: to find a place where they could practice their religion without suffering harassment and persecution."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947). Leaving a violation unchecked merely because it operates through the immigration system risks the very divisiveness that the Establishment Clause seeks to prevent. *See* Amicus Br. of Mormon History & Law Scholars 16-22 (describing the lasting divisive effects of restrictions on Mormon immigration).

In this case, as in *INS v. Chadha*, 462 U.S. 919 (1983), the question is whether the government has overstepped its structural constitutional bounds. *See id.* at 940-941 (undertaking ordinary separation-of-powers analysis because "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing" its immigration power); *see also Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."). Thus, as in *Chadha*, the Court need not apply any special immigration-related filter to its analysis—including the "facially legitimate and bona fide" requirement of *Mandel*, 408 U.S. 753.

2. If the Court does apply *Mandel*, that is no impediment to examining the Order's purpose. *Mandel* explains that where the government gives a "facially legitimate and bona fide reason" for excluding an alien, courts will not "look behind" the given explanation when considering the claims that result. 408 U.S. at 770. In contrast, as Justices Kennedy and Alito explained in their controlling concurrence in *Kerry v. Din,* when a challenger makes "an affirmative showing of bad faith," 135 S. Ct. at 2141, *Mandel* teaches that it *is* appropriate to "look behind" the face of the Order, *id.* (quoting *Mandel*, 408 U.S. at 770).

This is, as the Fourth Circuit found, just such a rare case: Plaintiffs have "ample evidence" of improper purpose. J.A. 214. Moreover, the Order is not facially legitimate. For both of these reasons, applying *Mandel* requires the Court to "look behind" the face of the Order.

3. The government resists the conclusion that *Mandel* and *Din* mandate an analysis of bad faith, but only by misreading the cases. It maintains that courts may decide only whether "the reason is *facially* bona fide as well as facially legitimate," Br. 66 (emphasis added), but that is wrong. It is inconsistent with the controlling *Din* concurrence, which expressly contemplates looking beyond the face of an order where a plaintiff has made an affirmative showing of bad faith. *Din*, 135 S. Ct. at 2141. It would render *Mandel*'s "bona fide" element meaningless, because an order that is facially legitimate would necessarily also be "bona fide" on its face. And it does not reflect the natural meaning of "bona fide": A "bona fide" reason is given "sincerely," "honestly," and "with good faith." Bona Fide, *Black's Law Dictionary* 223 (4th rev. ed. 1968); *see* J.A. 212-213. In most instances, that cannot be assessed as a facial matter.

For similar reasons, the government's description of *Mandel*'s standard as an "objective 'rational-basis' standard" that forbids any inquiry into purpose is not consistent with *Mandel* or *Din*. Br. 64 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017)). The Court did not describe *Mandel*'s standard that way in *Morales-Santana*. Rather, the Court explained that *Fiallo v. Bell*, 430 U.S. 787 (1977)—not *Mandel*—applied "rational-basis" review. *Morales-Santana*, 137 S. Ct. at 1693. *Fiallo*, however, involved a challenge to congressional line-drawing on the face of the statute itself. 430 U.S. at 791. The plaintiff was not seeking to "look behind" the statute's text to evidence of purpose, and thus the Court had no occasion in that case to address how such evidence would be treated. *See id.* at 798-799.

4. The government alternately proposes that the bona-fide inquiry may lead to an examination of the evidence, but only in situations where a statute specifies "factual predicates" for exclusion and the plaintiff has made an "affirmative showing" that those predicates were not met. In such cases, the government says, the inquiry might allow for additional "factual details" to be produced, but it could not consider whether the officer was acting with an improper *purpose*. Br. 67-68.

That reading is also contrary to the *Din* concurrence, and would turn *Mandel* and *Din* on their heads. In *Din*, the government supplied a "facially legitimate" reason for denying a visa to the noncitizen applicant by citing a specific statute. 135 S. Ct. at 2140. That statute, in turn, set out "specific criteria"—"discrete factual predicates"—for the denial. *Id.* at 2140-2141. Absent any evidence or allegation of bad faith, those circumstances indicated that the government "relied upon a bona fide factual basis for denying a visa." *Id.* at 2140.

Accordingly, the *Din* concurrence did *not* ask whether the plaintiff "ma[de] an 'affirmative showing' that [the] consular officer had no 'bona fide *factual basis*'" for the decision. Br. 68 (emphasis added). Instead, it asked whether she had "plausibly alleged with sufficient particularity" "an affirmative showing of *bad faith* on the part of the consular officer." *Din*, 135 S. Ct. at 2141 (emphasis added). *That* was what the plaintiff would have had to show for the Court to "look behind" the government's stated reason in *Din*. And that is what the plaintiffs have shown here.

5. Underscoring that the "bona fide" inquiry encompasses inquiries into purpose, the *Din* concurrence cites a case in which the Court considered an improper-purpose allegation—that a government action was motivated by "conspiracy, fraud or deception." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (cited in *Din*, 135 S. Ct. at 2140). The lower courts have understood *Mandel*'s "bona fide" prong the same way—especially after *Din*. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1173 (9th Cir. 2016) (rejecting claim of racial discrimination because plaintiff did "not plausibly establish that the decision to deny [him] a visa was made on a forbidden racial basis"); *American Academy of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide").

No court has ever adopted the government's position on *Mandel*, and for good reason. On the government's view, even irrefutable evidence that a government official had denied entry out of racial or religious animus, or in order to collect a bribe, could not be considered. And the government's version of *Mandel* would generate far more litigation, as it would allow individuals to bring claims that the government was factually wrong in applying specific exclusion grounds, while barring any consideration of the far rarer case in which there is affirmative evidence that officials were acting with an unconstitutional purpose. That is the opposite of what *Mandel* and *Din* teach.[18]

B. Section 2(c) Fails Any Purpose Inquiry.

1. Both courts below, and the district court in *Hawai'i*, concluded that Section 2(c) was issued with the improper purpose of banning Muslims. J.A. 119-128, 147-161 (district court); J.A. 172-184, 214-236 (Fourth Circuit); *id.* at 219, 233 (citing "compelling" evidence in this "unique" case); J.A. 1104-1114, 1129-1139 (District of Hawai'i); *id.* at 1134 (noting the "remarkable facts at issue here"). Even a brief recital of the facts leaves no doubt about the purpose of the Order.

As a candidate, President Trump announced that he would ban Muslim immigration because, in his view, Islam "hates us." J.A. 766. He convened a commission to recommend how to effectuate a Muslim ban legally, then acted on its proposal of using nationality as a proxy. J.A. 754; *supra* n.2. He explained that he began "talking territories instead of Muslim," because "[p]eople were so upset when I used the word Muslim." J.A. 700-701. And he repeatedly denied that he was "changing [his] position" or that the shift to territories was a "rollback" from his proposed Muslim ban. *Id.*

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[18] Justice Marshall's dissent in *Mandel* is illustrative. Contrary to the government's contention, the dissent did not assert that the Court should have inquired into whether an official acted with an improper purpose. *Mandel*, 408 U.S. at 774-786. The plaintiffs in *Mandel* made no allegation of bad faith, much less an affirmative showing. The concern that Justice Marshall voiced in dissent was that he saw no *evidence* to support the Attorney General's decision not to grant Mandel a waiver. *Id.* at 778. Justice Marshall urged a "factual hearing to see if there is any support for the Attorney General's determination." *Id.* The *Mandel* majority rejected that proposed factual review, instead requiring that the determination be "facially legitimate *and* bona fide." *Id.* at 770 (emphasis added).

A week into his presidency, without consulting any of the government agencies tasked with defending national security, President Trump signed an executive order that did the very thing he promised he would do as a candidate: suspend entry by nationals of overwhelmingly Muslim countries. J.A. 157-158, 224, 1404-1415. After the first order was enjoined, he issued a second. Aides made clear that it was the same fundamental policy. J.A. 545, 842. The President later explained that he only issued the "politically correct" second order because "the lawyers" said he should, and lamented that he did not stick with "the first one and go all the way," which is what he "wanted to do in the first place." J.A. 138, 1202, *supra* n.8.

EO-2, like EO-1, does exactly what President Trump promised: It uses nationality as a proxy to ban Muslims. It purports to do so on grounds relating to security and vetting, but it ignores the government's own conclusion that the ban would not advance those interests. J.A. 1051, 1059-1060; *see also* Amicus Br. of the Cato Institute 22-23 (noting that from 1975 to 2016, no national of any of the six countries was involved in a fatal terrorist attack); Amicus Br. of Former National Security Officials 5-13, Doc. 126-1, No. 17-1351 (4th Cir. filed Apr. 13, 2017); Amicus Br. of T.A. 18-23. And, on its face, the Order directs reporting on "honor killings," which have nothing to do with international terrorism, but are a common way to denigrate Islam. J.A. 224 n.17, 312 n.7, 1437; Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, Just Security, June 9, 2017.[19] As the Fourth Circuit held, "EO-2 would likely fail any purpose test." J.A. 236 n.22.

The unrebutted evidence in the record is more than enough to make out an Establishment Clause violation under this Court's precedent. Those cases do not require the Court to psychoanalyze the President or subject him to intrusive discovery, as the government contends. Br. 70-72. Rather, they require an *objective* assessment of whether a reasonable observer, aware of the public, "readily discoverable fact[s]" surrounding the Order, would view it as denigrating Islam. *McCreary*, 545 U.S. at 862; *see also Santa Fe*, 530 U.S. at 308.

Here, as both lower courts found, a reasonable observer—aware of the text and operation of the ban, its context, and the words of the President himself and his aides—could reach only one conclusion: The Order was designed to ban Muslims.

2. That evidence establishes that the Order is not bona fide. Fundamentally, it is not bona fide to use the immigration power to condemn a particular religion—and indeed, even the

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[19] https://www.justsecurity.org/41953/facially-legitimate-bona-fide-why-unconstitutional-travel-ban/.

government has never asserted that it would be. Moreover, inventing post-hoc rationalizations and selectively ignoring relevant agency conclusions is the antithesis of honesty and good faith.

Cases that satisfy the requisite affirmative showing of bad faith are appropriately rare. *See, e.g.*, *Cardenas*, 826 F.3d at 1173. But if the facts of this case do not show "bad faith," it is difficult to imagine any circumstances that would. The government offers no real response except to argue for deference so radical that it amounts to abdication, and to claim that the President's revision of EO-1 "is the opposite of bad faith" because it was undertaken to address the Ninth Circuit's due process holding. But the President's own statements fatally undermine this assertion of a good faith response.[20]

3. In addition, the Order is not facially legitimate. As signed on March 6, it was religiously gerrymandered, illogical, factually incorrect, statutorily infirm, and invoked religious stereotypes about "honor killings." Accordingly, it was facially illegitimate from the outset.[21]

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[20] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017) (attributing the "watered down, politically correct" Order to the "Justice Dept." and saying the Department "should have stayed with the original"); Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017) ("We need . . . a MUCH TOUGHER version" of the "Travel Ban").

[21] The Order's claim that banned nationals present an "unacceptably high" risk to our security under current vetting procedures, J.A. 1422-1423, is irrational on its face, since the Order allows tens of thousands of those nationals to enter the

Moreover, the Order in effect now has been modified by the June 14, 2017 Presidential memorandum. And that memorandum, by separating the 90-day ban from the review scheme it supposedly facilitates, renders the revised order even more irrational.

All of the reasons given for Section 2(c) in the Order are directly tied to the review process set forth in Section 2. According to EO-2's text, the 90-day ban will "reduce investigative burdens ... during the review period"; "ensure the proper review ... of available resources"; "ensure that adequate standards are established" post-review; and address the concern that "*until* the assessment of current screening and vetting procedures required by section 2 of this order is completed," the risk of allowing banned nationals into the country is "unacceptably high." J.A. 1422-1423,

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United States having received visas under current vetting procedures, J.A. 1428 (§ 3(a)(iii), (a)(ii), (b)(iii)), and grants *all* consular officials the ability to issue waivers, J.A. 1429-1431. Its operation belies its stated purpose: "if the conditions in the six countries" were the true motivation, the Order "would have based its ban on contact with the listed countries, not nationality." J.A. 311 (Thacker, J., concurring). It cites a patently irrational reason for banning 180 million people: a single terrorist plot, by a teenager from Somalia who had entered the country 16 years earlier as a three-year-old. J.A. 1424. And it mentions a concern that the six countries covered by Section 2(c) may be failing to provide information about their nationals to consular officials, J.A. 1419-1420, even though under existing procedures, consular officials must *already* deny visas whenever they lack sufficient information about an applicant. *See* 8 U.S.C. §§ 1201(g), 1361; 22 C.F.R. § 40.6.

1426 (emphasis added).

But the June 14 memorandum's modification means that instead of proceeding together, the ban and the review will proceed independently. Under Section 2(b) of EO-2, as modified, the worldwide vetting review was complete on July 9, 2017, and under Section 2(d), as modified, the 50-day post-review period for countries to provide additional information ended on August 28, 2017. *See also* Amicus Br. of T.A. 14-18 (explaining that the administration had already implemented a new extreme vetting policy pursuant to Section 5 of EO-2, which has never been enjoined, by the beginning of June).

The ban on people without connections to U.S. persons or entities, which is currently ongoing despite the review procedures' completion, expires on September 24, before the Court hears argument in this case. But the government is still litigating, evidently because it wants to impose a new ban on individuals *with* bona fide relationships with the United States. Any such ban will begin long after the vetting review and the post-review follow-up period are complete, and could not be justified by any of the reasons given in EO-2.

Nor is the ban's facial legitimacy saved by the government's newly added justification— "helping to persuade foreign countries to supply needed information about their nationals." Br. 45. This brand-new rationale is not even articulated on the Order's face.

C. The Court Should Not Ignore the Evidence Before It.

The government contends that the Court should ignore virtually all the evidence in this case. And, indeed, that is the approach the government takes in its brief. In 83 pages, it manages not to quote or acknowledge the content of *any* of the pre-inauguration statements and evidence demonstrating the ban's purpose. And it argues that even post-inauguration statements should essentially be ignored to the extent they undermine the government's case. Br. 76-77. But the plaintiffs and the public cannot ignore what the President has said about Islam, Muslims, and the ban. This Court should not either.

1. The government first proposes limiting review to the text of EO-2 itself. The government argues that, because "only an 'official objective' of favoring or disfavoring a religion" violates the Establishment Clause, courts are limited to examining the "operative terms" of the challenged governmental action. Br. 70 (quoting *McCreary*, 545 U.S. at 862).

The Fourth Circuit properly rejected this argument as "contrary to the well-established framework," J.A. 229, under which courts "refuse to turn a blind eye to the context in which [the challenged] policy arose," *Santa Fe*, 530 U.S. at 315. In analyzing governmental purpose under the Establishment Clause, the Court has, where relevant, relied on statements by private pastors, *McCreary*, 545 U.S. at 869; members of the public, *Lukumi*, 508 U.S. at 541; letters to the editor and newspaper advertisements, *Epperson*, 393 U.S. at

108 n.16; and invocations by students, *Santa Fe*, 530 U.S. at 295 & n.2, 297 n.4.

2. The government next contends that, even if courts can go beyond the text of Section 2(c), they may not consider any of the public statements made by President Trump and his close advisors because it "would require precisely the type of 'judicial psychoanalysis' that *McCreary* forecloses." Br. 71-72 (citation omitted).

Not so. Purpose under the Establishment Clause is assessed from the standpoint of an objective observer based on the readily discoverable facts, not on a subjective inquiry into the defendant's psyche. *McCreary*, 545 U.S. at 862. Here, there is no "*secret* motive." *Id.* at 863 (emphasis added). Just as in *McCreary*, "openly available data support[] a commonsense conclusion" regarding the Order's impermissible purpose. *Id.* Indeed, the statements the government seeks to exclude "are explicit statements of purpose . . . attributable either to President Trump directly or to his advisors." J.A. 222; *see also* J.A. 150-151 (finding the statements at issue to be "explicit, direct," and "clear statements of religious purpose"). Because President Trump and his agents have explained their purpose "on numerous occasions and in no uncertain terms," there is simply no need to "probe anyone's heart of hearts." J.A. 222. "'The remarkable facts at issue here require no such impermissible inquiry." J.A. 1134.[22]

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[22] For the same reason, the government's dire warnings about "intrusion on privileged internal Executive Branch

3. The government alternatively contends that the Court should ignore what it calls "campaign-trail comments." Br. 73; *cf.* J.A. 301-320 (Thacker, J.) (finding improper purpose without reference to campaign statements). To be clear, however, the statements at issue here were not peripheral, isolated, accidental, or off-hand. They were specific, repeated, never repudiated, confirmed post-election, immediately enacted, and amply corroborated in the Order's text, operation, and contemporaneous statements. They were a central feature of President Trump's campaign, with the core promise of a ban featured on the President's website well into his presidency.

This Court, moreover, has repeatedly considered statements made during political campaigns when they are probative of impermissible purpose. *See, e.g.*, *Washington v. Seattle School District No. 1*, 458 U.S. 457, 463, 471 (1982) (relying on referendum campaign statements in equal protection challenge); *Epperson*, 393 U.S. at 108 n.16 (relying, in Establishment Clause challenge, on materials from public campaign to pass statute); *see also Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (relying on campaign promises in Establishment Clause challenge). As the government previously explained, by way of a real-life example: "[W]hen people leading the movement to form a village openly express anti-Orthodox animus and

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deliberations" and "litigant-driven discovery" that "prob[es]" the President's "subjective views," Br. 72, are entirely beside the point, as the Fourth Circuit held. J.A. 228 n.19.

thereafter become cloaked with the color of law as the village's elected and appointed officials, their expressions of religious animus become highly probative evidentiary sources in assessing whether discriminatory intent underlay formation of the village and enactment of its zoning code." U.S. Reply Br. 6, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) (Nos. 94-7103, 94-6048, 94-6125), 1994 WL 16181393. *Cf. Arlington Heights*, 429 U.S. at 266 (intent can be proved by circumstantial as well as direct evidence); *Hunter v. Underwood*, 471 U.S. 222, 229-233 (1985). The same is true here.

Virtually all the government's observations about campaign statements—that they are frequently "short-hand for larger ideas," and can be "explained, modified, [or] retracted," Br. 73 (quotation marks and citations omitted)—apply equally to post-campaign statements, and to evidence more generally. The fact that they "often are made without the benefit of advice from an as-yet-unformed Administration," *id.*, hardly minimizes their relevance to the Order's purpose—especially when the policy itself was set without agency consultation. J.A. 157-158, 224.

The government's contentions boil down to unsubstantiated speculation that courts might—in some *other* case—misuse campaign statements. *See* Br. 73-76. But "[e]xamination of purpose . . . makes up the daily fare of every appellate court in the country," *McCreary*, 545 U.S. at 861; *see* J.A. 234-235, and courts are well equipped to determine what weight to give to any particular statement. The government has not cited a single case where a court has adopted a bar on the admission of campaign statements. This case—where those statements are highly relevant, closely tied to the President's actions, and known to everyone in the country—is certainly not the place to begin.

Likewise, the government's specter of "chill[ing] campaign speech" is a red herring. The government cites no setting where the fear of chilling speech has led courts to ignore direct evidence of unconstitutional intent. It would be a perverse rule that constitutional violations should go unremedied to ensure that candidates may freely promise to violate the Constitution.

Finally, the government claims that because the President has made a speech overseas that refrains from condemning Islam, it undermines foreign relations for the Court to consider his statements that directly condemn that religion—and to recognize the religious purpose of the Order. Br. 75-76. Yet the rest of the world already knows what the President said; this Court looking away will not obscure what is clear to everyone else.[23]

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[23] For example, in August 2017, after that overseas speech and long after his inauguration, the President revived his campaign trail suggestion that an effective way to fight terrorism is to summarily execute suspected terrorists using bullets dipped in pigs' blood. *See Trump Cites Fake Story to Endorse Racist Mass Murder as Anti-Terror Tactic*, Toronto Star (Aug. 17, 2017) (President "endorsed a fictional war crime against Muslims"), https://www.thestar.com/news/world/2017/08/17/donald-trump-endorses-racist-mass-murder-as-an-anti-terror-tactic-citing-fake-story.html; *see generally* Amicus Br. of MacArthur Justice Center 27-33 (collecting post-inauguration statements.

4. The government repeatedly cites dicta in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("*AAADC*"), implying that it requires deference to the executive's national security determinations in this case. Br. 42, 44, 64, 71-72. But the Court's holding was merely that Congress had expressly deprived it of jurisdiction over a selective-prosecution challenge. *AAADC*, 525 U.S. at 487. The Court went on in dicta to say that foreign nationals generally do not have a selective-enforcement defense to deportation, in part because such claims would involve "the disclosure of foreign-policy objectives and . . . foreign-intelligence products and techniques." *Id.* at 490-491. That was the context in which the Court declined to require the Executive to "disclose its 'real' reasons," which a court would be "ill equipped" to assess. *Id.* at 491.

The claims in this case do not raise any of those concerns. And here, unlike in *AAADC*, there is no statute precluding this Court's review. But in any event, even in *AAADC* the Court declined to "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." *Id.* This is such a case. And the government's attempt to read *AAADC* so broadly cannot be squared with this Court's refusal to defer to executive claims of national security even in times of war. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 797-798 (2008).

5. The government's remaining evidentiary objections amount to the contention that the lower courts gave too little weight to the religion-neutral reasons for the Order the

government proffered. Br. 76-78. The lower courts were right to discount these arguments.

For example, the government suggests throughout its brief that the entry ban is the product of "consultation with Members of [the] newly formed Cabinet," including the "Secretaries of State and Homeland Security and the Attorney General," who "recommend[ed]" that it be imposed. Br. 3, 74, 77; *see also* Br. 69. But the only evidence to support that assertion is a letter that: (1) was issued the same day the *second* entry ban was signed; (2) did not name any specific countries whose nationals should be banned; (3) was not mentioned in EO-2; and (4) was plainly prepared to further the government's litigation position. Particularly because it is undisputed that there was "no consultation" with the relevant agencies before the entry ban was first imposed, J.A. 120, the letter cannot outweigh the ample evidence of unconstitutional purpose.

Similarly, the government's invocation of the "'presumption of regularity'" is entirely unwarranted. Br. 78 (citation omitted). By any measure—procedurally, substantively, or historically—nothing about the efforts to impose the entry ban has been regular. Any "presumption" to the contrary has long since been rebutted.

The government has been forced to make extreme, categorical, and novel arguments in defense of the Order. That is a measure of how extreme the Order itself is. But the guideposts this case sets will, of course, shape the religious liberties of everyone, of every faith, well after this President leaves office. As the government has conceded, in its view, if a President made repeated anti-Semitic statements, said he wanted to exclude Jews from the United States, explained that he was going to do it by focusing on geography, and then issued an executive order banning all travel from Israel, citing recent terrorism in that country in the Order itself, that ban would be valid. 4th Cir. Oral Arg. 1:55:20-1:58:00.

The Court should not adopt the government's arguments. Doing so would not only harm the plaintiffs and allow the government to condemn a major American religion, but the resulting ruling would, as Justice Jackson warned in *Korematsu v. United States*, "lie[] about like a loaded weapon," threatening yet more damage for decades to come. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

III. SECTION 2(c) VIOLATES THE INA.

Before deciding a constitutional claim, the Court first determines whether resolving the case on statutory grounds makes "it unnecessary to reach the constitutional question." *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 343-344 (1999).

That is the case here. This is not a case in which the President and Congress speak with one voice. Instead, the President claims the sweeping power to arrogate Congress's immigration power to himself alone—and to exercise it free from judicial review. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). Section

1182(f) does not give him that power, especially where, as here, § 1152(a) specifically prohibits the policy at issue. Section 2(c) of EO-2 thus violates the INA.

A. The Order Exceeds the President's Authority Under 8 U.S.C. § 1182(f).

1. The government asserts that there is no "meaningful" limit on the President's ability to rewrite our immigration system under 8 U.S.C. § 1182(f). Br. 42. And while it admits that the President must, under that provision, find "that entry [of a noncitizen] would be detrimental to the Nation's interests," it contends that a bare recitation of those words "should be the end of the matter." Br. 41, 44, 50.

Under the government's theory of § 1182(f), the President could use it to override swaths of the INA with which he disagreed. The President could find that immigrant workers were harming American workers, and then ban all entry on employment-based visas indefinitely. Or he could find that U.S. interests require solely a skills- or education-based immigration system, and then ban all entry on family-based visas. It would be no obstacle that Congress had enacted a detailed and extensive employment- and family-based immigration system. 8 U.S.C. § 1153(a) ("Preference allocation for family-sponsored immigrants"); § 1153(b) ("Preference allocation for employment-based immigrants"). As the government candidly admits, on its theory "the current President is entitled to look at the same information relied upon by . . . Congress . . . and to make his own judgment." Br. 48 (emphasis omitted).

That cannot be right. As this Court explained in a prior immigration case, the Framers were "acutely conscious" of the danger posed by subjecting national policy decisions to the "arbitrary action of one person." *Chadha*, 462 U.S. at 951. Congress undoubtedly did not delegate wholesale its authority to make immigration law. U.S. Const. art. I, § 8, cl. 4. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (holding that statute involving "travel controls" could not "grant the Executive totally unrestricted freedom of choice"); *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) (facially broad delegation "construe[d] narrowly" in foreign affairs context in light of constitutional concerns). And it certainly did not do so through § 1182(f), which it enacted mere months after this Court had recognized limitations on Congress's ability to delegate its power in an immigration case. *See* Pub. L. 82-414, § 212, 66 Stat. 163 (1952); *Carlson v. Landon*, 342 U.S. 524, 542-544 (1952) (holding that a "delegation of legislative power" is "permissible" only when "the executive judgment is limited by adequate standards"); *see also Mahler v. Eby*, 264 U.S. 32, 40-41 (1924).

2. Section 2(c) rejects a specific policy judgment of Congress. In 2015, Congress considered and addressed the possibility, in light of recent events, that travelers from certain countries—including those banned in EO-1 and EO-2—might commit acts of terrorism in the United States. After declining to advance proposals to ban refugees, Congress decided to make certain visitors to and dual nationals of the

countries in question ineligible for the Visa Waiver Program. *See* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)); *see also, e.g.*, H.R. 3314, 114th Cong., *introduced* July 29, 2015 (rejected refugee ban); S. 2302, 114th Cong., *introduced* Nov. 18, 2015 (rejected ban on refugees from Iraq, Libya, Somalia, Syria, and Yemen). Thus, Congress decided to require all nationals of and visitors to those countries "to apply for a visa and go through the formal visa screening process" in "an abundance of caution." 161 Cong. Rec. H9051 (Dec. 8, 2015) (statement of Rep. Miller, principal sponsor of the 2015 provision).

In that stringent, individualized vetting process, consular officers must deny visas whenever the individual cannot produce sufficient information to satisfy the officer regarding any ground of inadmissibility, including a detailed terrorism bar "cover[ing] a vast waterfront of human activity." *Din*, 135 S. Ct. at 2145-2146 (Breyer, J., dissenting); *see* 8 U.S.C. §§ 1182(a)(3)(b), 1201(g); 22 C.F.R. § 40.6; *see also* Amicus Br. of the Cato Institute 9-17 (explaining burden borne by visa applicants and documenting the extreme rarity of vetting failures). And the 2015 Act was enacted against the background of Congress *already* having strengthened the visa vetting process multiple times since the September 11 attacks to address specific identified concerns. *See, e.g.*, Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, tit. II, 116 Stat. 543 (providing for access to electronic information and training for consular officers in the "effective screening of visa applicants"); Intelligence

Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 7201, 7203, 118 Stat. 3638 (similar); *see also* Amicus Br. of Former National Security Officials 9-12, Doc. 126-1, No. 17-1351 (4th Cir. filed Apr. 13, 2017); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266.

The Order upends Congress's judgment about the proper response to the very same circumstances. It *bans* entry for nationals of the exact same countries (except Iraq) that Congress considered, even though Congress's response to the very same country conditions was to allow individuals to travel as long as they satisfactorily completed the vetting process and were issued visas. *See* J.A. 1419-1421; *compare* 161 Cong. Rec. H9049-9060 (Dec. 8, 2015); *see also* H.R. Rep. No. 114-369, at 3-4 (2015) (addressing countries that fail "to provide terrorism-related information"); *contra* Br. 58.

The Order does not provide *any* reason to think that the existing visa process is—or even might be—inadequate, and certainly no new information that Congress did not already consider. Rather, the President—acting in the first instance eight days into his term and without consulting the relevant agencies—simply concluded that Congress got it wrong, looking at "the same information" but making his "own judgment" about the proper policy response to that information. Br. 48. Congress did not, in § 1182(f) or anywhere else, authorize the President to disregard its policy judgment at will.

3. Since the enactment of § 1182(f) in 1952, many Presidents have issued suspensions of entry, but no other President has used the statute to override Congress's contrary policy judgment.

For example, President Reagan suspended the entry of certain Cuban nationals in 1986 (Br. 43-44) to retaliate against the Cuban government for its failure to abide by a migration agreement—a diplomatic event Congress did not and could not practicably address. Proclamation No. 5,517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). President Bush's 1992 suspension of unauthorized entry by sea likewise responded to an urgent influx of unauthorized migrants. Exec. Order No. 12,807, 57 Fed. Reg. 23133 (May 24, 1992); *see Sale*, 509 U.S. at 163-164 (describing escalating crisis).

Other § 1182(f) suspensions have been far narrower, *see* Br. 43 n.15, most reaching only a handful of individuals who had contributed to specific and recent harmful situations abroad. *See generally* Kate M. Manuel, *Executive Authority to Exclude Aliens*, 6-10, Cong. Res. Serv., Jan. 23, 2017 (listing § 1182(f) suspensions); 9 *Foreign Affairs Manual* 302.14-3(B)(1)(b)(2)-(3) (2016) (observing that "[s]ome" proclamations are "based on affiliation" with foreign governments or militaries, and "other[s]" on "objectionable conduct"). In each case, the suspension addressed a threat to U.S. interests to which Congress had not already responded.

That makes sense: Section 1182(f) is meant to grant authority *consistent* with the INA, not to permit a President to unilaterally override Congress's immigration policy judgments. *Accord*

Abourezk, 785 F.2d at 1049 n.2 (explaining that § 1182(f) applies to "cases that [are] *not covered* by one of the categories in [the INA]") (emphasis added); *Allende v. Shultz*, 845 F.2d 1111, 1118-1119 (1st Cir. 1988) (same).

4. Almost in passing, the government also invokes 8 U.S.C. § 1185(a)(1), which allows the President to "prescribe" "reasonable rules, regulations, and orders" governing entry. But the government contends only that it "confirms" the President's § 1182(f) authority—not that it could independently authorize this Order. Br. 40. That is a sensible concession. The same separation-of-powers principles foreclose any sweeping interpretation; Section 1185(a)(1) does not even address suspension of entry explicitly; and, any event, it requires that any regulations be "reasonable." *See* Dep't of Justice, *Immigration Laws and Iranian Students*, 4A O.L.C. 133, 140 (1979). Accordingly, the Order is likewise unauthorized by § 1185(a)(1).

B. The Order Violates § 1152(a)(1)(A).

The Order also violates the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1)(A). That is a separate reason why the Order is illegal, and further illustrates that the government's sweeping interpretation of §1182(f) is untenable.

1. Section 1152(a)(1)(A)'s anti-discrimination mandate is straightforward: Save for "specific[]" exceptions not applicable here, it forbids discrimination "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

8 U.S.C. § 1152(a)(1)(A). EO-2's violation of that mandate is just as straightforward. As the government acknowledges, Section 2(c)'s "suspension is implemented by denying visas." Br. 51-52. And the suspension is based on nationality. It therefore directly violates § 1152(a)(1)(A).

The government contends, however, that § 1182(f) allows the President to override § 1152(a)(1)(A) entirely. The government reaches that conclusion by asserting that § 1182(f) allows a nationality-based entry ban, and then reasoning that if it does, there is no point in granting visas to banned individuals.

The government has it backwards. First, in practical terms, what the government has created is not an entry ban with an incidental effect on visas; it is almost entirely a visa ban. Under EO-2, individuals who have visas are exempt from Section 2(c). J.A. 1428 (§ 3(a)(ii)-(iii)). Thus, the Section 2(c) ban operates on individuals who do not have visas—that is, visa *applicants*. The work that Section 2(c) actually does is therefore to deny visas, not to turn people back at the border. And that work is directly outlawed by § 1152(a)(1)(A).

Second, 8 U.S.C. § 1201(g) and 8 U.S.C. § 1182 do not excuse the violation of § 1152(a)(1)(A). Section 1201(g) authorizes the government to deny a visa to an individual who is "ineligible to receive a visa . . . under section 1182." But § 1182(f) does not categorize anyone (or authorize the President to categorize anyone) as "ineligible to receive a visa." Section 1182(a), in contrast, sets forth specific categories of individuals who are "inadmissible" and thus explicitly "ineligible to receive visas."

Finally, even if the government only banned entry, not visas, that too would violate § 1152(a)(1)(A), because it would render those visas meaningless during the ban period—which could be indefinite. By nullifying visas based on nationality, the government would do the precise thing that § 1152(a)(1)(A) forbids.

If § 1152(a)(1)(A) could be so easily circumvented, it would serve no real purpose. *Accord* J.A. 1212. But the antidiscrimination provision is no throwaway: It was enacted in 1965 along with other major civil rights legislation and represented a fundamental transformation of the INA. J.A. 1209-1210. That transformation closed the book on the previous national-origins immigration system, which maximized immigration from northern and western Europe while restricting immigration from southern and eastern Europe and barring immigration from Asia. J.A. 292-295 (Wynn, J.); *see generally* Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest 161-216, *excerpted in* T. Alexander Aleinikoff, Immigration and Citizenship 14-21 (2016). It reflects what is now a basic principle of our law: Reducing individuals to such group-based characteristics is "odious to a free people whose institutions are founded upon the doctrine of equality." J.A. 264-265 (Wynn, J.) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (internal quotation marks omitted)); *cf. Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

2. Section 1182(f) does not extend so far as to come into conflict with § 1152(a)(1)(A). But if there were any conflict between the two, § 1152(a)(1)(A) would control. It is later-enacted and, contrary to the government's contention, more specific, in that § 1152(a)(1)(A) specifically addresses nationality discrimination in the issuance of visas, while § 1182(f) is silent as to visa issuance in general and discrimination in particular. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & n.7 (1976).

That is not to say that § 1152(a)(1)(A) "repeal[ed]" § 1182(f). Br. 55-56. But the government's repeal argument is telling. On the government's theory, the President—at least absent an explicit "repeal" of his § 1182(f) authority through a specific prohibition like § 1152(a)(1)(A)—would have the unreviewable power to reinstate precisely the national-origins system Congress emphatically rejected in 1965, by issuing entry-ban proclamations targeted at visa issuance in Africa, Asia, and Latin America. The government's argument cannot be reconciled with the INA.

IV. THE NATIONWIDE INJUNCTION IS APPROPRIATE.

The unique facts and circumstances of this case warrant nationwide relief. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 358 n.8 (1961)("Equitable remedies . . . are distinguished by their flexibility [and] their adaptability to circumstances.") (internal quotation marks omitted).

1. The Order inflicts condemnation, exclusion, and isolation on the plaintiffs. Those injuries set this case apart from others that might be remedied by a narrow injunction. Just as one could not remedy the Establishment Clause violation from an unconstitutional religious display by covering it with a curtain only when plaintiffs walk by, so too here, the injury would not be remedied by allowing the anti-Muslim EO-2 to remain in place as to everyone but the individual plaintiffs. The message of condemnation would remain, and a limited injunction would thus fail to provide plaintiffs with "complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Indeed, Section 2(c)'s condemnation of Islam has already caused widespread harm, sending a discriminatory message to Muslim Americans with friends and relatives affected by the ban. *See, e.g.*, Amicus Br. of Interfaith Coalition 1 (explaining that "the Order is anathema to th[e] core tenet [of religious tolerance]" shared by a wide range of religious organizations). It is thus appropriate to enjoin the ban altogether. *Cf. Santa Fe*, 530 U.S. at 313-314 (facially invalidating a policy instituting school elections regarding prayer at football games, even though no prayer had taken place).

2. Moreover, it would be exceptionally difficult, if not impossible, to effectively tailor an injunction to the organizational plaintiffs. For example, MESA and its members are harmed by the Order in myriad and complex ways: Members will be blocked from obtaining visas to attend conferences, including MESA's annual meeting; the absence of scholars at those conferences because of the Order will hinder the

collaboration and exchange of ideas that is so important to MESA and its members; and U.S.-based members will lose the opportunity to arrange for students to study in this country, which will undermine the members' academic work and the organization's mission. JA 429-433. IRAP also works with a wide range of individuals harmed by the Order: While EO-1 was in effect, for instance, IRAP responded to more than 800 emergency email queries and coordinated its network of over 2,000 pro bono attorneys and law students nationwide. J.A. 388, 390. And the Order's legal flaws infect all of its applications. *See* J.A. 244, 1234. The government has never suggested how a court might structure an injunction to address all of these harms. The "systemwide impact" here warrants a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359 (1996) (internal quotation marks omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

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In the Supreme Court of the United States

No. 16-1436

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

No. 16-1540

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

REPLY BRIEF FOR THE PETITIONERS

I. RESPONDENTS' CHALLENGES TO THE ORDER ARE NOT JUSTICIABLE

Setting aside the impact of Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (which will be addressed in supplemental briefing), the lower courts never should have reached the merits. Respondents' statutory claims are barred by the rule that the denial of entry to aliens abroad is not judicially reviewable "unless Congress says otherwise"—and far from authorizing review, Congress has foreclosed it. *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). To garner review, respondents therefore must claim a violation of their own constitutional rights. *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Kerry* v. *Din*, 135 S. Ct. 2128 (2015). But they merely reframe derivative injuries that flow from the effect of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), on aliens abroad. In any event, those claimed delay-in-entry injuries are now moot because the only family members plausibly affected by the entry suspension have received visas. And even if respondents could challenge the Order's entry suspension, they cannot possibly challenge its refugee provisions.

A. Respondents' Statutory Challenges To Section 2(c) Are Not Cognizable

1. The Administrative Procedure Act does not authorize review

Respondents do not directly confront the fundamental principle that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). Respondents instead begin by arguing (IRAP Br. 29) that the Administrative Procedure Act (APA), 5 U.S.C. 702, authorizes review here. But in three ways the APA embraces the general rule that visa denials are not judicially reviewable.

a. The APA does not apply "to the extent that * * * statutes preclude judicial review." 5 U.S.C. 701(a)(1). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (*CNI*). Here, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of the consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1160 (citation omitted).

Indeed, the one time this Court held that the APA permitted review of an order excluding an alien who had presented himself at the border, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress responded by abrogating that ruling. Gov't Br. 25. Both this Court and Congress acted on the understanding that aliens abroad have no such right under the APA. The Court disclaimed any "suggest[ion]" that "an alien who has never presented himself at the border of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. The House Report accompanying the abrogating statute was even clearer, explaining that APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961).

Respondents assert (IRAP Br. 28) that no specific provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, expressly bars review. But this Court has made clear that statutory context can preclude review even without "express language." *CNI*, 467 U.S. at 345. And "[t]here was no reason for Congress to" preclude review expressly because, "[g]iven the historical background against which it has legislated over the years * * * , Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions." *Saavedra Bruno*, 197 F.3d at 1162. Indeed, if an alien present in the United States cannot invoke the APA to obtain review—as Congress prescribed in 1961, Gov't Br. 25—then *a fortiori* neither aliens abroad nor U.S. citizens acting at their behest may seek review. And given that Congress generally foreclosed "judicial review" of visa revocations, 8 U.S.C. 1201(i), it is implausible that Congress would allow review of visa denials in the first instance.

b. In addition, the APA provision that creates a cause of action, 5 U.S.C. 702, itself preserves the background rule of nonreviewability. Section 702 contains a "qualifying clause" providing that "'[n]othing herein'—which includes the portion of § 702 from which the presumption of reviewability is derived—'affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.'" *Saavedra Bruno*, 197 F.3d at 1158 (quoting 5 U.S.C. 702(1)). "[T]he doctrine of consular nonreviewability—the origin of which predates passage of the APA—thus represents one of the 'limitations on judicial review' unaffected by § 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action." *Id.* at 1160 (citation omitted).

c. Finally, the APA does not apply "to the extent that * * * agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The President is not an "agency" under the APA, and thus his decisions are not "reviewable for abuse of discretion under the APA." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801

(1992). But if the APA applied, the statutes granting the President broad authority to suspend and restrict entry of aliens commit those matters to his discretion. 8 U.S.C. 1182(f), 1185(a)(1); see *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988).

2. *Respondents cannot avoid the need for express authorization to review their statutory claims*

Unable to ground review in the APA or any other statute, respondents try to avoid the need for express statutory authorization in various ways. None is sound.

a. Respondents assert (IRAP Br. 25-29; Hawaii Br. 15-18) that this Court's decisions authorize the review they seek. The decisions they cite, however, involved either habeas actions brought by aliens in U.S. custody, see *Knauff*, *supra*, or deportation of aliens in the United States, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 581-582 (1952)—not exclusion of aliens abroad.

Respondents cite (IRAP Br. 25; Hawaii Br. 16) only one case, *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), in which this Court reviewed a challenge by aliens abroad to measures returning them to their home country. Contrary to respondents' description (IRAP Br. 25), the Court did not "reject[]" the argument that the aliens' claims were unreviewable; it simply did not address reviewability because it rejected their claims on the merits. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Moreover, the aliens in *Sale* alleged that the INA and a treaty gave them a judicially enforceable right. Here, respondents have no such colorable claim. See pp. 8-9, *infra.*[1]

Respondents' remaining cases are irrelevant. *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), addressed a presidential order nullifying attachments against assets of (and suspending claims against) Iran. And *Dalton* v. *Specter*, 511 U.S. 462 (1994), dealt with closure of a naval base. Neither involved exclusion of aliens. Moreover, *Dalton* merely "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." *Id.* at 474. It then explained that "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President," and "[h]ow the President chooses to exercise the discretion Congress has granted him"—here in 8 U.S.C. 1182(f) and 1185(a)(1)—"is not a matter for [judicial] review." 511 U.S. at 474, 476.

b. Respondents' other arguments lack merit. First, they argue (IRAP Br. 27-28; Hawaii Br. 17) that nonreviewability of exclusion of aliens abroad applies only to consular officers' individualized decisions, not the President's policy decisions. But it makes no sense to permit review of decisions by the Head of the Executive Branch—often grounded in sensitive foreign-affairs and national-security determinations—while barring review of consular officers' case-specific determinations. Respondents assert that consular officers possess "discretion,"

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[1] Respondents invoke (IRAP Br. 26) *Abourezk* v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987). But *Abourezk* held that Congress expressly authorized review in 8 U.S.C. 1329 (1982). 785 F.2d at 1050-1051. Congress later amended that statute to preclude review. *Saavedra Bruno*, 197 F.3d at 1162, 1164.

Hawaii Br. 17 (citation omitted); see IRAP Br. 28 n.17, but the Constitution and statutes at issue here grant the President far more latitude than provisions governing consular officers. Compare 8 U.S.C. 1182(f), 1185(a)(1), with 22 C.F.R. 40.6.

Second, respondents assert (Hawaii Br. 16-17) that only Congress's decisions are unreviewable. But *Knauff* made clear that "[t]he action of the *executive officer* * * * is final and conclusive." 338 U.S. at 543 (emphasis added). Although "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," "the power of exclusion of aliens is also inherent in the executive department of the sovereign," and "Congress may in broad terms authorize the executive to exercise the power." *Ibid.* Especially when Congress has done so, the Executive's decisions are similarly unreviewable. See *ibid.*

Third, respondents incorrectly argue (IRAP Br. 26) that, because they also assert constitutional claims, constitutional avoidance compels considering their statutory arguments first. The principle that courts should "'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of,'" applies only if the nonconstitutional ground is "'present.'" *Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009) (citation omitted). It does not justify disregarding other limitations on judicial review. See, *e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 478-482 (2011) (constitutional avoidance did not require disregarding party's waiver of statutory argument); *Doe*, 486 U.S. at 600-605 (constitutional claims reviewable but statutory claims not reviewable under APA). Otherwise, litigants could circumvent limitations on judicial review of statutory claims simply by adding meritless constitutional claims.

3. Respondents lack any statutory right to enforce

Even if the general nonreviewability rule did not foreclose respondents' claims, respondents cannot challenge Section 2(c) on statutory grounds because no statute affords them any rights to enforce. The APA's "general cause of action" exists only for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,'" *CNI*, 467 U.S. at 345 (citation omitted)—*i.e.*, persons to whom Congress intended to accord privately enforceable rights. See also *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 177-178 (2011).

Respondents cannot assert any rights under the statutes they invoke in challenging Section 2(c). The provisions empowering the President to suspend or restrict entry of aliens, 8 U.S.C. 1182(f), 1185(a)(1), and prohibiting nationality-based discrimination in the issuance of immigrant visas, 8 U.S.C. 1152(a)(1)(A), do not confer any rights on U.S. persons seeking entry of aliens. Even when the INA permits a U.S. person to file a petition for a foreign family member's classification as a relative eligible for immigrant status (*e.g.*, John Doe #1 petitioning for his wife), any interest he has "terminate[s]" "[w]hen [his] petition [i]s granted." *Saavedra Bruno*, 197 F.3d at 1164. Nothing in the INA authorizes him to challenge the later denial of a visa to his relative. *A fortiori*, persons or entities whom the INA does *not* entitle to petition for classification of aliens (*e.g.*, Hawaii) have no statutory right regarding aliens' entry. And for the individual respondents whose relatives have now received visas, any claimed statutory right is moot. See pp. 13-14, *infra*.

4. No equitable action for injunctive relief is available

Respondents alternatively contend (IRAP Br. 29; Hawaii Br. 15) that they may bring an equitable action for injunctive relief under *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015). But the "judge-made remedy" *Armstrong* addressed does not permit plaintiffs to sidestep "express and implied statutory limitations" on judicial review of nonconstitutional claims, such as under the APA; "'[c]ourts of equity can no more disregard'" those limitations than may "'courts of law.'" *Id.* at 1384-1385 (citation omitted). Indeed, a suit for injunctive or declaratory relief is the primary vehicle for challenging government action under the APA itself. See 5 U.S.C. 703. *Armstrong* itself held that a federal statute "implicitly preclude[d] private enforcement" actions "in equity" based on the text and structure of the statute. 135 S. Ct. at 1385. Likewise here, the general rule of nonreviewability precludes the type of equitable action respondents contemplate. A contrary rule would eviscerate the APA's limits on judicial review.

B. Respondents' Establishment Clause Challenges To Section 2(c) Are Not Cognizable

This Court has permitted review of exclusion of aliens abroad only when U.S. citizens assert that the exclusion infringes their own constitutional rights. Respondents cannot point to any cognizable violation of their own Establishment Clause rights.

1. The individual respondents' delay-in-entry injuries are not cognizable and in any event are now moot

a. To secure review under *Mandel* and *Din*, respondents must show that Section 2(c) violated their own Establishment Clause rights. But Section 2(c) applied only to aliens abroad; it did not regulate Doe #1 or Dr. Elshikh at all. Respondents claim that the Order violates the Establishment Clause because it discriminates against their foreign-national relatives. But only those persons who are personally subject to religious discrimination have standing to challenge such action as allegedly discriminatory. Gov't Br. 29-30. That principle applies with particular force here because respondents' alien relatives abroad themselves have no constitutional rights regarding their entry. See *Mandel*, 408 U.S. at 762. It makes no sense to allow U.S. plaintiffs to assert a derivative Establishment Clause claim predicated on alleged discrimination against aliens who themselves have no rights to assert.[2]

b. Respondents are left to contend (Hawaii Br. 19) that anyone who suffers injury-in-fact from an alleged violation of the Establishment Clause may challenge the alleged violation. This Court has never adopted that broad theory, and a simple example illustrates why it cannot be correct. Consider a non-Muslim U.S. citizen who seeks to have his Syrian, non-Muslim brother-in-law visit. On respondents' view, the U.S. citizen could sue to challenge the Order's exclusion of the brother-in-law under the Establishment Clause on the basis that it discriminates against Muslims. Yet the Order cannot plausibly be said to discriminate against the U.S. citizen (who is not Muslim) on the basis of his own religion; the Order does not apply to him at all. And the brother-in-law (who also is not Muslim) has no rights regarding his entry under the Establishment Clause. The same is true here.

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[2] The Fourth Circuit correctly did not find that the organizational respondents in No. 16-1436 had standing to challenge Section 2(c). Two of them—IRAP and HIAS—are refugee-resettlement organizations and have not identified any member or client injured by Section 2(c), Gov't Br. 28 n.10, as opposed to the refugee provisions. See pp. 16-17, *infra*. Respondent MESA did allege that Section 2(c) would prevent its members from attending the organization's annual meeting. But that conference is scheduled for November 2017—long after both the 90-day suspension was originally scheduled to expire in June 2017 *and* the actual expiration date of September 24, 2017. Gov't Br. 28 n.10; *IRAP* Gov't C.A. Br. 25.

Respondents cite no case that contravenes the common-sense principle that, regardless of injury-in-fact, a plaintiff still must allege a violation of his own Establishment Clause rights. They cite (IRAP Br. 20-21; Hawaii Br. 19-21) *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961). But both involved typical Establishment Clause claims brought by employees and businesses directly regulated by Sunday-closing laws. *McGowan*, 366 U.S. at 430-431; *Two Guys*, 366 U.S. at 583 n.1. Although compliance with those laws caused the plaintiffs economic injury, their Establishment Clause rights were implicated because they were coerced into engaging in an allegedly religious practice—observing the Sabbath—by laws purportedly adopted for religious purposes.[3] Respondents' other cases likewise were brought by plaintiffs directly subject to the regulations at issue. See *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 705-711 (1985) (employer challenging law requiring businesses to allow employees not to work on their chosen Sabbath); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117-127 (1982) (restaurant operator challenging law allowing nearby churches to veto liquor licenses); *Epperson* v. *Arkansas*, 393 U.S. 97, 100 (1968) (teacher challenging law forbidding teaching of evolution).

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[3] Respondents assert that *Two Guys* permitted a business to challenge application of a Sunday-closing law "even though the direct victims of the penalties were the store's *employees*." Hawaii Br. 21; see IRAP Br. 20. That is incorrect. The law regulated the business directly, see 366 U.S. at 583 n.1, and this Court characterized the challenge as one by the business to prevent application of the law to the business itself, see *id.* at 585-586. The law's operation against the employees was merely an additional means of regulating the business. See *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 946 (E.D. Pa. 1959), aff'd, 366 U.S. 582 (1961).

Respondents also argue (Hawaii Br. 18) that the Establishment Clause is different because it imposes a structural constraint on the government. But a person seeking to challenge governmental action must still show a violation of his own rights under the Clause. The cases above, for example, were all brought by plaintiffs whose conduct was directly regulated by the laws at issue. Moreover, this Court has rejected respondents' argument for Establishment Clause exceptionalism: the Clause "establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution." *Valley Forge Christian Coll.* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). Had respondents asserted substantively identical claims of discrimination against other persons under the Free Exercise Clause, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (*Lukumi*), their claims undisputedly would be foreclosed, see *McGowan*, 366 U.S. at 429-430. Respondents presumably did not style their claims in free-exercise terms precisely because the categorical, nationwide relief they request would then plainly be unavailable. But there is no reason to allow respondents to evade established justiciability rules by applying special, less stringent standards for Establishment Clause claims.

c. Even if the individual respondents' asserted injuries were once cognizable, they are now plainly moot. All but one whose relatives sought visas—Dr. Elshikh's mother-in-law, Doe #1's wife, Paul Harrison's fiancé, and John Doe #3's wife—have now received them. Gov't Br. 28 n.10. That leaves only Jane Doe #2's sister in *IRAP*. But respondents do not dispute that Doe #2's sister faces a multi-year wait for an immigrant-visa number for a sibling to become available, *ibid.*, and thus they have not contended that Doe #2's sister would ever have been affected by the Order's temporary 90-day entry suspension.[4]

Implicitly recognizing as much, respondents have belatedly asked to insert new plaintiffs into these appeals. IRAP Br. 22 n.15; Hawaii Br. 26. Those requests are futile because none of the proposed parties alleges a non-speculative, cognizable injury traceable to the Order. The *Hawaii* respondents seek to add an anonymous plaintiff with a Yemeni son-in-law, but they have not even alleged that the son-in-law has submitted his visa application. *Hawaii* Gov't Resp. in Opp. to Mot. to Add Party 2, 14-15. And the *IRAP* respondents seek to add plaintiffs whose alien relatives allegedly had visa-application interviews but did not receive visas—meaning the relatives may never have been affected by the Order at all. See 22 C.F.R. 41.121(a), 42.81(a).

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[4] Dr. Elshikh argues that other, unspecified members of his family "remain in Syria." Hawaii Br. 25. Those claims are not in the record, see *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009), and Dr. Elshikh does not assert that any of his other relatives has even applied for a visa.

IRAP Gov't Resp. in Opp. to Mot. to Add Parties 2, 14-15. The Court should not countenance respondents' efforts to reshape this litigation at the eleventh hour.

2. *The individual respondents' message injuries are not cognizable*

Respondents alternatively contend (IRAP Br. 16-17, 21-23; Hawaii Br. 23-25) that the Order violates their own rights by sending a "message" condemning their religion. But respondents identify only one setting where this Court has recognized such a message injury: overtly religious displays or activities to which plaintiffs were directly exposed. See *ibid.* (citing cases). Here, by contrast, the Order is directed to aliens abroad and says nothing about religion.

Nor may respondents recast a facially religion-neutral regulation of conduct as sending an implicit religious message. That would mean that any Muslim—or perhaps anyone who objects to a perceived implicit message—could challenge the Order. This Court has held that such generalized injury is insufficient because "standing would extend nationwide to all members of the particular * * * groups against which the Government was alleged to be discriminating." *Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984). Indeed, that is precisely what respondents urge: they contend that the individual respondents may challenge the Order based on its purported message even though their relatives have received visas. IRAP Br. 21; Hawaii Br. 25. But claims of such "stigmatizing injury" may be brought only by "'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (citation omitted).

Respondents' contrary theory would render *Valley Forge*'s rule an empty pleading requirement. On their view, any purportedly religiously motivated conduct could be recast as sending an implicit religious message. For example, respondents' position would mean that the plaintiffs in *Valley Forge* would have had standing if they had simply alleged that the transfer of land without cost to a Christian college sent a pro-Christian or anti-atheist message. That cannot be correct. See *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009).

3. *Hawaii does not allege a cognizable violation of any Establishment Clause rights of its own*

Hawaii likewise cannot assert that the Order violates its own constitutional rights, and indeed the Ninth Circuit did not affirm the *Hawaii* injunction on Establishment Clause grounds. Hawaii argues (Br. 19, 22-23) that it may sue to prevent the federal government from violating the Establishment Clause rights of its citizens. That is wrong for three reasons.

First, for the same reasons discussed above, the Order does not violate the rights of Hawaii's citizens because it does not regulate them. Second, Hawaii's theory would mean that a State would have standing to challenge *any* federal law that allegedly violated the Establishment Clause rights of its citizens. But it is well established that a state cannot sue the federal government as *parens patriae*; in that context, it is the federal government, not the States, that represents the interests of citizens. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). That is especially true of the exclusion of aliens, a power vested exclusively in the national government.

Third, even if Hawaii were correct (Br. 19) that the Establishment Clause was originally intended to "'protect[] state establishments from federal interference,'" *Cutter* v. *Wilkinson*, 544 U.S. 709, 728 (2005) (Thomas, J., concurring) (citation omitted), that would not help Hawaii here. States no longer can create such establishments in light of the Fourteenth Amendment. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring). Hawaii argues (Br. 19) that States still have an interest in preserving their own policies of "preventing any establishment of religion." But whatever interest States may have in not being directly regulated by an asserted federal establishment of religion, it is not implicated here. The Order does not regulate Hawaii at all, much less require the State to participate in implementing a federal establishment.[5]

C. Respondents Cannot Challenge The Order's Refugee Provisions

In all events, no respondent has standing to challenge Section 6(a) and (b), the provisions governing refugees. Only the *Hawaii* district court enjoined Section 6(a) and (b); the *IRAP* district court rejected respondents' request for an injunction, and those respondents did not cross-appeal. And in *Hawaii*, neither respondent asserted a cognizable injury from the refugee provisions. Dr. Elshikh's mother-in-law was not seeking admission as a refugee. Hawaii contends (Br. 22) that the Order has prevented the State "from resettling refugees within its borders." But Hawaii never explained how it has a cognizable statutory (much less constitutional) interest in the initial entry of aliens as refugees—a matter committed exclusively to the federal government. Moreover, Hawaii has never identified any particular refugees whom it seeks to "resettle." See J.A. 1039-1040. Vague desires to have the United States allow a handful of refugees to enter the country and the State in the future are insufficient to establish a concrete, cognizable Article III injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

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[5] Hawaii also has failed to demonstrate any concrete injury. Hawaii's standing must be determined as of the time it filed suit, see *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008), and it did not identify any concrete injury that was extant or imminent when it filed its operative complaint in March 2017. Even now, Hawaii points only (Br. 22) to students who already accepted admission for the 2017-2018 academic year, which commenced in August; a Syrian speaker scheduled to visit Hawaii in September, who presumably has visited already; and students who have applied for (but evidently not yet received) admission to study at the university in 2018. None of those allegations suffice to establish Hawaii's standing.

II. THE ORDER DOES NOT VIOLATE THE INA

A. The Order Is Expressly Authorized By 8 U.S.C. 1182(f) And 1185(a)(1)

Respondents do not defend the Ninth Circuit's rationale that the Order failed to provide a sufficiently detailed factual basis to "support the conclusion that entry" of the affected aliens is detrimental to the national interest under 8 U.S.C. 1182(f). J.A. 1197. And for good reason. The Order directed a worldwide review of vetting procedures used to identify whether nationals seeking entry into this country pose a national-security or public-safety threat, and while that review was pending, it temporarily paused entry from the six countries that Congress and the Executive previously had determined posed heightened risk. The Order's findings are not reviewable at all, but they amply suffice under any plausible interpretation of Section 1182(f).

Instead, respondents ask this Court (Hawaii Br. 31) to replace Section 1182(f)'s text with a requirement that the President may "exclude only (1) aliens akin to subversives, war criminals, and the statutorily inadmissible; and (2) aliens whose admission would undermine congressional policy during an exigency in which it was impracticable for Congress to act." That interpretation has no basis in Section 1182(f)'s text or history or this Court's precedent. Respondents also have no answer to Section 1185(a)(1).

1. a. When "statutory language is plain, [courts] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). Section 1182(f) authorizes the President to "suspend the entry of all aliens or any class of aliens," and to "impose on the entry of aliens any restrictions he may deem to be appropriate," "[w]henever [he] finds" that such entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f). That language vests the President with a "sweeping proclamation power" that "provides a safeguard against the danger posed by any particular case or class of cases that is not covered" by a specific provision in the INA. *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987).

Respondents' reading cannot be reconciled with the statutory text. Their only textual argument (Hawaii Br. 38) is that the phrase "interests of the United States" locks Section 1182(f) into 1940s administrative practice. That is not credible. As this Court has held, such phrases do not constrain discretion; they confer it. Thus, in *Doe*, the Court construed that language as "exud[ing] deference" to the Executive and "foreclos[ing] the application of any meaningful judicial standard of review." 486 U.S. at 600; see also, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 369-370 (2000) (broadly construing "'national security interests of the United States'"); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322-327 (1936).

b. Respondents urge the Court (Hawaii Br. 31-37) to disregard this plain language, contending that "'[i]nterests of the United States' had a settled meaning" when Section 1182(f) was enacted in 1952 and the phrase "brought 'the old soil with it.'" *Id.* at 35, 38 (quoting *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013)). Their contention fails for three reasons.

First, respondents fail to show that "interests of the United States" had a settled meaning even in the context of the statutes respondents discuss. Respondents assert (Hawaii Br. 31) that "[t]he language of Section 1182(f) originated in 1918." But the phrase "interests of the United States" did not appear in that statute. Act of May 22, 1918, ch. 81, 40 Stat. 559. As respondents note (Hawaii Br. 32), that language was added to the 1918 Act in 1941, at the request of President Roosevelt, to "broaden this statutory authority." See Act of June 21, 1941, ch. 210, 55 Stat. 252. Respondents argue based primarily on floor debates that Congress in 1941 understood that the newly expanded power would be used only to "'suppress[] subversive activities.'" Hawaii Br. 33 (citation omitted). But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 115 (1988). Where, as here, "the text of the [relevant] statute plainly embraces criteria of more general application," it controls. *Ibid.* Respondents note (Hawaii Br. 33-34) that, during World War II, President Roosevelt's Administration used this authority to target aliens whose entry undermined the war effort, such as spies and saboteurs. But they cite no evidence that the Executive understood those applications as exhausting the *only* permissible uses of the President's power.

Second, respondents' history refutes their contention that Congress intended *Section 1182(f)* to carry the meaning they impute to the 1941 law. As respondents concede, the 1941 law was the predecessor not of Section 1182(f), but of Section 1185(a)(1). Section 1182(f) was added in 1952, using the broad language it contains today. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(e), 66 Stat. 188 (8 U.S.C. 1182(f)). Both the fact that Congress enacted Section 1182(f) *in addition* to what became Section 1185(a)(1), and the different language Congress employed, confirm that Section 1182(f) was meant to confer a different power. See *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) (presumption against superfluity); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (difference in language in same law is presumed deliberate).

Third, Section 1182(f)'s own legislative history confirms its breadth. Opponents criticized Section 1182(f) as "giv[ing] the President the power to suspend all immigration whenever he feels it is in the national interest to do so," 98 Cong. Rec. 4249 (1952) (letter from Rhoads Murphey, Friends Comm. on National Legislation), and as a "very, very broad provision," *id.* at 4304-4305, 4423, 5114 (statements of Reps. Celler and Multer and Sen. Lehman); S. Rep. No. 1137, 82d Cong., 2d Sess. Pt. 2, at 4 (1952) (minority views); see also S. Rep. No. 1515, 81st Cong., 2d Sess. 381, 805-806 (1950). No one suggested otherwise.

c. Respondents' remaining arguments lack merit. First, they argue (Hawaii Br. 29-30) that this Court's cases support reading Section 1182(f) narrowly, citing

Kent v. *Dulles*, 357 U.S. 116 (1958). But *Kent* was a straightforward constitutional-avoidance case addressing the denial of passports to U.S. citizens based on their political beliefs, which threatened to transgress their freedoms of speech and travel. See *id.* at 125-130. Here, in contrast, Section 1182(f) applies to the suspension of entry of aliens abroad—who, unlike the U.S. citizens in *Kent*, are not entitled to the same constitutional protections.

Respondents suggest (Hawaii Br. 29-30) that the avoidance canon requires construing Section 1182(f) narrowly to avoid a nondelegation-doctrine question. But as this Court made clear in *Knauff* (addressing the 1941 statute above), nondelegation concerns are at their nadir in this setting because the authority to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. at 542. Thus, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "implementing an inherent executive power." *Ibid.* Even if the avoidance canon applied, it would mean at most that Section 1182(f) is limited to the foreign-affairs and national-security context, which is precisely where the Order operates.

Second, respondents assert (Hawaii Br. 36-37) that historical practice supports their narrow, atextual interpretation of Section 1182(f). But as they acknowledge (*id.* at 37), in August 1986, President Reagan suspended entry of "all Cuban nationals," with limited exceptions, based on the Cuban government's decision in May 1985 to suspend an immigration agreement. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). That proclamation, issued more than a year after Cuba's decision, cannot be dismissed as addressing a "fast-breaking diplomatic crisis that Congress was plainly ill-suited to address." Hawaii Br. 37. Indeed, many past presidential proclamations did not address "exigencies" in the narrow sense respondents assert, *ibid.*, but rather invoked Section 1182(f) to encourage foreign nations' cooperation with the United States' objectives. See, *e.g.*, Exec. Order No. 13,662, 79 Fed. Reg. 16,169 (Mar. 24, 2014) (suspending entry of (*inter alios*) aliens who operated in financial, energy, and engineering sectors of Russian economy); Proclamation No. 7524, 67 Fed. Reg. 8857 (Feb. 26, 2002) (aliens who "derive significant financial benefit from policies that undermine or injure Zimbabwe's democratic institutions" through dealings with its government); Proclamation No. 6730, 59 Fed. Reg. 50,683 (Oct. 5, 1994) (similar for Liberia). The Order likewise sought in part to pressure countries to provide the United States with the information necessary to vet their nationals. See J.A. 1423-1424 (§ 1(g)).

Third, respondents argue (IRAP Br. 51; Hawaii Br. 38-39) that Section 1182(f) must be read narrowly to prevent the President from readopting a quota system or prohibiting immigrant farm workers in order to protect the domestic economy. But whatever outer limits may exist on the President's authority under Sections 1182(f) and 1185(a), they are not implicated here. The Order does not seek to subvert the INA by reinstituting the quota system; rather, it has helped *implement* the INA by ensuring that the government has the information needed to determine whether aliens present national-security or safety risks. Nor did the President invoke his power to protect the domestic economy; instead, he used it to protect national security and conduct foreign policy, matters at the core of Sections 1182(f) and 1185(a) and the INA more generally.

Fourth, respondents assert (IRAP Br. 52-53; Hawaii Br. 42-43 & n.12) that the Order contravenes the statutory framework governing vetting of aliens seeking entry. That is wrong. To be sure, especially since September 11, 2001, Congress has enacted laws giving the Executive Branch better tools to detect terrorist entry. But those statutes do not remotely suggest that Congress concluded that the existing vetting system is sufficient and that the President may not seek to improve it, respond to new developments, or seek to pressure other nations to provide the information needed to vet their nationals. Thus, the Order does not conflict with any of the statutes respondents cite.

2. Whatever Section 1182(f)'s scope, the Order was independently authorized by 8 U.S.C. 1185(a)(1), which provides that it "shall be unlawful" for any alien to "enter" the United States "except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Ibid.* Respondents make no effort to show that the Order's restrictions exceed that authority. *Ibid.* Respondents incorrectly assert (IRAP Br. 56) that the government has not relied on Section 1185(a)(1) as an independent basis for the Order. The Order expressly invokes that provision, J.A. 1426 (§ 2(c)), and the government has consistently argued that it supports the Order, *e.g.*, Gov't Br. 40-41, 53-54, 56, 64, 68; *Hawaii* Gov't C.A. Br. 20-21 (No. 17-15589); *Hawaii* Gov't C.A. Reply Br. 20-26 (No. 17-15589). And respondents' legislative-history-driven reading of the 1941 law that became Section 1185(a)(1) is irrelevant because, as they

acknowledge (Hawaii Br. 34 n.8), Congress in 1978 eliminated the restrictions confining Section 1185(a)(1) to times of war and national emergency. See Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993. Congress thus rejected the kind of limitations on Section 1185(a)(1) that respondents wrongly try to read into Section 1182(f).

B. Section 2(c) Is Consistent With 8 U.S.C. 1152(a)(1)(A)

1. There is no conflict between the President's broad authority to suspend or restrict "entry" under Sections 1182(f) and 1185(a)(1) and the principle in Section 1152(a)(1)(A) that consular officers may not discriminate on various bases (including nationality) in the "issuance of an immigrant visa." Section 1182(f) confers on the President power over the "entry" of "any class of aliens" in the "interests of the United States." Section 1185(a)(1) likewise addresses the President's authority to impose restrictions on whether and when aliens may "enter." By contrast, Section 1152(a)(1)(A) does not govern the President's authority over "entry" at all; it does not mention either the President or entry. See *Sale*, 509 U.S. at 171-173 (statutory references to particular executive officials did not encompass powers vested in the President).

The statutes thus do not conflict because, by their plain terms, they address distinct subjects and operate in different spheres. Section 1152(a)(1)(A)'s nondiscrimination principle applies only to the universe of applicants *who would otherwise be eligible to receive visas*. See 8 U.S.C. 1201(g) (visas may not be issued to aliens "ineligible to receive [them] * * * under [S]ection 1182"). If an alien is ineligible to receive a visa on any ground enumerated in Section 1182—for instance, criminal history, terrorist affiliation, or (as here) being subject to an entry suspension—Section 1152(a)(1)(A) does not apply. Respondents offer no reason why Congress would have required the issuance of immigrant visas (which are for those wishing to live in the United States) to aliens who are barred from entering for any reason under Section 1182. See also H.R. Rep. No. 745, 89th Cong., 1st Sess. 12 (1965).

Respondents' argument is also squarely foreclosed by history. In 1986, for example, President Reagan invoked Section 1182(f) to suspend entry of Cuban nationals on the ground that he was "retaliat[ing] against Cuba's breach of an immigration agreement." Hawaii Br. 45. Similarly, in 1979, President Carter invoked Section 1185(a)(1) to limit "entry of" Iranian nationals. See Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (Nov. 28, 1979); Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 9, 1980). Although President Carter's Order itself did not deny or revoke visas to Iranian nationals by its terms, he simultaneously explained how the new measures would operate: the State Department would "invalidate all visas issued to Iranian citizens for future entry into the United States, effective today," and "w[ould] not reissue visas, nor w[ould] [it] issue new visas, except for compelling and proven humanitarian reasons or where the national interest of our own country requires."[6] And that is how the State Department implemented it. See 45 Fed. Reg. 24,436 (Apr. 9, 1980). In respondents' view, that action was illegal.

Indeed, under respondents' view, if the President knew today that an unidentified Iranian national was seeking to enter the country with a dirty bomb, he could not temporarily bar the entry of all Iranian nationals. Respondents have no answer to the serious constitutional and practical concerns that would arise under their interpretation of Sections 1182(f) and 1185(a)(1)(A). See Gov't Br. 52-54.

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[6] The American Presidency Project, Jimmy Carter, *Sanctions Against Iran: Remarks Announcing U.S. Actions* (Apr. 7, 1980), https://goo.gl/4iX168.

2. Even if Section 1152(a)(1)(A) applied here, it could not justify the existing injunctions. Section 1152(a)(1)(A) does not govern the President's broad power over "entry" because it does not govern "entry" at all. Thus, even if respondents' relatives were eligible to receive immigrant visas, they are not entitled to enter the United States. Section 1152(a)(1)(A) therefore provides no basis for enjoining Section 2(c), which governs entry, not visas.

Respondents' position requires reading the later-enacted Section 1152(a)(1)(A) as impliedly repealing the President's broad power to suspend entry of "any class of aliens"—a category that obviously would otherwise include aliens from a particular country. But courts require an irreconcilable conflict before finding an implied repeal. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Here there is no such conflict, because Section 1152(a)(1)(A) does not address the President's power over "entry."

Notwithstanding this clear text, respondents argue (IRAP Br. 58-59; Hawaii Br. 44-45) that Section 1152(a)(1)(A) must be read to reach entry or its prohibition on discrimination in visa issuance would be meaningless. But Section 1152(a)(1)(A) applies to the vast majority of aliens whose entry has not been restricted under Section 1182(f). Moreover, a visa is a travel document that is never sufficient alone to entitle an alien to enter the country; if an alien holds a visa but "is found to be inadmissible" upon arrival at a port of entry, he cannot enter. See 8 U.S.C. 1201(h), 1225(a). And like the Ninth Circuit, J.A. 1233 n.24, respondents do not even attempt to explain how Section 1152(a)(1)(A)—which applies only to immigrant visas—supports enjoining Section 2(c) as to nonimmigrant visas.

3. Respondents' remaining arguments likewise do not support their assertion that Section 1152(a)(1)(A) overrides the President's authority under Sections 1182(f) and 1185(a)(1). They argue (IRAP Br. 59; Hawaii Br. 45) that Section 1152(a)(1)(A) is "more specific" because it "addresses nationality discrimination in the issuance of visas." As explained above, there is no conflict because the two statutes cover different subjects. In any event, Section 1152(a)(1) prescribes a general rule governing consular officers' issuance of visas to aliens otherwise eligible to receive them; Section 1182(f) is more specific because it concerns the President's special power to suspend or restrict entry of aliens or classes of aliens when in the national interest.[7]

Respondents also suggest (IRAP Br. 59; Hawaii Br. 46) that Section 1152(a)(1)(A) embodies a categorical rejection of nationality-based distinctions in federal immigration law. That is wrong. Section 1152(a)(1)(A) applies in one circumstance: "the issuance of an immigrant visa."

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[7] Respondents argue that Section 1152(a)(1)(A) contains various exceptions but does not include Section 1182(f) among them. No exception for Section 1182(f) is necessary, however, because Section 1182(f) renders a covered alien ineligible for a visa and addresses only entry, not visa issuance. Moreover, Section 1152(a)(1)(A)'s listed exceptions are demonstrably not exhaustive. For example, 8 U.S.C. 1253(d)—which requires the Secretary of State to "order consular officers" to "discontinue granting immigrant visas or nonimmigrant visas" to nationals of a country that refuses to accept return of its own nationals—is not listed in Section 1152(a)(1)(A)'s exceptions.

It does not apply to non-immigrant visas, and it does not apply to suspending or restricting "entry." Moreover, the immigration laws and regulations are replete with provisions that draw distinctions based on aliens' nationality—including, most notably, the Visa Waiver program. 8 U.S.C. 1182(a)(7)(B)(iv), 1187; see, *e.g.*, 8 U.S.C. 1101(a)(15)(E), (E)(iii), (F)(iii), (b)(1)(G), 1184(e), 1232, 1254a, 1255 note, 1437, 1735; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 202, 111 Stat. 2193-2194; 8 C.F.R. 214.2(h)(5)(i)(F), (6)(i)(E), 214.5, 245.7, 245.15, 245.21.[8]

C. Section 6(b) Is Consistent With 8 U.S.C. 1157

Section 6(b)'s limitation on the number of refugees who could be admitted in Fiscal Year 2017 is consistent with 8 U.S.C. 1157. Section 1157(a)'s cap, set at the beginning of each fiscal year, governs the number of refugees who "'may be'" admitted, not the number who "'must be.'" Hawaii Br. 46-47 (citation omitted). That is why the federal government routinely admits far fewer refugees than authorized by the cap. Gov't Br. 61. Respondents' assertion (Hawaii Br. 47) that Section 6(b) "alter[ed] the number that 'may be' admitted" is wrong. Section 6(b) did not change the Section 1157(a) ceiling; it simply directed federal agencies to admit fewer refugees than the maximum number authorized by that ceiling during Fiscal Year 2017, which has now ended.

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[8] Respondents erroneously conflate "nationality" with "'national origin.'" Hawaii Br. 46 (citation omitted); see IRAP Br. 59. Unlike national origin (and race), which are immutable characteristics, nationality concerns the country to which one "ow[es] permanent allegiance." 8 U.S.C. 1101(a)(21). "[C]lassifications on the basis of nationality are frequently unavoidable in immigration matters." *Rajah* v. *Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

III. THE ORDER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Respondents' Establishment Clause challenges are governed by *Mandel*, but they fail under any standard of review. Section 2's purpose was to conduct a worldwide review of the procedures for vetting aliens who seek entry into this country, and to pause entry from six countries that posed particularly acute risks pending such review. Those purposes have nothing to do with religion.

A. The Order Is Constitutional Under *Mandel* And *Din*

1. In the area of the exclusion of aliens abroad, *Mandel* requires "minimal scrutiny (rational-basis review)." *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1693 (2017). Thus where, as here, the challenged action is facially neutral and supported by an objectively reasonable factual basis, courts may not "look behind the exercise of that discretion" (408 U.S. at 770) in search of ulterior motives. After all, "[t]he Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat * * * and even if it did, * * * a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AAADC*). That straightforward logic disposes of respondents' constitutional challenge.

2. Respondents make two principal counterarguments, both of which lack merit.

a. Respondents begin by arguing that *Mandel* does not apply. First, they assert that as in *INS* v. *Chadha*, 462 U.S. 919 (1983), the Establishment Clause is a structural constraint on governmental power to which

Mandel is inapplicable. But *Chadha* did not concern exclusion of aliens outside the United States; it addressed deportation of aliens already present. *See id.* at 923-928. Moreover, *Chadha* addressed the procedure by which Congress may exercise legislative power. *Id.* at 944-959. *Mandel* has no sensible application in that context.

Second, respondents contend that *Mandel* applies only to claims that "challenge the adequacy of the Government's explanation for an alien's exclusion," not to respondents' claims here that the exclusion's purpose was "unconstitutional." Hawaii Br. 49. *Fiallo* v. *Bell*, 430 U.S. 787 (1977), forecloses that argument; it held that *Mandel*'s test governed a constitutional challenge to an immigration statute that expressly drew distinctions based on "sex and illegitimacy." *Id.* at 794-795; see *id.* at 789-791, 797-800. Moreover, in *Mandel* itself, Justice Marshall maintained in dissent that the government's proffered reason was a "sham" not because the explanation for denying Mandel a waiver was inadequate, but because in the dissent's view it was untrue: the "Department of State had already conceded" facts that disproved that rationale. 408 U.S. at 778. That was the contention the majority categorically refused to entertain in refusing to "look behind" the stated reason. *Id.* at 770.

Third, respondents assert (Hawaii Br. 51) that *Mandel* "do[es] not apply to broad Executive policymaking." That too is wrong. The Court has applied *Mandel* to federal statutes, see *Fiallo*, 430 U.S. at 794-795, and the rule originated in a case involving a decision by "the Executive," *Mandel*, 408 U.S. at 770. Here, the President acted pursuant to broad grants of authority by

Congress. It also makes no sense to exempt broad policies simply because they are made by the President. "[T]he promulgation of broad policy is precisely what we expect the political branches to do; Presidents rarely, if ever, trouble themselves with decisions to admit or exclude individual visa-seekers." *Washington* v. *Trump*, 858 F.3d 1168, 1179-1180 (9th Cir. 2017) (Bybee, J., dissenting from the denial of reconsideration en banc). It would invert the constitutional structure to "give deference to a consular officer making an individual determination, but not the President when making a broad, national security-based decision." *Id.* at 1179.

b. Respondents also argue that, even if *Mandel* applies, Justice Kennedy's concurrence (joined by Justice Alito) in *Din*, *supra*, reads *Mandel* to allow courts to undertake a boundless search for evidence of "'bad faith.'" IRAP Br. 33-36 (citation omitted); see Hawaii Br. 50. Respondents' reliance on *Din* is misplaced.

In *Din*, there was no question that the government's stated reason for excluding the alien—he was inadmissible on "terrorism-related" grounds under 8 U.S.C. 1182(a)(3)(B)—was "facially legitimate." 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). And the government's decision "indicate[d] it relied upon a bona fide factual basis" for invoking that reason to exclude him—there, by citing a statutory ground for inadmissibility that "specifie[d] discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* at 2140-2141. Because the U.S.-citizen plaintiff offered nothing to refute that factual basis, the concurring Justices explained that "*Mandel* instructs us not to 'look behind' the Government's exclusion of" the alien. *Id.* at 2141. The concurring Justices' reference to "bad faith" thus did not propose an enormous loophole in *Mandel.* They merely hypothesized that, if the government had not identified a factual basis for the exclusion, the plaintiff might have been able to seek "additional factual details." *Id.* at 2141. But when the government does identify such a basis—as it did in *Mandel* and *Din*—that is the end of the analysis. Under rational-basis review, if "there are plausible reasons for" the challenged action, the "inquiry is at an end." *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). That is particularly true for laws involving the exclusion of aliens. See *AAADC*, 525 U.S. at 491.

In sum, the Order's stated national-security objective is unquestionably facially legitimate. And respondents have never contended that the facts recited in the Order for invoking that national-security rationale are not objectively reasonable. That should be the end of the analysis. Nothing in *Mandel* or *Din* permits further inquiry into the purported subjective motivations of government officials.

B. The Order Is Constitutional Under Domestic Establishment Clause Precedent

In any event, the Order is constitutional under any standard of review. Section 2(c)'s purpose was to protect national security and further foreign policy by conducting a worldwide review of vetting procedures and, pending the outcome, pausing entry from countries that had previously been found to pose heightened terrorism-related concerns. Respondents' contrary arguments rest principally on campaign statements. Those statements should not be considered at all. Regardless, they have no bearing on the policy that was ultimately adopted, which is not a "Muslim ban."

1. Respondents fail to show, even under domestic Establishment Clause precedent, that the Order is

premised on an impermissible religious purpose. They make virtually no effort to show that the Order's text or operation reflects any religious purpose. They cite nothing in the refugee provisions remotely suggesting a religious aim. Respondents assert (Hawaii Br. 54) that Section 2(c)'s entry suspension encompasses six Muslim-majority nations. But they disregard both that those six countries are the same ones previously identified by Congress and the Executive as raising heightened terrorism-related concerns, and that the Order omits the world's many other Muslim countries that had not been so identified. Respondents cite (IRAP Br. 40) a provision directing data collection about "acts of gender-based violence against women, including so-called 'honor killings,' in the United States by foreign nationals." J.A. 1437 (§ 11(a)(iii)). But "[h]onor crimes are not specific to any religion, nor are they limited to any one region of the world."[9] That single provision cannot possibly justify invalidating an Executive Order concerning immigration and national security.

Respondents also ignore that the Order was supported by three Cabinet officials: the Secretary of Homeland Security and the Attorney General (who recommended it), and the Secretary of State (who joined them in announcing it). See Gov't Br. 7-8. As the Secretary of State described on the day of its issuance, the Order is "a vital measure for strengthening our national security."[10] Respondents' theory would require this Court to conclude that all of those officials were either motivated by, or at least complicit in, anti-Muslim animus. There is no basis for that remarkable conclusion. On its face and in operation, the Order has nothing to do with religion.

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[9] Human Rights Watch, *HRW World Report 2001: Women's Rights, Item 12—Integration of the Human Rights of Women and the Gender Perspective* (Apr. 6, 2001), https://goo.gl/uBub9w.

[10] Rex W. Tillerson, Sec'y of State, *Remarks on the President's Executive Order Signed Today* (Mar. 6, 2017), https://goo.gl/815HN4.

2. Respondents ask the Court (IRAP Br. 37-39; Hawaii Br. 55-56) to ignore all of that and instead look to extrinsic campaign statements to divine a religious purpose. But campaign statements should not be considered at all, and even if they were, the statements on which respondents principally rely pertain to a proposal that was never adopted. They are therefore doubly irrelevant.

a. Statements made by a political candidate running for the Presidency form no part of the official action by which courts adjudge the constitutionality of laws. Campaign statements are made in the heat of political battle, are imprecise, and change over time. See Southeastern Legal Found. Amicus Br. 14-23. More importantly, they are made before the candidate swears an oath to uphold and defend the Constitution, forms his Administration, and receives the advice of his Cabinet. These momentous steps mark a fundamental shift from private citizen to the embodiment of the Executive Branch. Statements by a candidate running for President have no bearing on the meaning of actions taken by the Executive Branch.

None of respondents' cases is to the contrary. *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), involved an expressly religious display, and the county executive brought his own pastor to speak at the official unveiling; the pastor's remarks thus were part of the official record. *Id.* at 869. In *Lukumi*, the plurality considered public statements at a town-council meeting that were in effect legislative history of the local ordinance at issue. 508 U.S. at 541 (opinion of Kennedy, J.). Most of respondents' other cases similarly involved statements from a State's constitutional convention, see *Hunter* v. *Underwood*, 471 U.S. 222, 229-230 (1985), or else referenda, initiative campaigns, or their equivalent, where statements of sponsors explaining the referenda's meaning are likewise akin to traditional legislative history, see *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463, 471 (1982); *Epperson*, 393 U.S. at 108 n.16; *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 417-422 (2d Cir. 1995), cert. denied, 518 U.S. 1017 (1996). *Glassroth* v. *Moore*, 335 F.3d 1282 (11th Cir.), cert. denied, 540 U.S. 1000 (2003), concerned an overtly religious Ten Commandments display, and the candidate sponsoring the display repeatedly confirmed its religious purpose after taking office, *id.* at 1284-1285, 1297. And *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), merely noted that "circumstantial" evidence of an improper purpose, such as a "clear pattern, unexplainable on grounds other than" discrimination, may be relevant. *Id.* at 266. Respondents identify no case in which this Court invalidated government action that was religion-neutral in its text and operation based on campaign statements made by a candidate running for office.

b. Even if campaign statements were not categorically off-limits, the statements here have no bearing on the Order's meaning. Respondents invoke remarks such as a 2015 press release calling for a "total and complete shutdown of Muslims entering the United States." IRAP Br. 1-2; Hawaii Br. 8. But those statements describe something that was never adopted. Then-candidate and now-President Trump clarified over time that the Order's focus was security, not religion. See Gov't Br. 74. As President Trump stated after his election in describing the directive the Order replaced, and as the Order's text and operation clearly demonstrate, the Order "[is] not a Muslim ban."[11] And since taking office, the President has praised Islam as "one of the world's great faiths," decried "the murder of innocent Muslims," and emphasized that the fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[12] Under an objective review that accords the Head of a co-equal branch the presumption of regularity that is owed the Office, the Order here was based on national security and foreign policy, not religion.

IV. THE GLOBAL INJUNCTIONS ARE OVERBROAD

Finally, should this Court conclude that any injunction is nonetheless proper, it should reject the injunctions' vastly overbroad scope. Respondents do not dispute that Article III and equitable principles confine relief to what is necessary to redress injuries to the plaintiffs. Gov't Br. 78-79. An injunction limited to the individual respondents would have fully redressed their claimed injuries by allowing entry of their relatives. Respondents argue that a "message of condemnation would remain." IRAP Br. 60; see Hawaii Br. 61. But once the Order was enjoined as to respondents' relatives, it could not send any message to respondents. Respondents' contrary theory would nullify Article III and equitable limitations and enable any Muslim in the United States—perhaps anyone who objects to the Order—to sue and obtain global relief. And Hawaii does not attempt to show it would suffer irreparable harm without a categorical injunction. As Hawaii recently joined other States in arguing, federal courts should not enjoin a federal immigration policy "nationwide" "based on a single State's speculative claim of harm." State of Washington et al. Amicus Br. at 2, *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).[18]

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[11] *President Trump Signing Executive Orders*, C-SPAN.org (Jan. 28, 2017) (statement of President Donald J. Trump, at 3:32), https://www.c-span.org/video/?423167-1/president-trump-signing-executive-orders.

[12] Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2.

The decisions below reflect a disturbing trend of issuing nationwide injunctions at the behest of individual litigants. See generally Bray, *supra* n.13. This trend allows a single district court to bring judicial review in all other fora to a halt; deprives other courts, including this one, of differing perspectives on important questions; and undercuts the congressionally authorized mechanism that *is* intended to permit broader relief—namely, class actions. The Court should repudiate that practice. At the very least, it should make clear that, in these circumstances, a *preliminary* injunction issued in response to a request for a temporary restraining order should be narrowly tailored to the plaintiffs, not a vehicle for halting public policy across the Nation.

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[18] Respondents incorrectly argue (Hawaii Br. 61) that equity permits broader relief. Nationwide injunctions were not relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999) (citation omitted). They did not exist at equity at all. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. (forthcoming 2017) (Feb. 9, 2017 draft), https://goo.gl/7uNygt (Bray).

* * * * *

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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Solicitor General

OCTOBER 2017

Nos. 16-1436 & 16A1190

JUN 20 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL.,
Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROGRAM, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Presidential Mem., *Effective Date in Exec. Order 13780* (June 14, 2017) ....*passim*

RULE

S. Ct. Rule 15.8 1

Pursuant to Supreme Court Rule 15.8, the respondents respectfully submit this supplemental brief to inform the Court about new developments since their last filing.[1] The decision of the U.S. Court of Appeals for the Ninth Circuit in *Hawai'i v. Trump* means that the government may now proceed with its review of vetting procedures under Section 2 of Executive Order 13780, 82 Fed. Reg. 13209 (the "Order"). *Hawai'i v. Trump*, ___ F.3d ___, 2017 WL 2529640, at *28-29 (9th Cir. June 12, 2017), *appl. for stay docketed*, No. 16A1191. And the President's June 14 Memorandum establishes separate effective dates for different provisions of the Order, thus severing the Section 2(c) ban from the vetting review that it ostensibly facilitated. Presidential Mem., *Effective Date in Exec. Order 13780* (June 14, 2017) (the "Memorandum").

Together, these developments make the facial illegitimacy of the Order and its inconsistency with the Immigration and Nationality Act even clearer. They negate the Order's own justification for the 90-day ban in Section 2(c), as a "temporary pause" *concurrent* with the review process, instead reinforcing the conclusion that Section 2(c)'s actual purpose is to disfavor Muslims. And because the review process will now proceed, the argument that the Court should intervene is even weaker. By October, the review will be complete, and the asserted purpose for the Section 2(c) ban will no longer exist at all. Moreover, the Order contemplates that the government may put into place a different set of measures after completing its review.

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[1] The government addressed these developments in its reply papers. *See* Cert. Reply 2; Stay Reply 1-2, 6 n.3.

Therefore, the government's request for certiorari is clearly premature. Different, more permanent measures may be in place before the new Term; those new measures may or may not include a ban; and if they do include a ban, it may be substantially different from the Section 2(c) ban. The new measures, if challenged, would be more suitable for this Court's review. Certiorari should be denied here, and so should the government's extraordinary request for a stay that would allow it to implement the entire 90-day ban without merits review.

STATEMENT

On June 12, 2017, after the respondents had sent their brief in opposition to the printer, the Ninth Circuit issued its decision in *Hawai'i v. Trump.*[2] In a per curiam opinion, the Ninth Circuit affirmed on statutory grounds a preliminary injunction of the Section 2(c) 90-day six-country ban, the Section 6(a) 120-day refugee ban, and the Section 6(b) reduction in refugee admissions, without reaching the plaintiffs' Establishment Clause claims. *See Hawai'i*, 2017 WL 2529640, at *13-23; *see also* Opp. Cert. 34-36 (explaining that Section 2(c) violates the Immigration and Nationality Act).

More importantly for present purposes, the Ninth Circuit lifted the injunction of Section 2's review and reporting provisions. *See Hawai'i*, 2017 WL 2529640, at *29. Those provisions mandate a 70-day review process, *see* Order §§ 2(a), 2(b) (20 days),

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[2] Respondents briefly addressed the *Hawai'i* opinion in their opposition to the government's stay application, which was finalized soon after the Ninth Circuit issued its decision. *See* Opp. Stay 16.

2(d) (50 days), followed by a prompt recommendation to the President regarding any action after the review, *id.* § 2(e). On June 13, the government filed a consent motion in *Hawai'i* requesting that the court of appeals immediately issue the mandate so that the "government may then implement" the review provisions of the Executive Order. Consent Mot. to Issue Mandate 3-4, Doc. 316, *Hawai'i v. Trump*, No. 17-15589 (9th Cir. filed June 13, 2017). On June 19, the Ninth Circuit granted that motion and ordered that the mandate issue immediately.

Meanwhile, on June 14, the President issued the Memorandum, revising the Order's effective date, as to each individual provision, from "March 16, 2017," Order § 14, to "the date and time at which the [preliminary] injunctions are lifted or stayed with respect to that provision." Thus, according to the Memorandum, every provision that was initially enjoined may go into effect separately, if and when the injunctions as to that provision are lifted—and without regard to the status of any other provision.

ARGUMENT

1. These developments undermine any claim that Section 2(c) is facially legitimate or consistent with 8 U.S.C. § 1182(f). Section 2's text binds the Section 2(c) ban to the Section 2 review process. *See* Order § 2, titled "Temporary Suspension of Entry . . . *During Review Period*" (emphasis added); *id.* § 2(c) (purpose of 90-day ban is "[t]o temporarily reduce investigative burdens on relevant agencies during the review period . . . ."). Similarly, the government's asserted secular purpose for the ban rests on the claim that it is a "temporary pause" to allow the review of vetting procedures. Order

§ 1(f); *see also, e.g.*, *id.* §§ 2(a), (b) (stating that Section 2's purpose is a "worldwide review"); Pet. 7 (observing that Section 2(c) exists "to facilitate [that] review"); Supp. Mem., *Trump v. Hawai'i*, No. 16A1191, at 16-17 (filed July 15, 2017) (same).

What Section 2's text originally purported to connect, the Memorandum has now explicitly severed. The Memorandum treats each "provision" in Section 2 as an end in itself, and provides that each may have its own effective date, irrespective of the effective dates of other provisions. As amended by the Memorandum ("[t]o the extent it is necessary, this memorandum should be construed to amend the [Order]"), the 90-day ban can no longer be expected to run concurrently with the review process, and therefore cannot be explained either by the need to free up agency resources for the review process or to "pause" entries while uncertainty about these nationals or countries is addressed through the review—the only reasons the government has ever given for this extraordinary and unprecedented 90-day ban. In short, the Memorandum cuts the legs out from under the Order's own justification for the ban. *See also* Opp. Cert. 23 n.13 & 34-36 (providing other reasons the ban is not "facially legitimate" and does not comply with the statute).

2. As a practical matter, the 70-day review process laid out by Section 2 will begin immediately, and will be complete by the beginning of the Court's next Term.[3] Thus, even if the government still asserts that the ban serves the review process (notwithstanding the President's decision to sever

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[3] A similar review process established by Section 6 will be complete by the end of October. *See* Order § 6(a).

them), the review process will be over by October, and the asserted reason for the 90-day ban imposed by Section 2(c) will no longer exist. *See* Opp. Stay 16 (noting the possibility that the review provisions could be reinstated and explaining that the completion of that process would vitiate the asserted need for the 90-day ban). The government's insistence on implementing the ban even in these circumstances is inconsistent with the purposes stated in the Order and in the government's papers—but is consistent with the President's clearly and repeatedly stated goal of preventing Muslims from entering the United States.

3. After the review is complete, the Order expressly contemplates that, in place of the expiring 90-day ban, the government may implement more-permanent measures affecting the currently-listed countries or other countries—or may decide not to impose any ban at all. *See* Order §§ 2(e) (contemplating a potential new presidential proclamation imposing further travel restrictions), 2(f) (same). What is before the Court now, therefore, is a request to review a temporary ban provision that, even by the government's telling, will be overtaken by events by the time the Court hears oral argument.

If, after the review is complete, the government decides not to impose further travel restrictions, the 90-day ban at issue here will be a pointless relic of prior circumstances, and will not require review. And if the government does take more-permanent actions after that process ends, *see* Order §§ 2(e), (f), the Court can review any challenges to those actions in due course, after the lower courts have addressed them in the first instance. *See, e.g.*, *NCAA v. Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below").

Moreover, this case is on interlocutory appeal from a preliminary injunction. There is no circuit split to resolve. And, as the lower courts have repeatedly observed, the case is truly unique. App. 61a-62a; 252a. No case in our history involves an even remotely similar factual record, and the court of appeals' decision applying this Court's precedent to this unique set of facts does not restrict this or any future President's legitimate exercise of his or her extensive national security powers in any way. *See* Opp. Cert. 15, 20-29. There is no reason for this Court to grant certiorari.

4. Finally, these developments weaken the government's case for a stay even further. They seriously undermine the government's position on the merits and its likelihood of obtaining certiorari. And by clarifying that the 90-day Section 2(c) ban is tied neither to the review nor to circumstances in any particular 90-day period, they further underscore that the government will suffer no injury from not being allowed to implement the ban *now*. The lack of any such injury is particularly striking here, where a stay would effectively short-circuit the merits by allowing the government to execute the entire 90-day ban before this case will be argued and decided. *See* Opp. Stay 19-20; *accord* Stay Reply 13 (not disputing that stay would have that effect).[4]

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[4] Should the Court grant the petitions for certiorari in this case and the *Hawai'i* case, the respondents concur with the government that the cases should be heard in tandem, rather than consolidated. The two cases involve differently situated

Respectfully Submitted,

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plaintiffs, and the courts of appeals relied on different grounds and granted different relief.

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File

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Supreme Court, U.S.
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October 5, 2017

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Donald J. Trump, et al. v. International Refugee Assistance Project, et al.*, No. 16-1436
Letter Brief of Respondents

Dear Mr. Harris:

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OFFICERS AND
DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

On September 24, 2017, the President signed a proclamation imposing an indefinite ban on certain nationals of eight countries. *See Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3"). Pursuant to the Court's order of September 25, 2017, plaintiffs in the above-captioned case respectfully submit this letter brief addressing whether, or to what extent, EO-3 renders this case moot.

This case is not moot. Plaintiffs retain an all-too-real stake in the outcome of the case. The 90-day ban on their relatives has now been converted into an indefinite ban with the potential to separate their families, and thousands of others', for years. And the religious condemnation of the earlier Executive Order is not dissipated by EO-3, which—despite some new window dressing—continues to relay a message of disparagement to the plaintiffs and other members of their faith.

Moreover, even if the Court were to conclude that the government had voluntarily ceased the challenged conduct, the government has not met its "heavy burden" of demonstrating that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). To the contrary, the President has already repeated his wrongful behavior in EO-3, and has also made clear his preference to reinstate an even broader ban. Br. of Respondents 6 & n.8, 40 n.20. Accordingly, the case is not moot and the Court should reschedule it for argument.

Even if Court were to determine that the government's appeal is moot, vacatur is inappropriate. Any mootness would be the result of the government's own choices. The government controlled the timing of the prior ban, and adjusted it at its pleasure. *See* June 14 Memorandum, J.A. 1442. It chose not to seek expedited merits review of the preliminary injunction. Instead, the government sought and received a stay and a schedule that allowed it to impose the entire 90-day Section 2(c) ban before this Court could decide the merits of the appeal, and then chose, about two weeks before oral argument, to issue a new ban proclamation. Where the appealing party's own conduct moots an appeal, the exceptional equitable remedy of vacatur is not warranted. The decision of the court below should be left intact.

In the alternative, the Court could conclude that even though the case is not moot, resolving the merits at this juncture may not be in the interests of judicial economy, and therefore it could dismiss the writ of certiorari as improvidently granted. EO-3 raises questions that this Court may prefer the lower courts to pass on in the first instance.

BACKGROUND

This Court granted certiorari to consider the district court's preliminary injunction of Section 2(c) of the Executive Order signed March 6, 2017. J.A. 1416-1440 ("EO-2"). As set forth more fully in the plaintiffs' merits brief, that order was itself a continuation of the basic policy and characteristics of the original Executive Order ("EO-1"). *See* Br. of Respondents 1, 3-7.

EO-3, issued on September 24, 2017, represents yet another step in the same progression from the President's promises of a Muslim Ban, to EO-1, and then to EO-2. It continues to impose bans on five of the six countries subject to Section 2(c) of EO-2: Iran, Libya, Somalia, Syria, and Yemen. It adds a ban on yet another Muslim-majority country, Chad. It also includes two non-Muslim-majority nations, North Korea and Venezuela, but their inclusion barely alters the overall effect of the ban. Virtually no North Korean nationals obtain U.S. visas even in the absence of a ban.[1] And the narrow ban on tourist and similar visas for Venezuelans applies *only* to certain government officials and their family members. EO-3 § 2(f)(ii).

The new ban varies in the extent to which it bars the entry of individuals on nonimmigrant visas: All nonimmigrants from Syria are banned, for example; most from Iran; only some from Yemen; and none from Somalia. But the ban imposes the same across-the-board ban on immigrants from the six Muslim-majority nations (along with the near-empty set of immigrants from North Korea). EO-3 § 2.

The combined effect of Section 2(c) of EO-2, and the preliminary injunction and stay previously ordered in this case, was that as of September 23, 2017, nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen who lacked "a credible claim of a bona fide relationship with a person or entity in the United States" were banned. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam). EO-3 immediately imposes its ban on those who were banned on September 23 and are also in one of the categories banned by EO-3. EO-3 establishes an effective date of October 18 for application of its ban to all other individuals. EO-3 § 7.

EO-3 transforms what the government previously sought to portray as a "pause," Br. of Petitioners 7, 8, 45, 47, 50, 65, 66, into an indefinite ban. For plaintiffs and their clients and members, EO-3 represents potential permanent separation from loved ones, including spouses, children, parents, and siblings. And it continues to send the President's message of condemnation of Islam, a religion that he said "hates us." J.A. 766.

ARGUMENT

I. THIS CASE IS NOT MOOT.

"Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies.'" *Chafin v. Chafin*, 568 U.S.

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[1] *See Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FiveThirtyEight (Sept. 28, 2017), *available at* https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban/.

165, 171 (2013). "There is . . . no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 172 (internal quotation marks omitted). "But a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," and "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (internal quotation marks omitted).

The issuance of EO-3 does not render this case moot because it extends rather than eliminates the challenged conduct at issue. And even if EO-3's imposition of a third version of the ban were a cessation of all the challenged conduct, the government has not shown that it is "absolutely certain" that the challenged conduct will not recur. *Friends of the Earth*, 528 U.S. at 189.

First, the case as a whole is not moot. The limited aspect currently before this Court is the government's appeal from the preliminary injunction of Section 2(c) of EO-2. But plaintiffs' suit challenges EO-2 in its entirety—not only Section 2(c)—and that dispute remains live and pending in district court. Moreover, plaintiffs are amending their complaint to add intervening facts regarding EO-3 and to challenge the updated ban.

The injuries plaintiffs assert have, if anything, become more acute because of EO-3. Jane Doe #2 and clients and members of the organizational plaintiffs now face indefinite separation. Plaintiffs remain condemned for their religion, and will be for the indefinite future. The organizational plaintiffs must confront potentially permanent diversion of their resources and impediment of their goals. Plaintiff Middle East Studies Association, for example, will feel the effects of the ban not just on this year's annual meeting, and the associated loss of revenue, but next year's, and in years beyond. Thus, even if the government's actions were to have rendered its own appeal moot, the case as a whole is not. *See* Robert L. Stern, et al., *Supreme Court Practice* 824 (8th ed. 2002) (noting that "one issue in a case, such as the right to an injunction, may become moot" while "another issue . . . may remain live").

Second, the appeal as to Section 2(c) is not moot, because the government has not satisfied the heavy burden imposed on parties who claim a dispute has been mooted by the party's own voluntary cessation of the challenged conduct. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Id.* (internal quotation marks omitted). Accordingly, voluntary cessation will only moot a case if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (internal quotation marks omitted); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.").

Thus, even where a town had wholly revised a challenged ordinance while a constitutional challenge to it was on appeal, this Court held that the case had not become moot, because the town had not demonstrated that there was no chance that it would revert to its challenged conduct. *City of Mesquite*, 455 U.S. at 289 & n.10. The Court noted that the government could attempt to "show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary," but held nonetheless that the case was not moot. *Id.* at 289 n.10; *see also Comer*, 137 S. Ct. at 2019 n.1.

The only events that might even conceivably render this appeal moot result from the government's own voluntary actions. The government chose to establish a set 90-day period for the Section 2(c) ban. It chose to issue a Presidential Memorandum providing that the ban would go into effect were this Court to stay the injunctions, even absent a ruling on the merits. *See* Br. of Respondents 10-11; J.A. 1442. It chose *not* to seek expedited merits review that could have been completed before the 90-day ban expired. And it chose to issue a proclamation just two weeks before oral argument, imposing yet a third version of its ban. The doctrine of voluntary cessation thus applies.

The government has manifestly failed to show that the challenged conduct will not recur. Indeed, the government is not just "free to return to his old ways." *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted). It has "*already* done so." *Ne. Florida Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (emphasis added). EO-

3 extends the bulk of the Section 2(c) ban. It broadly bans nationals of five of the six same countries subject to Section 2(c), a group that remains overwhelmingly Muslim. Because the government voluntarily ceased the narrow conduct at issue but at the same time reinstated effectively the same conduct in a new form, "[t]his is an *a fortiori* case" for rejecting any contention of mootness. *Id.*

That EO-3 is not identical to Section 2(c) does not alter this conclusion. *Jacksonville* lays to rest any suggestion that only the recurrence of the "*selfsame*" ban provision prevents mootness. *Id.* Rather, the question is whether the potential—or, as in *Jacksonville* and here, the actual—new conduct allegedly violates plaintiffs' rights "in the same fundamental way." *Id.*

Jacksonville was a challenge to an affirmative action ordinance. After certiorari was granted, the ordinance was replaced by a significantly different version. The new program altered the set of preferred groups; replaced a set aside with participation goals; and provided five methods, rather than one, to achieve those goals. *Id.* at 661. This Court nevertheless concluded that the "gravamen" of the plaintiffs' claim that they were disadvantaged in city contracting remained the same, so the case was not moot despite the city's "voluntary cessation." *Id.* at 662.

That conclusion applies with equal if not greater force here. The government has not ceased its challenged conduct, but has instead extended it. The gravamen of plaintiffs' case remains that the President has unconstitutionally sought to effectuate his promised ban on Muslims, and violated the governing statutes. EO-3 does not change those essential contentions. The continuity between EO-2 and EO-3 is closer and clearer than the relationship between the revoked ordinance and its replacement in *Jacksonville*. EO-3 is framed as the indefinite successor expressly contemplated in § 2 of EO-2; it continues to ban Muslim-majority countries, including five of the same six countries; and it has the same statutory infirmities as EO-2, invoking an untenably broad reading of Congress's delegation of authority in 8 U.S.C. § 1182(f) and violating the prohibition on discrimination on the basis of nationality set forth in 8 U.S.C. § 1152(a)(1)(A). Because the gravamen of plaintiffs' challenge applies to EO-3, and the government has not met its heavy burden of demonstrating with absolute certainty that its challenged conduct will not recur, the appeal is not moot, and should be rescheduled for argument.[2]

II. IF THE COURT FINDS THE CASE MOOT, VACATUR IS INAPPROPRIATE.

If the Court concludes that the aspect of the case pending before the Court is moot, it should not vacate the judgment below.

Vacatur is an "equitable remedy" that is available only to "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (internal quotation marks omitted); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). That remedy is "extraordinary," and may be forfeited by a party's litigation decisions. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("voluntary forfeiture of review" disentitled party from vacatur); *see also Munsingwear*, 340 U.S. at 41 (government not entitled to vacatur where it "slept on its rights").

As already explained, the government's own choices in shaping the bans at issue and litigating this case have resulted in the expiration and replacement of the Section 2(c) ban before this Court could hear the merits of the government's appeal. The government sought an immediate stay of the injunctions issued in this case and No. 16-1540, but notably did not seek an expedited merits briefing and argument schedule that would have permitted a final decision during the 90-day ban period. In fact, the government *conceded* that, if granted, a stay would effectively prevent the Court from considering the merits. Stay Reply 13. It sought, in other words, an order triggering the 90-day ban period knowing full well that the ban would expire before a decision on the merits. The government unilaterally and voluntarily altered the effective date of EO-2 as this Court was considering whether to grant review. And, of course, the government chose the timing of EO-3 itself.

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[2] This case also falls within "the exception to mootness for acts that are 'capable of repetition, yet evading review.'" *Friends of the Earth*, 528 U.S. at 170 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999)). Were the issuance of EO-3 enough to render this case moot, the President could easily do the same with regard to any challenge to EO-3 that reaches this Court; and he could repeat that process indefinitely. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (doctrine does not require "repetition of every 'legally relevant' characteristic" of the case).

Vacatur is not warranted under these circumstances. To the extent the expiration of the 90-day ban and the signing of EO-3 moot the appeal, that situation is attributable to the government's "voluntary conduct." *Friends of the Earth*, 528 U.S. at 194 n.6 ("[I]t is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court."). Like the losing party's decision to settle the case in *U.S. Bancorp*, the government's decisions here to delay merits review while seeking a stay, and to issue a new ban shortly before oral argument "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering [its] claim to the equitable remedy of vacatur." 513 U.S. at 25; *see also Munsingwear*, 340 U.S. at 41.

III. IN THE ALTERNATIVE, THE COURT MAY PREFER TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED IN LIGHT OF EO-3.

Because this case is not moot, plaintiffs believe that the proper course is to restore it to the calendar for argument and decision. But the Court may prefer to dismiss the government's petition as improvidently granted in light of EO-3. *See, e.g., Sanks v. Georgia*, 401 U.S. 144 (1971) (dismissing appeal where state repealed virtually all of challenged law after Court noted probable jurisdiction); *Cook v. Hudson*, 429 U.S. 165 (1976) (per curiam) (dismissing writ in light of later-enacted statute).

As set forth above, plaintiffs maintain that EO-3 is invalid for the same reasons that EO-2 was; it delivers on President Trump's unconstitutional promise to ban Muslims, and it exceeds his statutory authority. Still, this Court is "one of final review, not of first view." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015) (internal quotation marks omitted). The lower courts have not had the opportunity to examine how the principles articulated in their earlier opinions apply to EO-3; nor have the parties had the opportunity to brief that question or to present a record on which it could be decided. Plaintiffs recognize that the Court may prefer to have the lower courts address EO-3 in the first instance, should it find the case in its present posture not to be "a provident expenditure of the energies of the Court." *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 502 (1971) (Harlan, J., concurring). Accordingly, the Court may prefer to dismiss the writ as improvidently granted in light of the government's subsequent conduct. That course would leave adjudication of EO-3 to the lower courts in the first instance, and reserve this Court's review for any review of those decisions, if sought.

Respectfully submitted,

/s/ Omar C. Jadwat
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Counsel for Respondents

cc: Noel Francisco

STATEMENT OF SERVICE

Case No. 16-1436 (16A1190)

Case Title: *Trump v. International Refugee Assistance Project*

Type of Document: Respondents' Letter Brief Addressing Whether, The Proclamation Issued On September 24, 2017, May Render Cases No. 16-1436 And 16-1540 Moot

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Washington, D.C. 20530

October 5, 2017

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re. Donald J. Trump, et al. v. International Refugee Assistance Project, et al., No. 16-1436
- and -
Donald J. Trump, et al. v. State of Hawaii, et al., No. 16-1540

Dear Mr. Harris:

This letter is in response to this Court's September 25 order requesting letter briefs addressing "whether, or to what extent, the Proclamation issued on September 24, 2017, may render [these appeals] moot," as well as "whether, or to what extent, the scheduled expiration of Sections 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16-1540 moot." The United States respectfully submits that both of these appeals are now or soon will be moot. As a result, pursuant to this Court's "established practice," the Court should "vacate the judgment[s] below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur is especially necessary here, where the lower-court opinions could "spawn[] * * * legal consequences" in future cases, *id.* at 42, on critical issues including justiciability and the President's authority to protect national security.

A. The Executive Order And September 24 Proclamation

1. The President's March 6 Executive Order

As explained in our initial brief (at 7-19), these cases involve challenges to Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order). In *Trump* v. *International Refugee Assistance Project*, No. 16-1436 (*IRAP*), the district court preliminarily enjoined Section 2(c) of the Order, which placed a 90-day pause on entry, subject to exceptions, for certain nationals of six countries that Congress or the Executive previously identified as presenting heightened terrorism-related concerns. In *Trump* v. *Hawaii*, No. 16-1540, the district court preliminarily enjoined all of Sections 2 and 6 of the Order. Section 6(a) globally suspended for 120 days decisions on refugee applications, and travel into the United States, under the U.S. Refugee Admission Program (USRAP), subject to exceptions. Section 6(b) limited to 50,000 the number of refugees who could be admitted to the United States in Fiscal Year 2017. On appeal, the Fourth and Ninth Circuits modified but substantially affirmed the injunctions. J.A. 170-385 (*IRAP*); J.A. 1164-1237 (*Hawaii*). This Court partially stayed both injunctions on June 26, *Trump* v *International Refugee Assistance Project*, 137 S. Ct 2080, 2087-2089 (2017) (per curiam), which triggered the Order's effective date, 82 Fed. Reg. 27,965 (June 19, 2017)

For refugees, the Order's cap in Section 6(b) ended on September 30, at the conclusion of Fiscal Year 2017. Gov't Br 38 n.14. The President has established a new maximum number of refugees to be admitted in Fiscal Year 2018 per 8 U.S.C 1157. See Memorandum for Sec'y of State, *Presidential Determination on Refugee Admissions for Fiscal Year 2018* (Sept 29, 2017), https.//www.whitehouse gov/the-press-office/2017/09/29/presidential-memorandum-secretary-state Section 6(a)'s global suspension on travel and decisions for refugees is set to expire on October 24—120 days after the government was able to put the Order into effect following this Court's stay During that 120-day period, the Order directed that "the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures " J.A 1433

Section 2(c)'s temporary entry suspension expired on September 24, 90 days after this Court's June 26 stay. Gov't Br 36 In Section 2(a), the President directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking U S. visas. The Order directed the Secretary to report his findings to the President, after which nations identified as deficient would have time to alter their practices. In its June 26 order, the Court stated that it "expect[ed]" its stay would "permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of § 2(c) " 137 S Ct at 2089

2. *The President's September 24 Proclamation*

On September 24, the President issued a Proclamation summarizing the completed review and notice process, as well as his findings and corresponding determinations Proclamation No. 9645, 82 Fed Reg 45,161 (Sept. 27, 2017). The Proclamation describes how, as part of the government's review, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, determined the information needed from or about foreign governments to enable the United States to assess its ability to make informed decisions about foreign nationals applying for visas. That information had three components: (1) identity-management information, to assess "whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports", (2) national-security and public-safety information, to determine "whether the country makes available * * * known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information", and (3) a national-security and public-safety risk assessment, including such factors as "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program * * * that meets all of [the program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States " § 1(c)

After developing these criteria, the Department of Homeland Security, in coordination with the Department of State, collected data on and evaluated every foreign country. Based on the specified criteria, the Secretary of Homeland Security identified 16 countries as "inadequate." § 1(e). Another 31 countries were classified as "at risk" of becoming "inadequate." *Ibid.* These preliminary results were submitted to the President on July 9, as the Order directed. § 1(c). The Department of State then conducted a 50-day engagement period to encourage all foreign governments to improve their performance. These diplomatic efforts yielded significant gains: for example, 29 countries produced travel-document exemplars to combat fraud, and 11 countries agreed to share information on known or suspected terrorists. § 1(f).

After the engagement period ended, the Secretary of Homeland Security submitted a report to the President, per Section 2(e), recommending entry restrictions on certain nationals from seven countries (Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen) that continue to be "inadequate" in providing information to the United States. § 1(h)(ii). The Secretary also determined that Iraq did not meet the United States' requirements, but in lieu of entry restrictions, recommended additional scrutiny of Iraqi nationals seeking entry because of the United States' close cooperative relationship with Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combatting the Islamic State of Iraq and Syria (ISIS). § 1(g). The Secretary also recommended entry restrictions on nationals of Somalia. Although Somalia generally satisfies the information-sharing criteria, the Secretary found that the Somali government's inability to effectively and consistently cooperate, as well as the terrorist threat that emanates from its territory, present special circumstances warranting limitations on entry. § 1(i).

Pursuant to the President's broad authority under Article II of the Constitution and federal statutes, including 8 U.S.C. 1182(f) and 1185(a)(1), and based on extensive consultation with his Cabinet, the President issued a Proclamation on September 24, 2017 consistent with the Secretary of Homeland Security's recommendations. The Proclamation imposes a different set of restrictions than Section 2(c) of the Order, and it applies to a different set of countries. Unlike the Order, the Proclamation imposes no restrictions on Sudan, but it does impose restrictions on Chad, North Korea, and Venezuela. The restrictions are tailored for each country to take account of U.S. goals for foreign policy, national security, and counterterrorism, as well as individualized assessments of the country's conditions and capabilities. Thus, for countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation suspends entry of persons seeking both immigrant and nonimmigrant visas; for countries that are valuable terrorism partners but nonetheless have information-sharing deficiencies (Chad, Libya, and Yemen), it suspends entry only of persons seeking immigrant visas and business, tourist, and business/tourist nonimmigrant visas; for Somalia, it suspends entry of persons seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas; and for Venezuela, it suspends entry of "officials of government agencies of Venezuela involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business and tourist visas. § 2.

The Proclamation also exempts certain categories of foreign nationals from the suspensions and provides that the limitations on entry are subject to case-by-case waivers in accordance with guidance implemented by the Departments of State and Homeland Security. § 3.

For each country, the Proclamation is designed "to encourage cooperation" and to "protect the United States until such time as improvements occur." § 1(h)(i). To that end, it requires an ongoing review process to determine whether the limitations imposed should be continued, terminated, modified, or supplemented. § 4. The suspensions on entry were effective immediately for foreign nationals who previously were restricted under the Order and this Court's June 26 stay, and they will be effective October 18 for all other covered persons. § 7.

B. The Appeals Of The Preliminary Injunctions Are Or Soon Will Be Moot

1. Sections 2(c) and 6(b) of the Order have expired

Section 2(c)'s 90-day entry suspension ended on September 24. Section 6(b)'s refugee cap ended on September 30. As a result, the preliminary injunction in *IRAP* against Section 2(c) is now without effect, as are the portions of the preliminary injunction in *Hawaii* against Sections 2(c) and 6(b). Thus, these appeals of the injunctions are moot. See *University of Tex.* v. *Camenisch*, 451 U. S. 390, 394 (1981) (When enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction * * * is moot."). If this Court were to continue to hear these appeals, it would be asked to decide questions with no ongoing practical import—for example, whether the Ninth Circuit was wrong to conclude that the Order lacked sufficient findings, J. A. 1197, even though the Proclamation is supported by new and different national-security findings; and whether the Fourth Circuit was wrong to conclude that the Order's national-security determinations were pretextual, J. A. 219-223, even though the Proclamation now in effect is the result of an extensive, multi-agency review and recommendations from the President's Cabinet. An opinion from this Court on those issues would be advisory.

For the same reason, even if respondents' claims were ever justiciable, but see Gov't Br. 22-35, Sections 2(c) and 6(b) of the Order no longer impose any arguable harm on respondents. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (citation omitted). As the United States explained in its initial brief (at 28-30), the claims of the only two individual respondents whom the courts of appeals found to have standing became moot wholly apart from the Order's expiration when their relatives received visas. And now that the Order has expired, neither they nor any other respondent can claim to be injured by any supposed "message" that the Order formerly communicated. Nor can Hawaii claim pecuniary or any other type of harm from the now-lapsed provisions. Indeed, respondents themselves effectively conceded in this Court that the running of the Order's time limits would moot these appeals. See IRAP Br. in Opp. 13 (arguing that when Section 2(c)'s time-limited ban expires, "[a]t that point, the injunction will be moot"), Hawaii Supp. Br. in Opp. to Appl. for Stay 35 (arguing that "'time will soon bury the question'" because once the government's reviews were complete, "this Court's review will serve no practical purpose") (citation omitted).

The President's September 24 Proclamation confirms that respondents' challenges to Section 2(c) are moot, because this Court has held that a case is moot when a challenged government regulation is replaced by one that is not substantially similar. See, *e.g.*, *Kremens* v. *Bartley*, 431 U. S. 119, 128-129 (1977) (claims of named plaintiffs challenging a Pennsylvania statute were moot because the state had since enacted a new statute substantially altering the challenged procedures). Here, the new Proclamation materially differs from the Order in several ways that bear directly on the legal questions raised by these appeals. In *Hawaii*, the Ninth Circuit's core statutory holding was that the Order lacked a "sufficient finding * * * that the entry of the excluded classes [of aliens] would be detrimental to the interests of the United States." J.A. 1197. And in *IRAP*, the Fourth Circuit held that the Order was the product of religious animus, not bona fide security concerns. J.A. 219-223 (concluding that Order was "motivated" by a "desire to exclude Muslims from the United States"). The Proclamation's text and operation, however, differ significantly from Section 2(c), and it is based on detailed findings regarding the national-security interests of the United States that were reached after a thorough, worldwide review and extensive consultation. Although the *IRAP* respondents are now challenging the Proclamation, see 17-cv-361 D. Ct. Doc. 198, at 2 (D. Md. Sept. 29, 2017), that new and distinct challenge must proceed on its own terms and in the district court in the first instance.[*]

The exceptions to mootness that this Court has recognized do not apply. The limited exception when a legal question is capable of repetition yet evading review "applies 'only in exceptional circumstances,'" where "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted, brackets in original). Here, there is no significant likelihood that the same parties will be subject to the same action again. Dr. Elshikh's mother-in-law and Doe #1's wife have now received visas to immigrate to the United States, and Dr. Elshikh's mother-in-law has in fact already entered the country. Gov't Br. 30. Although Dr. Elshikh claims to have other relatives who could be affected by a policy that denies entry to nationals of certain countries, that claim is not in the record. Regardless, there is no evidence that he or anyone else has successfully petitioned the U.S. Citizenship and Immigration Services on behalf of those other relatives or that they have filed visa applications with the State Department. "Such speculative contingencies afford no basis for [the Court's] passing on the substantive issues [the parties] would have [the Court] decide with respect to the now-expired provisions." *Burke* v. *Barnes*, 479 U.S. 361, 364-365 (1987) (citation, and quotation marks omitted). Moreover, no respondent is likely to face the "same action": the purposes of the temporary suspensions that were set out in the Order have been accomplished, and the President has issued a new Proclamation based on new findings.

The exception to mootness for a defendant's "voluntary cessation" of "allegedly illegal conduct" also does not apply here. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). That exception exists because "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 285 n.1 (2001). But the government has not altered Section 2(c) or 6(b) of the Order to cause mootness. Rather, the entry suspension and refugee cap were always temporary while the Departments of State and Homeland Security reviewed the Nation's screening and vetting procedures, the provisions simply expired by their own terms. In *Burke*, Members of the House of Representatives sued to challenge the President's pocket-veto of a bill pertaining to U S. military aid to El Salvador. 479 U S. at 363 When the "bill in question expired by its own terms * * * a few weeks after the Court of Appeals entered its judgment," this Court held "that any issues concerning whether [the bill] became a law were mooted " *Ibid* The same is true here. And although the President extended the suspensions' effective date to clarify that they would take effect only when injunctions against them were lifted, that had the effect of prolonging the potential for judicial review—not evading it If respondents (or anyone else) believes the Proclamation violates their rights, they can file new challenges and those claims will not evade review (provided the plaintiffs satisfy the requirements for judicial review, such as standing).

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[*] Similarly, the President's September 29 Determination regarding the maximum number of refugees to be admitted in Fiscal Year 2018 confirms that the *Hawaii* respondents' challenge to Section 6(b) is moot. The Ninth Circuit held that Section 6(b) violated 8 U.S.C. 1157 because it reduced mid-year the number of admissible refugees below the maximum that had been set for Fiscal Year 2017. J.A. 1216-1221. But the new Determination establishes a new, different maximum for the newly commenced fiscal year, rendering academic the Ninth Circuit's analysis of Section 6(b) of the Order under 8 U.S.C. 1157.

2. *The global suspension of refugee travel and decisions under Section 6(a) is scheduled to expire soon*

Section 6(a)'s 120-day global suspension on refugee adjudications and travel is set to expire on October 24. At the end of the 120 days, the Order directs that "[t]he Secretary of State shall resume travel of refugees into the United States under the USRAP * * * , and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to [the review during the 120-day process] are adequate to ensure the security and welfare of the United States " J A. 1433-1434 The Section 6(a) review process is ongoing, and the United States anticipates that, per the terms of the Order, the government will complete its review and undertake any new actions regarding refugees by October 24. The government will promptly apprise the Court of such developments.

Any further decision regarding prospective restrictions on refugees, based on the multiagency assessments conducted during the 120-day review, will confirm that the appeal of the injunction in *Hawaii* against Section 6(a) is moot Just as a challenge to the new Proclamation would require new claims, a challenge to the legality of any new measures regarding refugees would require a showing that such measures are causing a concrete and particularized injury, as well as new proceedings to account for the government's review process. None of that is before the Court here In fact, no respondent in *Hawaii* even has a justiciable claim against Section 6(a). See Gov't Reply Br. 16-17 Hawaii is the only party whose challenge to Section 6(a) is at issue in this Court, see *id* at 16, but at most a handful of refugees are placed in Hawaii each year (approximately three per year since 2010, none in Fiscal Year 2016, and only three in Fiscal Year 2017) See Hawaii Br 22, Bureau of Population, Refugees, and Migration, U S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2018*, Tbl VIII, https //www state gov/documents/organization/274857 pdf, Bureau of Population, Refugees, and Migration, U S Dep't of State, *Refugee Arrivals by Placement State and Nationality Oct 1, 2016 through Aug 31, 2017*, http //www wrapsnet org/s/Arrivals-by-State-and-Nationality-by-Month9517 xls Hawaii cannot show a cognizable injury from being able to receive refugees except those covered by any particular set of restrictions, and Hawaii clearly has not done so on this record Nor could Hawaii establish that any new measures would cause it irreparable harm, which independently precludes continued injunctive relief.

C. The Judgments Below Should Be Vacated Under *Munsingwear*

Where, as here, an appeal becomes moot before the appealing party can obtain review, the Court's "established practice" is to "vacate the judgments below and remand with a direction to dismiss." *Munsingwear*, 340 U.S at 39. This rule is "commonly utilized," *id* at 41, and is the "normal" procedure for mootness, *Camreta* v *Green*, 563 U S. 692, 713 (2011) The rule serves important purposes: vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance " *Munsingwear*, 340 U.S at 40. In addition, a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U S Bancorp Mortgage Co* v *Bonner Mall P'ship*, 513 U S 18, 25 (1994) "Vagaries of circumstance" describes these cases. the temporary provisions in Sections 2(c) and 6(b) of the Order have expired on their own terms, and Section 6(a)'s global suspension on refugees will soon do likewise This Court repeatedly has vacated preliminary injunctions where cases became moot on their way here See *Honig* v *Students of Cal Sch for the Blind*, 471 U S. 148 (1985) (per curiam); *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U S 457 (1982); *Camenisch*, 451 U.S. at 390.

Vacatur is particularly essential here given the implications of the decisions below for the President's ability to conduct foreign affairs and protect national security As this Court has repeatedly noted, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs " *Department of Navy* v *Egan*, 484 U.S. 518, 530 (1988), see *Kiobel* v. *Royal Dutch Petroleum Co* , 569 U.S 108, 115-116 (2013) (noting "the danger of unwarranted judicial interference in the conduct of foreign policy"), *First Nat City Bank* v *Banco Nacional de Cuba*, 406 U.S. 759, 765-768 (1972) (opinion of Rehnquist, J) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations "). If allowed to stand, the lower courts' decisions threaten to undermine the Executive's ability to deal with sensitive foreign-policy issues in strategically important regions of the world The Court should not permit that unnecessary consequence, especially when the rulings below are preliminary injunctions litigated on a highly expedited basis

1. The government did not attempt to evade judicial review

Respondents note that vacatur generally is not appropriate where "the party seeking relief from the judgment below caused the mootness by voluntary action " *Bancorp*, 513 U S at 24 This exception to *Munsingwear* has been applied where the party seeking vacatur mooted the case by settlement, *id* at 25, or failed to pursue an appeal, *Karcher* v *May*, 484 U.S. 72, 83 (1987) But those are starkly different from the circumstances here Indeed, this Court has previously recognized that vacatur is the proper course when a case becomes moot due to the expiration of a challenged law See *Burke*, 479 U.S at 363 In *Burke*, where the case was mooted when the challenged bill "expired by its own terms," this Court vacated the court of appeals' judgment and remanded with instructions to dismiss the complaint *Id* at 365. This case is materially indistinguishable from *Burke* And the brevity of the Order's temporary provisions is actually a virtue, ensuring that restrictions are not retained for longer than is necessary

The logic of *Burke*, as the Court made clear in *Alvarez* v *Smith*, 558 U.S 87 (2009), is that when neither a "desire to avoid review" nor "the presence of th[e] federal case" played any "significant role" in motivating the circumstances that caused mootness, there is "not present * * * the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id.* at 96-97 (brackets in original). That description fully applies here: the mooting events in these appeals—the time limits that were features of the Order from the start—were unrelated to the litigation and certainly not an attempt to evade judicial review From the beginning, the Order's entry and refugee suspensions always were temporary measures to facilitate the government's interagency review processes and to protect national security in the interim

2. *Numerous additional factors counsel in favor of vacatur*

Although vacatur is an "equitable tradition," *Bancorp*, 513 U.S. at 25, the Court has recognized that sometimes it is a "necessity," *Camreta*, 563 U S at 713 It is difficult to imagine circumstances better suited to *Munsingwear* than these

First, as noted above, leaving intact the lower courts' judgments potentially could inflict serious damage on the President's ability to protect national security, conduct foreign affairs, and formulate Executive Branch policy In *Arizonans*, this Court recognized that, when considering the equities of vacatur, courts should take account of exceptional circumstances, including affording respect for the place of States in our federal system. 520 U S at 75. These appeals concern another, no less critical part of our constitutional structure—the Framers' allocation of responsibility to the Executive to manage foreign affairs and protect national security See, *e g* , *Winter* v. *Natural Res Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." (quoting *Boumediene* v. *Bush*, 553 U S. 723, 797 (2008))), *Reno* v. *American-Arab Anti-Discrimination Comm* , 525 U.S. 471, 490-491 (1999) (noting that immigration and deportation policy implicates "foreign-policy objectives" that the judiciary is "ill equipped" to assess) Here, the President acted pursuant to the broad authority vested in him by the Constitution and Acts of Congress, including 8 U S C 1182(f) and 1185(a)(1) When the President of the United States, pursuant to express statutory authorizations and in consultation with multiple Cabinet officials, has implemented procedures that he deems necessary to protect national security, invalidation of the President's action should not stand where mootness prevents this Court from considering the matter

Second, the decisions below have the potential for seriously problematic "prospective effect[s]," *Camreta*, 563 U S. at 702, contrary to the Court's admonition that a judgment "unreviewable because of mootness" generally should not "spawn[ ] any legal consequences," *Munsingwear*, 340 U S. at 42. In *Camreta*, the Court reviewed a lower-court opinion that had found a constitutional violation but also had held that the defendants were shielded by qualified immunity The case thereafter became moot, and this Court held that vacatur was appropriate because "a constitutional ruling in a qualified immunity case is a legally consequential decision " 563 U S. at 713 Even though the defendants had ultimately prevailed below on qualified-immunity grounds, the "adverse constitutional ruling" would continue to "injur[e]" them, because an official who "regularly engages in that conduct as part of his job * * * must either change the way he performs his duties or risk a meritorious damages action " *Id* at 703

Here, although some parts of the lower courts' opinions have been overtaken by events, other parts of the opinions potentially remain "legally consequential." *Camreta*, 563 U S. at 713 For example, the Ninth Circuit held that the President is generally forbidden by 8 U.S.C. 1152(a)(1)(A) from using country-by-country security assessments to impose nation-specific restrictions on entry, which the court held would constitute "discriminat[ion]," or an unlawful "preference or priority," in the "issuance of an immigrant visa" on the basis of "nationality." J A 1209-1210 (citation and emphasis omitted) The Ninth Circuit also held that Section 1182(f) requires the President to provide detailed findings sufficient to satisfy APA-style judicial review, even though the Executive often must withhold this information for national-security and foreign-policy reasons. And the Ninth Circuit held that 8 U.S.C. 1157 prevents the President from directing that fewer refugees be admitted than the maximum number established each fiscal year in consultation with Congress J A 1216-1221.

Those conclusions contravene longstanding government practice. See Gov't Reply Br. 21-22, 25 (describing President Reagan's proclamation barring entry of Cuban nationals and President Carter's order resulting in the denial of visas to Iranian nationals), *id* at 28 (describing how the government routinely admits fewer refugees than authorized by the annual maximum) The Fourth Circuit's ruling finding anti-Muslim animus likewise risks undermining the President's ability to conduct foreign policy and protect national security in a critical region of the world Moreover, if the judgments below are not vacated, plaintiffs can be expected to attempt to rely on them in new litigation. The *IRAP* respondents are already challenging the Proclamation in district court based on the Fourth Circuit's holdings, and a separate new lawsuit against the Proclamation has been filed in the same district court 17-cv-2921 D Ct Doc. 1 (D Md. Oct. 2, 2017) Similarly, respondents in *Hawaii* or other plaintiffs may claim that the Ninth Circuit's decision below disables the Proclamation's country-specific conditions on the entry of foreign nationals into the United States. The lower courts should be considering challenges to the Proclamation anew based on its text, operation, and findings—all of which are materially different from the Order. The government respectfully submits that this is exactly a case where *Munsingwear* vacatur is a "necessity." *Camreta*, 563 U S. at 713.

Third, the decisions below are interlocutory "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits " *Camenisch*, 451 U S. at 395 Here, the lower courts made sweeping rulings about the scope of Executive authority, reviewability, and injunctive relief that could affect future cases Those rulings—including an extraordinary conclusion that the President was motivated by animus disguised as concern for national security, J.A. 219-223 (*IRAP*)—should not be frozen where mootness has deprived the government of "a full opportunity to present [its] case" or to obtain "a final judicial decision based on the actual merits of the controversy." *Camenisch*, 451 U S at 396

Fourth, the judgments below rest on what are at best highly dubious determinations of justiciability This Court in *Arizonans* explained that vacatur was appropriate in part because of the Court's grave doubts about standing, both for the initial plaintiff and the parties attempting to appeal See 520 U S at 72-73 Similar fundamental problems infect these appeals As explained above, most of the individual respondents' family members have received visas during this litigation, Gov't Br 30, and none of the other respondents ever had justiciable claims in the first place, *id* at 22-35. The sweeping, worldwide injunctions affirmed by the courts of appeals, in suits in which the courts relied on claims asserted by two individuals (which are now moot) and the State of Hawaii (which has no cognizable stake in the admission of aliens from abroad), vastly exceeded the permissible scope of relief under both Article III and bedrock equitable principles. Decisions resting on such a tenuous foundation should not stand.

Fifth, contrary to respondents' suggestion that the government was not diligent (IRAP Br. 30, Hawaii Br 27), this is not a case where the government "slept on its rights" and "now asks [the Court] to do what by orderly procedure it could have done for itself" ***Munsingwear***, 340 U.S. at 41 When the Fourth Circuit affirmed the injunction against Section 2(c), the government moved swiftly to seek both a writ of certiorari and a stay from this Court precisely so that the government could carry out the Order The government even sought certiorari before judgment as to the injunction entered by the district court in the *Hawaii* case This Court then granted a stay that enabled the government to put the Order largely into effect. The Court in ***Burke*** vacated under ***Munsingwear*** without any suggestion that the petitioners had a special obligation to seek review from this Court before the challenged bill expired by its own terms, and the government is aware of no case suggesting that it must seek expedited consideration (including potentially a summer argument) for the sole purpose of preventing a case from becoming moot In light of this Court's partial stay of the lower courts' injunctions, there was even less reason in these appeals than in ***Burke*** to request such an extraordinary procedure

At bottom, respondents contend that it is "important" for the Court to delineate the limits of the President's powers over immigration Hawaii Br. 27 But this Court has held that "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limits of [the Court's] discretion" and to its "customary procedural rules." *Illinois* v. *Gates*, 462 U.S 213, 224 (1983) The customary procedural rule in cases like these is vacatur under ***Munsingwear***. This Court should follow that rule here

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For the foregoing reasons, the Court should vacate both of the lower courts' judgments as moot. The appeal of the Fourth Circuit's judgment is now moot in full, as is the Ninth Circuit appeal concerning Sections 2(c) and 6(b). For the only portion of the Ninth Circuit's judgment still at issue—regarding the global refugee suspension in Section 6(a)—no respondent has a justiciable claim, and in any event the global suspension will expire in less than three weeks At a minimum, once Section 6(a) expires on October 24, this Court should vacate the judgments and remand with instructions to dismiss the complaints To the extent the Court concludes that any part of either appeal is not moot, the case should be reset for argument, and the judgments of the courts of appeals should be reversed

Sincerely,

/s/ Noel J Francisco

Noel J Francisco
Solicitor General

cc Counsel of record (via email)

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AND
BRIEFS

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS,
V.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
RESPONDENTS.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS,
V.
STATE OF HAWAII, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMICI CURIAE

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STATEMENT OF INTEREST

Amici curiae[1] are refugee resettlement groups, immigrant rights organizations and legal service providers whose members and clients have been directly impacted by the Executive Order at issue in this case. *Amici* work closely with individuals who, in this moment of increased hostility to immigrant and Muslim populations, face significant barriers in coming forward with their claims. *Amici* therefore have a strong interest in ensuring that the voices of the vulnerable populations that are marginalized by this Executive Order are heard despite their significant fears of retaliation, harassment and physical harm against themselves and their family members here and abroad. A detailed description of *amici* is appended at the conclusion of this brief.

SUMMARY OF ARGUMENT

The two Executive Orders released by the Trump Administration on January 27, 2017 (hereinafter "January 27 Executive Order")[2] and March 6, 2017 (hereinafter "March 6 Executive

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[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioners and respondents have consented to the filing of this brief pursuant to Rule 37.3(a).

[2] Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

Order"),[3] directly target Muslims immigrants and create unprecedented fear in these communities. A heavy burden of responding to these fears and challenging the Executive Orders has fallen on organizations serving these communities. International Refugee Assistance Project ("IRAP") and HIAS[4] are among the organizations that have brought the legal challenge now before this Court—not only on behalf of themselves, but also on behalf of their clients. In attacking the standing of the individuals and organizations pursuing this litigation, the Government has taken aim at IRAP's and HIAS's third-party standing to pursue the rights of their clients.[5]

Amici support Respondents' arguments that each of the individuals and organizations pursuing this legal challenge have proper standing on various other grounds, as well.[6] With respect to organizational Respondents IRAP, HIAS, and the Middle East Studies Association of North America ("MESA"), *amici* support their arguments that they each have organizational standing to sue in their own right. *See*

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[3] Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[4] HIAS was formerly known as the Hebrew Immigrant Aid Society.

[5] Pet'r Br. at 22-35; *see also* Brief of President Trump, et al., *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir.), as amended (May 31, 2017), as amended (June 15, 2017). The Fourth Circuit did not reach the third-party standing arguments in its decision. *See* Int'l Refugee Assistance Project, 857 F.3d at 586.

[6] Resp. Br. at 16-26.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (holding that an organizational plaintiff demonstrated organizational standing based on the concrete and demonstrable injury-in-fact to its ability to provide counseling and referral services related to its housing mission and the consequent drain on resources); *see also* Resp. Br. at 25-26; *infra* II.A (discussing IRAP's and HIAS's injuries). Moreover, *amici* support MESA's argument that it has associational standing on behalf of its members. *See Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) (holding that an agency had standing to pursue litigation on behalf of its members); *see also* Resp. Br. at 25. The specifics of these organizational and associational standing arguments are not further addressed here.

Rather, *amici* submit this brief to expound on the important third-party standing arguments IRAP and HIAS raise on behalf of their clients. Contrary to the Government's arguments, IRAP and HIAS have third-party standing to challenge the March 6 Executive Order, including Section 2(c) enjoined by the Fourth Circuit, on behalf of their clients.[7] As required to show third-party standing, IRAP and HIAS each: (1) has suffered an injury-in-fact; (2) has a close relationship with the third party (their clients); and (3) those clients face genuine obstacles in asserting their rights. *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Singleton v. Wulff*, 428 U.S. 106, 114–16 (1976). The Government's argument that IRAP and

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[7] Pet'r Br. at 28 n.10 (asserting that IRAP and HIAS "seek admission for refugees, J.A. 184-186—a process not affected by Section 2(c)" and therefore have no standing).

HIAS fail to meet these requirements is not only incorrect, it strikes at the heart of the protection that third-party standing is designed to provide to vulnerable populations such as IRAP's and HIAS's clients.

As explained below, third-party standing plays a critical role in protecting the constitutional rights of marginalized communities, and IRAP and HIAS meet these requirements. The Executive Order has significantly hampered the ability of IRAP and HIAS to fulfill their mission and provide an array of critically needed legal services to their clients, from refugee resettlement to family reunification through visa applications—all of which are affected by the Section 2(c) bar on entry for individuals from Iran, Libya, Somalia, Sudan, Syria, and Yemen. Many of IRAP's and HIAS's clients are impacted by Section 2(c) of the March 6 Executive Order, both with respect to visa applicants as well as refugees who are unlikely to fall under case-by-case exceptions to the refugee ban if they are from one of the six countries. IRAP and HIAS are engaged in advocacy and have close attorney-client relationships with these individuals, ensuring their resettlement and reunification with family in the United States. IRAP and HIAS necessarily bring suit on behalf of individuals who are deeply fearful of challenging the new administration's travel ban in light of the discriminatory anti-Muslim and anti-immigrant climate that the current administration has fostered throughout the United States.

This group of displaced individuals and visa applicants faces significant marginalization as a result of the efforts by the Trump Administration to promulgate a discriminatory and unconstitutional ban on Muslim immigrants. Organizations like IRAP and HIAS were involved in grassroots mobilization against and legal challenges to both Executive Orders, drawing upon their longstanding relationships with individuals from the impacted countries. Such organizational efforts were essential to ensuring that the concerns and the rights of the people directly impacted by the Executive Order would be vindicated. This *amici curiae* brief is about the critical ability of these community organizations to continue their work by bringing suit on behalf of those who would otherwise be doubly burdened by the constitutional and statutory violations at the heart of the March 6 Executive Order.

ARGUMENT

In order to have jurisdiction over a claim in federal court, a party must meet both constitutional and prudential standing requirements. We support the arguments of Respondents that both IRAP and HIAS, with the other individual and organizational parties in this case, have Article III standing, and in this brief focus on the importance of third-party standing. As explained below, courts have long recognized the importance of third-party standing in ensuring the vindication of the constitutional rights of marginalized communities. *See* Point I, *infra.* In this case, both IRAP and HIAS meet all three prerequisites of third-party standing. *See* Point II, *infra.* The March 6 Executive Order has strained IRAP's and HIAS's resources and inhibits the ability of both organizations to carry out their core purposes—thus meeting the injury-in-fact prerequisite. IRAP's and HIAS's close professional relationship with individuals affected by Section 2(c) of the March 6 Executive Order, both here in the United States and abroad, make them "fully, or very nearly, as effective . . . proponent[s] of the right as the [third party]." *Singleton*, 428 U.S. at 115. Finally, the environment of anti-Muslim sentiment, as well as the economic, psychological, and cultural barriers that newly-arrived immigrants face in the United States, serve as significant hindrances to these individuals asserting their own rights in court.

I. Third-Party Standing Is Critical To The Protection Of The Constitutional Rights Of Marginalized Communities

At its core, this case is about the targeting of Muslim communities through policies that strike at the intersection of various forms of discrimination, including Islamophobia, xenophobia, nativism, and racism. The availability of third-party standing to bring suit to raise such core civil rights issues has long been recognized in our judicial system. *See, e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 397–400 (1998) (white defendant had standing to assert constitutional rights of African-American jurors excluded from grand jury that issued indictment); *Powers*, 499 U.S. at 410–16 (white defendant had standing to assert constitutional claims of African-American persons excluded from petit jury service by racially discriminatory peremptory challenges); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683 (1977) (distributor of contraceptives could challenge state law limiting sale of its products, "not only in its own right but also on behalf of its potential customers"); *Singleton*, 428 U.S. at 117–18 (physicians who provide abortions have standing to assert rights of women patients in challenge to abortion funding restriction); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (physicians who provide abortions have standing to assert rights of women patients); *Eisenstadt v. Baird*, 405 U.S. 438, 445–46 (1972) (distributor of contraception has standing to assert the rights of unmarried individuals).

The availability of third-party standing doctrine in this context stems from recognition of the fact that there are instances where "there [exists] some hindrance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 411 (1991) (quoting *Singleton*, 428 U.S. at 112). Thus, so long as the litigating party itself suffers an "injury-in-fact" and has a "close relation" to the third party who is hindered from asserting his or her own rights, third-party standing is not only appropriate, but critical to the protection of constitutional interests. For example, lawyers and doctors have raised several access-to-justice and privacy rights concerns on behalf of their clients or patients. *See, e.g., Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (lawyers have standing to assert rights of clients); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623–624, n.3 (1989) (same); *Singleton*, 428 U.S. at 117-118 (physicians have standing to assert rights of women patients); *Doe*, 410 U.S. at 188 (same).

The March 6 Executive Order raises a host of constitutional and statutory issues that strike at the heart of civil rights for Muslim and immigrant communities in the United States. As mounting anti-Muslim sentiment reaches high-level government officials and results in policies affecting some of the most vulnerable immigrant communities, a careful application of third-party standing doctrine will play a critical role in ensuring that unconstitutional practices are reviewed by our judicial system. *See Exodus Refugee Immigration, Inc. v. Pence*, 165 F.Supp.3d 718, 732 (S.D. Ind. 2016) (recognizing refugee resettlement agency's third-party standing to litigate on behalf of Syrian refugees in lawsuit against then-Governor Mike Pence's declaration against the resettlement of refugees in Indiana), *aff'd,* 838 F.3d 902 (7th Cir. 2016). As described below, *see* Point II, *infra*, IRAP and HIAS meet the requirements of third-party standing. Recognizing this standing will help to ensure access to justice on behalf of the Muslim communities they serve.

II. IRAP And HIAS Have Third-Party Standing To Vindicate The Rights Of Their Clients Harmed By The Executive Order.

A. IRAP And HIAS Have Particularized And Concrete Injuries-In-Fact.

The first prerequisite for finding that a litigant has third-party standing is that the litigant must allege an injury that is both "concrete and particularized" and "actual and imminent." *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (citing *Lujan v. Defenders of Wildlife*. 504 U.S. 555, 560 (1992)). The Supreme Court and this Circuit have found a sufficient injury-in-fact when an organization alleges an injury based on harm to the organization's core purpose or mission. *See*

White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459–61 (4th Cir. 2005) (organization that alleged that statute infringed on ability to promote its social message alleged sufficiently particular and concrete injury); *cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (finding that the organization had standing when interests at stake were germane to organization's purpose). Organizations may also allege injuries-in-fact when they can show that a particular action will have a concrete and demonstrable injury to the organization's activities, including a consequent drain on the organization's resources. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 & n.20 (1982) (housing advocacy organization alleged sufficiently concrete and particularized injury based on drain of resources to combat racial steering practices); *Exodus Refugee Immigration, Inc.*, 165 F.Supp.3d at 732. In many cases, alleging an economic injury, while not necessary, is usually sufficient to find that there is standing. *See Ass'n Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970); *U.S. v. SCRAP*, 412 U.S. 669, 686 (1973). In this case however, IRAP and HIAS suffer both economic and non-economic harms that constitute concrete and particularized injuries-in-fact.

First, Section 2(c) of the Executive Order adversely affects the goals and social mission of both IRAP and HIAS, creating a concrete injury-in-fact. Their missions and values as organizations are deeply connected with the services they provide to refugees and other visa applicants, services that are now diminished as a result of the ban.

HIAS was established over 130 years ago, prior to the existence of refugee law in the United States.[8] Their mission is to welcome those who have been displaced to the United States and help them build new lives here in the United States. In the words of HIAS President Mark Hetfield:

> HIAS's refugee resettlement work is grounded in, and an expression of, the organization's sincere Jewish beliefs.... The Jewish obligation to the stranger is repeated in various ways throughout the Torah, more than any other teaching or commandment. HIAS believes that this religious commandment demands concern for and protection of persecuted people of all faiths. The Torah also teaches that the Jewish people are to welcome, protect, and love the stranger.... Throughout their history, violence and persecution have made the Jewish people a refugee people. Thus, both our history and our values lead HIAS to welcome all refugees in need of protection. A refusal to aid persecuted people of any one faith, because of stigma attached to that faith, violates HIAS's deeply held religious convictions. Hetfield Decl., ¶ 4, J.A. 398.

HIAS's purpose extends to assisting individuals already in the United States as well as facilitating admission to the United States of their clients' relatives.[9] Hetfield Decl., ¶ 7, J.A. 400. For example, HIAS is integral in assisting its clients' petitions for their children and other relative minors to immigrate here. Hetfield notes, "[t]hese children remain in vulnerable and dangerous situations in their home countries, despite having been approved for refugee status and their U.S. family members are forced to endure continued separation from and concern for these children." Hetfield Decl., ¶ 27, J.A 411.

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[8] *History*, HIAS, https://www.hias.org/history (last accessed Apr. 18, 2017).

[9] *Refugee Frequently Asked Questions*, HIAS, https://www.hias.org/faq/refugee (last accessed Apr. 18, 2017).

HIAS also provides training to help newly arrived immigrants "understand how American customs and culture differ from their native land," and invests in long-term support and guidance for these individuals, "for up to five years after arrival."[10] HIAS's "largest source of funding" is directed towards new immigrants and displaced individuals, and is used for provision of housing, rent and utilities, food, medical care, case management, safety and cultural orientation, ESL classes, school, employment services, and other social services programs. Hetfield Decl. ¶ 9, J.A. 401. HIAS aims to assert its clients' rights, infringed upon by the Executive Order, so that it may continue to fulfill its mission in providing its clients with this comprehensive aid and continue unifying families.

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[10] Welcome, HIAS, https://www.hias.org/welcome (last accessed Apr. 18, 2017).

IRAP was founded in 2008 "because of the clear obligations of Western countries, and the United States in particular, to provide relief to those who were unintended victims of the Iraq War."[11] Its mission has since expanded "to provide and facilitate free legal services for vulnerable populations around the world, including refugees." Heller Decl., ¶ 4, J.A. 387. Its work also includes filing family reunification petitions for refugees, asylees, lawful permanent residents, and U.S. citizens for family members overseas, including those in the six Muslim-majority nations subject to the ban in Section 2(c). Heller Decl., ¶ 5, J.A. 387. IRAP advocates for "the world's most at-risk refugees, including LGBTI individuals, religious minorities subject to targeted violence, survivors of sexual and gender-based violence, children with medical emergencies for which local treatment is not available, and interpreters being hunted down by the Islamic State, militias, and the Taliban in retaliation for their work with the United States and NATO."[12]

Both IRAP and HIAS's missions are thus thwarted when the people they purport to serve, through family reunification and other services, are blocked from entering the country. Hetfield Decl., ¶ 4, J.A. 398; Heller Decl., ¶ 8, J.A. 388-89.

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[11] *Our Model: The Evolution of IRAP*, INTERNATIONAL REFUGEE ASSISTANCE PROJECT, https://refugeerights.org/our-work/our-model/.

[12] *People We Serve*, INTERNATIONAL REFUGEE ASSISTANCE PROJECT, https://refugeerights.org/who-we-serve/ (last accessed Apr. 18, 2017).

Many of their clients impacted by Section 2(c) of the March 6 Executive Order both with respect to visa applicants as well as refugees who are unlikely to fall under case-by-case exceptions to the refugee ban if they are from one of the six countries. Hetfield Decl., ¶ 5, J.A. 398-99; Heller Decl., ¶ 7, J.A. 388. Thus, IRAP and HIAS are prevented from fulfilling their core mission if they cannot serve their clients due to the Executive Order.

IRAP and HIAS also suffer economic injuries-in-fact when their clients or clients' family members are prevented from entering the country. The nature of this prevention is economic because it constitutes a drain on their resources to manage hotlines, counsel clients, and dedicate time advising and warning clients of potential barriers they may face because of Section 2(c) of the Executive Order. *See* Heller Decl. ¶¶ 8, 10-18, J.A. 388-93 (describing how IRAP's resources have been diverted because of the strain of serving as a fielding house to ensure safe arrival of people at airports who were members of the targeted countries); Hetfield Decl., ¶¶ 13-21, J.A. 403-08 (describing potential HIAS layoffs occurring as a result of the Executive Order and the diversion of resources from its core work).

When IRAP and HIAS suffer economic injury, their clients are also injured by the reduced services these organizations can provide them. For example, HIAS employees have already been laid off at a HIAS affiliate in Ohio. *Id.* Many staff who have lost their jobs work with refugees. *Id.* When sites are shuttered or their capacity is decreased, the local expertise and relationships are lost. *Id.* These clients are receiving, or will receive, diminished services as a result of the March 6 Executive Orders. Hetfield Decl., ¶ 22, J.A. 408. As a result of the January 27 and March 6 Executive Order, IRAP's resources have also been stretched. *See* Heller Decl., ¶¶ 8, 10-18, J.A. 388-93. Because these organizations are now devoting resources outside the scope of their normal work, they have limited capacity to take on new cases and ensure full representation of their clients. *Id.*

IRAP and HIAS also suffer injury because resources dedicated to assist clients in their resettlement in the United States can no longer be used for those clients when they are barred from entry into the country. The Supreme Court and the lower districts courts within this Circuit have both recognized this sort of drain on organizational resources as a cognizable injury-in-fact. *See Havens*, 455 U.S. 363, at 369–70 (finding that racial steering practices of real estate company frustrated a housing rights organization's counseling and referral services, causing a consequent drain on resources that was a cognizable injury); *Equal Rights Ctr. v. Equity Residential*, 798 F.Supp.2d 707, 722–23 (D. Mar. 2011) (citing *Havens* to find that disability discrimination by real estate company caused injury-in-fact to housing rights organization due to drain on resources).

B. IRAP And HIAS Have A Close Relationship With The Third Parties Whose Rights They Are Vindicating.

The March 6 Executive Order is a direct attack on the very goals that IRAP and HIAS are working to achieve with their clients. As enshrined in each organization's purpose, and emblematic in their history, their relationships with their clients are so close that "the enjoyment of the right is inextricably bound up with the activity the litigant[s] wish[es] to pursue." *Singleton v. Wulff*, 428 U.S. 106, 113–15 (1976).

Courts' decisions have focused on the character of the relationship between the litigant and the rightholder. *Singleton,* for example, acknowledged the significant bond between physician and patient. *See* 428 U.S. at 117 (plurality opinion) ("[T]he physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision."). Similarly, the Court has recognized in the third-party standing context that an existing attorney-client relationship is sufficient for third-party standing. *See Caplin & Drysdale, Chartered*, 491 U.S. at 623–624; *Triplett*, 494 U.S. at 720. Moreover, the Court has found an adequate "relation" between litigants alleging third-party standing and those whose rights they seek to assert when nothing more than a buyer-seller connection was at stake. *See Carey*, 431 U.S. at 683; *Craig v. Boren*, 429 U.S. 190, 195 (1976).

The Executive Order stoked anti-Muslim sentiment and re-traumatized vulnerable populations—the very populations whose needs are at the core of the advocacy mission of IRAP and HIAS. As the legal advocates of these individuals, IRAP and HIAS have worked closely with them and are uniquely situated to litigate their concerns. *Singleton*, 428 U.S. at 115. Because of the March 6 Executive Order, IRAP and HIAS have clients whose constitutional rights "are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have [a] confidential relation to them," which both IRAP and HIAS develop while handling the sensitive claims of clients, many of whom are coping with the traumatic aftermath of enduring and surviving deadly conflict. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (determining that the defendant, a licensed physician, could assert their patients' privacy rights in court due to the confidential relationship that develops when a patient confides in their physician). Furthermore, in the context of ongoing attorney-client relationships, this is "sufficient to confer third-party standing." *Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004).

IRAP and HIAS provide legal and resettlement services, help with family reunification, and advocate on behalf of people new to the United States. *See* Hetfield Decl. ¶ 7, J.A. 400; Heller Decl. ¶ 5, J.A. 387. But for the help of these organizations, these individuals and their family members would be unable to settle into new homes in the United States. *See Eisenstadt*, 405 U.S. 438 at 445 (third-party standing could be found where there was a "relationship between one who acted to protect the rights of a minority and the minority itself," such as "that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so"). By violating these clients' constitutional rights, the March 6 Executive Order threatens the feasibility of IRAP and HIAS to continue their substantive work in providing comprehensive services for immigrants, including resettlement and family reunification, further demonstrating the close relationship between these individuals and IRAP and HIAS. *See Exodus Refugee Immigration, Inc.*, 165 F.Supp.3d at 732 (finding that a refugee resettlement agency had standing to bring equal protection claims where a state directive denying it funding threatened its ability to serve its purpose and mission to provide a range of services to Syrian refugee clients).

Rather than address these concerns, the Government suggests that neither IRAP nor HIAS can meet third-party standing requirements because they purportedly fail to "identify a . . . client whom Section 2(c) would bar from entering." Pet'r Br. at 28 n.10. As an initial matter, however, the organizations have specified their relationship with such clients—both clients who are refugees from the banned countries covered in Section 2(c) as well as clients who have family members in the banned countries who seek reunification. *See* Hetfield Decl. ¶¶ 24-25, 27, 30, 32-33, J.A. 409-14; Heller Decl. ¶¶ 5, 7, J.A. 386-87. Moreover, third-party standing does not require organizations to name specific individuals—such a requirement would defeat the purpose of third-party standing, which is to protect the rights of individuals who are hindered from bringing litigation in their own names. *See infra* II.C (discussing the hindrances faced by the clients of IRAP and HIAS). The test requires only that the organizations' relationships with their impacted clients are real and not hypothetical.

IRAP and HIAS's relationships with their clients are not conjectural or hypothetical, because these organizations have current and ongoing relationships with specific refugees and visa applicants affected by the March 6 Executive Order. *See Exodus*, 165 F.Supp.3d at 732. *See also* Hetfield Decl. ¶ 24-25, J.A. 409; Heller Decl. ¶¶ 5, 7, J.A. 263. They currently have clients from the banned countries who will not be able to seek the waivers purportedly available to them. Hetfield Decl. ¶ 24-25, J.A. 409-10; Heller Decl. ¶¶ 5, 7, J.A. 386-87. IRAP's and HIAS's work resettling and reuniting families separated by horrific circumstances, including torture and war, has become especially crucial in serving nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* The affected refugees and visa applicants, many of whom have fled persecution and are in the process of relocating to America, rely on their contacts at IRAP and HIAS to find community, to access resources, and to begin their new lives in the United States. Their reunification with family in the United States is dependent on the relief this Court could provide. Hetfield Decl. ¶ 25, J.A. 408-09; Heller Decl. ¶¶ 5, 15, 21–26, J.A. 386, 391, 393-95. These individuals, promised peace and safety in the United States, instead face chaos as a result of these two unconstitutional Executive Orders. IRAP and HIAS are the voices of their clients.

In sum, the missions of IRAP and HIAS are inextricably bound up with their clients' enjoyment of their constitutional rights. HIAS CEO Mark Hetfield notes, "[t]he way we describe ourselves is that we used to resettle refugees because *they* were Jewish; now we resettle refugees because *we* are Jewish."[13] IRAP and HIAS have ongoing, close relationships with some of the most vulnerable individuals here in the United States who rely on IRAP and HIAS to rebuild their lives and provide them with the tools they need to survive and thrive here.

C. IRAP And HIAS Litigate On Behalf Of Individuals Who Face Hindrances In Asserting Their Rights.

The final prerequisite for third-party standing is that the first party be hindered from asserting its rights. IRAP and HIAS are seeking to vindicate the rights of clients who are hindered from asserting their rights. *See* Heller Decl., J.A. 270. It is appropriate for a third party to raise a claim when the directly affected individuals face "some hindrance" in asserting their constitutional rights. The litigant becomes, by default, the right's best available proponent. *See Singleton*, 428 U.S. at 116; *Exodus Refugee Immigration, Inc.*, 165 F.Supp.3d at 732.

IRAP and HIAS work closely with and represent individuals here in the United States who are petitioning for relatives abroad to join them. *See* Hetfield Decl. ¶ 5, J.A. 287; Heller Decl., ¶¶ 5, 10, 19, J.A. 387-88, 390, 393. As explained below, many of these individuals here in the United States face hindrances that prevent them from coming forward in this suit, including both a chilling effect stemming from anti-Muslim immigrant sentiment and violence against those perceived to be Muslim, as well as practical barriers that hinder bringing suit.

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[13] Lizzy Ratner, *The Last Time We Closed The Gates*, THE NATION, Feb. 24, 2017, at 20, 24.

1. The Executive Order Has Resulted In A Chilling Effect, Which Courts Have Recognized As A Hindrance.

The clients of IRAP and HIAS have suffered serious chilling effects that hinder them from asserting their rights directly. Historically, courts have taken an expansive view of what constitutes hindrance, requiring "some hindrance" but not an absolute bar from suit. *Powers*, 499 U.S. at 411; *see also Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir. 2002) ("A party need not face insurmountable hurdles to warrant third-party standing."). In *Singleton*, the Supreme Court recognized that the obstacles confronting women when challenging an abortion statute were not overwhelming but nevertheless constituted a sufficient impediment. *Singleton*, 428 U.S. at 117. These hindrances included the chilling effect stemming from the desire to protect one's privacy from the publicity of a court suit, and imminent mootness of any woman's claim. The suit could have been brought under a pseudonym or as a class, but the Court found there was "little loss in terms of effective advocacy from allowing its assertion by a physician." *Id.* at 106. In this case, IRAP and HIAS play a similar role as the physician in *Singleton*.

Since the beginning of his campaign and subsequent election, President Trump has been outspoken in his desire to prevent Muslims from entering the country. *See* Order Granting Preliminary Injunction, p. 7-10. Muslims today live in fear of targeting by both the current presidential administration as well as by other individuals emboldened by the President's campaign promises for a "complete shutdown" on Muslim immigration to the United States and as a "Muslim registry."[14] The number of anti-Muslim hate groups in the U.S. has tripled in the last year.[15] This growth has been accompanied by a large uptick in hate crimes targeting Muslims, including an arson attack that destroyed a mosque in Victoria, Texas just hours after the Trump Administration announced the first Executive Order banning individuals from predominantly Muslim countries.[16] In February 2017, two Indian immigrants in Kansas City were shot, one fatally, after being asked if they had visas and being told by the shooter "get out of my country."[17] Multiple witness accounts confirm that the shooter believed that the men were Iranian.[18] Anti-Muslim and anti-immigrant bigotry have also affected those involved in litigation that seeks to uphold the constitutional rights of individuals affected by both Executive Orders. Individuals who have come forward to challenge both Executive Orders have faced harassment.[19] Anti-Muslim sentiment has also been directed at the federal judiciary. The day after the First Executive Order was signed, Judge Ann Donnelly, sitting in the Eastern District of New York, issued an order prohibiting the deportation of individuals detained at airports nationwide. Her decision drew the ire of anti-immigrant nationalists who published her phone number, her husband's name, and described her and those who supported her appointment using racial epithets and anti-Semitic language.[20] President Trump himself has referred to Judge James Robart, who issued an order temporarily restraining the First Executive Order, as a "so-called judge."[21] This climate and anti-Muslim sentiment has persisted since the Second Executive Order. Judge Derek Watson, sitting on the District Court in Hawai'i, received death threats after he issued an order enjoining implementation of the March 6 Executive Order.[22]

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[14] Donald J. Trump, *Statement on Preventing Muslim Immigration*, DONALDJTRUMP.COM (Dec. 7, 2015), https://www.donaldjtrump.com/pressreleases/donald-j.-trump-statement-on-preventing-muslim-immigration; *see also* Eric Lichtblau, *Hate Crimes Against Muslims Most Since Post 9-11 Era*, N.Y. TIMES (Sept. 17, 2016), https://www.nytimes.com/2016/09/18/us/politics/hatecrimes-american-muslims-rise.html (describing rise in hate crimes against Muslims in the United States).

[15] *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, SOUTHERN POVERTY LAW CENTER (Feb. 15, 2017), https://www.splcenter.org/news/2017/02/15/hate-groups-increase-second-consecutive-year-trump-electrifies-radical-right.

[16] *Id. See also* Issac Chotiner, *Donald Trump & the Spike in Anti-Muslim Hate Crimes in the U.S.*, SLATE (May 9, 2016), http://www.slate.com/blogs/the_slatest/2016/05/09/donald_trump_and_the_rise_of_anti_muslim_hate_crimes.html

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[17] John Eligon et al., *Hate Crime Is Feared as Two Indian Engineers Are Shot in Kansas*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/world/asia/kansas-attack-possible-hatecrime-srinivas- kuchibhotla.html

[18] Samantha Schmidt, *Suspect in Kansas Bar Shooting of Indians Apparently Thought They Were Iranians*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/news/morningmix/wp/2017/02/28/suspect-in-kansas-bar-shooting-of-indians-apparently-thought-they-were-iranians/?utm_term=.314bb587a0c7.

[19] Vivian Yee, *Meet the Everyday People Who Have Sued Trump. So Far, They've Won,* N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/us/trump-travel-ban.html?_r=1.

This hostile environment has sparked fear in many immigrants of Muslim faith. As noted by HIAS's executive director: HIAS's Muslim clients have been marginalized in their communities as a result of the Executive Order. Clients report feeling that everyone wants to fight with them, and describe rumors of various attacks on mosques and other Muslims. A HIAS client, Fawzia, for example, reports that her niece and sister, who are both in middle school, were attacked at school. *See* Hetfield Decl., ¶¶ 30, 37, J.A. 411, 415. HIAS clients report feeling isolated and anxious about their situation and the future for their refugee relatives. *Id.* Amidst this fear, many IRAP and HIAS clients are chilled from coming forward to assert their rights. Heller Decl., ¶ 27, J.A. 395-96. This desire to stay out of the spotlight during this time is particularly salient given the fact that many of these refugees and other visa applicants are recent arrivals from countries where they faced political or religious persecution. *Id.*

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[20] Ryan Lenz, *Daily Stormer Targets Federal Judge's Ruling Against Trump's Muslim Ban*, SOUTHERN POVERTY LAW CENTER (Feb. 1, 2017), https://www.splcenter.org/hatewatch/2017/02/01/daily-stormer-targets-federal-judges-ruling-against-trumps-muslim-ban.

[21] *See* Dean Obeidallah, *Donald Trump's Most Bone-chilling Tweet*, CNN (Feb. 6, 2017), http://cnn.it/2kFMEsG.

[22] Max Greenwood, *Judge Who Blocked Second Travel Ban Getting Death Threats*, THE HILL (Mar. 24, 2017 10:58 AM), http://thehill.com/blogs/blog-briefing-room/news/325614-federal-judge-who-blocked-second-travel-ban-received-threats

In a recent decision granting third-party standing to a resettlement agency that worked with Syrian refugees, a federal court noted the "significant hindrances" that the refugees faced in bringing suit themselves. These included the need that the refugees felt to 'lay low' and not draw attention to themselves" and the reticence that many likely felt to bring suit in a hostile political environment. *Exodus Refugee Immigration, Inc. v. Pence*, 165 F.Supp.3d 718, 732 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016). The added attention that the refugees received from government officials and the media made their desire to refrain from threats coming forward "particularly salient." *Id.* In *Exodus*, this chilling effect was enough to satisfy the genuine obstacle prong of the third-party standing test.

The publicity around the legal battles for both the initial Executive Order as well as the March 6 Executive Order has also further chilled IRAP's and HIAS's clients. Courts have found that the chilling effect created by the publicity of a legal battle is a sufficient hindrance to allow third-party standing. *Pa. Psychiatric Soc'y*, 280 F.3d at 290 (allowing a nonprofit to bring claims on behalf of individuals receiving mental health services because the "stigma associated with receiving mental health services presents a considerable deterrent to litigation"); *Singleton*, 428 U.S. at 117 (plurality opinion) (noting a woman may choose not to assert her right to an abortion because she is chilled by the desire to protect the privacy of her decision from the publicity of a court suit, even if suit is brought under pseudonym); *NAACP v. Alabama*, 357 U.S. 449 (1958) (compelled disclosure of NAACP membership list would have the effect of suppressing legal association among members); *Exodus Refugee Immigration, Inc.*, 165 F.Supp.3d at 732 (publicity from litigation on part of Syrian refugees constituted a hindrance to parties asserting their own rights).

The publicity of a lawsuit is particularly chilling for those clients of IRAP and HIAS who are petitioning for their loved ones to join them in the United States. *See* Hetfield Decl. ¶¶ 30, 32, 33, 37, J.A. 412-14; Heller Decl. ¶ 27, J.A. 395-96. The process for these individuals is already fraught with uncertainty, especially because visa approval petitions are discretionary. Many individuals may fear that putting their name on a high-profile lawsuit could result in adverse treatment for their family members in the visa process on pretextual grounds with little course for redress. For many, the risks of litigation are just too high.

2. IRAP And HIAS Clients Face Additional Genuine Obstacles Including Psychological, Cultural And Financial Barriers.

Many of IRAP's and HIAS's clients come from countries where standing up to government wrongdoing would be to put oneself in harm's way. *See* Heller Decl. ¶ 27, J.A. 396-97. The March 6 Executive Order affects all visa holders from the six banned countries, which, the government itself acknowledges, are countries with longstanding civil conflict. *See* Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209, 13,210 (Mar. 9, 2017). Expecting such individuals to shed those fears shortly after arrival in the United States is unrealistic, particularly now, when they are considered suspect because of their religion, ethnicity, and immigration status.

Scholars have recognized the obstacles that individuals who have suffered from trauma face in making legal claims.[22] Survivors of war, torture, displacement and other forms of trauma face a serious possibility of re-traumatization when they appear in court.[23] Part of IRAP and HIAS's client base includes individuals in the Direct Access ("USRAP") program and Special Immigrant Visa ("SIV") program who worked with the U.S. Armed Forces and U.S. government as contractors, translators or interpreters abroad. Hetfield Decl. ¶ 5, J.A. 398-99; Heller Decl. ¶ 26, J.A. 395 ("Our clients in USRAP and our Special Immigrant Visa programs are seeking resettlement to the U.S. as a safe haven but now feel threatened by the only safe option available to them."). Many of their clients have "suffered extreme trauma, often at the hands of government officials." Heller Decl., ¶ 27, J.A.

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[22] Jessica Mayo, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 WASH. U. L. REV. 1485, 1503 (2012).

[23] *Id.*

395 (noting also that IRAP clients avoid situations where they have to talk about their trauma, such as participation in a lawsuit).

Because many IRAP and HIAS clients are newly arrived in the United States, they face additional cultural and financial barriers to filing suit. *See* Heller Decl. ¶ 27, J.A. 396. IRAP's Executive Director notes the unfamiliarity IRAP clients have with U.S. law and customs. "[M]any of our clients have difficulty completing forms that seem basic and simple to Americans; a form that has a line for 'address line two,' for example, confuses our clients, who do not understand why the form is asking for a second address." *Id.* Many do not speak English. *Id.* IRAP and HIAS clients also have few resources with which to bring suit. Hetfield Decl. ¶¶ 30-36, J.A. 412-15. Courts have also recognized that financial barriers are a sufficient hindrance. *See Campbell*, 523 U.S. at 398–400 (1998) (economic burdens of litigation and a small potential financial award are sufficient obstacles to permit third-party standing); *Powers*, 499 U.S. at 415 (noting the practical barriers that excluded jurors face when bringing suit such as the small financial stake and economic burdens involved).

CONCLUSION

Central to IRAP's and HIAS's mission is providing safety and stability to clients who have endured life-threatening situations before making the United States their home. They help make family members whole and self-sufficient by re-unifying them with loved ones abroad. IRAP and HIAS have a vantage point that makes them particularly qualified to vindicate the rights of their clients. In this moment of great fear for Muslim immigrants in the United States, those most marginalized by the March 6 Executive Order are relying on organizations like IRAP and HIAS to continue to protect their interests, and speak out for their rights. Without a careful application of the third-party standing doctrine, their voices will continue to be silenced. For these reasons, *amici* support the third-party standing and relief sought by Respondents.

Respectfully submitted,

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APPENDIX: STATEMENTS OF INTEREST OF AMICI CURIAE

The Advocates for Human Rights is a nonprofit organization whose mission is to implement internationally-recognized human rights by promoting civil society and reinforcing the rule of law. In 2016, The Advocates for Human Rights provided full representation in over 650 cases throughout the Upper Midwest, including individuals from nations implicated in the Executive Orders, who were seeking asylum or attempting to re-unify with family. In addition to direct legal services, The Advocates for Human Rights works to eliminate bias against refugees, immigrants, and religious minorities through research, education, and advocacy. Since the announcement of the first travel ban in January 2017, The Advocates for Human Rights has assisted over 1,500 people including hundreds of Muslim refugees who have expressed fear of travel, concerns about family left abroad, and anxiety about living in the United States.

The Asian Law Alliance ("ALA") is a nonprofit law office founded in 1977 by law students from Santa Clara University School of Law. ALA's mission is to provide equal access to the justice system for Asian and Pacific Islanders and low-income residents of Santa Clara County. ALA provides legal services to the large refugee community residing in Santa Clara County. These services include family reunification, housing, and benefits. ALA works with immigrants of all backgrounds, including individuals of Muslim faith.

The Asian Pacific American Network of Oregon ("APANO") is a statewide, grassroots organization uniting Asians and Pacific Islanders to achieve social justice. APANO has worked for over 20 years to support the rights, resources, and recognition for Oregon's 250,000 Asian and Pacific Islanders. The travel ban further marginalizes members of our communities who are already vulnerable, limiting their rights and ability to redress claims. The Executive Order perpetuates racial and religious discrimination that undermines basic rights for all.

CASA is the largest membership-based immigrant organization in the mid-Atlantic region, with more than 80,000 members. CASA is deeply concerned about the Trump Administration's attempts to persecute those with the least power in our society. After the Muslim ban was announced, CASA was contacted by a community member with family trapped overseas and with whom she was only able to reunite because of the nationwide injunction that stayed the second ban. CASA staff stood with thousands of brave community members and attorneys at airports in Virginia and Maryland, fighting to protect the rights of immigrants seeking to lawfully enter the United States. CASA stands with the International Refugee Assistance Project ("IRAP"), HIAS, and the individuals they seek to protect through this litigation, which include many members of CASA's community.

Community Refugee & Immigration Services ("CRIS") helps refugees and immigrants sustain self-sufficiency and integrate into the Central Ohio community. CRIS is one of the largest resettlement agencies within the Church World Service network. Re-unifying families is essential to CRIS's work. CRIS has Affidavits of Relationship ("AORs") pending that represent at least 500 family members living abroad, mostly Somalis, and thus a great number of Muslims. Last year, CRIS resettled 833 immigrants from countries including Somalia, Iraq, and Syria. CRIS works with many immigrant parents who are waiting to be reunited with their children.

The Immigrant Law Center of Minnesota ("ILCM") is the state's largest provider of free legal immigration services. ILCM represents many individuals and families affected by the ban from predominately Muslim countries, including Somalia, Sudan, and Yemen. ILCM works directly with refugees and asylum-seekers to assist them with family reunification, applications for legal permanent residence, and naturalization. One of the youngest ILCM clients impacted by the ban was a girl named Mushkaad, the four-year-old child of a Minnesota Somali-born mother who was coming here to be reunited with her family after years of separation. Mushkaad and her mother are two of hundreds of Minnesota Somalis impacted by the ban

Integrated Refugee & Immigrant Services ("IRIS") is one of approximately 350 refugee resettlement nonprofits spread across the country welcoming and resettling refugees who have been rigorously vetted by the U.S. Government. Last year

IRIS welcomed 530 refugees from countries all over the world, including Syria, Sudan, and Iran. In general, refugees have two main concerns when they arrive in this country: reunification with their family members, and securing employment. Family reunification is such an urgent need for these new Americans that IRIS established an immigration legal services program specifically to help our clients reunite with family members left behind. Among the thousands of immigrants IRIS has welcomed over the past ten years, hundreds are petitioning for their loved ones to come to the United States.

The Southeast Asia Resource Action Center ("SEARAC") is a national organization originally founded to help with the resettlement and integration of Southeast Asian communities. SEARAC provides advocacy, leadership development, and capacity building support to empower Southeast Asian Americans. Some Southeast Asian American communities endure prolonged separation from their loved ones due to the inefficiencies of family reunification policies and SEARAC remains committed to advocating for fair and humane laws that promote family unity.

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AND
BRIEFS

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE FOURTH CIRCUIT AND NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of over 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[3] Among the ABA's goals is to "[i]ncrease public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "[e]liminate bias in the . . . justice system."[4]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* or its counsel, has made a monetary contribution to its preparation or submission. The Petitioners have granted blanket consent for the filing of *amicus curiae* briefs. Letters of consent by the Respondents to the filing of this brief have been lodged with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution and its system of separation of powers, including the role of the judiciary as a check against arbitrary exercises of Executive and Legislative power. As the voice of the legal profession, the ABA has a special interest in safeguarding, and responsibility to safeguard, the integrity of our legal system. Preserving and promoting robust judicial review of executive action that encroaches on the Constitution's fundamental protections or important statutory protections is an essential aspect of that responsibility.

On January 27, 2017, the President issued Executive Order No. 13,769 (Jan. 27, 2017) (the "January Order"), which, among other provisions, barred entry into the United States by nationals of seven overwhelmingly Muslim countries for 90 days and suspended entry of all refugees for 120 days. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017). Following entry of the January Order, the ABA adopted Resolution 10C, which expressed the concern that the order raised "legal, procedural, and rule of law issues"[5] and urged the Executive "[n]ot [to] use religion or nationality as a basis for barring an otherwise eligible individual from admission to the United States."[6]

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[3] *See ABA Mission and Association Goals*, ABA, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Sept. 12, 2017).

[4] *See id.*

On March 6, 2017, the President issued Executive Order No. 13,780 (the "Order"), which modifies some of the January Order's provisions but retains the 90-day bar on entry by nationals of six of the seven majority-Muslim countries identified in the January Order and the 120-day bar on entry by refugees. Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The Order thus raises the same grave concerns as its predecessor—that it is in purpose and effect the "Muslim ban" that the President himself has called it, that it far exceeds the President's statutory authority, and that it transgresses fundamental constitutional bounds.

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[5] *Report to ABA Resolution 10C*, at 5 (2017), http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

[6] *ABA Resolution 10C*, at 1 (2017), http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

The Government contends that this sweeping exercise of authority by the President is simply unreviewable by this Court—that this Court can neither examine the Order to determine whether it complies with Congress's dictates nor look beyond the four corners of the Order to consider its Establishment Clause implications. That position cannot be reconciled with this Court's precedent and with the rule of law. The ABA accordingly submits this brief to urge this Court to reject the Government's argument that it should abdicate its role and, instead, to exercise its full power of judicial review to preserve and enforce fundamental constitutional and statutory limits on Executive power.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive Order at issue here suspends entry into the United States by all nationals of six almost entirely Muslim countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days, subject to certain case-by-case waiver provisions. J.A. 1425-29. It likewise suspends entry of all refugees and decisions on applications for refugee status for 120 days, with a similar waiver process on a case-by-case basis. J.A. 1433-34. The suspension of entry purportedly serves to permit the Department of Homeland Security and other agencies to review screening and vetting procedures for entry of foreign nationals. *See* J.A. 1425.

As authority for this action, the Order relies on section 212(f) of the Immigration and Nationality Act ("INA"), Pub. L. 82-414, which states that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Echoing the language of § 1182(f), the Order states that "unrestricted entry into the United States of nationals" of the six countries "would be detrimental to the interests of the United States." J.A. 1426.

I. The Government contends that this Court may not even consider whether § 1182(f) in fact gives the President the authority he claims. It contends that the exclusion of aliens is committed entirely to the political branches and that Congress accordingly may delegate to the President sweeping authority that can be exercised without any review by the courts. *See* Pet'rs Br. 22-27.

This Court should reject the Government's attempts to insulate the Order from review. To be sure, judicial deference to the political branches' judgments regarding immigration—particularly to the extent those judgments implicate delicate questions of foreign relations—may be appropriate in certain circumstances. But deference does not justify abdicating the duty of judicial review. Accepting the Government's position would eviscerate the most fundamental task of this Court: to say what the law is, even when that law touches on sensitive subjects like foreign relations and national security. This Court has regularly reviewed Executive action to ensure that it is within statutory and constitutional bounds, and invalidated it where necessary, even in wartime.

The cases on which the Government relies articulating the doctrines of plenary power and "consular nonreviewability" are not to the contrary. Even to the extent the plenary power cases retain their full force today—and they are difficult to square with this Court's more recent precedent—they do not stand for the proposition that this Court can never address the limits of Executive power in the immigration context. And the consular nonreviewability cases articulate a narrow rule governing aliens' individual challenges to their exclusion. They are inapposite here.

II. Nor should the Court accept the Government's reading of § 1182(f) as granting the President unilateral and unreviewable authority. While the provision's language appears broad read in isolation, when it is examined in the context of the statute as a whole—as basic principles of statutory construction require—it becomes clear that the Government's interpretation of § 1182(f) would make a hash of the rest of the statutory scheme.

The Government's reading transforms significant portions of a complex statute into surplusage. The INA contains provisions designed to address the precise problems at which the Order ostensibly aims. Congress has enacted elaborate provisions designed to exclude persons associated with terrorist activities or organizations from obtaining a visa for entry to this country. And in 2015, Congress amended the INA to ensure that nationals of, or recent visitors to, the six countries addressed in the Order would have to undergo that thorough vetting and could not take advantage of the visa waiver program available to other foreign nationals. In doing so, Congress expressly declined to adopt a travel ban, concluding that existing vetting procedures and the limitation of the visa waiver program sufficed. Section 1182(f) should not be read to permit the President to overturn Congress's judgment. Moreover, on the Government's reading, § 1182(f) would permit the President to override the INA's historic prohibition of national-origin discrimination in the issuance of immigrant visas.

The Government's interpretation of § 1182(f) also raises serious constitutional questions, including separation-of-powers questions. It would collapse all power over the exclusion of aliens into a single branch of government, contrary to our constitutional structure of divided powers. And it would give the President the power to discriminate—for instance, on the basis of race, religion, or sex—in a way that would be prohibited in any other context and that implicates our most fundamental values as a nation.

This Court should interpret § 1182(f) narrowly, and read it to permit judicial review, to avoid those constitutional questions.

III. The Court should also reject the Government's contention that, in reviewing respondent's Establishment Clause challenge to the Order, the Court should restrict its inquiry to the four corners of the Order. Where, as here, the President himself and his advisers have repeatedly made clear that the Order is intended as a "Muslim ban," this Court need not and should not ignore those statements in determining the Order's constitutionality.

ARGUMENT

I. THIS COURT SHOULD REJECT THE GOVERNMENT'S ARGUMENT THAT THE ORDER CANNOT BE REVIEWED FOR COMPLIANCE WITH THE INA

A. Reviewing Executive Action For Compliance With Congressional Commands Is An Essential Judicial Role Even When National Security Is At Issue

The Government asserts that this Court may not review the President's actions to determine whether they are consistent with Congress's mandate in the INA. That position contravenes the judiciary's fundamental role—to "say what the law is" and whether it has been complied with. *Marbury*

v. *Madison*, 5 U.S. 137, 177 (1803). As Chief Justice Marshall explained, where the Court is asked to apply a statute to a particular case, the Court "must of necessity expound and interpret" that statute. *Id.* Such statutory interpretation is "the very essence of judicial duty." *Id.* at 178. And courts cannot avoid that duty merely "because the issues have political implications." *INS* v. *Chadha*, 462 U.S. 919, 943 (1983).

To the contrary, resolving questions of statutory interpretation—and thereby determining whether the executive branch is complying with Congress's dictates—is a core judicial responsibility, even where the question implicates sensitive issues of foreign policy or national security. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012). Zivotofsky sought to enforce a statute that permitted citizens born in Jerusalem to request their birthplace be identified as "Israel" rather than "Jerusalem" on their passports, notwithstanding contrary State Department policy. The Government argued that the dispute was nonjusticiable because it implicated the President's authority to speak for the Nation in international affairs, and specifically the Executive's policy of neutrality in the Israeli-Palestinian dispute over the status of Jerusalem. This Court rejected that argument:

> The federal courts are not being asked to supplant a policy decision of the federal branches with the courts' own unmoored determination of what United States

> policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Id.

So too here. This Court is not being asked to determine appropriate immigration policy by itself and without standards. Rather, it is being asked to determine whether the Order comports with Congress's mandate in the INA—a quintessential judicial task.

Indeed, this Court has long understood its responsibilities to include restraining exercises of executive power not authorized by Congress, even in wartime and when national security is at issue. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), for example, the Court famously struck down President Truman's executive order directing the Secretary of Commerce to seize steel mills to avoid a strike that the President believed would cripple the national defense and imperil his ability as Commander-in-Chief to prosecute the Korean War. Applying ordinary tools of statutory interpretation, the Court concluded that Congress had not authorized the seizure; rather, by adopting very different schemes for resolving labor disputes, it had implicitly precluded the President from exercising such power. *Id.* at 585-86; *id.* at 602 (Frankfurter, J., concurring). The executive order's finding of a national security crisis neither prevented this Court from reviewing the Order's compliance with Congress's dictates nor excused the President from obeying them. *See id.* at 588-89; *see also Dames & Moore v. Regan*, 453 U.S. 654, 675-76 (1981) (reviewing scope of President's statutory authority to direct transfer of Iranian assets and suspend pending suits as part of settlement of claims against Iran following Iranian hostage crisis).

Similarly, in a more recent wartime dispute over the scope of executive power, this Court reviewed and held unlawful the procedures of a military commission convened to try an alleged enemy combatant held at Guantanamo for conspiracy to commit terrorism. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 567 (2006). The Court first rejected the Government's argument that it should abstain from hearing Hamdan's challenge until the military commission proceedings were complete, declining to presume that the proceedings would vindicate Hamdan's constitutional rights. *Id.* at 586-87. Exercising its ordinary function of statutory interpretation, the Court concluded that the military commission did not comply with Congress's mandate in the Uniform Code of Military Justice ("UCMJ") requiring that such a commission's procedures be the same as those applied to formal courts-martial "insofar as practicable." *Id.* at 620-23 (quoting 10 U.S.C. § 836(b)). The President had determined that it was "impracticable" for military commissions to comply with formal court-martial rules, but this Court found that the President had not made the necessary showing of impracticability. *Id.* at 623. Again, the Government's pleas of exigency were insufficient to prevent this Court from either scrutinizing executive action for consistency with Congress's direction or examining the sufficiency of the underlying record.

In short, this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder* v. *Humanitarian Law Project*, 561 U.S 1, 34 (2010).

B. Neither the "Plenary Power" Nor The "Consular Nonreviewability" Doctrine Supports The Government's Position

There is no constitutional or prudential reason that this Court should have a more limited role in disputes involving the scope of the executive's power over immigration than it does in other cases, such as those discussed above, implicating sensitive questions of foreign policy or national security.

The Government relies on two lines of cases in support of its contention that the Order is unreviewable. Neither is applicable here.

1. The Government cites cases articulating what is generally known as the "plenary power"

doctrine—which the Government characterizes as holding that the political branches' power to exclude aliens is essentially unreviewable by the courts. Pet'rs Br. 22-23. Even to the extent those cases retain their full validity today—which is questionable—the Government reads them too broadly, and they fail to support the notion that the Order is immune from judicial review.

As an initial matter, the Government fails to acknowledge the most basic point regarding the plenary power doctrine: Decisions regarding immigration are committed to *Congress*, not to the President. *See Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (the formulation of policies "pertaining to the entry of aliens and their right to remain here" is "entrusted exclusively to Congress"); *see also Arizona* v. *United States*, 567 U.S. 387, 409 (2012). This principle is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan*, 347 U.S. at 531. The question presented in this case is not the wisdom of the policy Congress articulated—or even the wisdom of the policy the President articulated—but whether the Order is within the power Congress granted the President in the first place. As discussed above, that is the kind of question this Court is uniquely competent to resolve.

The cases on which the Government relies are not to the contrary. In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), for example, the Court was not presented with the question whether an executive action comported with Congress's dictates, but with the constitutionality of Congress's choice to distinguish between nonmarital children's relationships with their mothers and their relationships with their fathers in granting preferential immigration status. The Court addressed the question, concluding that such a distinction was reasonable and within Congress's constitutional authority. *Id.* at 799-800. It nowhere suggested that courts could not determine whether the President had acted within the powers Congress granted him, and such a suggestion would fly in the face of long-standing precedent such as *Youngstown* and its progeny.

Similarly, the Government relies on dicta in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), which upheld deportations of past members of the Communist Party under the Alien Registration Act, to the effect that "any policy toward aliens is . . . interwoven with . . . the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 588-89; *see* Pet'rs Br. 23. *Harisiades* did not, however, rely on that language to foreclose judicial review of the deportation orders in question, engaging—though rejecting—the deportees' constitutional challenge to the statute. *See* *Harisiades*, 342 U.S. at 583-84. Again, no challenge to *executive* authority was raised.

Undoubtedly, the plenary power doctrine—along with the McCarthy-era terror of Communism—had a role in driving the substantive constitutional analysis in *Harisiades* and similar cases such as *Galvan*. But the extreme reluctance in *Harisiades* and like cases to "deny or qualify the Government's power of deportation" by imposing due process limitations on that power, 342 U.S. at 591, cannot be squared with this Court's more recent precedent.

The Court has not hesitated in recent years to address challenges to the government's power of deportation and related immigration issues and to uphold those challenges where appropriate. In *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001), for example, the Court applied constitutional avoidance principles to construe the INA to impose a "reasonable time" limitation on detention of removable aliens, whose application was reviewable in federal court. The Court observed that "the Due Process Clause protects an alien subject to a final order of deportation," and that Congress's plenary power over immigration is "subject to important constitutional limitations." *Id.* at 693-95. Finding that indefinite detention would raise serious due process concerns, and locating no clear statement in the statute that Congress intended to authorize it, the Court held that indefinite detention is not authorized. *Id.* at 699. The Court also rejected the Government's argument that the federal courts must defer to the Government's decision that a particular detention is reasonable. Notwithstanding "the greater immigration-related expertise of the

Executive Branch," determining whether a particular detention is reasonable and thus authorized by statute is the job of the courts. *Id.* at 699-700. The same logic applies *a fortiori* here, where individualized decision-making is not at issue, but simply the scope of the Executive's rulemaking authority.

2. The Government also relies on cases involving the so-called "consular nonreviewability" doctrine. Pet'rs Br. 24-25. Despite the Government's casual attempt to expand that doctrine into a broad prohibition on review of all immigration-related decisions, *id.* at 25, those cases articulate a narrow exception to the general principle of reviewability of agency action. Under that exception, "a consular official's decision to issue or withhold a visa" to a specific alien seeking entry to the United States is committed to that officer's discretion and thus not reviewable absent Congress's express authorization. *See Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999). Most of the decisions the Government cites fall into that category. *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). In each case an alien seeking entry to the United States and detained at the border sought review by habeas corpus of the individual decision to exclude him or her.

These cases are irrelevant here for two reasons. First, the plaintiffs were aliens outside the United States contesting their own exclusion, not—as here—United States citizens, residents, or entities contesting the exclusion of persons in whose admission they have an interest. Second, the question here is not whether a consular official has reasonably exercised the discretion Congress has granted him, but whether the President has acted pursuant to any statutory authority.

For the same reasons, the Government's contention that Congress has precluded judicial review of the Order fails. The Government notes that Congress has expressly declined to create a private right of action to challenge "a decision . . . to grant or deny a visa" or to revoke a visa. Pet'rs Br. 25 (quoting 6 U.S.C. § 236(f)). But Respondents here are not challenging "*a* decision . . . to deny *a* visa"; they challenge an order preemptively forbidding entry by a group of more than 180 million people defined by their nationality and religion, subject to burdensome case-by-case waiver procedures.

The Order at issue here is far from a run-of-the-mill exercise of discretion over entry of an individual alien. It is extraordinary and unprecedented: a presumptive bar for a significant period on entry of *all* nationals of six overwhelmingly Muslim countries and *all* refugees, candidly referred to by the President and his advisors as a "Muslim ban." *See* Resp't Hawaii Br. 5-7; J.A. 1133. The Court should reject the Government's contention that it cannot even consider whether this was Congress's intent.

II. THE INA SHOULD NOT BE READ TO GRANT THE PRESIDENT UNTRAMMELED DISCRETION TO EXCLUDE A CLASS OF ALIENS FOR ANY REASON

The Government contends that the President's action is authorized by section 212(f) of the INA, which provides that the President may "suspend the entry of all aliens or any class of aliens" whose entry he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That provision does not grant authority for the Order.

To be sure, the language of § 1182(f) is broad. But that does not mean that it grants the President absolute discretion to exclude any group of persons for any reason, as the Government would have it. As this Court recognized long ago in the immigration context, "[a] restrictive meaning for what appear to be plain words may be indicated by [the INA] as a whole, by the persuasive gloss of legislative history or by the rule . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957). That is true here. *First,* the Government's interpretation of § 1182(f) would nullify significant portions of a complex and reticulated statutory scheme, including provisions Congress enacted to address the precise problems at which the Order is purportedly directed, and would override Congress's considered judgment *not* to institute the travel ban the Order imposes. *Second,* such an interpretation would raise serious constitutional concerns, as it would imply a delegation to the President of sweeping power over immigration—including the power to engage in discrimination on the basis of race, sex, and religion that would not be tolerated in any other context—without any discernible standards for exercising that power or any check on its exercise. The application of those principles here makes clear that Congress has not granted the President the authority he claims.

A. The Government's Interpretation of Section 1182(f) Is Incompatible With the Statutory Scheme As A Whole

The Government's reading of § 1182(f) would render much of the remainder of Congress's careful scheme in the INA—which includes specific provisions dealing with precisely the national security issues the Order claims to address—surplusage. Even more strikingly, it would contravene Congress's specific judgment *not* to impose a travel ban on nationals of the six countries at issue, but instead to institute more carefully tailored precautions. And it would violate the express repudiation of national-origin discrimination in immigration that has been a centerpiece of the INA since 1965.

1. Congress has not sat idly, failing to address the risk of domestic terrorism potentially posed by admitting aliens from countries that have been known to harbor terrorists. In 2015, Congress enacted a law designed to address precisely that concern, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. *See* Consolidated Appropriations Act, 2016, Pub. L. 114-113 div. O, tit. II (2015) (codified at 8 U.S.C. § 1187(a)(12)) ("Visa Waiver Act" or "Act").

The Act modified the existing visa waiver program, under which aliens in certain categories—such as those seeking short-term entry as a tourist, 8 U.S.C. § 1187(a)(1), having completed immigration forms, *id.* § 1187(a)(4), or having a round-trip ticket, *id.* § 1187(a)(8)—are not required to obtain a visa for entry. It provided that nationals of, or persons recently present in, the six countries identified in the Order, along with Iraq, are not eligible for the visa waiver program because of those countries' ties to terrorism. *Id.* § 1187(a)(12).[7] Accordingly, those persons will receive the full vetting necessary to receive a visa—vetting meticulously designed to exclude foreign nationals suspected of any association with terrorist activity or organizations, and updated multiple times since September 11, 2001 to address new concerns. *See id.* § 1182(a)(3)(B); USA PATRIOT ACT of 2001, Pub. L. 107-56; REAL ID Act of 2005, Pub. L. 109-13.

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[7] Syria and Iraq are specifically designated in the Act; the other five countries have been designated by the Secretary of State or Secretary of Homeland Security under authority granted by the Act. *See* 8 U.S.C. § 1187(a)(12)(A).

The Visa Waiver Act, however, does not impose a ban on entry by all nationals of the countries at issue. That was not an oversight, but a deliberate choice expressly discussed during debate over the bill. As Representative Lofgren, one of the bill's supporters, stated in debate on the bill:

> For those who have traveled to or are nationals of certain high-threat countries, a visa interview, rather than visa-free travel, will be required. *These individuals are not barred from traveling to the United States.*

177 CONG. REC. H9050 (daily ed. Dec. 8, 2015) (statement of Rep. Lofgren) (emphasis added). Similarly, while opponents of the bill criticized it as overbroad and discriminatory, they still understood it as limited to subjecting affected persons to additional screening measures prior to entry. *See, e.g., id.* at H9051 (statement of Rep. Conyers) ("I understand that these individuals are not banned from traveling to our Nation and are simply subject to increased questioning and scrutiny before they can travel here."); *id.* at H9057 (statement of Rep. Ellison) ("While this bill does not restrict entry to the U.S., it creates additional barriers.").

On the Government's reading, then, § 1182(f) permits the President to override Congress's deliberate decision not to impose a travel ban on nationals of exactly the six countries at issue. And it renders Congress's carefully crafted remedy in the Visa Waiver Act a nullity, since the President is free to impose the more drastic measure of a travel ban on nationals or residents of any country.

It need hardly be said that such a reading contravenes basic principles of statutory interpretation. This Court typically will not read a statute in a way that renders another part of the statute superfluous. *See, e.g., Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). Relatedly, where a general provision and a specific provision of a statute are addressed to the same problem, the specific provision takes precedence over the general provision. *See, e.g., RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) ("[T]he specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."). Here, Congress set out a careful and reticulated scheme, developed over many years, specifically designed to address the domestic terrorism risk posed by entry of nationals of the countries at issue. Interpreting the INA to permit the Order renders all of those labors superfluous, *see, e.g., Abourezk* v. *Reagan*, 785 F.2d 1043, 1056-58 (D.C. Cir. 1986) (Ginsburg, J.) (putting a limiting construction on the Executive's power to exclude certain aliens under one subsection of § 1182(f) in order to avoid rendering another subsection surplusage), and permits the general provision to override the specific.

Most significantly, that interpretation of the statute turns on its head Congress's deliberate decision *not* to impose a travel ban. There is no reason to believe Congress intended to delegate to the President a power to cast aside all the meticulously developed specifics of the INA in this manner. Just as in *Youngstown*, *see* 343 U.S. at 586-88, by adopting a specific scheme for addressing terrorism concerns that does not include a travel ban, Congress has precluded the President from doing so on his own.[8]

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[8] The scope of the President's authority under § 1182(f) is also illuminated by historical practice. See *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.") (internal quotation marks and citation omitted); *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) (noting that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President" by the Constitution). In the few instances where other presidents have invoked Section 1182(f), the suspension of nationals

2. On the Government's interpretation, § 1182(f) would also run afoul of the bar on national-origin discrimination in § 1152 of the statute—a key piece of civil-rights-era legislation specifically designed to repudiate the then-existing national origin quota system for immigration. Section 1152 provides:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A).

The bill ultimately codified in § 1152 was intended "fundamental[ly] [to] reform . . . the national origins system of selecting immigrants." Letter of Transmittal from President John Kennedy to Vice President Lyndon Johnson and Speaker of the House John McCormack, 1 (July 23, 1963). President Kennedy's transmittal letter emphasized

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from a particular country was in response to specific and articulable foreign policy events or other reasons having nothing to do with invidious discrimination based on nationality. Unlike the situation here, none of those actions branded the foreign nationals threats to public safety based solely on their nationality. *See* J.A. 1215-16; Resp't Hawaii Br. at 45-46.

that "[t]he use of a national origins system is without basis in either logic or reason," and that the new legislation would help "in developing an immigration law that serves the national interest and reflects in every detail the principles of equality and human dignity to which our nation subscribes." *Id.* at 1-2.

Senator Philip Hart described the "principal effort" behind the bill as "the elimination of a mistake that was made in the twenty's and has lived with us ever since in this business of the national origins quota system." *Immigration: Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary*, pt. I, 89th Cong. 4 (1965) (statement of Sen. Philip Hart, Member, S. Subcomm. on Immigration and Naturalization). Similarly, Attorney General Nicholas Katzenbach told the House Committee:

> Under present law, we choose among potential immigrants not on the basis of what they can contribute to our society . . . . We choose, instead, on the basis of where they . . . happened to be born. There is little logic or consistency in such a choice . . . when we proclaim to all the peoples of the world that every man is born equal and that in America every man is free to demonstrate his individual talents.

Id. at 8 (statement of Nicholas Katzenbach, Att'y Gen. of the United States). The House Report likewise explained that the new legislation was intended to "eliminat[e] . . . the national origins system as the basis for the selection of immigrants" and replace it with "a new system of selection designed to be fair, rational, humane, and in the national interest." H.R. REP. NO. 89-745, at 8, 12 (1965).

The Order on its face violates § 1152's prohibition on "discriminat[ion] in the issuance of . . . immigrant visa[s] because of the person's . . . nationality" by denying entry to the United States (including entry as an immigrant) solely on the basis that a person is a national of one of the six identified countries. *See* 8 U.S.C. § 1152(a)(1)(A).

The Government acknowledges—as it must—that § 1152 prohibits national-origin discrimination in the issuance of immigrant visas. It nevertheless argues that § 1182(f) empowers the President to ban "entry" on the basis of nationality. "[I]f an alien is subject to Section 2(c) . . . , he is denied an immigrant visa because he is ineligible to receive one as someone barred from entering the country under Section 1182(f)—not because he is suffering the type of nationality-based discrimination prohibited by Section 1152(a)(1)(A)." Pet'rs Br. 52. This is sophistry. The *reason* such an alien is ineligible to receive an immigrant visa is because he is barred from entering the country based on his nationality.

Indeed, the Government's interpretation would render Section 1152 entirely meaningless. It would enable the President to override Congress's ban on racial, nationality and gender discrimination in the issuance of immigration visas by simply banning entry for the same discriminatory reasons. That cannot have been what Congress intended in enacting § 1152. Rather, under longstanding principles of statutory interpretation, the specific ban on national-origin discrimination in the issuance of immigrant visas must be treated as an exception to the general power to exclude classes of aliens. *See RadLAX*, 566 U.S. at 645. The alternative reading makes § 1152—a historic and much-heralded repudiation of national-origin quotas—a nullity.

B. The Government's Reading Of Section 1182(f) Raises Grave Constitutional Concerns

The INA, like other statutes, must be interpreted, where possible, to avoid constitutional concerns. *See Zadvydas*, 533 U.S. at 689 ("It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (internal quotation marks, citation, and brackets omitted)). Thus, in *Zadvydas*, as discussed above, the Court construed a provision of the INA that arguably provided broad authority to detain a deportable alien indefinitely to include an implicit limitation to a reasonable time period. *Id.* And in *Witkovich*, the Court construed a grant of power to the Attorney General to require aliens with outstanding deportation orders to provide whatever information he "may deem fit and proper" as limited to information reasonably necessary to keep him informed of their availability for departure. 353 U.S. at 195-202. In both cases, the Court adopted a narrowing construction of language that "if read in isolation and literally, appears to confer upon the Attorney General unbounded authority" to avoid the constitutional concerns that would otherwise result. *Id.* at 199; *see id.* at 200-01.

The Government's reading of § 1182(f) as granting the President absolute and unreviewable discretion to exclude any or all aliens for any reason and any length of time he wishes likewise raises serious constitutional questions, including separation-of-powers concerns.

The Constitution confers power over immigration matters in the first instance on Congress, not the President. *See* U.S. Const., art. I, § 8, cl. 4 (granting Congress the power "[t]o establish [a] uniform Rule of Naturalization"); *id.*, art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations"); *Arizona*, 567 U.S. at 409 ("[p]olicies pertaining to the entry of aliens" are the "exclusive[]" province of Congress" (internal quotation marks and citation omitted)). Congress may, of course, delegate portions of that authority to the President, accompanied by some discernible principle to guide its exercise—but the President may not arrogate it all to himself and wield it at his whim. Such an assertion of absolute power must—at the very least—"be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

These separation-of-powers concerns are compounded by the Government's position that the President's actions are immune from judicial review—an approach that "condense[s] power into a single branch of government," in contravention of our fundamental system of checks and balances. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (examining both the statutory authorization for executive detention of enemy combatants and the constitutional limitations on its exercise) (emphasis omitted). "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.*

The Government contends that Congress should be presumed to have barred the courts from reviewing the President's actions to determine whether they are authorized, absent an express statement to the contrary. Pet'rs Br. 24-25. It apparently draws that proposition from the narrow line of consular non-reviewability cases discussed above, *see supra* Part I.B.2. As a general matter, however, this Court has held that such presumptions run the other way. Congress is not presumed to push the envelope of constitutionality. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *cf. Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (in federalism context, requiring clear statement before statute is interpreted to "upset the usual constitutional balance"). And ambiguities are resolved in favor of readings that do not create constitutional concerns—including concerns posed by the preclusion of judicial review. *See, e.g., INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (in the context of habeas review of removal orders, holding that "[a] construction of the [INA] that would entirely preclude review of a pure question of law [including a statutory question] by any court would give rise to substantial constitutional questions.").

This case does not, like *St. Cyr*, raise Suspension Clause concerns. But it surely does raise the serious concerns associated with "condens[ing] power into a single branch of government." *Hamdi*, 542 U.S. at 536. And it is also troubling that the Government appears to recognize no limitation on the President's ability to exclude aliens for discriminatory reasons—such as race and religion—that in other contexts would clearly be forbidden, and that would change the character of our Nation.

These concerns are heightened yet further by the specifics of the Order here. The Order attempts to justify its blanket ban on entry by nationals of the six designated countries and by refugees as necessary to protect the Nation from acts of terrorism pending the Administration's review of vetting procedures. But that justification is weak at best. The Order provides no instance of any national of five of the six designated countries engaging in an act of terrorism, and the only example it gives from the remaining country, Somalia, is of a national who entered as a two-year-old, became a citizen, and was later radicalized here. *See* J.A. 276. As the courts below noted, the Department of Homeland Security has found no meaningful relationship between citizenship of a foreign nation and proclivity to commit terrorist acts; and former national security officials from both Republican and Democratic Administrations have rejected any simple equation between nationality and the potential for terrorism. *See* J.A. 178, 1226. Moreover, the Order does not demonstrate any weakness in existing vetting procedures that necessitates a blanket ban on entry while they are reconsidered.

Combined with the repeated statements, described in Respondents' briefs and by the courts below, that the Order and its predecessor were intended to implement a "Muslim ban," the thinness of the putative justification for the Order gives pause. And it puts in stark relief the consequences of accepting the Government's assertion that the President's power is unilateral and unreviewable. The Court should reject that argument and construe § 1182(f) to avoid the serious constitutional doubts the Government's reading raises.

III. THIS COURT SHOULD NOT LIMIT ITS ESTABLISHMENT CLAUSE INQUIRY TO THE ORDER'S ASSERTED PURPOSE

Should this Court reach the Establishment Clause question, it should reject the Government's argument that its inquiry is limited to examining the four corners of the Order to determine whether it provides a "facially legitimate and bona fide reason" for its terms. *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). The Government contends that so long as the Order itself articulates some colorable national security rationale, this Court is precluded from inquiring any further into the underlying motives for and effects of the ban. Whatever the merits of that analysis in the ordinary case, this is no ordinary case. The record contains substantial evidence that the Order was motivated by a desire to ban entry of Muslims. This Court is not required to, and should not, ignore that evidence.

Kleindienst certainly imposes no such requirement. There, the question was whether the Government had articulated a sufficient basis for burdening the plaintiffs' First Amendment right to hear the speaker who was excluded. In that context, this Court concluded that it would be undesirable for courts to "be required to weigh the strength of the audience's interest" in hearing a speaker "against that of the Government in refusing a waiver to the particular alien applicant" on a case-by-case basis. *Id.* at 769. But those concerns are not implicated here. The Order is a sweeping proclamation presumptively excluding over 180 million people, not an individualized determination to exclude a particular person that incidentally burdens a U.S. citizen's rights. Equally importantly, *Kleindienst* involved no evidence of unconstitutional motive like that here. Where, as here, a litigant offers a prima facie "affirmative showing of bad faith" and unconstitutional motivation on the part of the Government, this Court should take that showing into account in determining the validity of the challenged action. *See Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring). Respondents' Establishment Clause claim deserves this Court's serious and full consideration, including examining the Order in the context of the entire record. When the President and his advisors themselves casually acknowledge their intent to implement a "Muslim ban," the threat to our constitutional values requires nothing less.

CONCLUSION

This Court should affirm the judgments below.

Respectfully submitted,

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v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*,
Respondents.

DONALD J. TRUMP, *ET AL.*, Petitioners,
v.
STATE OF HAWAII, *ET AL.*, Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS AND URGING REVERSAL OF THE DECISIONS BELOW AND VACATION OF THE PRELIMINARY INJUNCTIONS

In this brief, *amicus curiae*, the American Center for Law and Justice, addresses the President's broad discretion over immigration matters and demonstrates how the Executive Order does not violate the Establishment Clause (the second question presented). Counsel for the parties consent to the filing of this brief.[1]

STATEMENT OF INTEREST

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus curiae* briefs before this Court and other courts around the country in cases involving the Establishment Clause and immigration law. *See, e.g.*, *United States v. Texas*, 136 S. Ct. 2271 (2016); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v.*

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Mergens ex rel. Mergens, 496 U.S. 226 (1990); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

The ACLJ has actively defended, through advocacy and litigation, immigration-related policies that protect American citizens. This brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 250,000 Americans who have stood in support of the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

SUMMARY OF THE ARGUMENT

The federal government's primary job is to keep this nation safe. The President's revised national security Executive Order ("EO")[2] is designed to do just that. The EO temporarily pauses entry into the United States of refugees and nationals from six unstable and/or terrorism-infested countries to allow time for needed improvements to the immigration and refugee screening processes.

Under the Constitution and federal statutes, the President has broad power to exclude aliens from this country for national security reasons. Courts generally defer to the exercise of the President's power in this area, which is what the lower courts should have done here. The EO is a valid exercise of President Trump's authority that should not be disturbed.

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[2] Exec. Order No. 13,780 (Protecting the Nation from Foreign Terrorist Entry into the United States), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

Moreover, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters uttered on the campaign trial as private citizens, is not enough to defeat the EO. Even under *Lemon*'s purpose prong, all that is needed to establish the constitutionality of a government action is that it have *a* secular purpose and was not motivated wholly by religious considerations. The EO clearly serves a genuine secular purpose—protecting our national security—and is not motivated by anti-religious considerations.

The decisions below should be reversed and the preliminary injunctions should be vacated to permit the EO to be enforced in full to protect our nation from foreign terrorists.

ARGUMENT

I. The Executive Order should be reviewed under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Executive Order satisfies.

These cases involve the special context of an EO concerning the entry into the United States of refugees as well as nationals of six countries of particular concern, enacted pursuant to the President's constitutional and statutory authority.[3]

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[3] The six countries of concern are Iran, Libya, Somalia, Sudan, Syria, and Yemen primarily because they are terrorist breeding grounds. *E.g.*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, § 1 (findings supporting national security basis for EO); U.S. Dep't of State, *Country Reports on Terrorism 2015*, June 2016, www.state.gov/documents/organization/258249.pdf, at 11-12 (discussing terrorism in Somalia), 165-66 (describing Syria, Libya, and Yemen as primary theaters of terrorist activities), 299-302 (designating Iran, Sudan, and Syria as state sponsors of terrorism). Moreover, as noted in sociological literature, large numbers of incoming refugees, particularly those without adequate background verification, can pose the potential for a higher risk of terrorist activity to a welcoming nation. As one study explains, "[a] cross-national time-series data analysis of 154 countries from the years 1970-2007 shows evidence that countries with many refugees are more likely to experience both domestic and international terrorism." Seung-Whan Choi & Idean Salehyan, *No Good Deed Goes Unpunished: Refugees, Humanitarian Aid, and Terrorism*, 30 CONFLICT MGMT. & PEACE SCI. 53, 53 (2013) (abstract).

As discussed herein, when this Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny applied to non-immigration-related actions, choosing instead to take a considerably more deferential approach, which is what the lower courts should have done here.

A. Judicial review of the immigration-related actions of the political branches is deferential.

This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Moreover, the Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and the President has broad national security powers that may be exercised through immigration restrictions. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

Not only do the decisions below undermine the President's national security authority, they also undercut the considered judgment of Congress (in bolstering the President's broad discretion) that

> [*w*]*henever the President finds* that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may* by proclamation, and for such period *as he shall deem necessary*, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions *he may deem to be appropriate*.

8 U.S.C. § 1182(f) (2012) (emphasis added).

Where, as here, a President's action is authorized by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Frankfurter, J., concurring)). The EO falls squarely within the President's constitutional and statutory authority and should be upheld in full. As this Court recently noted,

> [n]ational-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to other branches. . . . For these and other reasons, courts have shown deference to what the Executive Branch has determined . . . is essential to national security. Indeed, courts

> traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs unless Congress specifically has provided otherwise. Congress has not provided otherwise here.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (citation and internal quotation marks omitted).

B. The Executive Order is constitutional under this Court's deferential standards applicable to challenges to the political branches' immigration-related actions.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court rejected a First Amendment challenge to the Attorney General's decision to decline to grant a waiver that would have allowed a Belgian scholar to enter the country on a visa in order to speak to American professors and students. The Court held that "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.'" *Id.* at 765 (citations omitted). The Court concluded by stating that

> plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to

> the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 769-70; *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (the government's statement that a visa application was denied due to suspected involvement with terrorist activities "satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard").

Similarly, in *Fiallo*, this Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are the children or parents of United States citizens or lawful permanent residents, except for illegitimate children seeking that status by virtue of their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

Id. at 792 (citation omitted). The Court noted that it had previously "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794. Additionally, the Court stated, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. Furthermore, the Court emphasized that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision," *id.* at 799, and concluded that the plaintiffs raised "policy questions entrusted exclusively to the political branches of our Government." *Id.* at 798.

The legality of executive orders related to immigration does not turn on a judicial guessing game of what the President's subjective motives were at the time the order was issued. Instead, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the face of such orders. *See Washington v. Trump*, 853 F.3d 933, 939 n.6 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc) (the panel's "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world").

The EO is closely tethered to well-established discretionary powers vested in the Executive Branch by the Constitution and statute. The EO *temporarily* pauses entry into the United States of refugees under the United States Refugee Admissions Program as well as nationals of six unstable and/or terrorism-infested countries, which were designated as such by the prior administration, for the legitimate secular purpose of allowing time for needed improvements to the immigration and refugee screening processes.

The EO does *not* single out Muslims for disfavored treatment. The countless millions of non-American Muslims who live outside the six countries of particular concern are not restricted by the EO. Neither does it limit its application to Muslims in the six designated countries; instead, it applies to all citizens of the six enumerated countries irrespective of their faith. There is ample justification for the determination of multiple administrations that the six designated countries pose a particular risk to American national security. Respondents' objection to the EO is a policy dispute that should be resolved by the political branches, not by the federal courts.

The EO is similar in principle to the National Security Entry Exit Registration System ("NSEERS") implemented after the terrorist attacks of September 11, 2001, which was upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (citing cases). Under this system, the Attorney General imposed special requirements upon foreign nationals present in the United States who were from specified countries. The first group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria, and a total of twenty-four Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3.

In one illustrative NSEERS case, the United States Court of Appeals for the Second Circuit rejected arguments that are strikingly similar to the arguments accepted by the lower courts here:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 *were facilitated by the lax enforcement of immigration laws.* The Program was [rationally] designed to monitor more closely aliens from *certain countries selected on the basis of national security criteria. . . .*
>
> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts. . . . The program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioners' claim.

Id. at 438-49 (emphasis added) (citation omitted). Similarly, the EO at issue here is constitutional.[4]

II. The Executive Order is constitutional even under a traditional Establishment Clause analysis.

As noted previously, consideration of the EO must take into account the deferential nature of judicial review of immigration-related actions. Nevertheless, the EO is constitutional even under non-immigration-related Establishment Clause jurisprudence. The Fourth Circuit determined (wrongly) that the EO likely violates the Establishment Clause. Jt. App. at 236. The Ninth Circuit did not reach the issue. *Id.* at 1178.

Assuming the "purpose prong" of the *Lemon v. Kurtzman*, 403 U.S. 602(1971), test applies, the EO clearly satisfies it. The EO's predominant purpose is its stated objective, namely, protecting national security, and, therefore, the government action here has a "secular legislative purpose." *Id.* at 612-13.[5]

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[4] In affirming parts of the preliminary injunction issued by the Hawaii trial court, the Ninth Circuit employed a novel reading of 8 U.S.C. § 1182(f) to conclude that the President exceeded his statutory authority by not making sufficient findings. Jt. App. at 1209. The Ninth Circuit's reading of Section 1182(f) is wrong because it directly contradicts the statute's unambiguous language providing the President with broad discretion to suspend or restrict entry of aliens into our country "whenever *he finds* that [their entry] would be detrimental to the interests of the United States." (emphasis added).

The Fourth Circuit sidestepped the EO's obvious secular purposes by focusing on miscellaneous comments made by then-candidate Trump, or his advisors, which is flawed for at least four reasons.

First, this Court has stated that the primary purpose inquiry concerning statutes may include consideration of the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (citation and internal quotation marks omitted); *see also id.* (noting that the primary purpose inquiry is limited to consideration of "the 'text, legislative history, and implementation of the statute,' or comparable *official act*") (citation omitted and emphasis added).

The Fourth Circuit relied upon several quotes, made as long ago as 2015, by then-candidate Trump and/or individuals holding some non-governmental position within his political campaign. Jt. App. at 219-22. Clearly, comments made, or actions taken, by a private citizen while a candidate for public office (or his or her advisors) *while on the campaign trail* are not "official" *government* acts, and do not constitute "*contemporaneous* legislative history." *McCreary Cnty.*, 545 U.S. at 862; *cf. Clinton v. Jones*, 520 U.S. 681, 686 (1997) (alleged misconduct occurring before Bill Clinton became President was not an "official" act).

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[5] The suggestion that the EO should be reviewed under *Lemon*'s purpose prong is particularly troubling given the flawed and inconsistent nature of the test. *See* Jay A. Sekulow & Erik M. Zimmerman, *Posting the Ten Commandments is a "Law Respecting an Establishment of Religion"?: How* McCreary County v. ACLU *Illustrates the Need to Reexamine the* Lemon *Test and Its Purpose Prong*, 23 T.M. COOLEY L. REV. 25 (2006) (discussing the irrational and inconsistent results produced by application of the *Lemon* test, especially the purpose prong).

Indeed, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Thus, the Fourth Circuit failed to properly limit its inquiry to official acts or statements in conducting its Establishment Clause analysis. Presidential campaign rhetoric is inherently unofficial and unreliable and should not be considered. *See Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from denial of reconsideration en banc) (explaining that, for Establishment Clause analysis, it "is folly" to consider a political candidate's campaign trail rhetoric, which is often contradictory or inflammatory).

Second, the Fourth Circuit's extensive reliance upon purported evidence of a subjective, personal anti-Muslim bias of the President and some of his advisors is improper because "what is relevant is the legislative purpose of *the statute*, not the possibly religious motives of *the legislators* who enacted the law." *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (emphasis added). In short, the lower court engaged in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by this Court's precedent. *McCreary Cnty.*, 545 U.S. at 862.

The EO, on its face, serves secular purposes, and no amount of rehashing of miscellaneous campaign trail commentary can change that, especially when the content of the current EO is substantively different from the now-repealed previous executive order. In fact, a foray into the malleable arena of legislative history is not even a *requirement* in all Establishment Clause cases. *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (noting this Court's "reluctance to attribute unconstitutional motives to the [government] particularly when a plausible secular purpose . . . may be discerned from the face of the statute"); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (explaining that inquiry into the government's purpose should be "deferential and limited").

As Judge Niemeyer explained in his dissenting opinion in *International Refugee Assistance Project*, the majority's use of campaign statements to convert the facially neutral EO into an Establishment Clause violation was improper. The "Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs." Jt. App. at 349 (Niemeyer, J., dissenting). In the few cases in which the Court has invalidated government actions based on a religious purpose, for example, *Edwards v. Aguillard*, 482 U.S. 578 (1987), "the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins." Jt. App. at 350-51 (Niemeyer, J., dissenting). Those cases are manifestly distinguishable from the EO, which "is framed and enforced without reference to religion, and the government's proffered national security justifications . . . are consistent with the stated purposes of the [EO]." *Id.* at 351. "Conflicting extrinsic statements made prior to the [EO]'s enactment surely cannot supplant its facially legitimate national security purpose." *Id.*

Third, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters, and intermixed with various secular purposes, is not enough to doom government action (along with all subsequent attempts to address the same subject matter). "[A]ll that *Lemon* requires" is that government action have "*a* secular purpose," not that its purpose be "*exclusively* secular," *Lynch v. Donnelly*, 465 U.S. 668, 681, 700 n.6 (1984) (citation omitted and emphasis added), and a policy is invalid under this test only if "the government acts with the ostensible and *predominant* purpose of advancing religion." *McCreary Cnty.*, 545 U.S. at 860 (emphasis added); *see also Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (upholding government action that "serv[ed] a mixed but primarily nonreligious purpose"); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated *wholly* by an impermissible purpose.") (emphasis added).

The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test. *See Sarsour v. Trump*, 2017 U.S. Dist. LEXIS 43596, at *24-34 (E.D. Va. 2017) (rejecting the claim that the EO violates the purpose prong of *Lemon* and noting that the EO is a facially lawful exercise of the President's authority and that the stated national security purpose of the EO is not a pretext for discrimination against Muslims).[6]

Lastly, under the Fourth Circuit's analysis, any hypothetical future immigration-related orders issued by the current President will be irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates, which runs contrary to this Court's admonition that the government's "past actions" do not "forever taint any effort . . . to deal with the subject matter." *McCreary Cnty.*, 545 U.S. at 874; *see also ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'") (citation omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 564 (8th Cir. 2009) ("Another reason we reject the district court's *Lemon* analysis is that . . . [it] would preclude the District from *ever* creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner.").

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[6] Further evidence to dispel the notion that the EO is a cover for anti-Muslim discrimination is found in the May 3, 2017, testimony by then-FBI Director James Comey before the Senate Judiciary Committee on FBI Oversight. Comey testified that the FBI has over 2,000 "violent extremist investigations" and "about 300 of them [roughly 15%] are people who came to the United States as refugees." *Read the full testimony of FBI Director James Comey in which he discusses Clinton email investigation*, WASHINGTON POST (May 3, 2017) www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/?utm_term=.874b0288f409; *see also* Mark Krikorian, *Comey: 15 Percent of Terror Cases Came as Refugees*, NAT'L REVIEW (May 8, 2017, 4:50 PM), www.nationalreview.com/corner/447423/comey-terror-cases-refugees.

The many substantive differences between the prior executive order and the existing EO constitute genuine changes in constitutionally significant conditions that cured any actual or perceived Establishment Clause deficiencies. *See Sarsour*, 2017 U.S. Dist. LEXIS 43596, at *33 ("[T]he substantive revisions reflected in [the EO] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominant purpose of [the EO] is to discriminate against Muslims based on their religion and that [the EO] is a pretext or a sham for that purpose.").

The EO was narrowly crafted to address concerns raised during litigation over the prior executive order, with the secular goal of protecting national security. Addressing actual or perceived flaws in previous iterations of a law or policy, in order to bolster the likelihood that it will be upheld in litigation, is itself a valid secular purpose. *See, e.g.*, *ACLU of Ky. v. Rowan Cnty.*, 513 F. Supp. 2d 889, 904 (E.D. Ky. 2007) (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Plain and simple, the EO does not violate the Establishment Clause. It should be enforced in full to protect our nation from foreign terrorists. As Judge Shedd properly noted in his dissenting opinion regarding the preliminary injunction upheld by the Fourth Circuit (words also applicable to the preliminary injunction upheld by the Ninth Circuit):

> the real losers in this case are the millions of individual Americans whose security is threatened on a daily basis by those who seek to do us harm. . . . [T]he security of our nation is indisputably lessened as a result of the injunction. Moreover, the President and his national security advisors (and perhaps future Presidents) will be seriously hampered in their ability to exercise their constitutional duty to protect this country.

Jt. App. at 366-67 (Shedd, J., dissenting).

CONCLUSION

This Court should reverse the decisions below and vacate the preliminary injunctions.

Respectfully submitted,

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Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

1. Whether Respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s temporary refugee suspension, and Section 6(b)'s refugee cap are justiciable.

2. Whether Respondents' challenges to Section 2(c) became moot on June 14, 2017.

3. Whether Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA.

4. Whether Sections 2(c), 6(a), and 6(b) violate the Establishment Clause.

5. Whether the global injunctions are impermissibly overbroad.

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  A. The Court's recent Establishment Clause cases increasingly look to history and coercion, and away from *Lemon* and the "endorsement test." 6

  B. Justices of this Court frequently criticize the *Lemon*/endorsement test. 11

  C. A broad consensus of scholars spanning the spectrum of legal thought agree that the *Lemon*/endorsement test is fatally flawed. 13

  D. While the prior Administration urged the Court to decide *Town of Greece* on *Marsh* alone, the Court instead responded to Petitioner's and *amici*'s urging to opine on *Lemon*. 19

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. Incorporated in Washington, D.C., the ACRU is dedicated to promoting originalism: that in the United States' democratic republic, the only legitimate way for politically unaccountable federal judges to interpret the law is in accordance with the original public meaning of its terms. Courts ascertain the original meaning of the Constitution and lesser laws by consulting the text, structure, and history of the document to determine the meaning that ordinary American citizens of reasonable education and public awareness would have understood those terms to mean at the time they were democratically adopted.

The ACRU Policy Board sets the policy priorities of the organization. Members include former Attorney General Edwin Meese III, former Assistant Attorneys General Charles J. Cooper and William Bradford Reynolds, and former U.S. Ambassador J. Kenneth Blackwell. These statesmen are accomplished leaders regarding immigration policy, national security, and Religion Clauses jurisprudence.

The ACRU has three specific interests here. First, advocating strict adherence to the requirements of

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[1] *Amicus Curiae* American Civil Rights Union certifies that all parties have consented to the filing of this brief, and were timely notified. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than the American Civil Rights Union contributed any money to fund the preparation or submission of this brief.

Article III regarding lawsuits that are properly justiciable. Second, ensuring that the most qualified federal officers are making decisions on immigration policy, meaning here that Congress has plenary authority to set immigration policy, and has conferred vast discretion on the President to make the specific decisions implicated in this litigation. And third, advocating an interpretation of the First Amendment's Establishment Clause that comports with the historical understanding of that constitutional guarantee. That third interest is the focus of this *amicus* brief.

SUMMARY OF ARGUMENT

The courts below applied the wrong Establishment Clause test. This Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), abandoned the test applied by the Fourth Circuit here, restoring an Establishment Clause inquiry that looks to history and determines whether plaintiffs in the litigation are being coerced by the government to participate in a religion or religious exercise against their conscience.[2]

The district courts in both cases, as well as the Fourth Circuit, applied the wrong standard by looking to whether the Executive Order had a secular purpose or whether it endorsed a particular religious message. This Court in *Town of Greece* jettisoned those errant lines of cases and abandoned their forms of inquiry. That 2014 decision restored a historically grounded approach to the Establishment Clause, under which the Constitution is violated if a government action involving religion would have been regarded as an official establishment of religion in 1791. Three Justices added that a historically accepted action might also be problematic if it coerces a person to engage in a religious exercise.

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[2] Although the Ninth Circuit decided the legal challenge before it on statutory grounds, and thus did not reach the constitutional question in the case, this brief's arguments are directed against the judgments of both the Fourth and the Ninth Circuits, and seeks a judgment from this Court reversing both of them.

There is no question that Executive Order 13780 is not a religious establishment by historical standards, nor does it coerce any of the Respondents here. Beyond the fact that Respondents presented no evidence that would satisfy the correct analysis, they do not even allege that the President's order violates this constitutional standard.

Despite the Court's recent refining of Establishment Clause jurisprudence, if there were any precedent from the Court directly on point, inferior courts would be required to follow that wrongly decided case until this Court explicitly overrules it. But this case presents a question of first impression, therefore inferior courts are bound by this Court's rule from *Town of Greece*: "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." All of the inferior courts in these consolidated cases were required to adopt that approach to answer this novel constitutional question. Given that there is no evidence—or even allegation—that Executive Order 13780 violates the Establishment Clause under the controlling test, this Court should reverse the courts below.

ARGUMENT

The Court should not reach the Establishment Clause question presented in this case for the reasons set forth by the President in the Federal Petitioners' opening brief.[3] But if a court were to (incorrectly) conclude that *IRAP* and *Hawaii* are justiciable cases, then (correctly) conclude that the EO is consistent with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* (INA), and thereby reach the constitutional issue, that court must then apply the correct test. The courts below failed to do so.[4]

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[3] Some of these reasons pertain to threshold issues. Others show that the various provisions of the Bill of Rights—including the Establishment Clause—do not apply to facially neutral immigration statutes and administrative actions. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). Executive Order 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "EO"), therefore does not implicate the Establishment Clause. The Court's more recent pronouncement in *Kerry v. Din*, 135 S. Ct. 2128 (2015), does not change that result. *See* U.S. Brief at 62–70. While *Amicus* American Civil Rights Union agrees with the President's arguments on each of the five questions before the Court in this litigation, this brief is exclusively focused on Question 4 in the Petition.

[4] While the Fourth Circuit held that the EO is consistent with the INA and thus reached the Establishment Clause issue in *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), the Ninth Circuit held that the EO violated the INA, and therefore never reached the constitutional question in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). However, like other federal appellate courts, the Ninth Circuit holds it may affirm the district court's judgment against the President "on any basis fairly supported by the record," *Henry v. Lehman Commer. Paper., Inc.*, 471 F.3d 977, 995 (9th Cir. 2006). The court of appeals could therefore persist in thwarting the EO

"*Any* test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (emphasis added). The lower courts applied an older test from other Establishment Clause contexts—a version of the so-called *Lemon* test—that violates the Court's rule.

I. IN *TOWN OF GREECE*, THIS COURT ABANDONED THE *LEMON*/ENDORSEMENT TEST IN FAVOR OF A HISTORY-AND-COERCION TEST.

The Establishment Clause commands that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1. The President is correct that, even if the Court holds that all other issues are satisfied and thus reaches the constitutional question in the case, Executive Order 13780 is permissible even under previous decades of Establishment Clause jurisprudence, characterized alternatively as the *Lemon* test or the endorsement test (both described *infra* in Part II). *See* U.S. Brief at 70–78.

However, in *Town of Greece*, the Court jettisoned that ahistorical and hopelessly subjective test in favor of one that looks to history and coercion. Executive Order 13780 is *a fortiori* constitutional under the historically grounded analytical framework

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if this Court reverses the Ninth Circuit's statutory ruling. For purposes of this brief, *amicus* assumes the Ninth Circuit would rule against the President on constitutional grounds as well as statutory grounds, and therefore the arguments contained herein are directed at both Nos. 16-1436 and 16-1540.

resuscitated in *Town of Greece*. This Court should not construe the Solicitor General's brief as a concession that *Lemon* controls. It does not. Under the test that does control, the two-step test from *Town of Greece*, it is even more clear that the President's Executive Order 13780 is constitutional.

A. The Court's recent Establishment Clause cases increasingly look to history and coercion, and away from *Lemon* and the "endorsement test."

1. Until recently, the Supreme Court would often apply the so-called *Lemon* test when deciding Establishment Clause claims, under which government action violates the Establishment Clause if it (1) lacks a "secular legislative purpose," (2) has a principal effect that advances religion, or (3) fosters "excessive entanglement" between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The test proved so unworkable that the Court finally revised it into the "endorsement test" in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Under this test, a court asks "whether the challenged governmental practice has the purpose or effect of 'endorsing' religion." *Id.* at 592. This variation of *Lemon* predicates the endorsement test on the premise that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 594 (internal quotation marks omitted). The question of endorsement is from the perspective of a hypothetical

"reasonable" or "objective" observer. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Four Justices vigorously dissented in *Allegheny*, with Justice Kennedy authoring the dissenting opinion. *Allegheny*, 492 U.S. at 659–70 (Kennedy, J., concurring in the judgment in part and dissenting in part). As discussed below, the dissenting Justices categorically rejected the endorsement concept as an acceptable interpretation of the Establishment Clause, instead insisting that the Establishment Clause must be interpreted in a manner consistent with its historical meaning, a meaning that focuses on coercion, rather than endorsement.

Although courts initially treated the endorsement test as a revision of *Lemon*'s second prong—the effects prong—it has long since subsumed the other two prongs as well. In 1997, the Court "recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect," collapsing *Lemon*'s third prong into merely one aspect of *Lemon*'s second prong. *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (opinion of Thomas, J.) (discussing *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997)); *accord id.* at 845 (O'Connor, J., concurring in the judgment). Then in the case most central to the analysis of the courts below, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court recast *Lemon*'s first prong as an endorsement inquiry. *Allegheny* itself had initially cast the endorsement test as encompassing purpose as well as effect, declaring the test of "whether the challenged governmental practice has the *purpose* or effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592 (emphasis added). In *McCreary*, the Court engrafted the endorsement test's rationale from *Allegheny* into the purpose prong, holding that "[b]y showing a purpose to favor religion, the government sends the . . . message to . . . adherents that they are insiders, favored members [of the political community]." *Id.* at 860 (internal quotation marks omitted). After supplying the necessary fifth vote for the majority opinion, Justice O'Connor's concurring opinion articulated this conjoining of *Lemon* and endorsement explicitly, adding, "The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer." *Id.* at 883 (O'Connor, J., concurring).[5] After 2005, government violates the Establishment Clause if (1) it shows a purpose favoring religion, conveying to a reasonable observer an endorsement of religion, (2) its action has the effect of advancing religion because a reasonable observer would believe the government is endorsing religion, or (3) its action excessively entangles government with religion, such that a reasonable observer would conclude the government is endorsing religion.

Endorsement is therefore now the touchstone of all three of *Lemon*'s prongs, including the purpose prong centrally at issue in this case. Some Justices even refer to this test on occasion as the "*Lemon*/endorsement test." *See, e.g., Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 996 (2011) (Thomas, J., dissenting from the denial of certiorari).

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[5] A panel of the Fourth Circuit acknowledged the fusion of these two inquiries. *See Lund v. Rowan Cnty.*, 837 F.3d 407, 424 (4th Cir. 2016), *aff'd en banc* 863 F.3d 268 (4th Cir. 2017).

2. However, in some types of Establishment Clause cases the Court does not apply *Lemon* at all. For example, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court eschewed *Lemon* when it affirmed the constitutionality of legislative prayers at the outset of lawmaking sessions. *See id.* at 794–95. And in *Lee v. Weisman*, 505 U.S. 577, the Court held that prayers at public school graduation ceremonies are unconstitutional because they coerce minors (though not adults) who are present. *Id.* at 599.

3. In more recent years, the Supreme Court has looked to history rather than *Lemon* in Establishment Clause cases. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court upheld a longstanding Ten Commandments display outside the Texas statehouse, with the principal opinion focusing on the place of the Ten Commandments in American history. *Id.* at 686–90 (opinion of Rehnquist, C.J.).[6] A majority of the Court held that *Lemon* did not apply in the case, and the plurality cast doubt on the test as a whole. *Id.* at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it is not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."). The Justices instead looked to history, explaining, "Instead, our analysis is driven both by the nature of the monument and by our

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[6] Justice Breyer supplied the fifth vote setting aside the *Lemon*/endorsement test to uphold the Ten Commandments, saying that instead of *Lemon* or the endorsement test, such difficult cases must be decided on the basis of "legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

Nation's history." *Id.* Thus after *Van Orden*, there is some class of passive displays that are not subject to the *Lemon*/endorsement test. At least one circuit followed the Court's lead, refusing to apply *Lemon* to a Ten Commandments display. *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 777–78 & 778 n.8 (8th Cir. 2005) (en banc). At least one circuit has gone even further, extending *Van Orden*'s displacement of *Lemon* to other types of establishment cases. *See, e.g.*, *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (upholding under *Van Orden* a statute concerning voluntary recitations of the Pledge of Allegiance in public schools). Another circuit expressed confusion as to whether *Allegheny*'s endorsement refinement of the *Lemon* test governs crosses in war memorials, or whether *Van Orden* instead supplies the rule, and purported to apply *both* tests. *Trunk v. San Diego*, 629 F.3d 1099, 1105, 1109, 1117–18 (9th Cir. 2011).

In a subsequent Establishment Clause case, this Court did not even mention *Lemon*, and instead looked exclusively to history. The Court in 2012 unanimously held that both the Establishment Clause and the Free Exercise Clause require a "ministerial exception" to federal employment laws. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012). Without dissent, the Court's analysis examined the history that illuminates the original meaning of the Religion Clauses as recognized by the Framers, never giving the slightest of nods to purpose, effects, or endorsement. *See id.* at 182–87.

B. Justices of this Court frequently criticize the *Lemon*/endorsement test.

Members of this Court routinely criticize the *Lemon* test directly or indirectly, either in its original three-pronged form or in its more recent endorsement variation. On occasion the full Court has highlighted *Lemon*'s shortcomings. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). It is no secret that the test has been beset by problems from its inception.

Other times the criticism is offered by one or more Justices, often in a more pointed fashion than is typically found in majority opinions. As Justice Scalia said in reaction to the Court's invocation of *Lemon* in a 1993 case involving a public school:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence again, frightening the little children and school attorneys of [the school involved in the litigation]. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, 505 U.S. 577 (1992), conspicuously avoided the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (citing, *inter alia*, *Lee*, 505 U.S. at 644 (Scalia, J., joined by, *inter alios*, Thomas, J., dissenting); *Allegheny*, 492 U.S. at 655–57 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346–49 (1987) (O'Connor, J., concurring in the judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting); *id.* at 90–91 (White, J., dissenting)).

As already noted, Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, questioned the longevity and vitality of *Lemon* in 2005. *Van Orden*, 545 U.S. at 686 (plurality opinion of Rehnquist, C.J.); *see also id.* at 692 (Scalia, J., concurring) ("I join the opinion of the Chief Justice because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time."). Justice Thomas separately weighed in six years later, faulting the Court's "nebulous Establishment Clause analyses" for creating the result that the Court's "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Highway Patrol Ass'n*, 565 U.S. at 995, 996 (Thomas, J., dissenting from the denial of certiorari). Justice Alito added his voice to the chorus in 2012. *See Mt. Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., respecting the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity[.]"). And Justice Gorsuch expressed skepticism over the continued applicability of the *Lemon* test as well, while serving as a circuit judge on a lower court. *See Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting from the denial of reh'g en banc) (asserting that whether the "reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear."). Other judges on the courts of appeals express similar sentiments. *See, e.g.*, *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 596–601 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result); *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (commenting that the federal judiciary is confined to "Establishment Clause purgatory"); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) ("We follow the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned.").

C. A broad consensus of scholars spanning the spectrum of legal thought agree that the *Lemon*/endorsement test is fatally flawed.

Justices' frequent withering commentary regarding *Lemon* is mirrored by scathing scholarly criticism of the test. Adherents of two schools of thought regarding the Establishment Clause—strict separationists and accommodationists—view the Clause in very different terms that often lead to diametrically opposed results. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 224–27 (2008). Notwithstanding the fact that they normally disagree with each other, a wide range of professors and academics spanning this divide find common ground in concluding that the *Lemon*/endorsement framework is as hopelessly subjective as Members of the Court have found it over the test's troubled lifespan. This "Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986).

1. Professor Michael McConnell is a leading accommodationist who concluded after *Allegheny* that this "Court's conception of the First Amendment more closely resemble[s] freedom *from* religion . . . than freedom *of* religion. The animating principle [of the *Lemon*/endorsement test is] not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) (footnote omitted). Rather than achieve consistent results as Justice O'Connor intended, *see Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), "this goal of consistency is the test's greatest failing." McConnell, *supra*, at 148. That should come as no surprise. "Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment." *Id.* Consequently, the "concept of 'endorsement' therefore

provides no guidance to legislatures or lower courts about what is an establishment of religion." *Id.*

This jurisprudential quagmire is the product of divorcing the Establishment Clause from its historical moorings. Marginalizing original meaning and historical context from the Establishment Clause has done far more than lead to decisions that the Framers would not recognize; it has led to decisions that this Court would not have recognized as recently as this past century. Professor McConnell contends that "it is like stepping into a time warp to read establishment clause opinions of the 1940's, 1950's, and 1960's." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 933 (1986). Strict-separationist Justices from that era might be mistaken for accommodationists today. "Was it really Justice Brennan . . . who told us that, in deciphering the first amendment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?'" *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

Professor Steven Smith hones in on the *Lemon*/endorsement test's ahistorical foundation. "If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not." Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 966 (1989). Religious sentiments were ubiquitous in both public and private thought and conversation, including consideration of public policy. "Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues." *Id.* The ineluctable result? "Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out." *Id.*

2. Professor Laurence Tribe is one leading strict separationist who sharply criticizes the *Lemon*/endorsement regime. Four years before the Court narrowly adopted the endorsement test, Tribe opined on Justice O'Connor's advocacy for the test in her *Lynch* concurrence that the "Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and non-believers that they are heretics, or at least not similarly worthy of public endorsement?" Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985) (footnote omitted).

Professor Steven Gey echoes Professor Tribe's criticism of the test's subjectivity. "In contrast to Justice Brennan, whose *Schempp* standard focuses on the objective facts of government aid to religion, Justice O'Connor converts the analysis of Establishment Clause issues into a question of subjective perceptions." Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 477. "The obvious problem with any approach that measures constitutional compliance by the appearance of compliance is that every individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality." *Id.* at 478–49.

3. Decades of wrestling with the *Lemon*/endorsement test employed in *McCreary*, applied by the Fourth Circuit below, and briefed by all the parties to this Court in these consolidated cases, confirm that this test is irredeemable, and cannot be the basis of a principled jurisprudence governing the Establishment Clause. As Professor Choper explained:

> [L]ower courts, struggling to give it content, have succeeded only in producing ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion. . . [S]ince its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable.
>
> . . .

Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 510 (2002). This judicial and scholarly impeachment of *Lemon* and its endorsement revision necessarily encompasses the purpose prong.

4. *Lemon*'s purpose prong is unworkable because it is as subjective as *Lemon*'s other two prongs. Whenever government acts, its lawyers can probably articulate some sort of secular purpose as part of the government's motivation. But the fact that the

government action touches upon religion should likely mean that policymakers were also considering some sort of religious sentiment. How can a judge read the minds of policymakers to draw the line between the two?

Evidently recognizing that secular and religious purposes are likely both present in such circumstances, *McCreary* made *Lemon*'s purpose prong even more subjective, citing several *Lemon* decisions to hold specifically that the government must have a *primarily* secular purpose—that the secular purpose must predominate over any religious purpose. *McCreary*, 545 U.S. at 864 (collecting cases). The challenge this presents is insoluble. A court cannot examine the thoughts and feelings of public officials to determine which motivation was primary, and which was secondary.

The purpose prong of the beleaguered *Lemon* test is the sole basis for the Fourth Circuit's judgment below holding that the EO violates the Establishment Clause. Yet the statements by Justices, judges, and professors discussed above make clear that the *Lemon*/endorsement test is not a workable or desirable test. And in fact, this Court recently acknowledged as much in *Town of Greece*.

D. While the prior Administration urged the Court to decide *Town of Greece* on *Marsh* alone, the Court instead responded to Petitioner's and *amici*'s urging to opine on *Lemon*.

The Court did not need to weigh in on the *Lemon*/endorsement test in *Town of Greece*, which concerned legislative prayer. Respondents' initial complaint in the district court declared that the *Lemon*/endorsement test should control legislative prayer and this Court's sole examination of legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983), is an "exception" to general Establishment Clause rules and applies only in the most "narrow and strictly circumscribed" circumstances. Pls.' Mot. Summ. J. at 8, *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010) (No. 08-cv-6088). On appeal, Respondents continued to argue against *Marsh* and insisted that *Lemon*'s endorsement variation controlled, an argument the Second Circuit accepted. *See Galloway v. Town of Greece*, 681 F.3d 20, 30–31 (2d Cir. 2012) (No. 10-3635). But before this Court, Respondents retained new legal counsel who completely reversed course, arguing that *Marsh* is good law, was fully applicable in that case, and that this Court should invalidate the challenged prayer practice instead as coercive under *Lee v. Weisman* and Justice Kennedy's *Allegheny* dissent. *See* Resp't Br. at 20–54, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). Justice Scalia responded to this abrupt about-face by extracting a stipulation from Respondents during oral argument that they agreed that *Marsh* controlled this case. *See* Transcript of Oral Argument at 36–37, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). This Court could then have decided *Town of Greece* in a short opinion invoking *Marsh*, and go no further.

The Solicitor General of the United States in the Obama Administration argued that this Court should do precisely that. The Solicitor General filed an *amicus* brief in which the United States likewise took the position that *Marsh* was dispositive of the case at bar, and therefore that the Court should decide the case solely on the basis of *Marsh*, *see* Brief for the United States as *Amicus Curiae* at 9–30, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), and not venture further. When Justice Scalia similarly pressed the Principal Deputy Solicitor General with the same question of whether the coercion test controlled, the Obama Administration explicitly replied in the negative, urging the Court to decide the case on *Marsh* alone. *See* Transcript of Oral Argument, *supra*, at 24.

However, Petitioner Town of Greece argued that the Court should address the broader issue and jettison the endorsement test. The Petitioner argued first that *Marsh* controlled legislative prayer cases, and that the Court could decide the case by following *Marsh* exclusively. Petitioner's Brief at 16–27, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). But instead of stopping there, Petitioner then devoted the bulk of its brief to lambasting the *Lemon*/endorsement test, arguing that the Court should abandon it. *See id.* at 27–50. Numerous *amici* followed suit, urging the Court to formally repudiate *Lemon*/endorsement, including almost two dozen sovereign States and almost 100 Members of Congress. *See* Brief for Indiana Supp. Pet'r, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696);

Brief for Members of Congress Supp. Pet'r, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696).

Ultimately, this Court in *Town of Greece* chose to "go big." The Court began by holding that the prayers in Greece were consistent with *Marsh*. *Town of Greece*, 134 S. Ct. at 1815, 1818. But the Court did not cabin its decision in the manner the Obama Administration urged, which could have left *Marsh* as a sui generis anomaly in Establishment Clause jurisprudence. To the contrary, *Town of Greece* proceeded to declare that *Marsh* did not "'carv[e] out an exception' to the Court's Establishment Clause jurisprudence," *id.* at 1818, and instead showcases the approach that should inform *every* Establishment Clause analysis, *see id.* at 1819 ("*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'") (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.)). The Court further held that the historical inquiry that controlled legislative prayer must also be the touchstone of any Establishment Clause analysis. "*Any* test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added).

In adopting this test, described *infra* in Part II, *Town of Greece* sharply criticized the endorsement test. The Court engaged in a broad rejection of the premises and rationale of the endorsement test, mirroring the criticisms that no fewer than six Justices had leveled against the test—whether called *Lemon* or endorsement—in the intervening years. Between the majority and plurality parts of his opinion, Justice Kennedy adopts the entirety of his *Allegheny* dissent as the holding of the Court in *Town of Greece*.

This repudiation of the *Lemon*/endorsement test includes the standalone purpose-prong inquiry from *McCreary* relied upon by the Fourth Circuit here. Pet. App. 29–30a, 47–48a, 51–54a. Justice Kennedy joined most of Justice Scalia's dissent in *McCreary*, along with all the Justices still serving on the Court who had joined Justice Kennedy in his *Allegheny* dissent. That part of the *McCreary* dissent incorporated the same principles as the *Allegheny* dissent, and embraced the same historical approach to interpreting the Establishment Clause. *See McCreary*, 545 U.S. at 900–12 (Scalia, J., dissenting). Aspects of *McCreary*'s inquiry might survive the Supreme Court's recurrence to history and tradition in *Town of Greece*, such as an examination of "the text, legislative history, and implementation of the statute, or comparable official act," such as the Executive Order at issue here. *Id.* at 862 (majority opinion) (internal quotation marks omitted). But the Court's holding in *McCreary* cannot be reconciled with *Town of Greece*, and thus did not survive the Court's 2014 seminal decision.

At least two circuits have acknowledged that *Town of Greece* abrogated *Allegheny*'s endorsement test. *Cressman v. Thompson*, 798 F.3d 938, 959 (10th Cir. 2015); *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 238 (3d Cir. 2014). In yet another circuit, Judge Batchelder discussed this doctrinal change at length, *Smith*, 788 F.3d at 596–605 (Batchelder, J., concurring in part and concurring in the result), referring to *Town of Greece* as a "major doctrinal shift" in Establishment Clause jurisprudence. *Id.* at 602.

II. EXECUTIVE ORDER 13780 SATISFIES THE ESTABLISHMENT CLAUSE TEST SET FORTH IN *TOWN OF GREECE.*

This Court set forth a two-step analysis in *Town of Greece*, under which the challenged government practice is unconstitutional (1) if it was historically regarded as an establishment of religion, *id.* at 1819–24, or (2), even if historically accepted, the practice coerces any person to participate in a religion or religious exercise, *id.* at 1824–28 (opinion of Kennedy, J.).[7] This test is now the current doctrine governing the Establishment Clause for any case where there is not a Supreme Court case still directly on point that dictates a different outcome in the lower courts.[8]

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[7] Most of the principal opinion in *Town of Greece* is a majority opinion. However, Part II-B is a three-Justice plurality opinion authored by Justice Kennedy, incorporating all the elements of his dissenting opinion from *Allegheny*. *See Town of Greece*, 134 S. C. at 1824–28 (plurality). This plurality opinion is narrower than Justice Thomas's concurring opinion, in which he and Justice Scalia agreed that coercion is unconstitutional, but would define that concept as "actual legal coercion" such as imprisonment or fines, which were religious establishments under the historical standard, and thus already invalid under Part II-A of the opinion, without the need for Part II-B. *Id.* at 1837 (Thomas, J., concurring in part and concurring in the judgment). Justice Kennedy's opinion therefore controls in the lower courts. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[8] There is also a tie between the historical-inquiry step and the coercion step, in that this Court has reasoned that

A. Executive Order 13780 is consistent with the historical meaning of the Establishment Clause.

1. *Town of Greece* holds that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.)). The Establishment Clause is not violated "where history shows the specific practice is permitted." *Id.* The Supreme Court held that "the line [courts] must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* (alterations and internal quotation marks omitted). The Court upheld legislative prayer because it is "a benign acknowledgement of religion's role in society," *id.* at 1819, showcasing one of many examples of this principle. Courts must rule permissible under the Establishment Clause "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* In the context of that case, the Court noted that many people might strongly object to public prayer, especially prayers expressing beliefs the objectors do not share, but reasoned that "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.*

2. Respondents here have not made any argument or introduced any evidence that would suggest that

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"governmentally established religions and religious persecution go hand in hand." ***Engel v. Vitale*****, 370 U.S. 421, 432–33 (1962).**

Executive Order 13780 runs afoul of the Establishment Clause when examined through the lens of a historical inquiry. Not a shred of their argument explores the application of the Establishment Clause to immigration questions in 1791. Nor do they cite any historical source showing that a positive law that is facially neutral on religion, but that affects adherents of one faith more than adherents of another faith, was an official religious establishment during the Framing. Not only is Executive Order 13780 constitutional under this standard, but the now-revoked Executive Order 13769 was legally permissible, as well.

None of the material the courts below regarded as betraying an impermissible religious purpose under *McCreary* is impermissible under the historical standard from *Town of Greece*. Executive Order 13780 satisfies the first step of *Town of Greece*.

B. Executive Order 13780 does not coerce persons in the United States to participate in a religious exercise.

1. Even if a government enactment involving faith was not considered an establishment of religion in 1791, *Town of Greece* also cautioned that the government action not be coercive. "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Id.* at 1825 (plurality opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)). For example, when reviewing legislative prayer, these Justices permitted a "fact-sensitive" inquiry to determine whether the government "compelled its citizens to engage in a religious observance," an inquiry that defines coercion

"against the backdrop of historical practice," *id.*, and thus retains a historical examination as the centerpiece of the entire analysis.

Justice Kennedy added that he thought other factors might suggest coercion, and the examples he gives for legislative prayers are useful here insofar as analogous facts are completely lacking in the instant case, such as "if [municipal] board members directed the public to participate in the prayers." *Id.* Justice Kennedy elaborated that public prayers might be coercive "where the prayers [e]ither chastised dissenters [or] attempted lengthy disquisition on religious dogma." *Id.* A majority of the Court explicitly rejected the argument that feeling offended or excluded violates the Constitution. It goes without saying that no one wants to be offended. "Offense, however, does not equate to coercion." *Id.* "Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views. . . ." *Id.*

2. Executive Order 13780 coerces no one. Neither did Executive Order 13769, for that matter. The EO does not require any immigrant in this country, nor any family member seeking to bring someone into this country, to engage in a religious activity. The President's order does not require any verbal affirmation of any religious belief, or any expression of rejecting any belief. It does not command that any person adopt a particular article of faith or adhere to any theological doctrine. It does not require any type of religious attendance, or ceremony, or observance. Executive Order 13780 does not preach conversion to

any one faith, or threaten damnation to the adherents of other faiths. It does not disparage or denigrate followers of any faith, nor does it threaten to withhold public benefits from those who will not acquiesce to a preferred governmental religious display or action.

The President's EO of March 6, 2017, is thus consistent with every aspect of *Town of Greece*. Given that the President's measure also comports with the historical-inquiry step, Executive Order 13780 is therefore consistent with the Establishment Clause.

III. THE EXECUTIVE ORDER LIKEWISE SATISFIES THE ESTABLISHMENT CLAUSE UNDER ANY TEST THE COURT COULD APPLY.

A. *Agostini* requires inferior courts to follow errant precedents that are directly on point until this Court overrules them.

Mere weeks after the Court decided *Town of Greece*, the Court declined review in another Establishment Clause case, regarding which Justice Scalia and Justice Thomas wrote, "*Town of Greece* abandoned the antiquated 'endorsement test,' which formed the basis of the decision below." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (dissenting from the denial of certiorari).

Nonetheless, the *Lemon* test or its endorsement test revision still applies in the lower courts in some Establishment Clause contexts. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme]

Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), *quoted in Agostini*, 521 U.S. at 237.[9] If this were a case involving a Ten Commandments display where the public leaders responsible for the display gave the sorts of speeches that were given in Kentucky more than a decade ago, then *McCreary* would control.[10] If this case involved a nativity display in a government building, *Allegheny* would control. Although the Court's approach in those cases cannot be reconciled with *Town of Greece*, the Court has not unequivocally overruled any of those prior cases. Lower courts are bound to follow those previous cases, even while this Court enjoys the option with each such case either to revisit those specific factual settings, or more broadly to formally repudiate the rule.

But *IRAP* and *Hawaii* together present a question of first impression. Never before has an immigration Executive Order been challenged on Establishment Clause grounds. There is no precedent directly on point that implicates *Agostini*'s admonition. With no such precedent, the general rule declared by *Town of Greece* controls. That would be true even if this case still resided in an inferior court. There is *a fortiori* no impediment to following *Town of Greece* here in the Supreme Court. This Court can and should adopt a test that looks to history, which will swiftly lead to the inescapable result that the EO is permissible under the Establishment Clause.

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[9] There is no question that this general principle controls in Establishment Clause challenges, because *Agostini* was an Establishment Clause case.

[10] Even then, the statements cited by the Court in *McCreary* were those of government policymakers who made the challenged policy, not those of private citizens running for public office, or aides to policymakers.

B. The Executive Order is also permissible under *Larson*.

Finally, arguments in the courts below that the EO violates the Establishment Clause under *Larson v. Valente*, 456 U.S. 228 (1982), are mistaken. *Larson* is inapposite. It is true that *Larson* holds that "one religious denomination cannot be officially preferred over another." *Id.* at 244. However, *Larson* then described what this Court meant by "official preference." *Larson*'s bar applies only when the positive law at issue makes "explicit and deliberate distinctions" between religious faiths. *Id.* at 246 n.23. Executive Order 13780 does precisely the *opposite*: It is explicitly religion-*neutral*. The EO references its predecessor, Executive Order 13769, only to declare that the President's initial order "did *not* provide a basis for discriminating on the basis of religion," explaining that it had intended to provide priority refugee relief to "members of persecuted religious minority groups," including subsects of the majority religion. Exec. Order 13780 § 1(b)(iv) (emphasis added). After the express disclaimer regarding the preceding order in Section 1, the new Executive Order is silent on religious faith.

Larson poses no difficulty for the EO. Instead, insofar as facial evaluation is concerned, assuming *arguendo* that the Establishment Clause can be invoked at all for aliens seeking admission into the

United States or any person currently in the country who can raise legal claims regarding the admission of others, all the Constitution requires is "a facially legitimate and bona fide reason" to limit a person's entry. *Mandel*, 408 U.S. at 770. The *IRAP* district court acknowledged that *Mandel*'s facial standard is satisfied here. *See* Pet. App. 254a.

All the statements cited by the courts below as the basis for holding that the EO discriminates on the basis of religion were extrinsic evidence consisting of statements by Donald Trump—some made as President, but many as a private citizen—plus statements by presidential aides. *See, e.g.*, *id.* at 10a–13a, 50a–51a.

These statements do not constitute evidence of an Establishment Clause violation, and holding such utterances henceforth to be admissible would have a profound chilling effect on the democratic process. Campaigns are messy, and candidates frequently say things during heated contests or at the end of a difficult day that do not find their way into formal policy decisions when the campaign is over and the candidate now carries the solemn obligation of governing. The Republic is best served by candidates whose words are judged solely by the electorate as manifested by Election Day returns at the ballot box. The unelected members of the judiciary must not sit as political censors, parsing campaign statements by private citizens seeking public office as evidence to be cited later as grounds for invalidating official actions.

* * * * *

In conclusion, for all the reasons the Solicitor General sets forth in the President's opening brief, Executive Order 13780 would pass constitutional muster even if analyzed under *McCreary*'s application of *Lemon*'s purpose prong and the endorsement test. U.S. Brief at 70–78. But in reality this is a much easier case, because the controlling precedent here is *Town of Greece*. Under *Town of Greece*, there cannot be any doubt that President Trump's Executive Order is consistent with the Establishment Clause.

CONCLUSION

The judgments of the United States Courts of Appeals for the Fourth Circuit and Ninth Circuit should accordingly be reversed.

Respectfully submitted,

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PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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INTERESTS OF *AMICI*[1]

Amici are 30 associations of colleges, universities, educators, trustees, and other representatives of several thousand institutions of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. These institutions educate, employ, and invite onto their campuses over a million individuals from other countries each year. All *amici* share a strong interest in ensuring that people from around the world, including the six countries identified in the challenged Executive Order, are not barred or deterred from entering the United States and contributing to American colleges and universities.

Amicus American Council on Education ("ACE") is the major coordinating body for American higher education. Its approximately 1,800 institutional and association members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Believing that a strong higher education system is the cornerstone of a democratic society, ACE participates as *amicus curiae* on occasions such as this where a case presents issues of substantial importance to higher education in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The Addendum contains information on the other *amici* on this brief.

SUMMARY OF ARGUMENT

American colleges and universities are part of a worldwide network of learning, research, and education. Together, *amici*'s members enroll millions of students from all over the United States and the world in undergraduate, graduate, and professional degree programs. *Amici*'s members also employ faculty and researchers from around the globe. These international scholars routinely publish pioneering peer-reviewed work in virtually all fields of knowledge. Many have gone on to invent groundbreaking technology, start thriving businesses, and assume leadership roles in governments and other organizations, both in this country and abroad. As ACE's President has written, the "roughly one million international students that attend U.S. colleges and universities add to this country's intellectual and cultural vibrancy, and they also yield an estimated economic impact of $32.8 billion and support 400,000 U.S. jobs, according to recent estimates. International students and scholars have served America well throughout our history."[2]

The March 6, 2017 Executive Order ("EO"), entitled "Protecting the Nation from Foreign Terrorist Entry into the United States," puts those benefits at risk. The EO sends a clarion message of exclusion to millions around the globe that America's doors are no longer open to foreign students, scholars, lecturers, and researchers. It directly threatens *amici*'s ability to attract the international students and scholars who are essential to the success of American educational institutions. Foreign students, faculty and researchers come to this country because our institutions are rightly perceived as the destinations of choice compared to all others around the globe. The EO has fundamentally altered those positive perceptions with the stroke of a pen.

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[2] Letter from ACE members to John F. Kelly, Secretary of Homeland Security (Jan. 31, 2017), http://www.acenet.edu/news-room/Documents/ACE-Letter-to-DHS-John-Kelly-International-Students-Scholars.pdf.

Regrettably, those changed perceptions quickly gave rise to new realities, as the EO immediately caused a range of adverse consequences for American institutions of higher education. From the moment it was signed, prospective students expressed serious concerns about attending American colleges and universities. Faculty recruits were similarly deterred from accepting teaching and research positions. And scholars based abroad pulled out of academic conferences in the United States, either because they were directly affected by the EO or because they are concerned about the EO's harmful impact on academic discourse and research worldwide.

It is essential that the United States maintain its deep commitment to ensuring the free flow of ideas and people that is critical to progress in a democratic society. The inquiry, innovation, and invention that take place every day within *amici*'s classrooms, libraries, and laboratories depend on the ability of scholars and students to travel to and from the United States. The EO, however, severely undermines the ability of American colleges and universities to fulfill their commitment to serving their students, their communities, the United States, and the world through innovative teaching and research. That commitment relies on maintaining a consistent pipeline of the most talented international students and scholars, who bring with them unique skills and perspectives that inure to the benefit of their classmates, colleagues, and the communities, small and large, served by *amici*'s member institutions. And for those students and scholars who do not remain, after receiving first-class education, training and experience in the United States, they take back to their countries the lessons and values they learned here, to the benefit of the entire international community.

Make no mistake, *amici* and their members are firmly committed to the security of their members' campuses and of the United States. Each member college and university places the highest priority on the safety of its students and scholars, and recognizes that security is essential to maintaining a productive learning environment. As one *amicus* has emphasized, our colleges and universities recognize "the importance of a strong visa process to our nation's security. . . . That is why we have worked closely with previous administrations, especially in the wake of 9/11, to ensure our visa system prevents entry by those who wish to harm us, while maintaining the inflow of talent that has contributed so much to our nation."[3]

But at the same time, the EO jeopardizes the vital contributions made by foreign students, scholars, and faculty by telling the world in the starkest terms that American colleges and universities are no longer receptive to them. *Amici* therefore submit this brief to provide information to this Court about the serious negative effects that the EO will have on American institutions of higher education. Like this Court, *amici* appreciate that "[i]mmigration policy shapes the destiny of the Nation . . . . The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here." *Arizona v. United States*, 567 U.S. 387, 415–16 (2012). *Amici*'s member universities know this better than most, as they witness the indelible positive contributions that international students and faculty add to their academic communities every day. In the end, American colleges and universities wish to make clear to this Court that the EO's unwelcoming message will impair the cross-border exchange of people and ideas that is critical to their success—and their ability to contribute to the success of the country as a whole.

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[3] Press Release, Association of American Universities, AAU Urges Quick End to Administration Order Barring Returning Students and Faculty (Statement by AAU President Mary Sue Coleman) (Jan. 28, 2017), http://www.aau.edu/news/article.aspx?id=18366.

ARGUMENT

I. Immigration Policy that Sends a Message of Exclusion Profoundly Harms American Colleges and Universities.

Colleges and universities in the United States regularly sit atop the rankings of the world's finest institutions of higher education.[4] This success is no accident. It is the result of many factors, one of which is the historic openness of our campuses to students, scholars, and researchers from all corners of the globe. As explained below, this openness has resulted in a variety of tangible and intangible benefits—from sizeable economic gains for our local communities to immeasurably important scientific breakthroughs to greater cultural understanding. The EO puts these many benefits at risk because it sends a stark message to the world that America is no longer the welcoming place it has been for the brightest foreign minds.

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[4] *See* Times Higher Education, *World University Rankings 2016-2017*, https://www.timeshighereducation.com/world-university-rankings/2017/world-ranking# (last visited Sept. 13, 2017).

A. Colleges and Universities, and Their Communities, Rely on the Cross-Border Exchange of People and Ideas.

The consistent success of American institutions arises, in no small part, from their ability to attract the very best students and faculty from the United States and from other countries. By enticing the sharpest minds to work together on the world's most challenging problems, American institutions are ideally equipped to improve the human condition through medical advances, scientific breakthroughs, new political and economic insights, innovative technologies, and the rich learning experiences that an internationally diverse group of students and teachers helps cultivate.

There are more than one million international students attending American colleges and universities.[5] Consider the following examples from the South, North, East, and West: Rice University hosts 1,611 international students and 883 international scholars.[6] Valencia College's international student population was 1,340 last year.[7] In the fall of 2015, there were 7,737 international students attending Northern Virginia Community College.[8] The University of Bridgeport's 5,000 students include approximately 1,200 international students from over 80 countries.[9] Rutgers University enrolls about 8,500 international students from 125 countries and employs more than 1,200 international scholars from more than 80 countries.[10] More than 5,800 international students can be found on University of Maryland, College Park's campus, along with more than 1,300 international scholars.[11] The University of Colorado Boulder is home to over 3,000 international students from over 91 countries and 796 international scholars

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[5] Allan E. Goodman, *Coming to America*, Inst. of Int'l Educ, https://www.iie.org/Learn/Blog/2017-July-31-Letter-from-Allan-Goodman (last visited Sept. 13, 2017).

[6] Rice Univ. Office of Int'l Students & Scholars, *International Students and Scholars at Rice*, Statistical Report, Executive Summary (2016), https://oiss.

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[7] Valencia College, *Student Characteristics*, http://valenciacollege.edu/academic-affairs/institutional-effectiveness-planning/institutional-research/Reporting/Strategic-Indicators/StudentCharacteristics.cfm (last visited Sept. 13, 2017).

[8] Northern Virginia Community College, *International Students*, http://www.nvcc.edu/about/glance/index.html (last visited Sept. 13, 2017).

[9] University of Bridgeport, *Frequently Asked Questions*, http://www.bridgeport.edu/admissions/international/frequently-asked-questions/#A4 (last visited Sept. 13, 2017).

[10] Rutgers University, *Facts & Figures*, https://global.rutgers.edu/about-gaia/facts-figures (last visited Sept. 13, 2017).

[11] Inst. of Int'l Educ., *Open Doors Data, Leading Institutions Hosting International Scholars, 2015/16*, http://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Scholars/Institutions-Hosting-the-Most-Scholars/2015-16 (last visited Sept. 13, 2017) (hereafter *Open Doors Data, Leading Institutions Hosting International Scholars*).

from 58 countries.[12] At the University of California, Los Angeles, 11,513 international students are enrolled in degree programs, and 3,512 international scholars are engaged in teaching and research.[13]

Maintaining international diversity on our campuses is critically important to the success of American colleges and universities. Regular interactions with students and professors who come from different cultures and who have had vastly different life experiences promote both a richer understanding and a deeper appreciation of the world in which we live. Scholars hailing from different countries have confronted different social and political conditions and so can identify different problems to solve—and can see different solutions to offer. Equally important, international diversity challenges all of the members of an academic community to consider and evaluate their assumptions, beliefs, and biases.

This Court has recognized the importance of such diversity, holding that universities have a compelling interest in securing the "'educational benefits that flow from student body diversity.'" *Fisher v. Univ. of*

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[12] University of Colorado Boulder, *International Admissions*, http://www.colorado.edu/international/ (last visited Sept. 13, 2017); University of Colorado Boulder, *International Scholar Statistics: July 1, 2015-June 30, 2016*, http://www.colorado.edu/isss/sites/default/files/attached-files/international_scholar_statistics_-_charts_2015-2016_0.pdf (last visited Sept. 13, 2017).

[13] Inst. of Int'l Educ., *Top 25 Institutions Hosting International Students, 2014/15 & 2015/16*, https://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/Leading-Institutions/2015-16 (last visited Sept. 13, 2017); Open Doors Data, Leading Institutions Hosting International Scholars, *supra* note 10.

Texas at Austin, 133 S. Ct. 2411, 2419 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). Campus diversity helps to create and maintain an "atmosphere which is most conducive to speculation, experiment, and creation." *Id.* at 2418 (internal quotation marks omitted). This Court has emphasized that these benefits of diversity are not theoretical. Global diversity is critical to the success of American students as they graduate and enter the modern borderless marketplace. As this Court has explained, "American businesses have made clear that the skills needed in today's increasingly global marketplace can *only* be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 308 (emphasis added). Accordingly, in order to "'fulfill[] [their] mission[s],'" universities must be able to recruit students—and, by extension, scholars and faculty—who will "'contribute the most to the robust exchange of ideas.'" *Id.* at 324 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

For example, Syrian students enrolled at American universities are undoubtedly able to contribute to their peers' understanding of the wide-ranging consequences of the civil war in Syria in a way no textbook or lecture ever could. Similarly, Iranian students offer a unique perspective on the strengths and weaknesses of the recent nuclear agreement and other aspects of United States foreign policy that students could not absorb by simply reading op-eds in domestic newspapers.

Without question, the presence of international scholars and students enriches the experiences of all members of a university community and better prepares students to succeed in and contribute to the global marketplace. Indeed, American colleges and universities would find it extraordinarily difficult to realize the ideals described in their respective missions if students and scholars from countries around the globe could not predictably enter and exit the United States.

The ability of American colleges and universities to attract these gifted, accomplished, and motivated students and scholars depends on ensuring predictable travel to and from the United States. If our universities cannot assure their students, professors, and researchers that they can come to the United States and then leave the country to visit their families, attend international symposia or conferences, or engage in overseas field research without encountering undue impediments to their return, then these institutions will struggle to maintain the level of talent and experience that makes the United States the world leader in higher education and research and development.

B. International Students and Scholars Bolster the American Economy and Strengthen Our Democracy.

The United States reaps tremendous profits—tangible and intangible—from its colleges' and universities' commitment to welcoming academics, researchers, and innovators from around the world. As a matter of pure economics, the enrollment of international students and scholars produces considerable returns for this country. A recent study by one *amicus*, "NAFSA: Association of International Educators" (NAFSA), determined that the more than 1 million international students studying at American colleges and universities contributed $32.8 billion to the U.S. economy during the 2015–2016 school year.[14] The same study estimated that, in a single school year, international students created or supported more than 400,000 American jobs.

To take just one state as an example, NAFSA calculated that the 11,346 international students who studied in Colorado during the 2015-2016 school year contributed $378.3 million to that state's economy and supported more than 5,000 jobs.[15] Another study credits the steady stream of international students into the United States for increases in "transnational business creation" and "trade and direct investment between the United States" and those students' countries of origin.[16]

The U.S. economy has been further fueled by foreign-born innovators who came to this country and chose to stay for extended periods of time, but the message of exclusion embodied in the EO unjustifiably raises the risk that these innovators do neither.[17] Between 1995 and 2005, foreign-born innovators "founded" "more than 25 percent of the engineering and technology companies . . . nationwide."[18] Those companies, in turn, "produced $52 billion in sales and employed 450,000 workers."[19] In the same vein, according to one study by the National Foundation for American Policy (NFAP), "[i]mmigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies."[20] The creation of new companies generates obvious economic benefits for the United States, including considerable job growth. Each $1 billion startup in the NFAP study has "created an average of approximately 760 jobs . . . in the United States."[21]

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[14] NAFSA, *NAFSA International Student Economic Value Tool*, http://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/NAFSA_International_Student_Economic_Value_Tool/ (last visited Sept. 13, 2017); *see also* Press Release, U.S. Dep't of State, Inst. of Int'l Educ., IIE Releases Open Doors 2016 Data (Nov. 14, 2016), https://www.iie.org/Why-IIE/Announcements/2016-11-14-Open-Doors-Data (citing a U.S. Department of Commerce study that estimates the financial contribution to be more like $36 billion).

[15] NAFSA, *Colorado Benefits from International Students*, https://istart.iu.edu/nafsa/reports/state.cfm?state=CO&year=2015 (last visited Sept. 13, 2017).

[16] Neil G. Ruiz, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations* 2, Brookings Inst. (2014), https://www.brookings.edu/wp-content/uploads/2014/08/Foreign_Students_Final.pdf.

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[17] *See, e.g.*, Adams Nager, et al., *The Demographics of Innovation in the United States* 5, Info. Tech. & Innovation Found. (2016), http://www2.itif.org/2016-demographics-of-innovation.pdf?_ga=1.256641800.2049822595.1486928220 (suggesting that more than one third of U.S. innovators were born outside of the country, and another 10 percent have at least one parent who was born abroad).

[18] Michael Greenstone, Adam Looney & Harrison Marks, *The U.S. Immigration System: Potential Benefits of Reform* 4-5, The Hamilton Project (2012), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/05_immigration_greenstone_looney.pdf (hereafter Greenstone).

[19] *Id.* at 5.

[20] Stuart Anderson, *Immigrants and Billion Dollar Startups* 1, Nat'l Found. for Am. Policy (2016), http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf.

[21] *Id.*

Foreign-born students who study at American educational institutions and then begin working in science, technology, engineering, and mathematics ("STEM") fields have made particularly significant contributions to the U.S. economy. In 2013, international students accounted for nearly two-fifths (39 percent) of Ph.D. candidates in STEM subjects, and a recent study estimates that the percentage will climb above 50 percent by 2020.[22] When these students graduate, approximately 48 percent hope to stay in the United States to work.[23] Even with this steady influx of international talent, the pipeline of STEM students in this country is not expected to be wide enough to keep up with the rapidly expanding number of STEM jobs available.[24]

The recruitment of additional STEM students translates into far larger benefits for the country at large. An increase in the number of STEM workers in a metropolitan area is "strongly associated with higher patents per workers (an indicator of innovation), lower unemployment, a lower rate of job losses during . . . recession[s] . . . , higher exports as a share of gross domestic product (GDP) (a measure of international competitiveness), and higher incomes."[25] The same goes for median household incomes and average wages, both of which tend to be higher "in STEM-oriented economies."[26] Consistent with these general trends, one study estimates that "patent activity by high-skilled immigrants in the 1990s increased U.S. GDP per capita" by between 1.4 and 2.4 percent—or $481 to $825 per person.[27]

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[22] Xueying Han & Richard P. Appelbaum, *Will They Stay or Will They Go?: International STEM Students Are Up for Grabs*, Ewing Marion Kauffman Found. (2016), http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2016/stem_students_final.pdf (hereafter Han & Appelbaum). If that growth is impeded, the U.S. will lose talent to other nations.

[23] *Id.* at 19.

[24] Lylah Alphonse, *New STEM Index Find's America's STEM Talent Pool Still Too Shallow To Meet Demand*, U.S. News & World Report (Apr. 23, 2014), http://www.usnews.com/news/stem-index/articles/2014/04/23/new-stem-index-finds-americas-stem-talent-pool-still-too-shallow-to-meet-demand.

The United States can ill afford to lose these STEM students and faculty to other countries. Even the perception that the United States is an unreliable place to pursue education has a dire impact. In a recent interview with an American newspaper, one of the aforementioned Nobel laureates "credited American openness with bringing top scientists to the country."[28] The American scientific community will remain strong only, he said, "as long as we don't . . . turn our back on immigration."[29]

Right now, there is a "global bidding war" for talented international students, particularly in the STEM fields.[30] Foreign countries give substantial cash bonuses and other benefits to international scholars to entice them to leave the United States.[31] When the United States immigration policy manifests a message of exclusion—not to mention an actually exclusionary effect, as here—fewer students and scholars choose to attend our universities. They instead go to other countries where they are welcomed with open arms. After 9/11, for example, when the United States also placed restrictions on student visas, our institutions of higher learning saw significant drop-offs in their international populations.[32]

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[25] Jonathan Rothwell, *The Hidden STEM Economy* 15, Brookings Inst. (2013), www.brookings.edu/wp-content/uploads/2016/06/TheHiddenSTEMEconomy610.pdf" https://www.brookings.edu/wp-content/uploads/2016/06/TheHiddenSTEMEconomy610.pdf.

[26] *Id.* at 16.

[27] Greenstone, *supra* note 17, at 5.

[28] Rafael Bernal, *Amid Debate, All 2016 American Nobel Laureates Are Immigrants*, The Hill (Oct. 10, 2016), http://thehill.com/latino/300237-all-american-2016-nobel-prize-honorees-are-immigrants.

[29] *Id.* (internal quotation marks omitted).

[30] Kevin Sullivan, *Other Countries Court Skilled Immigrants Frustrated by U.S. Visa Laws*, Wash. Post (Feb. 18, 2013),

Finally, the education of foreign-born students and the collaboration between American students and foreign-born scholars present the United States with an opportunity to promote the ideals that, together, make up the social, political, and cultural fabric of this country. International students and scholars who come to the United States to engage in various activities on our academic campuses are exposed to our democratic principles and our norms of tolerance and respect. They witness American society's steadfast commitment to human rights, our emphasis on education, and our dedication to the rule of law.

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https://www.washingtonpost.com/national/other-countries-court-skilled-immigrants-frustrated-by-us-visa-laws/2013/02/18/73d9f7ce-7137-11e2-ac36-3d8d9dcaa2e2_story.html?utm_term=.68283185f1f1

[31] *Id.*

[32] NAFSA, *Restoring U.S. Competitiveness For International Students and Scholars* (2006), http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdfhttp://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdf (last visited Sept. 13, 2017).

These values, in turn, are transmitted around the world, to the benefit of the United States, when these individuals depart this country. Juan Manuel Santos, the president of Colombia and the 2016 Nobel Peace Prize winner, holds degrees from the University of Kansas (bachelor's degree in economics and business administration) and Harvard University (master's degree in public administration). The University of Michigan counts the former prime ministers of Antigua, Egypt, Italy, and Peru among its alumni. In the last Indonesian administration alone, the Cabinet included three officials who attended American universities—the defense minister (University of California-Berkeley), the finance minister (University of Pennsylvania), and the trade minister (University of California-Davis)—plus two officials who attended other American universities.[33] Other colleges and universities could boast a comparable list of auspicious foreign government officials. These world leaders, along with countless other individuals, have come to the United States, engaged in the vigorous exchange of ideas for which this country is known, and then returned to their countries steeped in American democratic principles and culture.[34] They embody the achievements that occur when international students and scholars engage with American educational institutions.

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[33] The justice minister attended American University, and the energy minister attended the University of Colorado School of Mines. Ben Wolfgang, *Armed with U.S. Education, Many Leaders Take On World*, Wash. Times (Aug. 19, 2012), http://www.washingtontimes.com/news/2012/aug/19/armed-with-us-education-many-leaders-take-on-world/.

[34] The importance of a free-flowing exchange of students, scholars, and ideas is reflected in longstanding federal law and policy. In 1961, the government established a special non-immigrant visa program to encourage young leaders, entrepreneurs, research scholars, and professors to come to the

II. The Executive Order Adversely Affects Academic Exchange with International Students and Scholars.

Upholding the legality of the EO would have serious implications for *amici*'s students, scholars, and faculty. It would impair the ability of American educational institutions to draw the finest international talent and reap the attendant benefits. It would divide students and scholars who were able to enter the U.S. from their families who could not. And it would inhibit the open academic exchange that is so vital to modern higher education and our national interests.

According to the Institute of International Education,[35] in 2015–2016, approximately 15,400 students and 2,100 professors or researchers in the United States came from one of the six countries specified in the EO:

United States and engage in "educational and cultural exchange[]." U.S. Dep't of State, J-1 Visa Exchange Visitor Program, *Common Questions*, https://j1visa.state.gov/basics/common-questions/ (last visited Sept. 13, 2017). This program, called the J-1 Visa Program, expressly instructs visitors who have completed the program to "return to their home country . . . to share their exchange experiences." *Id.*

[35] Elizabeth Redden, *A Closing of America*, Inside Higher Ed (Jan. 26, 2017), https://www.insidehighered.com/news/2017/01/26/draft-executive-order-would-call-banning-entry-individuals-some-countries.

	Number of Students	Number of Scholars	Total Students
Iran	12,269	1,891	14,160
Libya	1,514	49	1,563
Somalia	35	0	35
Sudan	253	32	285
Syria	783	145	928
Yemen	599	19	618
Total	15,453	2,136	17,589

Amici's members also host and employ many nationals of the six specified countries, including:

- An activist and journalist who helped galvanize Yemeni support for the Arab Spring and has been appointed a visiting lecturer on public policy;
- A Syrian trauma surgeon who was instrumental in coordinating NGO support for medical care to casualties of the civil war and is now assessing the relative availability and quality of trauma care at Syrian hospitals;
- An Iranian professor who previously worked at a leading European architectural firm, taught throughout Europe, and received numerous awards and appointments for her contributions to the field;
- A Sudanese medical professor (and practicing physician at a local hospital) who has received awards and public acclaim for her work on female genital cutting;
- A Syrian professor and recipient of a MacArthur "Genius" grant who has, among other things, founded a company that develops

systems to monitor vital signs to detect the onset of illness in the elderly;

- An Iranian medical professor who has developed novel methods for studying the long-term risks of myocardial infarction and stroke following blood infection;
- A Syrian neuroscientist who researches the neurobiology of pain, anxiety, depression, and substance abuse; is co-director of a respected institute on molecular and behavioral neuroscience; and has been elected to the National Academy of Science; and
- An Iranian mathematician who was the first woman to win the Fields Prize, the most prestigious prize in mathematics.

Talented students and scholars like these have felt the EO's serious effects.

A. International Students and Scholars Have Been Directly Affected by the EO.

After the initial EO went into effect, hundreds of students and scholars at American colleges and universities were either locked out of or locked into the United States. Many members of our academic communities who were outside of the United States at the time the EO was signed were barred from returning to the United States to continue their studies and work. These included undergraduates who were simply trying to return to campus after spending their winter breaks with their families.[36]

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[36] *See, e.g.*, Stephanie Ebbert, *MIT Engineering Student From Iran Not Allowed To Reenter US*, Boston Globe (Jan. 31, 2017), http://www.bostonglobe.com/metro/2017/01/31/mit-engineering-student-from-iran-barred-entry-into/fQBJ7kLIhY7P79Y

They also included graduate students who hoped to continue their advanced study and research at *amici*'s member institutions.[37] And finally, they included students who had been offered admission but not yet started at universities. For example, at least two prospective students from the identified countries had already been admitted to MIT for the fall via early action. One, an 18-year-old from Damascus, was reported on in the media.[38] After dreaming for years of earning an engineering degree from MIT, the student was accepted for the class of 2021. But when the EO was signed, his ability to attend MIT became uncertain. As he explained it: "'My dreams are basically ruined.'"[39]

At the same time, those scholars and students from the six countries covered by the EO who were lucky enough to be in the United States when it was issued could no longer confidently travel outside the United States and expect reentry. Students could not pursue their own research in foreign libraries and laboratories, participate in study-abroad programs, or attend satellite campuses in other countries. Nor could they travel home for personal reasons, whether

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NKVKtTN/story.html; Anya Kamenetz, ***Students Stranded Worldwide By Trump Order***, NPR (Jan. 30, 2017), http://www.npr.org/sections/ed/2017/01/30/512431112/students-stranded-worldwide-by-trump-order.

[37] *See* Milton J. Valencia, ***Boston-Bound Iranian Scientist with Visa Sues US over Ban***, Boston Globe (Feb. 2, 2017), https://www.bostonglobe.com/metro/2017/02/01/iranian-scientist-with-visa-and-bound-for-boston-sues-over-ban/v0rRMIatsOfTTzY0sr8EvL/story.html.

[38] *See* Justin Lear, ***A Syrian Teen Was Headed to MIT and Then Came the Ban***, CNN (Jan. 29, 2017), http://www.cnn.com/2017/01/29/us/mit-syria-student-ban-trnd/.

[39] *Id.*

to celebrate a family member's marriage or to mourn a loved one's death at a funeral.

For example, a Ph.D. student at Boston University was scheduled to travel home to conduct interviews and research critical to his dissertation. He cancelled his trip due to the EO and the uncertainty of being able to return to the U.S.

In addition, two Iranian graduate students studying global health at an AAU member institution feared that they would not complete field research and training because of the EO's travel ban. And one Harvard graduate student published an eloquent editorial describing his fears about leaving the country and his sorrow about the effects that the EO would have on "thousands who, unlike me, might never get to experience America at its best."[40]

At Hood College, 16% of international graduate students with F-1 visas contacted the graduate school within 48 hours of the announcement of the travel ban, expressing concern, fear, and panic. And Grinnell College lost a committed student who withdrew to enroll at a school in Canada and a current student who transferred to a school in Canada, citing concerns about safety and the national climate for international students.

When the EO went into effect, it also impeded plans for academic conferences and other collaborations. For example, the Columbia Law School Human Rights Clinic, in an effort to research the mental health effects associated with the violent conflict in

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[40] Ziad Reslan, *Harvard Student: 'I Worry If I Leave, I Won't Be Let Back In'*, N.Y. Times (Feb. 2, 2017), https://kristof.blogs.nytimes.com/2017/02/02/harvard-student-i-worry-if-i-leave-i-wont-be-let-back-in/?_r=2.

Yemen, had been organizing an interdisciplinary workshop to be held in New York to bring together leading researchers from Yemen, the United States, and other countries to design a new study to investigate and improve mental health in Yemen. Because of the EO, the workshop was initially cancelled, and was then delayed by a number of months—as the researchers explored hosting it in another country and waited for the outcome of litigation on the ban—disrupting the progress of the research and imposing significant administrative, cost, and logistical burdens. The disruption also resulted in some participants being unable to attend the workshop. [41]

Amici were relieved by this Court's order preventing the government from enforcing the EO against students, workers, and lecturers who have a bona fide relationship with the United States by virtue of having accepted offers of admission or employment at American universities. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088

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[41] Collin Binkley, *Travel Ban Throws Research, Academic Exchange into Turmoil*, Associated Press (Jan. 31, 2017), https://apnews.com/43b52752391f45c8a416ec6f8928a02c; Dana Llebelson, *Trump's New Travel Ban Could Hinder Research On HIV And Mental Health*, Huffington Post (Mar. 7, 2017), http://www.huffingtonpost.com/entry/trump-travel-ban-science-research_us_58bf2623e4b0d1078ca1debe; *The Muslim Ban: What You Need To Know: Senate Briefing* (Feb. 14, 2017) (written statement of Columbia Law Student Kate Berry), https://www.scribd.com/document/339524897/Kate-Berry-Senate-Briefing-on-Immigration-Order; *The Muslim Ban: What You Need To Know: Senate Briefing* (Feb. 14, 2017) (testimony of Waleed Alhariri), https://www.scribd.com/document/339525433/Waleed-Alhariri-Immigration-Order.

(2017) ("The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience."). But if that relief is lifted, the above examples demonstrate the severe effects the EO would have on American universities and on the international students, scholars, and faculty they welcome each semester.

And even that targeted relief is insufficient. *Contra* Brief for Petitioners at 81, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 2017 WL 3475820 (Aug. 10, 2017) ("Any injuries to Hawaii's university system, for example, could be fully redressed by an injunction tailored to particular, identified students or faculty whom Hawaii has enrolled or hired."). This Court has rightly recognized that "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws . . . . Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Arizona*, 567 U.S. at 395. Our colleges and universities flourish when the international students and faculty who study and teach within their gates perceive that this country welcomes them and that they are fully protected by its laws. The inhospitable policy that infects the EO will have deleterious consequences for higher education far beyond the direct impact it might have on those from the six named countries who would be barred from studying at and teaching on our campuses.

B. The EO Will Have Continuing Adverse Effects on American Colleges and Universities and, by Extension, Our National Interests.

The EO promises to have detrimental effects on critical academic exchange by inhibiting the free cross-border exchange of ideas; dividing students and scholars from their families; and impairing the ability of American educational institutions to draw the finest international talent and reap the attendant benefits that are critical to the success of American educational institutions and broader national interests.

The EO has already affected the ability of many American colleges and universities to attract and educate the best and brightest foreign students. Recognizing that the full impact of the EO on higher education matriculation in the US will not be understood for some time, there is little doubt that the EO has already deterred students from attending American colleges and universities. A survey of 250 colleges and universities taken shortly after the EO was announced found that 39% of responding institutions reported a decline in international applications, with the highest declines in applications from the Middle East.[42] Another article reported that

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[42] Advancing Global Higher Education, *Trending Topics Survey: International Applicants for Fall 2017—Institutional and Applicant Perceptions* 1-2 (Mar. 13, 2017), http://www.aacrao.org/docs/default-source/TrendTopic/Immigration/intl-survey-results-released.pdf?sfvrsn=0; *see also* Stephanie Saul, *Amid 'Trump Effect' Fear, 40% of Colleges See Dip in Foreign Applicants*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/international-students-us-colleges-trump.html. To be

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sure, another report has identified more of a "mixed picture, with 38 percent of surveyed institutions indicating a decrease in international student applications, 36 percent seeing an increase, and 26 percent seeing no changed compared to the prior year." Inst. of Int'l Educ., *Shifting Tides: Understanding International Student Yield for Fall 2017* 1 (July 2017), https://www.iie.org/Research-and-Insights/Publications/Shifting-Tides-Understanding-International-Student-Yield-for-Fall-2017 (last visited Sept. 13, 2017) (hereafter *Shifting Tides*). But even despite the survey's mixed results, the report noted that "broad concerns" remain among educational institutions and prospective students about whether the EO will deter international students from enrolling in American colleges and universities. *Id.* at 2. Over time, these adverse perceptions of American institutions of higher education will surely lead to decreased enrollment if the EO is allowed to go into effect. Finally, certain factors make it "difficult to draw a definitive conclusion" about the long-term impact on enrollment if the EO is allowed to go into effect. *Id.* at 9. For example, enrollment may not have been significantly affected this year because the relevant provisions of the EO have been subject to a nationwide injunction since February. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017)

In addition, this report highlighted compelling reasons why the picture may be mixed—namely, the substantial work that American colleges and universities have done to mitigate the effects of the EO over the past several months. "In preparation for possible declines, many institutions have adjusted their recruitment and admission strategies in an effort to minimize the impact of possible declines in international . . . applications." *Shifting Tides*, at 9. And "[c]onsiderable efforts have been made by colleges and universities to maximize their international enrollments." *Id.* These include aggressive recruiting and added support mechanisms once international students arrive on campus, such as "airport pickups, meet-and-greets, seminars regarding visa policy changes, and partner students with peers and mentors to make them feel welcome." *Id.* These efforts, however, impose significant and unnecessary costs on colleges and universities, even if they may have temporarily offset the immediate damage imposed by the EO. American colleges and university administrators quickly saw a precipitous and unprecedented drop in the number of applications to graduate programs in engineering.[43] That article explained that "[u]niversity administrators worry that the declines, as much as 30% from 2016 levels in some programs, reflect heightened fears among foreign-born students that the United States is tightening its borders."[44] According to data provided by universities to the Associated Press, moreover, nearly half of the nation's largest 25 public universities have seen stagnation or decline in undergraduate applications.[45] And master's programs in particular have seen an even greater plunge.[46] Most recently, interviews with

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universities simply do not have the resources to keep up this sustained effort at attracting foreign talent. Moreover, these efforts are more likely to be effective with individuals who had already made the decision to come to the U.S. Over the long term, American colleges and universities will lose the opportunity to recruit students and scholars who decide against attempting to come to the U.S., a loss that will not be easily measured.

[43] Jeffrey Mervis, *Drop in Foreign Applicants Worries U.S. Engineering Schools*, Science (Feb. 14, 2017), http://www.sciencemag.org/news/2017/02/drop-foreign-applicants-worries-us-engineering-schools.

[44] *Id.*

[45] *Trump impact: As international student numbers fall, US universities send out welcome messages*, Associated Press (May 4, 2017), http://www.hindustantimes.com/education/trump-impact-as-international-student-numbers-fall-us-universities-send-out-welcome-messages/story-HV1V6plE1JN1wcoW4xZXLI.html.

[46] Karin Fischer, *Assessing the Travel Ban: What New Data on Overseas Recruitment Does—and Doesn't—Tell Us*, The Chronicle of Higher Education (July 6, 2017), http://www.chronicle.com/article/Assessing-the-Travel-Ban-

officials at two dozen universities revealed as much as a 30 to 50 percent drop in international enrollments for new students.[47]

Moreover, universities across the country will lose highly competitive candidates from the affected countries to institutions outside of the United States if the EO remains in effect. Britain, Canada, France, and Germany have all launched funding programs to recruit foreign researches away from U.S. universities.[48] Canadian universities have seen increases in international applications.[49] Universities have modified their admissions and recruitment strategies to try to address potential

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What/240548?cid=pm&utm_source=pm&utm_medium=en&elqTrackId=6b61ad40bfdb4ed79346b528fb25c742&elq=d2c5dee906bc4e24a17f4325861b7a62&elqaid=14620&elqat=1&elqCampaignId=6176.

[47] Elizabeth Redden, *International Enrollments: From Flat to Way Down*, Inside Higher Ed (Sept. 5, 2017), https://www.insidehighered.com/news/2017/09/05/some-universities-are-reporting-declines-international-enrollments-ranging-modest?utm_source=Inside+Higher+Ed&utm_campaign=6ba820df5e-DNU20170905&utm_medium=email&utm_term=0_1fcbc04421-6ba820df5e-197444557&mc_cid=6ba820df5e&mc_eid=fb069a4893.

[48] Elizabeth Redden, *Ready to Go Expat?*, Inside Higher Ed (July 26, 2017), https://www.insidehighered.com/news/2017/07/26/several-countries-launch-campaigns-recruit-research-talent-us-and-elsewhere?utm_source=Inside+Higher+Ed&utm_campaign=7c2537cc65-DNU20170726&utm_medium=email&utm_term=0_1fcbc04421-7c2537cc65-197444557&mc_cid=7c2537cc65&mc_eid=fb069a4893

[49] Ann Saphir, *Trump's travel bans spook some students, fan fears of broader chill*, Reuters (May 16, 2017), http://www.reuters.com/article/us-usa-immigration-students-idUSKCN18C0BK.

declines,[50] but continued uncertainty will only make that task more difficult.

In addition, shortly after the EO was enacted, more than 3,000 international scholars signed a petition to "boycott international academic conferences held in the United States in solidarity with those affected by" the EO.[51] This proposed boycott was not a hollow threat. Nor is it a mere political statement. The EO creates a broad fear of unreliable immigration policy that discourages scholars from choosing to come to his country rather than another. For example, the International Studies Association, one of the oldest interdisciplinary associations dedicated to understanding international, transnational, and global affairs, hosted its annual conference in late February in Baltimore. However, many foreign participants pulled out of this conference as part of the international boycott, and the Association was forced to announce that it "will refund registration fees and waive any penalties for those who are unable to attend the annual meeting or choose not to attend as a result of the U.S. Executive Order on Immigration."[52] Many American universities have opposed the boycott as counterproductive, and its harmful impact is incontrovertible.

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[50] Fischer, *supra* note 45.

[51] Elizabeth Redden, *Boycotting the U.S.*, Inside Higher Ed (Jan. 31, 2017), https://www.insidehighered.com/news/2017/01/31/protest-trump-entry-ban-some-scholars-are-boycotting-us-based-conferences.

[52] Int'l Studies Ass'n, *Update on Remote Participation and Travel Concerns for Baltimore* (Feb. 6, 2017), http://www.isanet.org/News/ID/5416/Update-on-Remote-Participation-and-Travel-Concerns-for-Baltimore; *see* Redden, *supra* note 50.

The message of exclusion that the EO conveys also deters foreign academics who wish to come to the United States to foster collaborative study. More than 43,000 American scholars—including 62 Nobel Laureates; 146 recipients of prestigious awards like the Fields Medal, Pulitzer Prize, and MacArthur Fellowship; and 521 Members of the National Academies of Sciences, Engineering, and Arts—explained in an online petition that the "EO limits collaborations with researchers from these nations by restricting entry of these researchers to the US and can potentially lead to departure of many talented individuals who are current and future researchers and entrepreneurs in the US." [53] The loss of this talent would be incalculable. These accomplished scholars "strongly believe the immediate and long term consequences of this EO do not serve our national interests."[54]

Foreign institutions also cancelled their own conferences in response to the EO. For example, a conference sponsored by the Association for the Study of Persianate Societies was scheduled to take place in Shiraz, Iran, in March, but it could not proceed due to the travel difficulties posed by the EO and the related uncertainty around who (if anyone) would be able to attend.[55] Many American professors who had planned to participate in the conference to consult with academic colleagues in that unique field of study were unable to do so.

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[53] Academics Against Immigration Executive Order, https://notoimmigrationban.com/ (last visited Sept. 13, 2017) (hereafter Academics Against Immigration Executive Order).

[54] *Id.*

[55] Letter from Ghazzal Dabiri, 2017 Conference Chair, Ass'n for the Study of Persianate Societies to Friends and Colleagues, http://www.persianatesocieties.org/index.php/conventions/asps-biennial-convention-shiraz-2017 ("As many of you are aware, in a measure-for-measure response to President Trump's executive order of Friday, January 27, 2017, the Government of Iran

It is difficult to overstate the importance of conferences, colloquia, and symposia to scholarly communication. They enable intellectual give-and-take and real-time digestion and discussion of research. Conferences also allow for in-person encounters and discussions that give rise to important future collaborations. This kind of face-to-face collaboration is particularly important to scientific research. As the CEO of the American Association for the Advancement of Science (and former Assistant Director of the Princeton Plasma Physics Laboratory at Princeton University, head of the Nuclear and Scientific Division of the Office of Strategic Forces at the U.S. Department of State, and Swarthmore College professor) has stated: "Freedom of communication is absolutely essential for science to function. . . . It's not just nice for people to attend conferences and communicate in person, it's part of the practice of science. And being able to have scientists from diverse backgrounds and viewpoints, that's essential to the practice of good science."[56] The prospect of barred entry, and of retaliation and boycotts, means lost opportunities for the expansion

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announced on Saturday, January 28, that it would no longer issue any visas to American citizens for an initial period of 90 days and beyond it as long as the US ban remains in effect. . . . As the American scholars constitute the bulk of non-Iranian attendees at the Convention, we are forced to cancel it at this late stage.").

[56] Chelsea Whyte, *Trump's Travel Ban Is Already Stopping Scientific Collaboration*, New Scientist (Jan. 31, 2017), https://www.newscientist.com/article/2119910-trumps-travel-ban-is-already-stopping-scientific-collaboration/.

of knowledge and scientific discovery. And American universities risk being removed from the epicenter where cutting-edge ideas are discussed. The EO puts all of these benefits in jeopardy.

The EO also would impair the ability of American colleges and universities to recruit foreign students, faculty, and scholars by separating them from their families abroad. *See Int'l Assistance Refugee Project v. Trump*, 857 F.3d 554, 585 (4th Cir. 2017) (acknowledging "the impact on families" as one of the direct harms of the EO); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (describing "separated families" as "substantial injuries and even irreparable harms"). The aforementioned petitioning scholars offer this as a powerful reason for why foreign academics may be unwilling to teach at an American university in the future:

> The implementation of this EO will necessarily tear families apart by restricting entry for family members who live outside of the US and limiting the ability to travel for those who reside and work in the US.[57]

Given those working conditions, many scholars will choose not to teach in this country. One university's current recruit to fill a full-time faculty position has disclosed that he is married to a national from one of the six countries covered in the EO; that recruit has expressed concerns about accepting a position in light of the EO. Similarly, a professor at another university previously taught at universities around the world and has maintained close ties with her foreign academic colleagues, who are important to her creativity and work. The EO struck a sudden, significant blow to these connections, spurring concerns about traveling abroad to visit and care for her mother, who is terminally ill. Other professors have faced similar obstacles since the EO was issued.

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[57] *See* Academics Against Immigration Executive Order, *supra* note 52.

Finally, the unwelcoming message sent by the EO likely will deter students, scholars, and faculty from countries *not* currently covered by the EO from travelling to and from the United States for academic purposes. To take just one example, the University of Rochester's Division of Solid Organ Transplantation recently hired a Saudi Arabian hepatologist who is now concerned about his future here. What is more, the Division's Chief of Solid Organ Transplantation, a Mexican national, is a world-renowned liver-transplant surgeon. He has recruited an international team to join him (including the doctor from Saudi Arabia). In the six months that he has been at the University of Rochester, the surgeon has doubled the number of liver transplants performed at the university's medical center. The EO puts that work—and this surgeon's ability to attract the talented foreign doctors who assist him in it—in severe jeopardy, even though he and his colleagues do not hail from the six countries listed in the EO. In fact, he had standing invitations to give talks at conferences in Canada, Argentina, Germany, and the Czech Republic, but he put them on hold out of fear that the ban will be expanded or that he will face increased scrutiny returning to the country.

These fears are understandable. Although there are reportedly no plans in place to add to the list of restricted countries, the EO provides for this possibility. EO § 2(e) ("The Secretary of State, the Attorney General, or the Secretary of Homeland

Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States."). Given this uncertainty, individuals from a wide range of nations may fear—quite reasonably—that their countries might be the next additions to the list. Foreign scholars and students may not be willing to risk being stranded here or abroad, even if they must instead change plans and go elsewhere to gain an education, engage young minds, conduct research, or perform vital medical services at teaching hospitals. *Amici* thus support any legal measure that will mitigate that risk, provide much-needed clarity in these uncertain times, and restore confidence to those who travel to and from American universities every day.

CONCLUSION

American colleges and universities "have a mission of 'global engagement' and rely on . . . visiting students, scholars, and faculty to advance their educational goals." *Washington v. Trump*, 847 F.3d at 1160. That vital mission cannot be achieved if American immigration policy no longer sends a welcoming message to the members of the international community who wish to enter our campus gates. As explained above, the EO jeopardizes the many contributions that foreign students, scholars, and researchers make to American colleges and universities, as well as our nation's economy and general well-being. In light of those risks and for the foregoing reasons, *amici* respectfully submit that the lower court decisions should be affirmed.

September 18, 2017 Respectfully submitted,

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APPENDIX

ADDENDUM: *AMICI* ON THIS BRIEF

- **American Council on Education (ACE).** See description at page 1 of brief.
- The **Association of American Universities (AAU)** is a non-profit organization, founded in 1900 to advance the international standing of United States research universities. AAU's mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 62 public and private research universities.
- The **Accreditation Council for Pharmacy Education (ACPE)** is the national agency for the accreditation of professional degree programs in pharmacy and providers of continuing pharmacy education. ACPE also offers evaluation and certification of professional degree programs internationally and with ASHP accredits pharmacy technician education and training programs.
- **ACT** is a mission-driven, nonprofit organization dedicated to helping people achieve education and workplace success. Headquartered in Iowa City, Iowa, ACT is trusted as a national leader in college and career readiness, providing high-quality assessments grounded in nearly 60 years of research. ACT offers a uniquely integrated set of solutions designed to provide personalized insights that help individuals succeed from elementary school through career.
- The **American Association of Collegiate Registrars and Admissions Officers**

(AACRAO), founded in 1910, is a non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries. Its mission is to provide professional development, guidelines, and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology, and student services. AACRAO represents institutions in every part of the higher education community, from large public institutions to small, private liberal arts colleges.

- The **American Association of Community Colleges (AACC)** is the primary advocacy organization for the nation's community colleges. It represents more than 1,100 two-year, associate degree-granting institutions.

- The **American Association of State Colleges and Universities (AASCU)** includes as members more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

- The **American Association of University Professors (AAUP)** is a non-profit organization of over 40,000 faculty, librarians, graduate students, and academic professionals. Its purpose is to advance academic freedom, the free exchange of ideas in higher education, and shared university governance; to define fundamental professional values and standards for higher education; and to ensure higher education's contribution to the common good.

- The **American College Personnel Association (ACPA)** is chartered as a membership organization within the higher education sector, specializing in the advancement of Tier 1 research and scholarship in the field of student affairs and providing professional and career development for college and university professionals in student affairs, services and support.

- The **American Indian Higher Education Consortium (AIHEC)** is the unifying voice of our nation's 37 Tribal Colleges and Universities—federally recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. Through public policy, advocacy, research, and program initiatives, AIHEC strives to ensure strong tribal sovereignty through excellence in American Indian higher education.

- The **American Speech-Language-Hearing Association (ASHA)** is the national professional, scientific, and credentialing association for 191,500 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology support personnel; and students.

- The **Association of American Colleges and Universities (AAC&U)** has approximately 1,400 member institutions, including accredited public and private colleges, community colleges, and universities of every type and size. Its mission is to reinforce commitment to liberal education and inclusive excellence in service to democracy.

- The **Association of American Law Schools (AALS)**, founded in 1900, is a nonprofit association of 179 law schools. Its members enroll most of the nation's law students and produce the majority of the country's lawyers and judges, as well as many of its lawmakers. The mission of AALS is to uphold and advance excellence in legal education. In support of this mission, AALS promotes the core values of excellence in teaching and scholarship, academic freedom, and diversity, including diversity of backgrounds and viewpoints, while seeking to improve the legal profession, to foster justice, and to serve our many communities–local, national and international.
- The **Association of Catholic Colleges and Universities (ACCU)** serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.
- The **Association of Governing Boards of Universities and Colleges (AGB)** is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership.
- The **Association of Jesuit Colleges and Universities (AJCU)** represents all 28 Jesuit

institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide.

- The **Association of Public and Land-grant Universities (APLU)** is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. With a membership of 236 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 194 U.S. member campuses enroll 4 million undergraduates and 1.2 million graduate students, award 1.1 million degrees, employ 1 million faculty and staff, and conduct $40.7 billion in university-based research.
- The **Association of Research Libraries (ARL)** is a nonprofit organization of 123 research libraries at comprehensive, research institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements.
- The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, represents more than 23,000 human-resources professionals at over 2,000 colleges and universities. Its membership includes 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions, and nearly 600 two year and specialized institutions.

- The **Council for Advancement and Support of Education** is a professional association serving educational institutions and the advancement professionals who work on their behalf in alumni relations, communications, development, marketing, and allied areas. CASE helps its members build stronger relationships with their alumni and donors, raise funds for campus projects, produce recruitment materials, market their institutions to prospective students, diversify the profession, and foster public support of education.
- The **Council of Graduate Schools (CGS)** is an organization of approximately 500 institutions of higher education in the United States, Canada, and across the globe engaged in graduate education, research, scholarship, and the preparation of candidates for master's and doctoral degrees.
- The **Council of Independent Colleges (CIC)** represents 684 private, nonprofit liberal arts colleges and universities and 83 state councils and other higher education organizations.
- The nonprofit **Educational Testing Service (ETS)** is passionate about its mission to advance quality and equity in education for all people worldwide because we believe in the power of learning. ETS strives to provide innovative and meaningful measurement solutions that improve teaching and learning, expand educational opportunities, and inform policy. ETS develops, administers and scores more than 50 million tests annually—including the TOEFL® and TOEIC ® tests, the GRE ® tests and The Praxis Series ®

assessments—in more than 180 countries, at over 10,000 locations worldwide.

- **EDUCAUSE** is a nonprofit association and the foremost community of information technology leaders and professionals committed to advancing higher education. Through analysis, advocacy, and professional development, EDUCAUSE supports IT professionals and the contributions technology makes to institutional and community-wide strategic initiatives. EDUCAUSE membership includes 2,300 colleges, universities, and related organizations.
- The **Graduate Management Admission Council (GMAC)** is a global, non-profit association of 220 leading graduate business schools. Founded in 1953, we are actively committed to advancing the art and science of admissions by convening and representing the industry and offering best-in-class products and services for schools and students. GMAC owns and administers the Graduate Management Admission Test® (GMAT®) exam, used by more than 6,500 graduate programs worldwide.
- The **Law School Admission Council (LSAC)** is a nonprofit corporation devoted to facilitating and enhancing the admissions process for more than 200 law schools in the United States, Canada, and Australia. Founded in 1947, LSAC is best known for administering the Law School Admission Test ("LSAT"), but it also sponsors and publishes research about law school admissions. LSAC has a strong interest in ensuring that standardized test scores are given the proper weight in the admissions process, and a longstanding

commitment to ensuring equal access to legal education for members of minority groups.

- **NAFSA: Association of International Educators** is the world's largest nonprofit association dedicated to international education and exchange with 10,000 members located at more than 3,500 institutions worldwide, in over 150 countries. Members of NAFSA share a belief that international education advances peace, learning and scholarship, builds respect among different peoples, and encourages constructive leadership in a global community.
- The **National Association for College Admission Counseling (NACAC)**, founded in 1937, is an organization of nearly 16,000 professionals from around the world dedicated to serving students as they make choices about pursuing postsecondary education. NACAC is committed to maintaining high standards that foster ethical and social responsibility among those involved in the transition process, as outlined in the NACAC Statement of Principles of Good Practice (SPGP).
- The **National Association of Diversity Officers in Higher Education (NADOHE)** is the leading voice of chief diversity officers in higher education. Its membership includes more than 600 individuals representing more than 250 colleges and universities, affiliated professional organizations, and ten state/regional NADOHE chapters.
- The **National Association of Independent Colleges and Universities (NAICU)** serves as the unified national voice of private, non-profit

higher education in the United States. It has more than 1,000 members nationwide.

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Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
STATE OF HAWAIʻI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

American Jewish Committee ("**AJC**") is a non-profit international advocacy organization that was established in 1906 with the purpose of protecting the civil and religious rights of American Jews.[1] It has approximately 170,000 members and supporters, and maintains 26 regional offices in major cities nationwide. AJC has participated as *Amicus Curiae* in numerous cases throughout the last century in support of its mission.

For centuries, Jews have been immigrants and refugees seeking asylum from tyranny and oppression. Even in the face of atrocities such as the Holocaust and Jewish pogroms in Russia, Jews have often faced significant resistance to their resettlement. AJC was founded by American Jews concerned about these very issues. Building on its history, AJC continues to zealously advocate for an inclusive America that provides a safe haven for refugees fleeing from persecution.

Consistent with AJC's position that a strong, united America is vital to securing global freedom and security, AJC promotes fair and just immigration policy. AJC historically has lobbied against rigid immigration quotas based on national origin, and instead has emphasized the importance of rules that are sufficiently flexible to accommodate pressing immigration needs.

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[1] According to Supreme Court Rule 37.6, *Amicus Curiae* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. Out of an abundance of caution, *Amicus Curiae* notes that other attorneys with the undersigned counsel's law firm are counsel to the International Refugee Assistance Project ("**IRAP**") and have conducted limited background research on a *pro bono* basis for IRAP in this matter, but were not directly involved in filing the underlying district court proceedings. Stephen A. Cobb of Linklaters LLP also contributed to the preparation of this brief. The parties have consented to the filing of this brief.

As discussed further below, AJC has advocated for the careful and considered extension of protection to groups in need, including by welcoming oppressed peoples to the United States. Over the years, AJC has worked with a variety of stakeholders, including leaders of Latino communities, other religious and community leaders, entrepreneurs, and students, to promote comprehensive immigration reform. Further, AJC has consistently advocated against actions based on prejudice that are inconsistent with these values.

Today, AJC is a champion for the civil rights of people of all national origins, races, and religions, and it seeks equality, uniformity, and consistency in policies affecting all minorities. The rights of Jews and other religious minorities will be secure only when the rights of all Americans of all nationalities and faiths are equally secure. A statement made by Dr. Martin Luther King, Jr., to AJC leaders over 45 years ago still rings true today: "Jews cannot ensure equality for themselves until and unless it is ensured for all." For these reasons and those that follow, AJC cannot support the Second Executive Order.

SUMMARY OF THE ARGUMENT

While the President enjoys broad authority in the field of immigration, these powers are not absolute. To survive constitutional scrutiny, at a minimum the Government must show a reason for the challenged action that is both "facially legitimate and bona fide." Here, it can do neither.

Although national security is the stated purpose of the Second Executive Order,[2] the Order does nothing to address the legitimate security threats facing the Nation. Unlike prior U.S. immigration policies, which demonstrate legitimate and bona fide reasons to apply preferences among certain immigrant groups, there is simply no factual basis here for such an unprecedented abdication of traditional American values.

The statements by the President and others in the Administration reveal that the Order is nothing more than the fulfillment of anti-Muslim campaign promises and a reflection of recent discriminatory rhetoric. The Order is therefore not rationally related to its stated purpose, nor based on any "facially legitimate and bona fide" reason. Because the disparaging rhetoric surrounding the Order is more than sufficient to make an "affirmative showing of bad faith," the Court should "look behind" the Order to assess its constitutionality.

Judicial scrutiny is especially appropriate where, as here, the President's actions are incompatible with the expressed will of Congress. Under the tripartite *Youngstown* framework, the President's power is at its lowest ebb when Congress's express or implied will is incompatible with Presidential action. Here, the Second Executive Order is inconsistent with specific provisions of the U.S. Immigration and Nationality Act, as well as obligations arising under international instruments that Congress has chosen to ratify. For the reasons stated here, and those in Respondents' briefs, AJC respectfully urges the Court to affirm the judgments below.

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[2] The President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (the "**Second Executive Order**," or the "**Order**"), after revoking Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (the "**First Executive Order**"). In relevant part, § 2(c) of the Second Executive Order provides for the temporary suspension of entry into the United States of alien nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "**Designated Countries**").

ARGUMENT

I. THE ORDER DOES NOT ADVANCE ANY FACIALLY LEGITIMATE OR BONA FIDE GOVERNMENT INTEREST.

To survive a constitutional challenge, as discussed below in Part C, at a minimum, the Government must show a "facially legitimate and bona fide reason" to suspend entry of aliens abroad from the six Designated Countries. This showing, as the Fourth Circuit correctly recognized below, entails two "separate and quite distinct requirements." *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 590 (4th Cir. 2017).

To be "facially legitimate," there must be a valid reason for the challenged action stated on its face. *Id.* For the stated reason to be "bona fide," on the other hand, the Government must have acted in good faith. *Id.* Here, the stated purpose for the Order is neither facially legitimate nor bona fide. Unlike the prior U.S. immigration policies discussed below, the Second Executive Order does nothing to advance any legitimate government interest.

Further, there is abundant evidence that the stated justification for the Order is merely pretext for what is in fact fulfillment of anti-Muslim campaign rhetoric. As the statements of the President and others in the Administration reveal, the modifications to the Second Executive Order amount to nothing more than transparent "window dressing," intended to obscure the Order's discriminatory motivation.

A. The Order Is Not Designed to Address a Genuine Threat to National Security or Other Legitimate Government Interest.

As AJC has previously stated, the Second Executive Order "[does] not effectively address the legitimate security threats we face."[3] Yet worse than being ineffective, the Order is counterproductive with respect to its stated purpose of promoting U.S. national security. Now, with little more than the cursory invocation of "national security" to ward off judicial scrutiny, the Order seeks to abandon the protection carefully extended to minorities, the oppressed, and others in danger that has long been a guiding principle and hallmark of U.S. foreign policy.

In an attempt to shield the Second Executive Order from the scrutiny that met its prior iteration, the Order invokes only two specific cases of terrorism-related offenses committed by refugees, one of which does not even involve a Designated Country: (1) two Iraqi refugees who were convicted of terrorism-related offenses in 2013; and (2) a Somali refugee who was convicted of an attempted terrorism offense in 2014. *See* Order, § 1(h).

Beyond that, the Second Executive Order relies entirely on the more general (and factually dubious) assertions that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States," and that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations" by the Federal Bureau of Investigation ("**FBI**"). *Id.* The Government provides no evidence or authority to support these assertions. *Id.* This failure demonstrates the Government's true purpose in issuing the Order. The Government's reliance on such vague evidence, and its focus on countries from which no terrorist attacks against the United States have originated, show that the stated purpose of the Second Executive Order is merely pretext.

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[3] *See* AJC, *AJC Statement on Revised Executive Order* (Mar. 6, 2017), www.ajc.org/site/apps/n1net/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=14987411.

The cited examples only highlight the disconnect between the stated purpose of the Order and its discriminatory intent. The Order identifies two Iraqi nationals as among the primary examples of the purported threat posed by refugees, yet Iraq is no longer subject to a travel ban under the Second Executive Order.

And while Somalia remains on the list of Designated Countries, the Somali refugee cited in the Order arrived in the United States as a three-year-old child in 1994, and the conduct underlying his conviction did not occur until 2010, when he was 19 years old. *See United States* v. *Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016). No degree of vetting before entry could have identified the risk posed by a person who became radicalized only after living in the United States for well over a decade.

Indeed, as the Ninth Circuit explained, this Somali refugee's background is consistent with a report authored by the Department of Homeland Security ("**DHS**"), which found that "most foreign-born, U.S.-based violent extremists are 'likely radicalized several years *after* their entry to the United States,' thus 'limiting the ability of screening and vetting officials to prevent their entry because of national security concerns.'" *Hawai'i* v. *Trump*, 859 F.3d 741, 775 n.16 (9th Cir. 2017).

Such limited evidence fails to show that the United States would be safer with an order excluding all nationals of six Muslim-majority nations from entering the United States. Even if the Court were to accept the Government's general statistics on foreign-born crime rates and individuals under FBI investigation (which, as former national security officials have suggested,[4] are not probative absent a definition of "terrorism-related crime"), these statistics provide no rational basis for the Order—an order supposedly intended to address terrorism concerns.

Neither the Second Executive Order, nor any other evidence, explains whether the "hundreds of persons" purportedly convicted for terrorism-related offenses were nationals of the Designated Countries, and Government officials have refused to disclose such information. Given that the Administration drafted the Second Executive Order specifically to survive judicial scrutiny, the absence of factual support is fatal to the Government's claim that the Order is responsive to any genuine threat to national security. *See* Order Granting TRO at 39, *Hawai'i* v. *Trump*, No.

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[4] *See* Corrected Br. of Former Nat'l Sec. Officials as *Amici Curiae* at 7, *Int'l Refugee Assistance Project* v. *Trump*, No. 17-1351 (4th Cir. Apr. 13, 2017), ECF No. 126-1 ("**Nat'l Sec. Br.**") ("The Order does not actually cite any support for this statement. But a similar set of data—relied on by White House officials in recent weeks to justify the initial January 27 Order—has been widely criticized for its definition of terrorism-related offenses, among other issues." (citation omitted)).

17-00050 DKW-KSC (D. Haw. Mar. 15, 2017) ("The Court's conclusion rests on . . . the dearth of evidence indicating a national security purpose." (citation omitted)).

Indeed, as former senior national security officials from across the political spectrum have unequivocally stated, "There is no national security or foreign policy basis for suspending entry of aliens from the six named countries." Nat'l Sec. Br. at 5-8.[5] In fact, "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years," and "multiple studies show that the overwhelming majority of individuals who were charged with—or who died in the course of committing—terrorist-related crimes inside the United States since September 11 have been U.S. citizens or legal permanent residents." *Id.* at 6 (citations omitted). As these officials conclude, "***No legitimate national security purpose*** is served by the Order's blanket ban on entry into the United

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[5] In the Ninth Circuit, ten former national security, foreign policy, and intelligence officials in the U.S. Government filed a joint declaration in opposition to the First Executive Order. *See* States' Resp. to Emer. Mot., Ex. A ("**Nat'l Sec. Resp. Decl.**") ¶ 4, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 28-2. In the Fourth Circuit, joined by a number of their colleagues, these officials further expanded on their professional judgments as *amici curiae* in the cited brief. These officials, who worked at senior levels in administrations from across the political spectrum, came together in opposition to the challenged action. A number of *amici* were current on active intelligence concerning all credible terrorist threat streams as of January 20, 2017, and have indicated that no specific threat of which they were aware would have justified the ban on travel from the Designated Countries. *See* Nat'l Sec. Br. at 9.

States of nationals of Syria, Sudan, Iran, Somalia, Libya, and Yemen." *Id.* at 5 (emphasis added).

Likewise, as the Fourth Circuit observed, "The Government's argument that EO-2's primary purpose is related to national security is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, and that those agencies only offered a national security rationale after EO-1 was enjoined." 857 F.3d at 596 (citations omitted).

Homegrown terrorism remains a more credible and prevalent threat to the United States than foreign terrorism. In fact, in the Administration's first few weeks, even DHS noted that a person's "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." DHS, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* (photo. reprint Feb. 2017) (n.d.).[6] Of the 82 terrorism-related offenses in the United States since March 2011, more than half of the perpetrators were native-born U.S. citizens, while foreign-born perpetrators were from 26 different countries. *Id.* The seven countries with the highest number of perpetrators were: Pakistan (5); Somalia (3); and Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan (each with 2)—a list very different from the Designated Countries of either the First or Second Executive Orders. *Id.*

The fact that in the past six years only one foreign-born individual from each of Iran, Sudan, and Yemen, and none from Syria, have engaged in terrorism-related offenses in the United States undermines any claim that excluding foreign nationals from the Designated Countries is rationally related to national security concerns. Nowhere does the Government explain how barring vulnerable groups of refugees, including the elderly and young children, will make the United States more secure. Although the Order allows for the "case by case" admission of some vulnerable individuals, members of these groups can, and inevitably will, still be excluded.

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[6] *See* Nora Ellingsen, *Leaked DHS Report Contradicts White House Claims on Travel Ban*, Lawfare (Feb. 27, 2017), www.lawfareblog.com/leaked-dhs-report-contradicts-white-house-claims-travel-ban.

Rather than protecting the United States, the Second Executive Order is fundamentally detrimental to U.S. national security interests. As national security and intelligence officials stated in their joint declaration, the Order has the perverse potential to: "endanger U.S. troops" and intelligence sources; "disrupt essential counterterrorism, foreign policy, and national security partnerships"; feed into the narrative of ISIS propaganda,[7] which portrays the United States as at war with Islam; "disrupt ongoing law enforcement efforts"; harm victims of terrorism; and result in negative economic consequences for the American people. Nat'l Sec. Br. at 17-22; Nat'l Sec. Resp. Decl. at 3-4. Further, excluding immigrants and refugees in these circumstances will irreparably damage the image of the United States around the world, harming our relationships with other countries and making it more difficult to pursue legitimate interests through diplomacy.

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[7] ISIS is also known as ISIL, or the Islamic State of Iraq and the Levant, the Islamic State in Iraq and Syria, or the Islamic State of Iraq and al-Sham.

If, as the Administration claims, a genuine threat to national security exists and its details cannot be publicly disclosed, avenues remain available to disclose this information to the Court. The Government, for example, can present evidence to the Court *in camera* without publicly disclosing sensitive national security information. That it has not done so speaks volumes. Despite public criticism and courts' consternation over the lack of evidence, the Government failed to provide factual support. This can mean only one thing: the stated national security rationale is nothing more than "window dressing."

As the U.S. District Court for the District of Maryland correctly observed, the Government has not "shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." Mem. Op. at 40, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-00361-TDC (D. Md. Mar. 16, 2017). In the months since the Order was enjoined, the Government still has not presented admissible evidence that U.S. national security was harmed. Nor can the Government rely on the President's assertions on social media of a national security purpose. There is simply no factual basis to sustain the Government's national security claim.

B. In Contrast to the Second Executive Order, Prior U.S. Immigration Policies That Gave Preference to Certain Groups Were Rationally Related to a Legitimate and Bona Fide Government Purpose.

Traditional U.S. foreign policy interests, from diplomatic signaling to protecting human rights, can serve as legitimate justification for shaping U.S.

immigration policy. Granting preferential treatment to certain immigrant groups in response to foreign policy concerns, however, requires issuing carefully tailored policies implemented for legitimate and bona fide reasons and supported by factual evidence.

In stark contrast to the Second Executive Order, prior U.S. immigration laws and policies have favored extending protections in the United States to specific groups of immigrants and refugees in need. As these policies demonstrate, legitimate and bona fide reasons have supported the preferences that were previously given to certain immigrant groups. Consistent with U.S. foreign policy concerns and the founding principles of human dignity, self-determination, and religious freedom that are central to American democracy, the Executive and Legislative branches have frequently exercised their authority over immigration affairs to protect refugees and other oppressed peoples. While the Government thus has some measure of authority to set immigration policy on the basis of religion or ethnicity, ultimately any such policy must rationally relate to a legitimate government interest. Unlike the Second Executive Order, each immigration policy discussed below is rationally related to its stated purpose, and further demonstrates that the Order fails to satisfy this test.

Historically, the United States has welcomed groups of persecuted refugees. After the Vietnam War, for example, the United States endeavored to repay its moral debt by offering sanctuary to approximately 111,000 Vietnamese refugees escaping economic hardship and the threat of "re-education" camps. The next year, that number almost doubled to 207,000 refugees. Around the same time, during the Mariel boatlift, the United States accepted over 120,000

Cuban refugees that were fleeing persecution by the Castro regime, including more than 80,000 in one month alone.[8] More recently, in 1999, the United States agreed to accept 20,000 refugees from Kosovo.[9]

The Executive branch has often established rational policies designed to assist groups in need, including through the use of Presidential Determinations on Refugee Admissions, which can increase admissions and funding for refugees in response to humanitarian needs.[10] Yet another example is President George

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[8] *See* Gardiner Harris, David E. Sanger & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. Times (Sept. 10, 2015), www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html?_r=1.

[9] *See* Adam Taylor, *That Time the United States Happily Airlifted Thousands of Muslim Refugees Out of Europe*, Wash. Post (Nov. 17, 2015), www.washingtonpost.com/news/worldviews/wp/2015/11/17/that-time-the-united-states-happily-airlifted-thousands-of-muslim-refugees-out-of-europe/?utm_term=.7cd5cd88608d.

[10] A Presidential Determination is a formal policy document issued by the White House, stating the position of the Executive branch on a particular issue, such as the adoption of a new foreign policy. Many of these have directly addressed refugee admissions. *See, e.g.*, Presidential Determination No. 2016-13, 81 Fed. Reg. 70,315 (Sept. 28, 2016) (permitting admission of up to 110,000 refugees to the United States in 2017, allocated on the basis of special humanitarian concern and geographic regions, and specifically providing that individuals in Cuba, Eurasia and the Baltics, Iraq, Honduras, Guatemala, and El Salvador could be considered refugees); Presidential Determination No. 99-23, 64 Fed. Reg. 28,085 (May 18, 1999) (allowing 20,000 Kosovar refugees to be admitted and providing $15 million in funds for relief); Presidential Determination No. 80-11, 45 Fed. Reg. 8539 (Jan. 28, 1980) (determining that Afghan refugees were eligible for assistance, and contributing monetary resources to their relief, in response to "urgent humanitarian needs").

H.W. Bush's Executive Order 12,711, "Policy Implementation with Respect to Nationals of the People's Republic of China," which deferred deporting Chinese nationals for four years in response to the Tiananmen Square incident. *See* 55 Fed. Reg. 13,897 (Apr. 11, 1990). In each of these cases, the Executive branch crafted rational policies that were specifically tailored to assist a group in need.

Congress, too, has rationally enacted immigration legislation in favor of specific groups to extend the protection of the United States to oppressed communities. The Lautenberg Amendment is one particularly noteworthy example. The Amendment, originally enacted with the 1990 Foreign Appropriations Bill, classified Soviet Jews and certain other religious communities as persecuted groups, automatically qualifying them for refugee status. Senator Lautenberg's initiative facilitated entry into the United States for Soviet refugees just before the collapse of the Soviet Union.[11] More generally, Congress has codified certain beneficial preferences among classes of aliens into U.S. immigration laws.[12]

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[11] *See* AJC, *AJC Mourns Passing of Senator Lautenberg*, Press Release (June 3, 2013), www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=13164165.

[12] For example, under the U.S. Immigration and Nationality Act (the "**INA**"), certain classes of aliens are given priority and preference with respect to visas or immigrant status. *See, e.g.*, 8 U.S.C. § 1153(b)(1)(A) (providing preference for individuals of extraordinary ability); *id.* § 1101(a)(27)(c) (conferring special immigration status on certain individuals seeking to enter the United States to work in a religious vocation or organization). Likewise, the Executive branch may propose, subject to congressional approval, yearly ceilings on refugee admissions by world region. *See id.* § 1157.

Unlike the Second Executive Order, none of the examples above was motivated by religious discriminatory animus or the mere execution of baseless campaign promises to exclude certain groups of people.[13] Instead, these prior policies were deliberately designed and tailored to achieve particular justified results, and they demonstrate how the Executive and Legislative branches have rationally used their immigration and foreign affairs authorities to advance the legitimate government purpose of protecting refugees and other oppressed peoples. These examples reflect careful consideration of U.S. foreign policy, including critical supporting facts, and respect for essential human dignity—they are precisely the kinds of immigration policies that AJC has championed throughout its history.

Accepting immigrants and refugees in times of need has long been a core tenet of the fundamental values and national identity of the United States. True to its character, this Nation frequently has opened its gates, offering safe haven and freedom for those without. Immigration has proved to confer enormous benefits on U.S. foreign policy, national security, and the economy. As demonstrated by the immigration policies discussed above, U.S. history is replete with examples of facially legitimate and bona fide reasons for Congress and the President to exercise their immigration powers by discriminating on the basis of religion or ethnicity. Inclusive policies that grant preferential treatment have achieved U.S. foreign policy aims and strengthened the Nation, while reinforcing fundamental values and saving thousands of lives. In contrast to the stark lack of rational support offered for the Order here, these historical examples further demonstrate why the Second Executive Order cannot withstand constitutional scrutiny.

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[13] Exclusionary policies can be rationally related to legitimate government purposes. *See, e.g.*, *Narenji* v. *Civiletti*, 617 F.2d 745, 747-48 (D.C. Cir. 1979) (holding that an affidavit from the Attorney General cited sufficient legitimate foreign-affairs concerns—the Iranian seizure of the American embassy—to draw rational distinctions based on nationality). Unlike *Narenji*, the Government has failed to offer evidence of a link between a specific foreign affairs crisis and the Second Executive Order. Rather, the Order risks repeating *Korematsu*. *See* section I.C.

C. Statements of the President and Others in The Administration Demonstrate That the Second Executive Order Fulfills Anti-Muslim Campaign Promises and Reflects Disparaging and Discriminatory Rhetoric.

Any possible legitimate justification for the Order is contradicted by blatant, recurring anti-Muslim rhetoric. The Second Executive Order was not issued in a vacuum. As the Fourth Circuit explained, "The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump's assumption of office." *Int'l Refugee Assistance Project*, 857 F.3d at 575. These statements provide ample evidence that national security is not the true purpose of the Second Executive Order. The public record contains myriad examples of such unfounded antireligious and discriminatory rhetoric—we recount but a few.

To start, President Trump himself has called the Second Executive Order a "watered-down version" of the original order, adding, "I think we ought to go back to the first one and go all the way."[14] And significantly, the day after signing the First Executive Order, President Trump's campaign supporter and advisor, Rudolph Giuliani, explained on television how that order came to be. He said, "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[15]

The desire to enact a "Muslim ban" reflected a longstanding campaign promise by President Trump. Indeed, until May 8, 2017, his campaign website referenced "preventing Muslim immigration," and "a total and complete shutdown of Muslims entering the United States."[16] On January 30, 2017, he tweeted, "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week."[17] Even more directly, on March 9, 2016, then-candidate Trump explained, "I think Islam hates us. There's something there that—there's a tremendous hatred there. There's a tremendous hatred. We have to get to the bottom of it. There's an unbelievable hatred of us." [18] On December 13, 2015, then-candidate Trump stated of Muslims, "There's a sickness. They're sick people. There's a sickness going on. There's a group of people that is very sick."[19] *See also Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d at 575-77 (collecting similar public statements by the President and his advisors).

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[14] *See* Matt Zapotosky, Kalani Takase & Maria Sacchetti, *Federal Judge in Hawaii Freezes President Trump's New Entry Ban*, Wash. Post (Mar. 16, 2017), www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-Wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.cf7d2d96 44f9.

[15] *See* Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally'*, Wash. Post (Jan. 29, 2017), www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.bd62c88d1c64.

[16] *See* Zack Ford, *White House Scrubs Campaign Website to Hide Trump's Past Muslim Ban Comments*, ThinkProgress (May 8, 2017), thinkprogress.org/trump-scrubs-muslim-ban-cc027c54f8c2.

[17] *See* Clare Foran, *Trump's Flawed Defense of His Immigration Order*, The Atlantic (Jan. 31, 2017), www.theatl

These disparaging statements provide ample evidence that the Second Executive Order was not issued to achieve its stated national security purpose, but was instead intended to fulfill a discriminatory campaign promise of a "Muslim ban." AJC has long advocated against this type of blatant religious intolerance.

Indeed, permitting the Government to discriminate based on the unfounded assertion that a particular group poses a national security threat would return the Court to the widely discredited rationale that allowed the President to issue an executive order interring individuals of Japanese descent, including

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antic.com/politics/archive/2017/01/trump-immigration-ban-muslim-countries-syrian-refugees/515085/.

[18] *See* Jenna Johnson & Abigail Hauslohner, *'I think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, Wash. Post (May 20, 2017), www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.d544b1f8001a (collecting President Trump's statements regarding Islam and Muslims from 2011 to 2017).

[19] *See id.*

U.S. citizens, based solely on ethnic ancestry. *See Korematsu v. United States*, 323 U.S. 214 (1944).

This rationale has been repudiated by each of the Executive[20], Legislative,[21] and Judicial branches of Government, *see Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984), as a shameful relic of our history. In granting Fred Korematsu a writ of *coram nobis*, the U.S. District Court for the Northern District of California cautioned:

> As a legal precedent it is now recognized as having *very limited application*. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. *It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.* It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens

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[20] In 1976, President Gerald R. Ford issued Presidential Proclamation No. 4417. It terminated Executive Order No. 9066 (1942), which had authorized the Japanese-American internment during World War II. Proclamation No. 4417 made this termination retroactively effective December 31, 1946, when Proclamation No. 2714 was issued, announcing the end of World War II hostilities. *See* Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

[21] On August 10, 1988, President Ronald Reagan signed the Civil Liberties Act, authorizing compensation to over 100,000 individuals of Japanese descent who were interred during World War II. *See* 50 U.S.C. §§ 4211-4220.

> from the petty fears and prejudices that are so easily aroused. *Id.* (emphasis added).

An examination of the disparaging, anti-Muslim rhetoric animating the Second Executive Order is entirely appropriate under the precedents of this Court. While the Executive and Legislative branches enjoy broad authority to regulate matters of immigration, these powers are not absolute. *See Fiallo* v. *Bell*, 430 U.S. 787 (1977); *Reno* v. *Flores*, 507 U.S. 292 (1993); *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

This Court has previously recognized a "limited judicial responsibility under the Constitution" to review Congressional actions concerning "the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 793 n.5. More recently, the Court again emphasized that this plenary power, though broad, is still "subject to important constitutional limitations." *Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001); *see also INS* v. *Chadha*, 462 U.S. 919, 941 (1983) (noting requirement that the political branches "cho[ose] a constitutionally permissible means of implementing" their authority over immigration). At a minimum, the Government must show that a challenged immigration action is "facially legitimate and bona fide." *Mandel*, 408 U.S. at 769. As the Fourth Circuit observed, these are "separate and quite distinct requirements." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 590.

Although the Executive and Legislative branches may craft immigration policies that differentiate among particular groups, they cannot act without a rational relationship to a legitimate government purpose. *See, e.g.*, *Flores*, 507 U.S. at 306 (noting that despite Congress' plenary power over immigration, "INS regulation must still . . . rationally advanc[e] some legitimate government purpose"). For an action to be "facially legitimate," the Government need only show a valid reason for the action stated on its face. When a court finds that the Government has acted with the purpose and effect of engaging in actions that "disparage and . . . injure" a group of people—as the Government has done here—it is less likely that its stated policies are rationally related to a legitimate government purpose. *United States* v. *Windsor*, 133 S. Ct. 2675, 2696 (2013).

The "bona fide" requirement, on the other hand, is a requirement of good faith. Thus, when the plaintiff makes an "affirmative showing of bad faith," courts can "look behind" the Government's exclusion of a nonresident alien "for additional factual details beyond" its express reasoning.[22] *Kerry* v. *Din*, 135 S. Ct. 2128, 2131 (2015) (plurality opinion).[23] Courts may consider circumstantial evidence, including rhetoric, to determine whether a challenged action is based on animus, rather than a legitimate purpose.[24]

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[22] The courts considering the First Executive Order looked behind the Government's arguments to the "highly particular 'sequence of events' leading to this specific EO and the dearth of evidence indicating a national security purpose." *Aziz* v. *Trump*, No. 1:17-cv-116-LMB-TCB, 2017 WL 580855, at *9 (E.D. Va. Feb. 13, 2017).

[23] As at least the Fourth and Ninth Circuits have recognized, Justice Kennedy's concurrence is the narrowest ground for the Court's holding in *Din*; thus, under the reasoning of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), Justice Kennedy's concurrence in *Din* is the controlling opinion. *See Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d at 590.

[24] *See, e.g.*, *Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (considering statements by decisionmakers in finding that the denial of a rezoning request was not motivated by a discriminatory purpose); *Church of the*

For the reasons explained above, the Second Executive Order is not rationally related to its stated purpose of ensuring national security, nor is it based on any "facially legitimate and bona fide" reason. Indeed, the failure to rely on appropriate or relevant evidence, as well as the focus on countries from which no terrorist attacks on the United States have originated, demonstrates that the Order fails the facial legitimacy test set forth in *Mandel*. Further, the disparaging anti-Muslim rhetoric undercuts any potentially legitimate and bona fide reason for the Order and is more than sufficient to make an "affirmative showing of bad faith." The Government's stated purpose is therefore no longer entitled to deference, and the Court should "look behind" the Order to assess its constitutionality.

II. REVIEW IS ESPECIALLY APPROPRIATE WHERE, AS HERE, THE PRESIDENT'S ACTIONS ARE INCOMPATIBLE WITH THE EXPRESSED WILL OF CONGRESS.

Finally, it must be noted that the more searching judicial review urged here is particularly appropriate where the President's actions are incompatible with the expressed will of Congress. Under the tripartite framework of *Youngstown*,[25] the President's power is

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Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (finding that the historical context of a local law against religious animal sacrifice was evidence that a law improperly targeted a specific religious group); *INS* v. *Pangilinan*, 486 U.S. 875, 886 (1988) (considering the historical record to determine whether U.S. Government actions in removing its naturalization officer from the Philippines were motivated by racial animus).

[25] Because the Government asserts national security as the nominal justification for the Second Executive Order, the context of *Youngstown* is significant. On the eve of a strike against certain steel companies, President Truman issued an executive

at its highest ebb when there is an express or implied delegation of authority from Congress; in a "zone of twilight" with concurrent authority when Congress is silent on or ambiguous about an issue; and "at its lowest ebb" when Congress's express or implied will is incompatible with Presidential action. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2084 (2015) (citing *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring)).

In this case, as the Ninth Circuit recognized, the President has taken measures that are "incompatible with the expressed will of Congress"; the President's authority is thus "at its lowest ebb," and subject to particular scrutiny. *See Hawai'i* v. *Trump*, 859 F.3d at 782. "In this zone, 'Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.'" *Id.* (quoting *Youngstown*, 343 U.S. at 638).

There is no question that the INA reflects the expressed will of Congress. The President's authority to issue the Second Executive Order is inconsistent with the INA, 8 U.S.C. § 1152(a)(1)(A), which states that "[e]xcept as specifically provided in paragraph (2) and in Sections 1101(a)(27), 1141(b)(2)(A)(i), and 1153

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order directing the Secretary of Commerce to seize and operate most of the Nation's steel mills. Given the importance of the steel supply to the Korean War effort, the President invoked national security to justify the seizure. Rejecting this argument, the Court found that there was no congressional statute that authorized this order, and that the President's military powers under the Constitution did not extend so far. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Thus, contrary to the Government's position here, the invocation of national security is not, nor has ever been, a blank check for Presidential authority.

of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." *See also id.* § 1157 (providing procedures for refugee admission into the United States); § 1182(a)(3)(B) (identifying criteria for determining terrorism-related inadmissibility). As discussed, absent legitimate and bona fide reasons for narrowly tailored policies granting preferential treatment of certain immigrant or refugee groups, such discrimination violates the INA.

These INA provisions were enacted to reject the shameful legacies of previous eras, in which immigration policy operated on a "national origins system" that explicitly sought to maintain a certain "ethnic composition of the American people." H. Rep. No. 89-745 (1965); S. Rep No. 89-748 (1965). AJC was a vital part of this movement to abolish the national origins system,[26] and has campaigned vigorously against discriminatory national origin quotas since then.

The Government claims here that the Executive Branch may discriminate in suspending entry of immigrants under the INA, 8 U.S.C. § 1182(f). This 1954 INA provision allows for Executive discretion, stating that if the "President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," the President may "suspend" such entry or impose "any restrictions he may deem to be appropriate." *Id.* This claim, however, conflicts with the clear intent of Congress, as well as the text and structure of the statute.

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[26] Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee 1906-1966* (1972); Marianne R. Sanua, *Let US Prove Strong: The American Jewish Committee 1945-2006* (2007).

The 1965 discrimination ban was passed 11 years after the 1954 provision for Executive discretion. Congress undoubtedly knew the contents of the INA when amending it, and would have intended for this amendment to apply to the INA as it existed at the time—including § 1182(f). This accords with traditional principles of statutory construction, under which a provision enacted later in time governs one enacted earlier. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Thus, § 1152(a)(1)(A) restricts § 1182(f)—not vice versa. Congress also carefully considered exceptions to this bar on discrimination, and specifically wrote them into the INA. Section 1182(f) is not one of these exceptions, and therefore does not apply here.

In the face of the INA, the Executive lacks the authority to issue the Second Executive Order because it is plainly incompatible with the INA. As the Ninth Circuit found below, the Second Executive Order violates the INA. *See Hawai'i* v. *Trump*, 859 F.3d at 782; *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 611, 613-14 (Thacker & Wynn, JJ., concurring).

Further, in *Medellín* v. *Texas*, 552 U.S. 491 (2008), the Supreme Court affirmed that *Youngstown* is the proper analytical framework for reviewing executive authority with respect to international obligations as well. In relevant part, *Medellín* makes clear that the President lacks the authority to unilaterally transform international obligations where Congress has taken no action (for example, by attempting to unilaterally execute a treaty). Under *Youngstown*, the international obligations assumed by Congress further demonstrate that the President acts at the "lowest ebb" of his authority here.

In this case, the Refugee Act of 1980 is particularly germane, as its legislative history reflects an unambiguous congressional intent to accede to the Convention and Protocol Relating to the Status of Refugees.[27] Indeed, this Court has specifically recognized that the legislative history makes clear that "one of Congress' primary purposes was to bring United States refugee law into conformance with the [Refugee Convention]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1980). Again, by acting contrary to this clearly expressed will, the President's authority is reduced to its "lowest ebb."

Where Congress has ratified other international instruments, these agreements provide additional evidence that Congress's express or implied will is incompatible with the Order. *See, e.g.*, International Covenant on Civil and Political Rights [ratified June 8, 1992], art. 4 (providing that even in a "time of public emergency which threatens the life of the nation," states cannot take any action to stray from their obligations that involve discrimination "solely on the ground of race, colour, sex, language, religion or social origin"); *id.* art. 26 (requiring equal treatment before the law of all persons, without discrimination on any ground, including race, religion, or national or social origin); International Convention on the Elimination of All Forms of Racial Discrimination [ratified Oct. 21,

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[27] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); S. Rep. 96-590, at 19 (1980); *see also* Convention and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

1994] (requiring state parties to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law).

As these authorities further demonstrate, absent evidence of a legitimate and bona fide national security threat to the United States or U.S. foreign policy interest, the Second Executive Order is plainly incompatible with the expressed or implied will of Congress. Acting in this zone of authority, as the Ninth Circuit recognized below, the President's claim to such broad power goes to the very "equilibrium established by our constitutional system," *Hawai'i* v. *Trump*, 859 F.3d at 782, and the importance of careful scrutiny is paramount.

CONCLUSION

While the President enjoys broad authority to set immigration policy, that authority is necessarily constrained by the Constitution. Here, because the Second Executive Order remains unsupported by a facially legitimate or bona fide government purpose, it cannot survive even the most basic constitutional scrutiny. For these reasons, and those in Respondents' briefs, the judgments below should thus be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMERICAN LEGISLATORS IN SUPPORT OF JUDICIAL RESTRAINT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents four questions concerning Executive Order No. 13780, *Protecting the Nation from Foreign Entry into the United States*, issued by the President on March 6, 2017: (1) Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13780 is justiciable; (2) whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause; (3) whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad; and (4) whether the challenges to Section 2(c) became moot on June 14, 2017.

This Amici Curiae brief addresses the following question: Whether Section 2(c) of the President's Executive Order violates the Establishment Clause?

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, American Legislators in Support of Judicial Restraint, respectfully submit this brief.[1] *Amici Curiae*, all elected legislators, include:

- State Senator Patrick Colbeck (http://www.senatorpatrickcolbeck.com/)

-State Senator Mike Green (http://www.statesenatormikegreen.com/)

-State Senator Judy Emmons (http://www.senatorjudyemmons.com/)

-State Senator Tonya Schuitmaker (http://www.senatortonyaschuitmaker.com/)

-State Representative Tom Barrett (http://gophouse.org/representatives/central/barret/)

-United States Representative Tim Walberg (https://walberg.house.gov/).

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[1] Petitioner granted blanket consent for the filing of *amicus curiae* in this matter. *Amici Curiae* sought consent from Respondents, and received consent from the Respondents' counsel of record. Pursuant to Rule 37(a), *amici* provided 10-days' notice of its intent to file this amicus curiae brief to all counsel. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *amici curiae* brief.

Amici Curiae American Legislators in Support of Judicial Restraint, composed of elected state and federal legislators, are politically accountable to the citizenry for the public policy they promulgate. They care deeply about the policies affecting their constituents, and therefore, about the social and legal impact of judicial decisions that improperly usurp the legislative prerogative. They understand the proper scope of the Article III judicial power and the proper role of the federal judiciary in our constitutional republic. They hold special knowledge helpful to this Court about the importance of properly applying Constitutional provisions, like the Establishment Clause, that limit the exercise of governmental power.

Amici Curiae urge this Court, in resolving the issue before it, to look to the plain meaning of the words in the Establishment Clause. *Amici* additionally urge this Court to reverse *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* and its progeny extra-constitutionally permit changeable political preferences of unelected judges to substitute their politically unaccountable will for politically accountable governance. *Amici Curiae* file this brief to support the arguments of the Petitioner and encourage this Honorable Court to guide the American judiciary, and other branches of government, back to a sound constitutional basis for state-church relations.

BACKGROUND

On March 6, 2017, the President of the United States issued Executive Order No. 13780, *"Protecting the Nation from Foreign Entry into the United States,"* 82 Fed. Reg. 13209 (hereinafter EO). Section 14 of the EO set the EO's effective date as March 16, 2017. *Id.*

In Section 1(e) of the EO, the President identified conditions in six nations demonstrating that individuals from those nations continued to present heightened risks to the security of the United States. *Id.* Section 1(h) of the EO further indicated that some individuals entering the United States via our immigration system posed a threat to our national security. *Id.*

Section 2 of the EO required the Secretary of Homeland Security to determine whether foreign governments provide adequate information about individuals applying for U.S. visas. This section also directs the Secretary to report his findings to the President within twenty days of the effective date of the EO. *Id.*

To ensure dangerous nationals cannot enter the U.S. while the Executive Branch established "adequate standards . . . to prevent infiltration by foreign terrorists," Section 2(c) of the EO suspended entry by individuals from the six nations into the U.S. for 90 days from the effective date of the E.O. *Id.*[2] Those challenging the President's EO contend, *inter alia*, that Section 2(c) violates the Establishment Clause because the President's purpose in issuing the EO was not secular.

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[2] Section 6 of the EO suspended "decisions on applications for refugee status" as well as "travel of refugees into the United States" under the United States Refugee Admission Program for 120 days from the effective date of the EO. The EO directed that

SUMMARY OF THE ARGUMENT

The President's Executive Order, banning travel from nations posing a threat to our national security, does not violate the Establishment Clause. This Court should apply the plain meaning of the words in the Establishment Clause to its judicial review of the President's Executive Order (EO). The Establishment Clause simply bans federal laws "respecting an establishment of religion." U.S. const. amend. I. The EO does not subject the American citizenry to governance under a theocracy. It does not coerce the American citizenry, by force of law and penalty, to practice an official religion. It does not, therefore, violate the Establishment Clause.

Amici additionally urge this Court to reverse *Lemon v. Kurtzman* because it unconstitutionally empowers unelected judges to supplant our politically accountable system of governance with their own protean preferences. *Lemon's* judicially contrived "secular

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the Secretary of State use this time to review the sufficiency of admission procedures and implement any further procedures needed "to ensure that individuals seeking admission as refugees do not pose a threat" to the security of the United States. *See* Exec. Order § 6(b)(i-iii). Section 6 of the EO also determined that entry of more than 50,000 refugees into the United States in Fiscal Year 2017 would be detrimental to the interest of the United States, and therefore suspended entries into the U.S. exceeding 50,000.

purpose" policy: 1) exceeds the scope of judicial power stated in Article III of the Constitution; 2) bypasses Constitutionally required, politically accountable processes for amending a Constitutional Rule of Law; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous U.S. citizens.

ARGUMENT

I. THE PRESIDENT'S EXECUTIVE ORDER BANNING TRAVEL FROM NATIONS POSING A THREAT TO OUR NATIONAL SECURITY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. const. amend. I.

A. The Court Should Apply the Plain Meaning of the Words in the Establishment Clause to the President's Executive Order.

The Constitution is not just a set of guidelines. It is the framework on which the government and our legal system are constructed. Its words both create this Court's authority and give it definition. Faithful adherence to those words is thus the touchstone for measuring the fulfillment of this Court's sacred duty. Every Justice who takes the oath of office in the nation's highest Court swears to uphold the Constitution as it is written, not as he or she would like it to be written. Discerning and applying the meaning that the Drafters embodied in the Constitution's language is this Court's high calling.

Resolution of the issue before this Court necessarily requires a correct understanding of what the Establishment Clause means. To correctly apply the Rule of Law in the Establishment Clause, the appropriate approach is to ask what do the words in that Clause mean? This Court has long sought to honor this duty by understanding those meanings in their historical context. As Chief Justice Burger observed in *Marsh v. Chambers*, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied...." 463 U.S. 783, 790 (1983).

Reviewing the history of the Clause and its application, this Court held that a chaplain (employed by the government) did not violate the Establishment Clause by leading a legislature in prayer. *Id.* Similarly, in *Lee v. Weisman*, 505 U.S. 577, 631 (1992), Justice Scalia, joined by three other justices, stated that in this search for truth, "the meaning of the Clause is to be determined by reference to historical practices and understandings."

Webster's 1828 American Dictionary of the English Language defined *respecting* as: "[r]egarding; having regard to; relating to,"[3] and *Establishment* as "[t]he act of establishing, founding, ratifying or ordaining."[4] Thus, the simple meaning of the Establishment Clause is that government should not shackle the consciences of the people, for whose sake it exists, through a state religion.

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[3] (http://webstersdictionary1828.com/Dictionary/respecting, *last visited* July 27, 2017).

The experience of our Founders, which the Establishment Clause reflects and seeks to save us from, was aptly delineated by Justice Scalia, dissenting in *Lee v. Weisman,* 505 U.S. 577, 640-41 (1992):

> The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

(internal citations omitted).

Numerous government policies supporting, acknowledging, and accommodating religion are considered time-honored practices that are a part of our nation's heritage. *See e.g., Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (Justice Kennedy, joined by Justices Rehnquist, Scalia, and White, dissenting). Properly understood, the "separation of church and state is not a limitation on churches or religion; it is a limit on the role of government with respect to churches and religious life in general." *See* M. W. McConnell, *Religion and its Relation to Limited Government,* 34 Harvard J. of Law and Pub. Pol. 943, 944 (2010).

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[4] (http://webstersdictionary1828.com/Dictionary/establishment, *last visited* July 27, 2017).

The President's National Security EO does not violate the Establishment Clause because it was not an action regarding or relating to the act of establishing or founding of a religion. The Order does not subject the American citizenry to governance under a theocracy. Nor does it coerce the American citizenry, by force of law and penalty, to practice one official religion to the exclusion of all others. The President's action did not, therefore, violate the Establishment Clause.

B. The Court Should Abandon the *Lemon* Test.

This Court's "religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." *Weisman,* 505 U.S. at 644 (Scalia, J., joined by three other Justices, dissenting). The test, not yet overruled by this Court, regularly continues to receive "well-earned criticism." *Id.* at 644.

In *Lemon*, the Court replaced the test proscribed by the Constitution—whether government action "established" a religion, with a test of its own creation, whether government action had a secular purpose or "endorsed" religion. 403 U.S. at 612-13. The Court judicially contrived a three-part test, and then mandated that government action must satisfy all three elements to comport with the Establishment Clause:

> First, the [government action] must have a secular [] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not foster an excessive government entanglement with religion.

Id.

A few justices addressed the second prong of the *Lemon* test by requiring the government action to not even symbolically endorse religion. No agreement existed though, even among those justices, on how to decide when a government action symbolically endorsed religion.[5]

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[5] For example, Justice O'Connor, concurring in *Wallace v. Jaffree* stated:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. *** The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].

472 U.S. 38, 76 (1985).

Elsewhere she likewise stated that: "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 773 (1995) (O'connor, J. concurring). Compare Justice O'Connor's measure with that of Justice Souter, who

The *Lemon* Court, in fashioning its test, ignored the plain meaning of the words in the Clause. When the Drafters wrote the Establishment Clause, they well knew the meanings of both "establish" and "endorse." They chose "establish" to express their intent. If they had meant "endorse," there is no doubt they would have chosen that word. It was wrong for the *Lemon* Court to alter the meaning of the Establishment Clause, and this Court should correct that error.

Remarkably, when determining the constitutionality of a government action under *Lemon,* the content of the government action is irrelevant. Instead, the *Lemon* test requires that a judge make a subjective assessment as to whether the government actor had a secular purpose (*i.e.*, the judge must attempt to personally divine the heart and mind of the President, legislator, county commissioner, etc., and then subjectively conclude whether the government actor had a secular purpose). If no, the judge must hold

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opined that he "attribute[s] these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis..., where I believe that such reasonable perceptions matter." *Id.* at 786. Likewise, Justice Stevens articulated a less informed "reasonable person" standard to determine whether an endorsement of religion exists when addressing the second prong in *Lemon*:

> If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.

Id. at 799.

that the government action violates the Establishment Clause.

Amici Curiae urge this Court to reverse *Lemon v. Kurtzman* because it extra-Constitutionally permits changeable political preferences of unelected judges to substitute their politically unaccountable will for politically accountable governance guaranteed by the Constitution. As explained below, *Lemon's* "secular purpose" policy: 1) exceeds the scope of judicial power granted in Article III of the Constitution; 2) bypasses constitutionally required processes for amending the Constitution; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous United States citizens.

Lemon's "secular purpose" test exceeded the scope of judicial power stated in Article III of the Constitution. In pertinent part, Article III of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... (Section 1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

U.S. Const. art. III, § 2.

The *Lemon* Court conspicuously failed to identify any legitimate source of constitutional authority on which it relied when amending the meaning of the Establishment Clause. The simple reason the *Lemon* Court failed to do so is that no enumerated judicial power exists for the judiciary to amend the constitutional law of the nation.

> The Federal Government "is acknowledged by all, to be one of enumerated powers." That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . .
>
> The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404, 405 (1819); Const. art. I § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 Wheat. 1, 194-95, 6 L.Ed. 23 (1824)).

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. 137 (1803).

The *Lemon* Court, wandering far beyond the scope of its Article III powers, improperly permits changeable political preferences of unelected judges to amend a Constitutional Rule of Law (i.e., the Establishment Clause). Thus, *Lemon* amends "make no law respecting an establishment of religion" to instead require that "every government action must have a secular purpose" merely because a panel of Justices preferred it so.

Moreover, in amending the meaning of the words in the Establishment Clause, *Lemon* bypassed constitutionally required political processes that specifically require involvement of politically-accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .

U.S. Const. art. V.

Although the judicial branch may hold the power to say what the provisions of the Constitution mean, that power does not extend to amending or evolving the meaning of these provisions. That power is delegated to the politically accountable branches of government in Article V. Thus, when *Lemon* amended the meaning of the Establishment Clause, it usurped legislative authority in violation of Article V.

When a court steps beyond its limited duty and usurps legislative authority, as the Court did in *Lemon*, it undermines good governance under the Rule of Law and its own legitimacy. To test the provisions of a government action against the Constitution is one thing; judicially imposing a new meaning on the words of the Constitution to achieve a judicially preferred outcome or social policy is another.

Those supporting *Lemon* wrongly see the Constitution as an evolving organism, the meaning of which they believe their jurisprudence empowers them to actively manipulate. They become Platonic Philosopher Kings, ruling by judicial fiat, unbound by the constraints of the Constitution's actual language. *Lemon* embeds this tyrannical principle in our Constitutional jurisprudence by allowing judges to make subjective, ad hoc assessments as to whether a government actor had a secular purpose or motive.

In this case, the courts below struck down the President's action because it violated *Lemon's* distorted version of the Establishment Clause. The lower courts subjectively applied *Lemon's* judge-made doctrine that all government actions must have a secular purpose. *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir 2017). In applying this judicially contrived test, the court ignored the content of the EO, and relied instead on religious references in Donald Trump's pre-election campaign speeches to hold that the EO violated the Establishment Clause. *Id.*[6] This case shows once again that *Lemon's* subjective test makes a litigant's success in judge-shopping the best indicator of whether a law will be struck down under the Establishment Clause.

If *Lemon's* judicially manufactured doctrine existed during the Lincoln Administration, the Emancipation Proclamation would be unconstitutional because Lincoln expressly invoked "the gracious favor of Almighty God." – not in a political speech during a Presidential campaign, but in the text of the proclamation itself.[7] Thus, when Judge Paul Niemeyer asked an ACLU lawyer in this case whether it would be Constitutional if Presidential candidate Hillary Clinton had drafted the exact same Executive Order, the lawyer reluctantly, but truthfully, answered in the affirmative—revealing the absurdity of the doctrine and the potential for its abuse by a politically motivated judge or activist lawyer.[8]

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[6] Contrary to the lower court's unsupported suppositions, the President's EO, issued after he was elected, survives even if it must face the judicially-manufactured *Lemon* test. This is because, *inter alia*, the President's purpose in issuing it was purely a secular one – preserving national security. *See*, Executive Order 13780, *Protecting the Nation from Foreign Entry into the United States,* 82 Fed. Reg. 13209.

[7] *Available at* (https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html, *last visited* August 2, 2017).

Additionally, the *Lemon* test undermines predictability in the law, a vital component of good governance under the Rule of Law. When it comes to judicial review of government action and the Establishment Clause, the subjectivist nature of the *Lemon* test produces inconsistent judicial precedents. This inconsistency is inevitable because judges utilizing *Lemon* make a personal subjective assessment as to whether a government actor had a secular purpose, rather than looking to the content of the government action itself.

Inconsistent judicial precedents lead to unpredictability in the law. The inconsistent precedents produced by *Lemon's* subjectivist jurisprudence provide no useful guidance for government officials trying to act Constitutionally. To illustrate, compare two Establishment Clause cases handed down by this Court on the same day: *Van Orden v. Perry,* 545 U.S. 677 (2005) (upholding government action placing Ten Commandments on Government property as Constitutional) and *McCreary County v. ACLU,* 545 U.S. 844 (2005) (striking down government action placing Ten Commandments on government property as unconstitutional). Four justices would have upheld both. Four justices would have struck down both. One justice upheld one and struck down the other—but applying *Lemon's* subjective standard, found one symbolically endorsed religion and the other did not. (also compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding baby Jesus in a manger constitutional) and *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573 (1989) (striking down baby Jesus in a manger as unconstitutional)).

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[8] IRAP, 857 F.3d 554 (4th Cir 2017) (Oral Argument, as reported in the American Thinker, *available at* (http://www.americanthinker.com/blog/2017/05/aclu_lawyer_admits_trump_travel_ban_would_be_constitutional_if_hillary_issued_it.html#ixzz4o56hdFvM, *last visited* August 15, 2017)).

If *Lemon* says the Ten Commandments are both Constitutional and unconstitutional; if *Lemon* says displaying baby Jesus in a manger is both Constitutional and unconstitutional; if *Lemon* says Hillary Clinton issuing an EO is Constitutional but President Trump issuing the same EO is not, then no predictability exists for those seeking to conform their conduct to the law. Predictability in the law is a necessary component of good governance under the Rule of Law. *Lemon* replaces predictability in the law with the evolving political preferences of unelected judges.

Finally, *Lemon's* judicially contrived "secular purpose" test creates unjustifiable hostility toward the religious identity of numerous United States citizens. Many United States citizens seek guidance from their faith in formulating their public policy positions. Activist lawyers and politically motivated judges repeatedly use the *Lemon* doctrine to deprive and diminish a person's religious identity. They do so by requiring religious people to substitute a purpose informed by their religious conscience for one founded on secular beliefs or traditions.

Requiring that every government action have a secular purpose and not even symbolically endorse religion is not only hostile toward a person's religious identity, it is an attempt to make that identity culturally, socially, and politically irrelevant. Proponents of this secular approach favor it because it enables judges to nullify unalienable rights. They assert that everyone can participate in important policy discussions except those whose identity is informed by religious viewpoints. Thus, the Court has struck down, for example, laws accommodating the teaching of creation science and regulating the teaching of evolution.

For example, in the State of Louisiana, Darwin's theory of evolution was taught in the government schools. Louisiana passed a law to also accommodate those with a different theory on the origin of the universe— creation science.[9] On its face, such an effort seems to embody the very essence of neutrality. The Court, however, reached an opposite conclusion in *Edwards v. Aguillard,* holding the law unconstitutional because it lacked a secular purpose and symbolically endorsed religious ideas. 482 U.S. 578 at 583, 592 (1987). According to *Lemon's* revisionist test, to be constitutionally "neutral," all laws and other government action must have a secular purpose and not even symbolically endorse religion.[10]

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[9] The law prohibited the teaching of the theory of evolution in public schools unless accompanied by the instruction in creation science.

[10] For a scholarly discussion of how the neutrality principles demean religion in the United States, *see* G. Moens, "The Menace of Neutrality in Religion" (2004) (Summer) *Brigham Young U. L. Rev* 535, 566–572.

Similarly, in *Epperson v. Arkansas*, the State of Arkansas passed a law regulating the teaching of evolution. 393 U.S. 97 (1968). The Court began its analysis by declaring that "[g]overnment in our democracy ... must be neutral ..." *Id.* at 103. The Court nevertheless proceeded to hold that because the law was motivated by a religious purpose, it violated the Establishment Clause.

Thus, although often couching its analysis in terms of neutrality, court decisions utilizing *Lemon* require secularly informed purposes while prohibiting religiously informed ones. Descriptive of such an analysis is Justice O'Connor's concurring opinion in *Wallace v. Jaffree*:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws ... It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

472 U.S. 38 (1985).

It is apparently acceptable, and sufficiently neutral though, for government to dictate and endorse a secular belief or practice that all citizens do not share.

The implications of decisions like *Aguillard* and *Epperson* are immense. Mandating the irrelevance of religious identity and God facilitates judicial extinction of unalienable liberty as viewed by the Framers.

Increasing numbers of judges and other government authorities rely on *Lemon* to diminish religious identity and conscience. By way of example, senior citizens at a nursing home in Georgia were prohibited from praying before they ate their meal. The government said that because the meals were subsidized by the government, praying over the meal would be a violation of the Establishment Clause. *Georgia Seniors Told They Can't Pray Before Meals*, ASSOCIATED PRESS, (May 10, 2010). Likewise, those whose actions are informed by the sacred rather than the secular have faced Establishment Clause challenges for erecting the Ten Commandments, *McCreary County v. ACLU,* 545 U.S. 844 (2005), raising memorials for the fallen, *Am. Atheists, Inc v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), engaging in a moment of silence prior to starting school, *Wallace v. Jaffree,* 472 U.S. 38 (1985), praying prior to football games, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and for displaying a manger scene at Christmas time. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

Several Justices on this Court have recognized how, contrary to the plain meaning of the Clause, *Lemon's* judicially contrived "secular purpose" test creates unjustifiable hostility toward the religious identity of numerous United States citizens:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage .... Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society [citation omitted]. Any approach less

> sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious ....
>
> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.
>
> * * *
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Allegheny, supra, at 657-659 (Justice Kennedy, joined by Justices Rehnquist, Scalia, and White dissenting). These Justices, dissenting in *Allegheny* correctly recognized that *Lemon's* "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents..." *Id.* at 655.

For some legislators viewing the world through their religious identity, God and his Word are real, and therefore really matter. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

They understandably, therefore, oppose devolutionary social engineering that threatens the health, safety, and morals of the nation, as viewed through their religious identity. The government *Lemon* envisions must shape public policy informed by secular dogma, without regard to any religious conscience or moral considerations. In such a government, wisdom derived from religious tradition or individual conscience informed thereby has no place. Legislators should not have to choose between fidelity to their religious identity or participating in the policymaking process. The *Lemon* test demands that they do, invalidating any policy they make that happens to be informed by their religious identity.

Moreover, the *Lemon* test deprives people of faith of their dignity by discouraging them from participating in government, by telling citizens that reliance on their faith while serving in government is unconstitutional.

Prohibiting a policy simply because it is informed by ancient sacred tenets prevents thousands of years of wisdom from informing the public ethic. The idea that God created humans in His image, and that all human life has dignity, ended slavery and advanced the rights of women around the world. Conversely, when government suppresses religious identity and the free expression of religious ideals, it often results in tragic consequences. Stalin murdered over 42 million. Mao Zedong murdered over 37 million. Hitler murdered over 20 million. And the list of atrocities goes on and on where those in power selectively pick and choose which citizen's identities it will arbitrarily censure.

We are, therefore, in the midst of a high-stakes battle over the character of the American nation. The extent to which *Lemon's* "secular purpose" jurisprudence prevails over the view that the plain meaning of a Constitutional provision governs will determine: 1) whether unalienable truth, as envisioned in the Declaration, will continue to be relevant as an objective limit on government action; and 2) whether the judiciary replaces the Framers' intent with its own personal social policy views.

Institutional integrity cannot exist without personal virtue. Good governance and civic institutional integrity rest on the virtue of those holding power within those institutions. Ideas grounded in one's religious identity support and nurture this virtue and should, therefore, always be permitted within the marketplace of ideas and the policymaking process. The *Lemon* test precludes great ideas grounded in one's religious identity from entering the policymaking process. People of faith should not be stripped of their dignity, religious identity, and conscience in order to serve in our constitutional republic.

In summary, judicial crafting of a subjective three-prong "secular purpose" test defining the Establishment Clause: 1) exceeds the scope of Article III; 2) bypasses constitutionally required politically accountable processes for amending a constitutional rule of law; 3) undercuts the legitimacy of the judicial power; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous U.S. citizens. This Court should, therefore, overrule *Lemon* and no longer apply its "secular purpose" test to government action.

CONCLUSION

Because the President's EO was not a law establishing a national religion, the EO did not violate the Establishment Clause of the First Amendment. This Honorable Court should, therefore, reverse the decision of the appellate court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., RESPONDENTS.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
STATE OF HAWAI'I, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Professional Society on the Abuse of Children ("APSAC") is the leading national organization for professionals serving children and families affected by child maltreatment, including abuse and neglect. A multidisciplinary group, APSAC achieves its mission through expert training and educational activities, policy leadership and collaboration, and consultation emphasizing principles that are both theoretically sound and evidence-based.

For 30 years, APSAC has played a central role in developing guidelines that address child maltreatment. It is qualified to inform the Court about the damage maltreatment can inflict on children's brain development and cognitive ability. APSAC submits this brief to assist the Court in understanding the impact of Executive Order 13,780 on the physical, emotional, and mental development of children, both those receiving its message of religious discrimination in the United States and those abroad suffering the consequences of exclusion from this country.

APSAC members have a direct and substantial interest in these issues because of their historical and scientific experience with juvenile brain development, especially where child maltreatment is involved. APSAC is therefore qualified to advise the Court on the impact of maltreatment on child health, well-being, and ability to survive.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief. The Petitioners in these consolidated cases have filed a blanket letter of consent. Consent from the respective Respondents has been lodged with the Clerk's office.

SUMMARY OF ARGUMENT

Executive Order 13,780 effectuates a discriminatory intolerance of Muslims. The respondents and various *amici curiae* in Nos. 16-1436 and 16-1540 have documented the purposes and motivation of the Executive Order, and they have explained how the Order communicates animus towards Muslims. *Amicus curiae* APSAC submits this brief to draw to the Court's attention the effect of that animus on a particularly vulnerable group of people: children.

Child health experts have found that exposure to early adversity and traumatic experiences can affect mental and physical health and well-being for a lifetime. A clear dose-response relationship between trauma and its health impacts means that the longer children are exposed to negative experiences, the greater the ultimate harm to their brains and bodies.

Amicus discusses two groups of children. Muslim children in the United States suffer fear and insecurity from their government's expression of discriminatory animus directed at them because of their religion. Many also experience physical violence from individuals encouraged by the President's Executive Order. Research suggests that such negative childhood experiences are associated with an increased risk for later depression and other mental illnesses, cardiovascular disease, and other health effects later in life.

Muslim children in the six nations targeted by the Order face acute risk of harm from trauma caused by violence, malnutrition, displacement, and the constant fear and uncertainty that accompany them. Thousands of children from these countries who would otherwise seek refuge in the United States will instead stay in refugee camps, experiencing additional months of trauma. That time is significant in the lives of these children and will cause additional harm to their long-term health and well-being.

For these reasons, APSAC urges this Court to affirm the decisions of the courts of appeal below.

I. STRESS AND TRAUMA EXPERIENCED DURING CHILDHOOD CAN CAUSE LONG-LASTING PHYSIOLOGICAL AND PSYCHOLOGICAL HARM

Children are not simply small adults. They are, even in their teenage years, in a constant process of development—physically, mentally, and emotionally. A developing child's exposure to environmental toxins, it is well known, can cause long-lasting adverse health consequences. The same is true of exposure to environmental harm that is social, not chemical. The experiences that people have as children help shape their personalities and health, both as children and into their futures as adults. Traumatic and stressful experiences produce genuine physiological changes, which ultimately cause physical and mental problems that can persist throughout the life of a person exposed to adverse experiences during childhood.

The occurrence of these phenomena has been repeatedly documented over several decades,[2] and scientists now widely accept that childhood experiences of trauma and toxic stress correlate to long-term health effects, including adulthood disorders and diseases. Health outcomes that have been correlated with childhood trauma include, among others, substance abuse, mental illness, sexually transmitted infections, cardiovascular illness, cancer, immune disorders, and other chronic diseases.[3] As the American Academy of Pediatrics noted, in response to the Executive Order, "fear and stress, particularly prolonged exposure to serious stress—known as toxic stress—can harm the developing brain and negatively impact short- and long-term health."[4] The damage to physical and mental health and well-being can be severe.

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[2] *See* M. Bucci et al., "Toxic Stress in Children and Adolescents," 63 *Advances in Pediatrics* 403, 406 (2016) (discussing a

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seminal 1998 study on the correlation between adverse childhood experiences and long-term health outcomes); K. Hughes et al., "The effect of multiple adverse childhood experiences on health: a systematic review and meta-analysis," 2 *Lancet Pub. Health* e356, e356 (2017) (noting mental, emotional, and physical health impacts, as "individuals who have ACEs can be more susceptible to disease development through both differences in physiological development and adoption and persistence of health-damaging behaviours").

[3] *See* R. Wade Jr. et al., "Household and community-level Adverse Childhood Experiences and adult health outcomes in a diverse urban population," 52 *Child Abuse & Neglect* 135, 140 (2016); J.P. Andersen & J. Blosnich, "Disparities in Adverse Childhood Experiences among Sexual Minority and Heterosexual Adults: Results from a Multi-State Probability-Based Sample," 8 *PLOS ONE* 1, 2 (2013).

[4] F. Stein, *AAP Statement on Revised Immigrant and Refugee Travel Ban Executive Order*, Am. Acad. of Pediatrics (Mar. 6, 2017), at https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAP-Statement-on-Revised-Immigrant-and-Refugee-Travel-Ban-Executive-Order.aspx.

A. The Developing Brain Responds to Positive and Negative Stimuli and Signals

Research has now begun to reveal the causative mechanisms for the relationship between childhood trauma and adverse health effects.

The brains of infants and children are highly plastic. Developing brains respond to the environment, as neurons "change in response to external signals."[5]

Under normal circumstances, a child's environment includes caregivers, secure sources of physical needs such as food and shelter, and social and emotional supports. Healthy brain development takes place in such contexts, as the interaction between children and their environments provides appropriate external stimuli and generates healthy physiological conditions. But when an infant or child is maltreated or placed in chronic danger, the brain "will adapt to a negative environment just as readily as it will adapt to a positive one."[6] Such adaptations "can cause permanent, life-long neurological damage and have a significant negative impact on the developing brain."[7] Just as exposure to positive environments benefits the developing brain, exposure to negative or harmful experiences can damage it.[8]

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[5] B.D. Perry et al., "Childhood Trauma, the Neurobiology of Adaptation, and 'Use-dependent' Development of the Brain: How 'States' Become 'Traits,' " 16(4) *Infant Mental Health J.* 271, 274 (1995).

[6] U.S. Dep't of Health & Human Servs., Child Welfare Info. Gateway, *Understanding the Effects of Maltreatment on Brain Development* 4 (2015), http://www.childwelfare.gov/pubPDFs/brain_development.pdf.

[7] H.R. Cellini, "Child Abuse, Neglect, and Delinquency: The Neurological Link," 55 *Juv. & Fam. Ct. J.* 1, 10 (Sept. 2004).

A key mechanism for this damage is the physiological manifestation of stress.[9] In ordinary speech stress refers to external pressures—physical, such as hunger or cold, or social, such as a looming deadline—and to the mental and emotional experience of being under such pressures. But stress is also a physical condition. A person experiencing stress in the colloquial sense undergoes changes in hormone levels and other physiological signals. The hypothalamic-adrenal-pituitary axis of endocrine glands "releases a surge of stress hormones, including adrenaline and cortisol."[10] Additional physiological chemicals may increase in response to stress, including "catecholamine secretion" and "corticotropin releasing factor."[11] These changes cause further metabolic shifts, in physiological substances such as catecholamine and corticotropin releasing factor,[12] as part of an adaptive mechanism by which humans, like other organisms, manage difficult conditions.

Repeated stress, and especially persistent stress, can be toxic, especially in children. Physiological stress response mechanisms become dysregulated, resulting in long-term shifts in metabolism that affect every bodily system, including the brain. The brain continues to develop throughout childhood and early adulthood, and a persistent toxic stress metabolism harms the developing brain. As a whole, "a maladaptive response to stress during childhood, referred to as a toxic stress response, plays an important role in the pathway from early adversity to disease."[13] "Neurobiological changes and disruptions in core stress response physiology . . . have all been linked with childhood maltreatment and are likely central mechanisms by which immune dysregulation, cardiovascular disease, cancer and other chronic diseases are linked" to adverse childhood experiences.[14]

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[8] Inst. of Med. & Nat'l Research Council, *New Directions in Child Abuse and Neglect Research* 119 (2014).

[9] N.B. Harris, "The Chronic Stress of Poverty: Toxic to Children," *The Shriver Report* 4 (Nov. 21, 2016).

[10] *Id.*

[11] Andersen & Blosnich, *supra* n.3, at 2.

[12] *Id.*

In short, the impact of child maltreatment is neurological and biological as well as psychological. Severe maltreatment and complex trauma can, and often do, cause temporary or permanent physical brain damage as the child's brain molds to fit its dangerous and frightening environment.

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[13] Bucci et al., *supra* n.2, at 404; *see also id.* at 414 ("The toxic stress response is particularly concerning for children because the developing brain is highly plastic and influenced by the environment. The dysregulation of the stress response produces significant biological alterations that can damage brain architecture and impact the nervous, endocrine, and immune systems. . . . Prolonged or frequent activation of the stress response in early childhood reduces neuronal connections in important areas of the CNS [central nervous system] that are key mediators and regulators of the SAM [sympatho-adrenomedullary] and HPA [hypothalamic-pituitary-adrenal] axes.").

[14] Andersen & Blosnich, *supra* n.11, at 2.

B. There Is a Dose-Response Relationship Between the Length and Intensity of Negative Experiences and the Severity of Poor Adult Health

The phenomena described above are not simply on-off, with a child exposed to a negative environment doomed to a lifetime of poor health. Recent research has demonstrated that there is a dose-response relationship between adverse childhood experiences (commonly called "ACEs") and other traumas and subsequent adverse health outcomes. In other words, the longer and more severe the adverse experiences, the greater and more serious the negative health consequences.

With respect to acute physical traumatic events, like abuse or violence, multiple exposures have a "cumulative effect"; "higher rates of trauma are often associated with higher rates of PTSD, depression, and behavior problems[.]"[15] Research indicates that "[t]he 'dose-response' relationship" between the number of traumatic events and adverse health outcomes is "strong and graded."[16] Thus, while a single event can have some long-term consequences, continued trauma leads to progressively worse health outcomes. This is true whether the trauma continues as a "repetition of similar stresses" such as ongoing interactions with an abusive parent or an "accumulation of disparate ones" such as the succession of adverse events a refugee child might experience.[17] In the case of the refugee children at issue here, "[h]igher rates of trauma appear to have a 'dose effect' in war-affected children: more frequent and severe trauma exposure leads to self-reports of worse psychological outcome."[18]

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[15] Am. Psychol. Ass'n, *Resilience & Recovery After War: Refugee Children and Families in the United States* 26 (2010) (citing studies).

[16] R.F. Anda et al., "The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology," 256 *Eur. Arch. Psychiatry Clin. Neurosci.* 174, 182 (2006).

The trauma and stress of experiencing discrimination has also been linked in a dose-response relationship with long-term poor health outcomes. Research in this area has been sparser, and consequently the effects are less well-established. Still, "[t]hose who are chronically bullied by peers . . . compared to those bullied at one time point have been reported to have a higher risk for adverse outcomes such as psychiatric problems in childhood,"[19] and having inferior social relations in adulthood.[20] There is also evidence for a dose-response relationship between discrimination and poor health outcomes.[21] For example, women who experienced discrimination in three or more domains (such as in getting a job or in shopping at a store) had much higher risk than others of having children with very low birth weight.[22] One of the larger studies in this area observed a dose-response relationship between adverse childhood events like experiencing bullying or discrimination and long-term adverse outcomes such as depression.[23] For males in particular, increases in the number of adverse childhood experiences correlate with the risk of later committing violent acts.[24]

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[17] Am. Acad. of Pediatrics, *Adverse Childhood Experiences and the Lifelong Consequences of Trauma* 3 (2014) ("*AAP Statement on Trauma*").

[18] E.E. Werner, "Children and war: Risk, resilience, and recovery," 24 *Development and Psychopathology* 553, 553 (2012).

[19] D. Wolke et al., "Impact of Bullying in Childhood on Adult Health, Wealth, Crime and Social Outcomes," 24 *Psychol. Sci.* 1958, at 2 (2013) (author manuscript).

[20] *Id.* at 7.

[21] N. Priest et al., "A systematic review of studies examining the relationship between reported racism and health and wellbeing for children and young people," 30 *Social Sci. & Medicine* 1, 10 (2012).

The implications of these dose-response relationships are positive as well as negative. While the research shows that longer or more severe exposure to harmful environments leads to worse health problems, it also follows that reducing such exposure can help mitigate the long-term impacts. A child who has experienced trauma will likely suffer some long-term consequences, but improving the child's environment will be beneficial to his or her lifelong health.[25]

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[22] L.M. Pachter & C.G. Coll, "Racism and Child Health: A Review of the Literature and Future Directions," 30 *J. Dev. Behav. Pediatr.* 255, at 5 (2009) (author manuscript).

[23] Wade et al., *supra* n.3, at 140.

[24] J.A. Reavis et al., "Adverse Childhood Experiences and Adult Criminality: How Long Must We Live before We Possess Our Own Lives?", 17 *Perm. J.* 44, 45 (2013).

[25] Bucci et al., *supra* n.2, at 420 ("Recent research demonstrates that even after epigenetic modifications, it may still be possible to reverse negative changes and restore normal physiologic function through positive interactions between child and caregiver.").

II. THE GOVERNMENT'S SANCTION OF ANTI-MUSLIM ANIMUS HARMS AMERICAN CHILDREN

Discrimination can generate significant toxic stress. When individuals, and especially children, experience discrimination or suffer violence or the threat of violence because of membership in a particular group, they can experience toxic stress, which can produce adverse effects through the mechanisms described above.

Anti-Muslim discrimination in the United States has increased significantly in recent years. Physical assaults, attacks on mosques, and hate crimes tabulated by the Federal Bureau of Investigation in 2015 totaled 257, a 67% increase since 2014.[26] The Southern Poverty Law Center has reported that the number of hate groups targeting Muslims jumped from 34 in 2015 to 101 in 2016.[27]

Executive Order 13,780, as the parties and *amici* before the Court have demonstrated, is an expression of animus. Individual actors perceive expressions like this as validating negative conduct towards Muslims.[28] The direct effects of the Order should also not be underestimated. When American Muslims are stereotyped as terrorists, violent criminals, and not "real" Americans, they must maintain a constant state of fear and vigilance.[29] The declarations of the plaintiffs in No. 16-1536 vividly illustrate this experience. For example, plaintiff Meteab reports how people stare at him and his wife and refuse to grant them ordinary courtesies, and they feel isolated and stressed. J.A. 446-447. An expression of animus directly from the national government can only intensify that stress.[30]

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[26] Am. Psychol. Ass'n, "Islamophobia," 48(4) *Monitor on Psychol.* 34 (2017) ("*APA on Islamophobia*"). Tables and data accessible at the Federal Bureau of Investigation's Uniform Crime Reporting site, https://ucr.fbi.gov/hate-crime/2015.

[27] Southern Poverty Law Ctr., *Anti-Muslim*, https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-muslim.

[28] *See APA on Islamophobia*, at 2 (citing K.L. Nadal et al., "A Qualitative Approach to Intersectional Microaggressions: Understanding Influences of Race, Ethnicity, Gender, Sexuality, and Religion," 2 *Qualitative Psychol.* 147 (2015)).

The result is a constellation of harms for American Muslim children: they witness rhetoric directed against their religion and community; the rhetoric is coming from their government, a putative source of safety and protection for them; the rhetoric influences non-Muslim children, leading to an increase in bullying; and their parents are stressed and anxious, which can affect the parent-child relationship.

Expressions of animus are not just words to those whom they target; they have real psychological and physiological effects. Studies in this area have typically focused on racial discrimination, rather than religious discrimination, presumably because racial discrimination has historically been more widespread and more readily observable in the United States. Recent research confirms that "experiencing discrimination is associated with higher reported stress and poorer reported health."[31] There is a "clear relationship between discrimination and increased risk of mental disorders," controlling for other sources of stress.[32] These studies involved adult experiences of discrimination, but the more limited research on the impact of discrimination on children strongly suggests the same result.[33] Experience of discrimination during childhood appears to be a source of traumatic stress, and negative health outcomes result in just the manner described above.[34] Repeated encounters with negative portrayals of their race can cause children to experience toxic and chronic stress, particularly where such encounters make them feel less safe at school or in the outside world. Over time, toxic stress exerts a pernicious influence over mental and physical health, leading to greater risk of depression, suicide attempts, substance abuse, and a host of other ills.

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[29] *Id.*

[30] *See, e.g.*, J. Desmond-Harris, " 'Crying is an everyday thing': life after Trump's 'Muslim ban' at a majority-immigrant school," *Vox* (Feb. 16, 2017), at https://www.vox.com/identities/2017/2/16/14584228/muslim-ban-trump-immigration-ban-children-kids-schools-anxiety.

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[31] Am. Psychol. Ass'n, *Stress in America: The Impact of Discrimination* 8 (2016).

[32] Article, "Unhealthy Treatment," *UCLA Sch. of Pub. Health Mag.*, Autumn/Winter 2015, at 8, 9 (citing G.C. Gee et al., "The association between self-reported racial discrimination and 12-month DSM-IV mental disorders among Asian Americans nationwide," 64 *Social Sci. & Medicine* 1984 (2007)).

[33] For a review of relevant research, see Pachter & Coll, *supra* n.22, at 255. *See also* Am. Acad. of Pediatrics News, *Study finds exposure to racism harms children's health* (May 4, 2017) (describing preliminary results of new research study). As Pachter and Coll note, research on the impact of discrimination on child health is a new and emerging area of study, but the available research strongly indicates negative health impacts.

[34] *See, e.g.*, M. Jernigan & J. H. Daniel, "Racial Trauma in the Lives of Black Children and Adolescents: Challenges and Clinical Implications," 4 *J. Child & Adolescent Trauma* 123, 130 (2011) ("The implications of perceived racial and ethnic discrimination . . . are overwhelmingly associated with negative mental health outcomes such as depression, stress, anxiety, and psychological distress."); P. Cronholm et al., "Adverse Childhood Experiences: Expanding the Concept of Adversity," 49(3) *Am. J. Pre-*

While, as noted, these studies involved race-based discrimination, *amicus* submits its considered view that religious discrimination will have comparable effects. A child experiencing religious discrimination is likely to undergo the same sort of physiological stress response, with similar toxic consequences. And in the case of Muslim Americans, religion is often a proxy for racial identity.

Bullying is a form of discrimination that is highly harmful to American Muslim children. In 2014, according to one survey, 55% of Muslim students in California had experienced bullying in school and 52% had been verbally insulted or abused on the basis of religion.[35] Among Muslim students of Middle Eastern ethnic identity, 64% experienced bullying and 21% experienced discrimination at the hands of a teacher or school administrator.[36] A 2017 survey revealed that Muslim American children are four times as likely to

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ventive Medicine 354, 358 (2015) ("[S]tudies from different contexts have shown that witnessing or experiencing . . . discrimination is associated with concurrent negative health effects and increased participation in risk behaviors.").

[35] Council on Am.-Islamic Rel., *Mislabeled: The Impact of School Bullying and Discrimination on California Muslim Students* 12-13 (2015).

[36] *Id.* at 17.

report bullying as the general public. Worse, one in four of these events involves a teacher or other school employee, indicating that discriminatory rhetoric influences adults to take action against children in their care.[37]

In sum, the approximately 1.6 million Muslim children in the United States are regularly exposed to stress from discrimination and animus, which not only hurts them emotionally but may cause durable, long-term harm. Executive Order 13,780 contributes to and exacerbates this damage.

III. CHILDREN IN COUNTRIES AFFECTED BY THE EXECUTIVE ORDER FACE CONTINUING STRESS AND TRAUMA

In addition to hurting Muslim children in the United States, Executive Order 13,780 harms Muslim children outside the country by blocking entry from six countries where the vast majority of the population is Muslim. These children may have varying legal status with respect to the United States; some are relatives trying to join families in this country, while others are refugees who would seek asylum here. As an association of physicians and mental health professionals, *amicus* believes it is important for the Court to be aware of the health consequences of the Order for these children, regardless of their precise legal status. The Executive Order would expose thousands of children in these countries to continued trauma, causing additional long-term physical, mental, and emotional harm.

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[37] D. Mogahed & Y. Chouhoud, Inst. for Soc. Pol'y and Understanding, *American Muslim Poll 2017: Muslims at the Crossroads* 12-13 (2017).

The trauma is especially damaging to children. Due to their developmental stage, children are uniquely vulnerable to damage from trauma that is highly impactful and difficult to heal. Children are "more vulnerable than adults to the traumatic events, chaos, and disruptions experienced in disasters," and the results can be "serious and persistent even for preschool children."[38] Worse, the stresses of war and political violence tend to co-occur with "forced displacement; traumatic loss; bereavement or separation; exposure to community violence; and exposure to domestic violence."[39] These combined traumas compound the damage done to children in the midst of key developmental stages in their neurobiology. *Amicus* emphasizes that the children that the Order specifically excludes are among the most vulnerable children in the world.

A. The Order Affects Large Numbers of Refugees and Refugee Children

The current refugee crisis bears especially heavily upon the young. Children make up a sizeable proportion of those affected by disaster; "civilians comprise

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[38] R. Williams, "The psychosocial consequences for children of mass violence, terrorism and disasters," 19.3 *Int'l Rev. Psychiatry* 263, 264 (2007).

[39] T.S. Betancourt et al., "Trauma History and Psychopathology in War-Affected Refugee Children Referred for Trauma-Related Mental Health Services in the United States," 25.6 *Traumatic Stress* 682, 682 (2012).

80 to 90% of all who die or are injured in conflicts – mostly children and their mothers."[40] Nearly half of the casualties in today's violent civil wars are children.[41] And fifty percent of the world's 10.7 million refugees in 2013 were below the age of 18.[42]

The countries that Executive Order 13,780 targets—Libya, Sudan, Somalia, Syria, Yemen, and Iran—include some of the most unstable countries in the world, and are the sources of some of the largest flows of refugees in modern history. In 2015, 37% of refugees worldwide came from Syria and Somalia.[43] Sudan accounted for more than 600,000 refugees, and in Libya and Yemen almost 3 million people are displaced internally.[44]

Syria is suffering the worst humanitarian crisis since World War II due to a brutal civil war that began with a military crackdown on antigovernment protests in March 2011. For six years, President Bashar al-Assad's government, a variety of rebel forces, and the Islamic State have mired the country in a conflict that has killed nearly half a million people. Over 13 million people are affected within Syria, 6 million of them children. Five million Syrians have fled the country and registered as refugees.[45] ***Half of Syria's refugees are children, and more than a third are under the age of twelve.***[46]

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[40] Williams, *supra* n.38, at 266.

[41] Werner, *supra* n.18, at 553.

[42] I. Kaplan et al., "Cognitive Assessment of Refugee Children: Effects of Trauma and New Language Acquisition, 53.1 *Transcultural Psychiatry* 81, 82 (2016).

[43] United Nations High Comm'r for Refugees, *Global Trends: Forced Displacement in 2015* 3 (2015) ("*UNHCR 2015 Report*"), http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

[44] *Id.* at 62-65 (annex tab. 2).

In Iran, human rights violations have not improved significantly under President Hassan Rouhani. Under Iranian law, many nonviolent crimes, such as "insulting the Prophet," same-sex relations and adultery remain punishable by death.[47]

Iranian children are also subject to similar human rights violations. Indeed, flogging remains a lawful punishment for children, and LGBTQ Iranian youth have been subjected to electric shocks to "cure" them.[48] The age of marriage for girls in Iran is thirteen, and sexual intercourse with girls as young as nine remains legal. Children also continue to be legally executed by the state. In 2016 alone, at least forty-nine inmates on death row were convicted of crimes that they committed when they were under eighteen.[49] Violations such as these have contributed to almost 85,000 refugees' fleeing Iran as of 2015; and over 57,000 refugees have sought asylum as of 2015.[50]

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[45] *See* United Nations Children's Fund, *Syria Crisis Situation Report* (Feb. 2017), available via UNHCR Syria Regional Refugee Response Inter-agency Information Sharing Portal, data.unhcr.org/syrianrefugees/regional.php#_ga=1.54009320.1956903019.1492444710.

[46] United Nations High Comm'r for Refugees, Syria Regional Refugee Response Inter-agency Information Sharing Portal, data.unhcr.org/syrianrefugees/regional.php.

[47] Hum. Rights Watch, *World Report* 334 (2017) ("*HRW 2017 Report*"), at https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

[48] *Id.* at 335.

Government instability in Libya has resulted in a bloody power struggle that has displaced nearly half a million civilians and has led 6,000 refugees to flee the country since the start of the crisis in 2011.[51] Many have been displaced since the start of the crisis and face a limited ability to return.[52] Moreover, the civilian population that remains in Libya struggles to gain access to basic services such as healthcare, fuel, and electricity.[53] Human Rights Watch reports that in 2016, dozens of rival militia groups and military forces continued to indiscriminately bomb civilians and abduct, forcibly disappear, torture, and unlawfully kill individuals and seize their property.[54]

Libya also serves as an important transit country for migrants trying to reach Europe. Indeed, as of September 2016, an estimated 256,000 migrants have been identified in Libya, of which 23,102 are children, with a third of this group consisting of unaccompanied children.[55]

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[49] *Id.*

[50] *UNHCR 2015 Report*, at 63.

[51] *Id.*

[52] Int'l Org. for Migration, *IOM Libya Brief*, www.iom.int/countries/libya (last updated Sept. 2016).

[53] *HRW 2017 Report*, at 405.

[54] *Id.* at 403.

[55] United Nations Children's Fund Press Release, *A Deadly Journey For Children, The Central Mediterranean Migration*

With respect to Somalia, in 2015, the number of refugees and internally displaced persons together reached over two million.[56] Al-Shabab continues to target civilians and civilian structures, including schools, hotels, and restaurants.[57] Humanitarian agencies struggle to reach needy and displaced populations because of security risks, restrictions, and targeted attacks.

The UN Refugee Agency reports that as of 2015, there are over 1.4 million refugees from Sudan and South Sudan, and over 5 million internally displaced persons.[58] Mercy Corps reports six out of ten South Sudanese refugees are children.[59] Despite continued human rights violations, countries including Italy, Jordan, and Egypt, have been deporting Sudanese back to Sudan, sometimes without assessing their claims to asylum.[60]

Sudan is of particular concern because its refugee camps harbor thousands of unaccompanied minor

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Route (Feb. 28, 2017), https://www.unicef.org/media/media_94941.html.

[56] *UNHCR 2015 Report*, at 64.

[57] *HRW 2017* Report, at 537.

[58] *UNHCR 2015 Report*, at 64.

[59] Mercy Corps, *Quick Facts: What You Need To Know About the South Sudan Crisis* (Feb. 23, 2017), https://www.mercycorps.org/articles/south-sudan/quick-facts-what-you-need-to-know-about-south-sudan-crisis.

[60] *HRW 2017* Report, at 565.

children as young as 10 who have fled there from Eritrea.[61] These unaccompanied minors face possible *refoulement* at the hands of the Sudanese government—meaning return to a country found guilty of crimes against humanity by a United Nations panel.[62]

Since conflict broke out in March 2015, almost 6,000 Yemeni people have become refugees,[63] but 18.7 million, including 10 million children, more than one-third of the total population, are in urgent need of humanitarian assistance.[64]

B. Refugee Children in the Affected Countries Experience Harmful Trauma

The level of war and violence witnessed and experienced by refugee children in these countries is extraordinary. Children in Syria have been exposed to airstrikes—including wide-area explosives, barrel bombs, cluster munitions, and flammable incendiary weapons—in their homes, markets, schools and hospitals.[65] In addition, killing and maiming of children are common along with abuse, recruitment and use by armed groups, and sexual and gender-based violence.[66] Migrants in Libya are subjected to torture, beatings, forced labor, and sexual violence.[67] In Yemen, according to one report, "[e]very ten minutes, one . . . child dies from preventable killers like diarrhea, malnutrition and respiratory tract infection."[68] Airstrikes have targeted health facilities, including hospital supply routes.[69]

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[61] Women's Refugee Commission, United Nations High Comm'r for Refugees, *Young and Astray: An Assessment of Factors Driving the Movement of Unaccompanied Children and Adolescents from Eritrea into Ethiopia, Sudan and Beyond* 1 (2013).

[62] *Id.* at 2; United Nations News Centre, *Crimes against humanity committed in Eritrea, warns UN group* (June 8, 2016).

[63] *UNHCR 2015 Report*, at 67.

[64] Save the Children, *Struggling To Survive: Stories from Yemen's Collapsing Health System* 1 (2016) ("Save Yemen's Children"), https://yemen.savethechildren.net/ sites/yemen.savethechildren.net/files/library/YEM-cx-15-StrugglingTo Survive-H%26NBrief-19December2016.pdf.

[65] *HRW 2017 Report*, at 572-73.

A child refugee in one of these countries can expect to witness or experience violence on a daily basis. For example, plaintiff Jane Doe #2's younger nephew spent his first few months of life in a house that fighters used to fire rockets; her sister's family now lives in a house that is repeatedly subjected to shellfire from continuing warfare; and her older nephew is so accustomed to weaponry that he can recognize the type of weapon and identify what area is being targeted, from sound alone. J.A. 450. "Being a victim or witness of violent acts" or "being exposed to heavy shelling or combat," researchers have found, makes children

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[66] United Nations Children's Fund, *Syrian Conflict and Europe's Refugee Crisis in Numbers*, UNICEF Blog (Sept. 30, 2015), https://blogs.unicef.org/blog/the-syrian-conflict-and-europes-refugee-crisis-in-numbers/. The United Nations verified 2,300 offenses of such types in 2016. United Nations High Comm'r for Refugees, Syria Regional Refugee Response Inter-agency Information Sharing Portal, data.unhcr.org/syrianrefugees/regional.php.

[67] *HRW 2017 Report*, at 409.

[68] *Save Yemen's Children*, at 1.

[69] *HRW 2017 Report*, at 675-76.

"more likely to exhibit [post-traumatic stress disorder]."[70] "Those who had been exposed to bombing and combat as children were 2.3 times more likely to have severe illnesses in their early sixties," and there is a significant association between such traumas and later cardiovascular disease.[71]

Refugee camps are also violent.[72] This violence exacerbates the developmental harms from the violence that a refugee child fled in the first place. Adults living in or near a concentration of refugees may try to take advantage of their precarious situation, such as by sexually abusing children who are without parents or whose parents have little recourse to authority. Teenage refugees, cooped up in refugee settlements, are likely to become restless and violent. The resulting "unpredictable climate[] of fear" is the sort of "repetitive 'process' trauma" that can produce negative developmental effects.[73]

Many refugee children are on their own, without parents or other caregivers. Separation from parents is most likely to lead to depression, and enforced separation from parents increases the likelihood of poor health in old age by a factor of 3.6.[74]

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[70] Werner, *supra* n.18, at 554.

[71] *Id.* at 554-55.

[72] *See, e.g.*, A. Sheehy, "Sexual Assault in the Refugee Camp," *Harvard Pol. Rev.* (Oct. 17, 2016), at http://harvardpolitics.com/hprgument-posts/sexual-assault-in-refugee-camps/; T. Gaynor, U.N. High Comm'r for Refugees, *UNHCR concerned at reports of sexual violence against refugee women and children* (Oct. 23, 2015), at http://www.unhcr.org/ news/latest/2015/10/562a3bb16/unhcr-concerned-reports-sexual-violence-against-refugee-women-children.html.

[73] Williams, *supra* n.38, at 274.

Beyond violent trauma, life in a refugee camp is unstable; refugees often struggle to find food, water, and shelter. Children are also adversely affected by the "collapse of social networks and daily routines."[75] Consider, again, the situation of the sister of plaintiff Jane Doe #2. Her children have experienced only displacement and danger for their whole lives, which they currently live out in a small motel suite of windowless, filthy rooms that are regularly exposed to artillery fire. For over a year, her husband departs every day simply searching for food and water. Now they are trapped in a cramped and unsanitary place—unable to leave because it is unsafe to do so. The children are skeptical that the sun actually comes up in the sky where they are, because they haven't witnessed it for years. The building is genuinely uninhabitable, and the family is constantly ill from exposure to human waste and to inhaled toxins. School is not available for either of the children, though as they play in their confined space they pretend to be at school. JA 450-452.

Circumstances like these constitute a psychological trauma that can "wield a severe blow to a child's sense of security and self, including central organising fantasies and meaning structures."[76] Children are developing, both neurologically and psychologically, the ability to understand who they are and how they relate to the world. The uncertainties of life of a refugee can "effect great damage . . . because of the lingering need to re-evaluate one's view of oneself and the world."[77]

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[74] Werner, *supra* n.18, at 554-55.

[75] Williams, *supra* n.38, at 264.

[76] *Id.*

Amicus stresses that there is a dose-response relationship between the experience of trauma and stress and the occurrence of long-term health problems. This effect causes multiple forms and instances of abuse to amplify the negative impact that each has on a child's mental and physical health.[78] Even if Executive Order 13,780 were only a temporary suspension of immigration by certain Muslims, rather than a prelude to a long-term ban, that suspension would extend the exposure to trauma of many refugee children.

The health and development of these children, and thousands more just like them, will be severely disrupted by these traumas. We know that substantial healing is possible—but not so long as these children and their families are stranded in the midst of chronic, life-threatening war.

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[77] *Id.* at 268.

[78] Anda, *supra* n.16, at 176. As discussed above, scientists use the term "dose-response relationship" to mean that the impact of a deleterious substance or experience grows as the extent of exposure increases. *See, e.g., AAP Statement on Trauma*, at 3 (stating that the effects of trauma and stress "multiply when the trauma continues, whether by repetition of similar stresses . . . or accumulation of disparate ones . . . The effect may be particularly severe when trauma involves the child's primary caregiving system.").

The United States alone cannot resolve the child refugee problem. But our nation can do its part, together with the international community, to stem the tide of despair and destruction that threatens to effectively wipe out an entire generation of leaders and citizens of these six nations.

Today, Jane Doe #2's refugee nephew sits in a windowless room, listening to shells as they whistle by and explode in the border town that confines him, in the next block, in the building across the way. Tomorrow, that boy could find refuge in the United States instead—safe and free, and in sure hope of a future. The refugee children we can accept today may one day return to lead their countries out of chaos. That is the heritage and the pride of our nation.

CONCLUSION

For the reasons set forth above and those discussed in the respective briefs of the respondents, the Court should affirm the decisions of the courts of appeal.

Respectfully submitted.

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In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF FOR AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American-Arab Anti-Discrimination Committee (ADC) is a nonprofit, grassroots civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non-partisan. With members from all fifty states and chapters nationwide, ADC is the largest Arab-American grassroots organization in the United States. ADC protects the Arab-American and immigrant communities against discrimination, racism, and stereotyping, and it vigorously advocates for immigrant rights and civil rights.

ADC worked with thousands of individuals from around the world who have been directly and adversely affected by Section 2(c) of the Executive Order at issue in this case, which bans people from six majority-Muslim countries from entering the United States, five of which are nations with ethnic Arab majorities.[2]

For example, ADC has worked with K.S., who is a legal permanent resident in the United States. His wife, an Iranian citizen, is not. K.S.'s wife has applied for a green card, but processing can take up to five years. Green card holders can see their spouses and their children only in six-month increments under B-2 tourist visas. K.S.'s wife came to see him in November 2016, but her six-month allotment and visa expired in March 2017. K.S.'s wife requested and was denied a visa extension. If the injunction preventing the Executive Order's enforcement is lifted, K.S.'s wife's application for a new visa will probably be denied because she is Iranian. K.S.'s life is in limbo; he does not know when he will see his wife again.

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[1] ADC certifies that all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

[2] Libya, Sudan, Somalia, Syria, and Yemen.

ADC also worked with E.M., a U.S. citizen living in the District of Columbia. Her fiancé is Syrian. His K-1 visa interview scheduled for February 2017 at the U.S. consulate in Turkey was cancelled. If Section 2(c) of the Executive Order is enforced, E.M.'s fiancé will not be able to enter the United States, and she will not be able to marry the man that she loves.

Another ADC client, A.S., is a Syrian national whose interview for a green card at the consulate in Turkey was cancelled. The interview is a necessary step in the process to obtain a valid visa. Thus, with enforcement of the Executive Order, A.S. will be denied a visa.

ADC has worked diligently to assist K.S., E.M., and A.S. while Section 2(c) has been fully and partially stayed, but their hardships remain ongoing. This is a small sample of the hardships ADC has had to help Arab-Americans (and their friends and family in Arab-majority nations) navigate as a result of the Executive Order.

Moreover, the Executive Order was intended to have and has had the effect of branding Islam as a dangerous religion and making clear that Muslims are not fully welcome in the United States. Plainly, this adversely affects Muslim American Arabs. But it also adversely affects American Arabs who are *not* Muslim. Americans frequently conflate Arabic ethnicity with belief in Islam, despite the fact that most Muslims are not Arab. *See generally* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1584 (2002); *see also President Trump's Speech to the Arab Islamic American Summit* (May 21, 2017), (describing as a single category "Arab, Muslim and Middle Eastern nations").[3] Accordingly, Arab-Americans regardless of faith suffer from the effects of a government-sanctioned message that Muslims are un-American.

ADC therefore submits this brief to urge the Court to invalidate the Executive Order.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the key issues in this case is whether courts may inquire into whether the stated justification for the Executive Order is pretextual. Any reasonable person making that inquiry will conclude that Section 2(c) was the product of religious animus—specifically, hostility to Islam—and that the stated national security basis for the Executive Order is pretextual.

Candidate Trump promised "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* J.A. 179 (quoting President Trump's campaign "Statement on Preventing Muslim Immigration"). Candidate Trump explained his view in a nationally televised interview: "I think Islam hates us [and] * * * we can't allow people coming into the country who have this hatred." J.A. 180. He reiterated the same position in another interview: "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 180-81.

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[3] *Available at* https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit.

The government suggests that President Trump had an epiphany after his inauguration that removed any trace of his prior anti-Muslim animus. But in fact he signed the first Executive Order, J.A. 1404-15 ("January Executive Order"), that, among other things, barred entry by people from seven majority-Muslim countries after the inauguration, without consulting any government national security experts. *See* J.A. 1167. With a wink and a nod, he made clear that the Executive Order instituted his promise of a Muslim ban even though the ban applied to immigration from majority-Muslim *countries*. J.A. 182 ("This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."). Any ambiguity on that score was clarified by the Order's provisions ensuring that non-Muslims from the affected countries would be given preferential treatment. *See* January Executive Order § 5. After the January Executive Order was invalidated, President Trump made clear that the Executive Order he enacted in response, J.A. 1416-40 ("March Executive Order"), was a revised Muslim ban. *See* J.A. 183 (President Trump reiterated his intent to "keep my campaign promises" despite the invalidation of the January Executive Order, and described the March Executive Order as "a watered down version of the first order.").

The government's continued insistence on the need to bar entry by nationals of six majority-Muslim countries by implementing Section 2(c), even after having already had far more time than the face of the Executive Order contends would be necessary to conduct the review of vetting procedures that allegedly necessitated the ban, thoroughly undermines the contention that the ban was motivated by national security concerns. An administration that was serious about national security concerns would have completed its review of the vetting procedures months ago.

The government urges the Court to look away, contending that, under the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(f), the President's exercise of his authority to suspend the entry of aliens is effectively unreviewable. Pet. Br. 38-39. As an initial matter, that would mean a president need not disguise his motives, but could, for example, explicitly ban all Muslims from entering the United States on the ground that he believes that Islam "hates us" and Muslims are therefore presumptively dangerous. But as the Court explained in *Sherbert* v. *Verner*, under the Free Exercise Clause the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." 374 U.S. 398, 402 (1963). Moreover, as Respondents ably explain, the Establishment Clause imposes a similar limit. Hawaii Br. 53. It may be unlikely that another Chief Executive would purposefully attack a particular religious group, but it is unsettling that the government's position would permit executive orders explicitly aimed at members of a particular faith.

In any event, Section 1182(f) does not provide discretion to discriminate on the basis of religion. Section 1182(f) allows the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" whenever he "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The government erroneously reads "finds" to mean nothing more than that the President must *say* that the entry of certain aliens "would be detrimental to the interests of the United States." *Id.* But "finds" is more naturally understood to mean that the President must provide a genuine explanation of *why* such entry would be "detrimental." *Id.*

Other language in Section 1182(f) confirms this reading. In addition to the "finding" requirement, Section 1182(f) separately contains a "proclamation" requirement ("[H]e may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants * * * *."). Pet. Br. 39. The Executive Order may satisfy the proclamation requirement, but it does not satisfy the finding requirement. The government's reading treats the finding and proclamation requirements as if they were the same, impermissibly reading one or the other out of the statute. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The President has explained why he thinks it would be detrimental to allow entry from the six majority-Muslim countries listed in the Executive

Order—but he did so in various public statements outside of the face of the Executive Order and through the order's structure and effect. As explained below, the courts below are likely to conclude the President based Section 2(c) on his view that admission of Muslims harms the United States.

Such a motive renders Section 2(c) unlawful because, in addition to posing constitutional problems, it conflicts with Section 1182(f). Section 1182(f) must be construed in harmony with the Religious Freedom Restoration Act (RFRA). That Act, which applies to laws passed before and after its enactment, codifies the protections of the Free Exercise Clause and creates additional protections for the free exercise of religion. RFRA provides that the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

This case involves a rare but sure-fire indicator of substantial burden: evidence that Section 2(c) was designed to disfavor belief in one particular religion. That the President had this motive is strong evidence that the Order, in fact, disfavors belief in Islam. History shows that laws designed to single out and discriminate against members of a minority religion almost always serve their intended purpose, and then some.

Accordingly, Respondents should be given the opportunity to show that the justifications offered on the face of the Executive Order are mere pretext for religious discrimination—or, more precisely given the procedural posture here, that Respondents are likely to succeed on the merits of their showing that the proffered justifications are pretextual. The Court should direct the lower courts to adapt the well-developed frameworks for unmasking unlawful discrimination concealed behind facially reasonable, pretextual justifications that have been developed in cases involving jury selection, employment discrimination, and the free exercise of religion.

It bears emphasis that permitting such inquiry should not prevent the adoption of executive orders under Section 1182(f) that are really aimed at advancing national security interests, because such interests are indeed compelling. It surely must be the unusual case where an executive order addressing national security interests is the product of religious animus and is not narrowly tailored to advance a compelling government interest.

ARGUMENT

I. SECTION 1182(f) DOES NOT PERMIT THE PRESIDENT TO INTENTIONALLY DISCRIMINATE AGAINST MUSLIMS.

ADC agrees with Respondents and several lower courts that the Constitution precludes enforcement of Section 2(c). However, before turning to the constitutionality of the Executive Order, the Court can engage in a straightforward analysis of whether the Order is a lawful exercise of the President's authority under the INA. It is not.

The government argues that the President can use his Section 1182(f) powers to exclude *any* alien or class of aliens for *any* reason for *any* period of time. *See, e.g.*, Pet. Br. 39. The logical—and alarming—conclusion of that reasoning is that the President might simply assert that he has every right to find that Muslims' entry is detrimental to the interests of the United States simply because they are Muslim. Clear statutory limits on the President's Section 1182(f) authority forestall that troubling conclusion.

According to the plain text of Section 1182(f), the President must have made a finding that the entry of nationals from the six designated countries is detrimental to the United States. The mere assertion or proclamation that the President makes on the face of the Executive Order does not suffice because, as Part II shows, the proclaimed reasons are mere pretext for the real factual finding motivating Section 2(c): that the entry of Muslims harms the United States.

This is not a factual finding that can lawfully serve as the basis for Presidential action under Section 1182(f). Despite the provision's facial breadth, Congress limited the President's authority under Section 1182(f) when it enacted RFRA. RFRA prohibits courts from simply taking at face value a proclamation that entry of a group of individuals would be detrimental to the United States based on a facially religiously neutral finding when there are very good reasons to believe the finding is pretext for purposeful discrimination against Muslims. Put differently, RFRA requires more of the government than does the Establishment Clause or the Free Exercise Clause. Because RFRA makes this an easy case of statutory interpretation, it provides the Court with an alternative, non-constitutional basis for upholding the decisions under review.

A. Section 1182(f). The INA delegates to the President authority to control entry of aliens under certain circumstances:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In this provision, Congress did not give the President unlimited authority to suspend alien entry into the United States. Instead, it created a condition precedent: the President must "find" that those aliens' entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). In other words, the INA requires the President to "find" a particular fact: detriment to the United States. *See* Finding of Fact, Black's Law Dictionary (10th ed. 2014) (noting that "finding of fact" is often shortened to "finding"). In that context, "to find" means "[t]he result of a judicial examination or inquiry" or "[t]hat which is found or discovered." Finding, 1 Compact Edition of the Oxford English Dictionary 226 (1986). The requirements of "examination" or "inquiry" distinguish "finding" from "deeming" or "declaring"

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[4] Because, as the Ninth Circuit explained, Section 1185(a)(1) provides coextensive authority, it is not separately analyzed here. *See* J.A. 1196 n.10.

something to be true. It may sometimes—even ordinarily—be the case that the face of an executive order reflects the required consideration. But here, where the pretext inquiry shows that the President actually relied on his view that Muslims are dangerous because they hate the United States, and not the factual assertions spelled out in the Executive Order on review, additional evidence is required to evaluate the President's compliance with the INA.

Other language in Section 1182(f) confirms that the "finding" prerequisite requires something more than writing down at least one facially lawful reason. Congress separately required the President to make a "proclamation" before suspending alien entries, and conditioned that requirement on satisfaction of the finding requirement. 8 U.S.C. § 1182(f). The Executive Order satisfies the proclamation requirement, but it does not free the President from judicial review of his fact finding. The government's reading ignores Congress's decision to structure this delegation of authority with two distinct requirements—one conditioned on the other—and treats the finding and proclamation requirements as if they were the same, impermissibly reading a requirement out of the statute. *Russello*, 464 U.S. at 23. Thus, the plain text of the INA supports the conclusion that it is necessary and appropriate to look beyond the face of the Executive Order to consider pretext.

B. RFRA. RFRA also limits the President's ability to apply Section 1182(f) in a way that substantially burdens Respondents' exercise of religion. Under RFRA, a federal government action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability" is valid only if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[5] The President's motive in adopting Section 2(c) is highly relevant to—if not determinative of—the issue of whether the Order passes muster under RFRA.

1. ***The interplay between animus and various religious liberty protections.*** In the decisions under review, lower courts examined the religious liberty implications of the Executive Order only under the Establishment Clause. But if Respondents successfully show that the Executive Order was motivated by animus against Muslims, the Order would be subject to strict scrutiny under *both* (1) the Establishment Clause and (2) the statutory and constitutional protections for free exercise, including RFRA. Because both the Establishment Clause and RFRA limit the President's authority under the INA, whether the President adopted the Executive Order in order to have fewer Muslims in the United States—or

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[5] Respondents stated claims based on RFRA's cause of action—independent from the INA claims implicated by the Court's grant of certiorari—before the district courts. *See* J.A. 1045-46; Mem. Supp. Pls.' Mot. for TRO at 40 n. 2, *Hawaii*, No. 17-cv-00050 (Mar. 8, 2017); J.A. 110; First Am. Mot. for a Prelim. Inj. and/or TRO at 27, *Int'l Refugee Assistance Project*, No. 17-CV-00361, (Mar. 11, 2017). No lower court has yet evaluated whether Respondents are likely to succeed on the merits of their RFRA claim. If the Court determines that Respondents are not entitled to preliminary relief for their Establishment Clause or INA causes of action, the Court should evaluate whether RFRA provides an alternative basis for affirming the decisions below, or remand to the district court with instructions to consider the issue.

another reason evincing actual disfavor based on religious belief—is highly relevant to whether the Executive Order exceeds the President's authority under the INA.

Government action that privileges belief in one religion over another undoubtedly implicates the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (courts have repeatedly held that government activity designed to "discriminate[] against some or all religious beliefs" leads to an impermissible entanglement between government and religion, thereby violating the Establishment Clause). Accordingly, ADC echoes Respondents' arguments that the Establishment Clause prevents the President from exercising Section 1182(f) in a manner designed to favor certain religions over others.

But favoring belief in one religion over another also implicates the Free Exercise Clause. Religious belief is a form of religious exercise and an extraordinarily protected form at that. As the Court explained in *Sherbert*, "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." 374 U.S. at 402. Government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Id.*; *see also* 42 U.S.C. § 2000bb (incorporating the *Sherbert* standard into RFRA); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (explaining that the term "exercise of religion" within the meaning of RFRA involves religious belief that does not result in action, in addition to religiously motivated speech and conduct).

This is because government action undertaken for religiously discriminatory reasons, almost without fail, will penalize belief in that religion. *See Lukumi*, 508 U.S. at 564 (striking down a "rare example of a law actually aimed at suppressing religious exercise" on Free Exercise Clause grounds); Brief of Scholars of Mormon History & Law as *Amici Curiae* in Supp. Of Neither Party (filed Aug. 17, 2017). Accordingly, *both* free exercise and anti-establishment jurisprudence "prevent the government from singling out specific religious sects for special benefits or burdens." Ronald D. Rotunda & John E. Nowak, 6 *Treatise on Constitutional Law-Substance & Procedure* § 21.1(a) (5th ed. 2017).

Sherbert and its Free Exercise Clause progeny require courts to apply strict scrutiny to government action inspired by animus toward belief in a particular religion. Such government action is also subject to strict scrutiny under RFRA. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2770 (using Free Exercise jurisprudence to determine whether government action substantially burdens the exercise of religion within the meaning of RFRA). This is a product of history and of statute: In *Employment Division* v. *Smith*, 494 U.S. 872, 883-90 (1990), this Court substantially limited the application of *Sherbert*, holding that the Free Exercise Clause did not subject facially neutral laws of general applicability to strict scrutiny. Congress enacted RFRA in direct response to *Smith*, and applied statutory protections that mirrored the protections for free exercise set out in *Sherbert* and its progeny. 42 U.S.C. § 2000bb.[6]

To further advance the free exercise of religion, Congress applied RFRA to all previously-enacted federal statutes that could substantially burden religion without passing strict scrutiny. 42 U.S.C. § 2000bb-3 (RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993 [the date RFRA went into effect]."). In other words, to the extent that any statute (before RFRA's passage) could be construed to impose a substantial burden on the exercise of religion in a manner that did not pass strict scrutiny, that construction must be altered in light of RFRA.

Importantly, RFRA does not contain an exception for the immigration or national security arenas; it "applies to *all* Federal law." *Id.* (emphasis added). Consequently, "[s]eemingly reasonable regulations based upon speculation [and] exaggerated fears of thoughtless policies cannot stand," even in contexts where the political branches are due considerable deference. H.R. Rep. No. 103-88, at 8 (1993) (explaining that RFRA applies even to the military context, where executive authority is at its height); *accord* S. Rep. No. 103-111, at 8, 12 (1993).

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[6] Section 2000bb states: "The Congress finds that * * * in *Employment Division* v. *Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.] * * * The purposes of [RFRA] are--(1) to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, and *Wisconsin* v. *Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." (internal citations omitted).

2. *The substantial burden here.* *Lukumi* and *Sherbert* show that government action based on animus toward believers in any particular faith so strongly suggests the imposition of a substantial burden that, if the Executive Order was adopted to discriminate against Muslims, Respondents need to show little more (if anything) for strict scrutiny to apply under RFRA. Respondents are likely to make such a showing. As the Ninth Circuit Respondents explained in their amended complaint:

> Religious communities in the United States cannot welcome visitors, including religious workers, from designated countries. And some non-citizens currently in the United States may be prevented from travelling abroad on religious trips, including pilgrimages or trips to attend religious ceremonies overseas, if they do not have the requisite travel documents or multiple-entry visas.

J.A. 1045. As the Fourth Circuit Respondents explained, the Executive Order has the effect of "denying or impeding Muslim Plaintiffs, on account of their religion, from accessing benefits relating to their own or their family members' immigration status." J.A. 110.

The government is also unlikely to show that the Executive Order is narrowly tailored to further a compelling government interest. *See* 42 U.S.C. § 2000bb-1. The government has no compelling interest in discriminating against belief in a minority religion. Although the government does have a compelling interest in national security, the Executive Order is not narrowly tailored to meet that interest; instead, the Executive Order is both over- and under-inclusive with respect to national security. *See infra* Part II(B)(3). Therefore, Respondents are likely to show that the Executive Order violates RFRA—and consequently that the INA cannot be interpreted to provide the President with the authority to adopt the Executive Order—if it was motivated by religious animus.

C. Kleindienst v. Mandel. The government contends that *Kleindienst* v. *Mandel*, 408 U.S. 753, 769–70 (1972), precludes the Court from "looking behind" the rationale put forth in the text of the Executive Order. Pet. Br. 21. But even assuming arguendo that *Mandel* precludes the Court from examining the President's motives as part of its *constitutional* analysis,[7] *Mandel* plainly does not apply to the Court's *statutory* analysis. *Mandel* did not involve an application of Section 1182(f) and was decided before RFRA was enacted. As shown above, Section 1182(f) is properly construed to permit courts to fully examine the "finding" upon which the President based Section 2(c), and RFRA requires courts to examine whether the President adopted

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[7] It does not. As Respondents explain, *Mandel* and other precedents requiring deference to the President's national security judgment do not bar an inquiry beyond the face of his justifications where, as in this case, there has been an "affirmative showing of bad faith" or an unconstitutional purpose. Hawaii Br. 49-51.

Section 2(c) with an intent to discriminate against Muslims.

II. THE PURPORTED JUSTIFICATIONS FOR THE EXECUTIVE ORDER ARE PRETEXTUAL.

As the Court has long recognized, discriminatory actions are often sheltered behind facially legal reasoning. Accordingly, this Court has developed robust tools for determining whether a party's stated reason for acting is actually a pretext for an impermissible discriminatory motive, including in cases involving the free exercise of religion, jury selection, and employment. Here, where the President's extraordinary public statements reveal the Executive Order's true motivations and where RFRA narrows the deference ordinarily owed to the President in the immigration and national security arenas, those tools can aid the Court or the lower courts in determining that the Executive Order results from animus toward Muslims.

A. Sources of Guidance for Detecting Pretext. In a variety of contexts where motivations matter, courts routinely decide whether lawful, non-discriminatory reasons are authentic or merely pretext. Three areas of law—the jury selection, employment discrimination, and free exercise of religion contexts—provide particularly well-developed models for identifying pretext.

1. ***Peremptory Strikes.*** When criminal defendants allege racial discrimination in prosecutors' use of peremptory strikes, courts evaluate prosecutors' proffered reasons for pretext as part of the *Batson* v. *Kentucky* three-step framework. 476

U.S. 79, 96 (1986). *First,* the defendant produces evidence that gives rise to an inference of discrimination. *Id.* at 97. *Second,* once the *prima facie* case is established, the government must come forward with a neutral non-discriminatory explanation for the strike. *Id.* at 97-98. *Third,* the court determines whether, in light of the prosecution's proffered reason, the defendant has nevertheless established purposeful discrimination. *Id.* at 98.

Batson's third step often turns on a pretext analysis. *See, e.g.*, *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) (At *Batson* step three, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.") (quotations omitted).

2. *Employment Discrimination.* Allegations brought under Title VII of the Civil Rights Act and other employment discrimination statutes often include a pretext inquiry. For example, "single-motive" employment discrimination cases—those where the employee alleges that a single, prohibited motive caused the employer's adverse employment action—require the plaintiff to prove pretext in many cases. Applying the *McDonnell Douglas* framework, courts first analyze whether the plaintiff has pled a few basic prerequisites of discrimination. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).[8] If the plaintiff carries that burden, the burden of production then shifts to the defendant, who must provide evidence of a nondiscriminatory reason for the challenged action. If the defendant does so, then the plaintiff bears the burden of persuading the factfinder that the defendant's stated reason for the action is a pretext for discrimination. *See id.* at 802-04.[9] Because making out a *prima facie* case and producing a nondiscriminatory reason are both relatively light burdens, *McDonnell Douglas* cases often focus on a pretext inquiry. *See, e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 187-88 (1989), *abrogated on other statutory grounds* ("Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons.").

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[8] The elements of the *prima facie* case vary with the circumstances. *See id.* at 802 n.13 (noting that the *prima facie* case recited therein "is not necessarily applicable in every respect to differing factual situations.").

3. *The Free Exercise Clause.* The Court has also evaluated pretext in the context of a Free Exercise Clause challenge to government action allegedly motivated by religious animus. In *Lukumi*, the Court held that "[f]acial neutrality" of government action "is not determinative" of whether it is designed to limit the free exercise of religion. 508 U.S. at 534. After noting that the text, history, and application of the challenged city ordinance suggested potential discrimination on the basis of religious belief, the Court engaged in an independent analysis of whether the ordinance was adopted for a religiously neutral purpose. *Id.*

B. Application of Factors Showing Pretext. In ferreting out discrimination in these areas, a few categories of evidence are especially probative of pretext. Courts have been particularly alert to: (1) shifting rationales for a challenged action; (2) unexplained differences between the treatment of members of different groups; (3) a lack of fit between the stated reasons for an action and that action's results; (4) an atmosphere of discrimination, based on past statements or actions; and (5) the plausibility of an explanation. Looking to those forms of evidence in this case, the inevitable conclusion is that the rationale stated for Section 2(c) on the face of the Executive Order was not the President's true motivation.[10]

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[9] Mixed motive cases also "employ a burden-shifting framework...with different burdens that shift." *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579, 1582 (1996).

1. ***Shifting Rationales***. When a party provides shifting rationales for the same action, those rationales are likely to be pretextual. *See, e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1751 (2016) ("As an initial matter, the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual."); *Miller-El* v. *Dretke*, 545 U.S. 231, 245-46 (2005) (refusing to credit a prosecutor's explanation because when "defense counsel called him on his misstatement [as to one reason], he neither defended what he said nor withdrew the strike. Instead, he suddenly came up with * * * another reason for the strike."). Government officials' change in explanation for their

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[10] As in many pretext cases, the early stages of an inquiry analogous to *Batson*, *McDonnell Douglas*, or *Lukumi* are easily satisfied here: Respondents have shown that Section 2(c) of the Executive Order, which targets Muslim-majority countries, disproportionately impacts Muslims, and the government has pointed to the facially neutral reasoning in the Executive Order.

actions—especially after the initial proffered explanation has been declared invalid—"reeks of afterthought," strongly suggesting that their stated reasons are not the true ones. *Id.* at 246.

The rapidly shifting rationales provided for the President's executive action fit this pattern. In January 2017, the President halted the entry of nationals from seven designated countries. When courts preliminarily ruled that the President enacted the Executive Order for impermissible reasons—*see Washington* v. *Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 02, 2017), *stay denied*, 847 F.3d 1151, 1156 (9th Cir. 2017)—the President "neither defended what he said nor withdrew" the order; instead, he "suddenly came up with * * * another reason for" it. *Dretke*, 545 U.S. at 245-46.

Though they achieve very similar ends, the January and March Executive Orders offer entirely different rationales for their entry ban provisions. *See* January Executive Order §§ 1, 2; March Executive Order §§ 1(a), (f). The January Executive Order's statements of purpose and policy focused on the risks posed by *individuals* from the countries subject to the ban. It mentioned conditions in those countries only to emphasize the supposed risks their nationals posed. *See* January Executive Order § 1 ("Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States."). The purpose of the January action was to "ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles" and to avoid admitting "those who engage in acts of bigotry or hatred (including 'honor' killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation." *Id.*

None of that reasoning appears in the March Executive Order. Indeed, that document hardly discusses *individuals* at all. Instead, the March Executive Order focuses entirely on the selected countries' *governments*:

> Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

March Executive Order § 1(d). This shift "reeks of afterthought," *Dretke*, 545 U.S. at 246, and "suggest[s] that those reasons may be pretextual," *Chatman*, 136 S. Ct. at 1751.

2. ***Comparisons***. Courts also use comparisons between individuals or groups subject to a challenged action and those not affected in order to assess whether a proffered non-discriminatory motive is pretextual. In the Free Exercise context, a strong inference of discriminatory motive arises when the burden of governmental action "in practical terms, falls on adherents [of a particular religion] but almost no others" or the challenged government action exempts non-religiously motivated conduct. *Lukumi*, 508 U.S. at 536-537. In employment discrimination cases, such comparisons are "especially relevant" to a finding of pretext. *See McDonnell Douglas*, 411 U.S. at 804. In the *Batson* context, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Dretke*, 545 U.S. at 241; *see also Chatman*, 136 S. Ct. at 1750 (finding certain explanations "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror").

Comparison evidence tends to demonstrate pretext for obvious reasons: if a party claims to have a particular rationale for its actions, but then applies that rationale in a disparate manner based on race, gender, or religion, that strongly suggests that race, gender, or religion is the true basis for the party's actions. When "no explanation" is offered for that disparate application, the inference of discrimination becomes stronger still. *Cockrell*, 537 U.S. at 345.

The stated rationale for Section 2(c) of the current Executive Order—alleviating the risk that a foreign government's vetting procedures will fail to identify a dangerous individual—has quite clearly been applied disparately, in a way that is nearly impossible to explain without reference to religion. The Executive Order provides three rationales for singling out these six particular countries: each is a "state sponsor of terrorism" that has been "significantly compromised by terrorist organizations, or contains active conflict zones." J.A. 1420. According to the government, those characteristics harm information sharing with the United States in ways that can be exploited by terrorists, and "once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents." March Executive Order § 1(d).

Whether any of those factors actually increases the risk of terrorism by a foreign national is far from certain. But even if they did, Iran, Libya, Sudan, Somalia, Syria, and Yemen are not uniquely imbued with these characteristics. Then-Secretary of Homeland Security John Kelly said as much at the time of the March Executive Order's signing, stating in an interview "that there are probably '13 or 14 countries' that have 'questionable vetting procedures,' not all of which are Muslim countries or in the Middle East." J.A. 184. Secretary Kelly did not name which countries he had in mind, but among them might have been Pakistan, Cuba, Ethiopia, Iraq, and Uzbekistan—all of which were among the top countries of origin for foreign-born individuals who planned or attempted terrorist attacks, not all of which are majority-Muslim[11] and none of which are included in Section 2(c).[12] *See* J.A. 1052.

The selected countries are, however, united by shared religious demographics. The six countries singled out in the Executive Order are overwhelmingly Muslim. Iran's population is 99.5 percent Muslim, Libya's is 96.6 percent Muslim, Sudan's is 90.7 percent Muslim, Somalia's is 99.8 percent Muslim, Syria's is 92.8 percent Muslim, and Yemen's is 99.1 percent Muslim. *See* J.A. 173 n.2. The ban does not include *every* majority-Muslim country, but it includes *only* majority-Muslim countries, without explaining its exclusion of similarly situated non-Muslim countries. The government's "proffered reason for" banning entry of nationals from the designated countries "applies just as well to * * * otherwise-similar" non-Muslim countries. *Dretke*, 545 U.S. at 241. "[T]hat is evidence tending to prove purposeful discrimination." *Id.*

3. *Lack of Fit Between Reasons and Results*. The inference of discriminatory pretext becomes stronger still when a party's stated goal could be accomplished just as effectively without a disparate impact. *See Albemarle Paper Co.* v. *Moody*, 422 U.S.

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[11] Cuba and Ethiopia both have large majorities of Christians. *See* Pew Research Center, *The Global Religious Landscape: A Report on the Size and Distribution of the World's Major Religious Groups as of 2010*, 46 (2012).

[12] The previous Administration's decision to exclude these countries from the visa waiver program was motivated by different concerns—and created different consequences—from those animating Section 2(c). *See* IRAP Br. 52-53.

405, 425 (1975) (explaining that evidence that an employment policy's goal could be accomplished without an "undesirable racial effect" demonstrates pretext). Likewise, in the jury selection context, this Court has often examined the "fit" between prosecutors' stated reason for striking jurors and the actual impact on the jury pool. *See, e.g.*, *Dretke*, 545 U.S. at 260. The utility of this proof is similar to that of comparison evidence: if a more efficient method exists to accomplish a stated goal, the natural question to ask is why someone would choose the less efficient method. When ignoring efficiency creates clear disparate impact on members of a particular class, that question answers itself: the stated goal is a pretext for discrimination.

A blanket entry ban for all nationals of six countries with overwhelmingly Muslim populations is not an effective way to combat terrorism. Section 2(c) is addressed neither to the primary sources of terrorist threats to the United States nor to any identifiable problem with the government's existing vetting procedures. A Department of Homeland Security draft report, prepared about two weeks before the March Executive Order took effect, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." J.A. 1052.

Moreover, the Department found that nationals of the countries listed in the January Executive Order—which, with the exception of Iraq, are the same in the March Executive Order—were "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism." J.A. 1173. The Department examined eighty-two instances where individuals were inspired by foreign terrorist organizations to plan or attempt an attack in the

United States. J.A. 1173. Of those eighty-two individuals, only six were nationals of the countries designated in Section 2(c) of the current Executive Order. J.A. 1173-1174. More than half were United States citizens. J.A. 1173. Among the foreign-nationals, the most common countries of origin were Pakistan, Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan, only one of which is designated in the current Executive Order. J.A. 1173. By the Executive Order's own standard—preventing "the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism," March Executive Order § 1(i)—its choice of designated countries is a poor fit.

The Executive Order's efforts to explain why it singled out these particular countries is unconvincing. None of the governmental failings identified in the Executive Order distinguishes the six designated countries from many others, including the "13 or 14" countries with questionable vetting procedures identified by Secretary Kelly. J.A. 184. And neither Secretary Kelly nor the Executive Order explained why a flat ban on entry is needed for nationals from six of those 13 or 14 countries, but no measures at all need be taken for the remaining seven or eight.

Moreover, the suspension of entry by *all* nationals of the six enumerated countries who are not lawful permanent residents of the United States for a period of ninety days bears no relationship to the Order's stated goals. A temporary pause on entry or change in vetting procedures would do little to nothing to reduce the terror threat, because even the vanishingly few foreign-born individuals who do end up committing acts of terror almost never have an inclination to do so at the time they enter the United States. Rather, as the Department of Homeland Security explained, most foreign-born, U.S.-based violent extremists likely developed an intent to engage in terrorist acts "several years *after* their entry into the United States." J.A. 1059.

The point is not that Section 2(c) constitutes bad policy or relies on questionable national security judgments. Rather, this evidence makes it clear that Section 2(c)'s means have little to do with its stated ends. There is no "fit of fact and explanation." *Dretke*, 545 U.S. at 260. And when a party's stated explanation deviates so sharply from the clear facts, this Court often draws the obvious inference that the stated explanation is not the true one.

That inference is even stronger when, as here, a different, discriminatory explanation leads to a "much tighter fit of fact and explanation." *Id.* Although Section 2(c) does a poor job of fulfilling its stated goals, it makes significant strides toward fulfilling a campaign promise to curtail the entry of Muslims into the United States. *See* J.A. 179 (quoting President Trump's campaign "Statement on Preventing Muslim Immigration").

4. *Atmosphere of Discrimination*. An atmosphere of discrimination can also provide evidence of pretext. *See, e.g.*, *Patterson*, 491 U.S. at 188 ("[P]etitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidence of respondent's past treatment of petitioner, including the instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position."); *Lukumi*, 508 U.S. at 539 (looking to the timing and circumstances surrounding an ordinance's passage when evaluating its constitutionality). In the *Batson* context, the Court has held that "historical evidence of racial discrimination" and a "culture * * * [that] in the past was suffused with bias" tend "to erode the credibility of the prosecution's assertion that race was not a motivating factor," especially when the prosecution uses the same tactics that had previously been shown to be racially motivated. *Cockrell*, 537 U.S. at 346-47.

Repeated statements of the President and his advisors evince just the sort of "culture * * * suffused with bias" that justifies a hard look at an alleged discriminator's stated reasons for action. *Id.* at 347. Most prominently, for a long period of time during his presidential campaign, President Trump called—on his website and in oral statements—explicitly for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* J.A. 179. This statement provides strong evidence that religion "was on [President Trump's] mind when he considered" Section 2(c). *Dretke*, 545 U.S. at 266.

Other statements made by President Trump and his close associates reinforce that conclusion. When he first called for a ban on Muslim entry to the United States, President Trump said it was "a very important policy statement on the extraordinary influx of hatred & danger coming into our country." J.A. 180. Discussing the ban at a campaign rally that night, he reiterated that Muslims were his focus: "I have friends that are Muslims. They are great people—but they know we have a problem." J.A. 180. Three months later, as he moved closer to securing his party's nomination for the presidency, President Trump went further still, saying in a nationally televised interview, "I think Islam hates us [and] * * * we can't allow people coming into the country who have this hatred." J.A. 180. He reiterated the same position in another interview later that month: "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 180-81.

As the presidential campaign went on, President Trump altered his language slightly. In July of 2016, reporters discovered that Trump's recently-announced running mate, Indiana Governor Mike Pence, had previously issued a statement declaring: "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional." J.A. 181. Asked about this statement, Trump responded: "So you call it territories. OK? We're gonna do territories." J.A. 181. President Trump later explained, "People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." J.A. 181.

After Election Day, President-Elect Trump did not back down from these positions. When asked whether some recent violence in Europe attributed to immigrants had affected his plans to ban Muslims from entering the United States, President-Elect Trump replied, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful." J.A. 182. Nor did he do so after his inauguration. The January Executive Order applied to "territories," as President Trump had promised, but it echoed language about presumed hate and anti-American attitudes among Muslims that he had used in his original calls for a ban:

> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

January Executive Order § 1. In signing that Executive Order, President Trump said, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 182. The clear implication, from the Executive Order's text and that statement, is that the Order furthered President Trump's longstanding promise to implement a "shutdown of Muslims entering the United States." J.A. 179.

The March Executive Order was signed against this backdrop, less than four weeks after the Ninth Circuit declined to stay a district court's injunction against the January Executive Order. *See Washington* v. *Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (denying stay on February 9, 2017). During that time, President Trump never disavowed his earlier anti-Muslim sentiments. To the contrary, President Trump reiterated his intent to "keep my campaign promises" despite the Ninth Circuit's decision. J.A. 183. Senior Policy Advisor to the President Stephen Miller, in discussing plans for a new Executive Order, explained that it would produce the "same basic policy outcome for the country," with "mostly minor technical differences." J.A. 183. Then-White House Press Secretary Sean Spicer concurred, saying, "The principles of the Executive Order remain the same." J.A. 183. And after he had signed the March Executive Order, President Trump described it in a major speech as "a watered down version of the first order." J.A. 183.

Taken together, statements made by President Trump and his staff before and after inauguration gave rise to the sort of atmosphere of discrimination that this Court has long held "tends to erode the credibility of" assertions that impermissible discrimination "was not a motivating factor." *Cockrell*, 537 U.S. at 346. Given President Trump's numerous, unequivocal statements that he was concerned with the threat of "hatred and danger" from Muslims, the stated reason for Section 2(c) can only be taken as a pretext for discrimination.

5. ***Implausibility.*** Finally, courts apply the common-sense rule of disregarding plainly "implausible or fantastic justifications" as "pretexts for purposeful discrimination." *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995). In *Chatman*, a prosecutor claimed to have struck a juror because the juror's son committed "basically the same thing that this defendant is charged with"—when the juror's son had stolen hubcaps but the defendant was "charged with capital murder of a 79–year–old widow after a brutal sexual assault." 136 S. Ct. at 1752. This Court's

response was clear: "Nonsense. * * * The 'implausible' and 'fantastic' assertion that the two had been charged with 'basically the same thing' supports our conclusion that the focus on Hood's son can only be regarded as pretextual." *Id.* The Court has taken the same approach to employer explanations that are simply "unworthy of credence," finding them "quite persuasive" in proving intentional discrimination. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

There are several factors that make the stated explanation for Section 2(c) frankly implausible. One is timing. President Trump signed the January Executive Order, with similar restrictions on entry, one week after taking office, and without engaging in any interagency review. J.A. 120. Indeed, the district court for the District of Hawaii found "there was *no consultation* with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security" before issuing the Executive Order. J.A. 120 (emphasis added). But the Executive Order purports to be responding to deficiencies in those departments' screening procedures. *See* January Executive Order § 1; March Executive Order § 1(f). Foundational to the Executive Order's reasoning, then, is that within a week of taking office, and without consulting any of the relevant agencies, President Trump was able to identify potential flaws in the government's vetting procedures and identify the countries as to which those flaws were of the greatest concern. To be sure, the Executive Order now at issue took effect somewhat later, on March 6, 2017—some six weeks after President Trump took office. But the passage of that extra time does little to make the timeline more plausible, because the March Executive Order identified exactly the same countries as the first one, minus Iraq. Of course, the March Order also asserted somewhat different rationales for banning the entry of those six countries' nationals; but as discussed above, that sudden change in justification makes the government's assertions less credible, not more.

The passage of time and status of the administration's review of the vetting process provide another basis for implausibility. The January and March Executive Orders were, purportedly, intended to temporarily halt entry to the United States from places of special danger while the Departments of State and Homeland Security reviewed their vetting procedures over a period of 90 days. Since the January and March Executive Order were issued, 234 and 196 days have passed, respectively, giving the government (on its own schedule) sufficient time to conduct such a review. Indeed, the State Department apparently did undertake a review of its procedures, even while Section 2(c) remained blocked. *See* Arshad Mohammed, *U.S. Demands Nations Provide More Traveler Data or Face Sanctions,* Reuters, July 13, 2017 (describing a diplomatic cable from the Secretary of State initiating a review of State Department vetting procedures).[13]

But the government nonetheless continues tc assert that a total ban on entry is necessary for nationals of the six designated countries. Indeed, the President specifically amended the Executive Order in June to make it clear that Section 2(c) would enter into force whenever the injunction against it was lifted, irrespective the passage of time. *See* J.A. 1441 ("Memorandum of June 14, 2017: Effective Date in Executive Order 13780"); Pet. Br. 37. The ban will remain in place until 90 days after a final ruling, whenever that may be and no matter how thoroughly the government has been able to review vetting procedures in the interim. That the government continues to press for the need to enforce Section 2(c) now—weeks after its supposed purpose has been served, and 144 days after it would have expired under the January Executive Order—renders the justification for it implausible.

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[13] *Available at* http://www.reuters.com/article/usa-immigration-travelban/u-s-demands-nations-provide-more-traveler-data-or-face-sanctions-idUSL1N1K41HE.

CONCLUSION

The Court should uphold the judgments of the Fourth and Ninth Circuits.

Respectfully submitted,

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PRESIDENT OF THE UNITED STATES *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

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BRIEF OF THE ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, *Amici Curiae* Anti-Defamation League ("ADL"), Jewish Council for Public Affairs ("JCPA"), Union for Reform Judaism ("URJ"), Central Conference of American Rabbis ("CCAR"), and Women of Reform Judaism ("WRJ") respectfully submit this brief in support of Respondents.

Founded in 1913, ADL is a civil rights and human relations organization that works against intolerance and hatred, seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all people. Through its 26 regional offices throughout the United States, ADL provides materials, programs and services to combat anti-Semitism and all forms of bigotry. Because of its history fighting discrimination, including prejudice toward immigrants and religious minorities, ADL can provide unique and important insights for the Court in addressing the Executive Order and in considering the historical context of the Executive Order's provisions limiting or barring entry of refugees into the United States.

JCPA is the coordinating body of 16 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society. JCPA recognizes that the United States was founded by individuals who came here in search of religious and political freedom and economic opportunity, and that our country is based upon the ethical imperative to "welcome the stranger." JCPA's policies make every effort to institute uniform, compassionate and humane protocols and criteria to process refugee and asylum claims. JCPA works to ensure that those fleeing persecution are protected, and that the United States is accessible and welcoming toward those who wish to come here to work and live. Since 1990, JCPA has supported an open admissions policy that maintains the pluralistic character of American society and does not prefer one national group at the expense of another. JCPA opposes the use of rigid caps on entry to the United States. Because of its work in this field, JCPA can offer unique and helpful information to this Court related to the harmful impact of the Executive Order on individuals fleeing persecution.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than *amici* contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and Women of Reform Judaism, representing more than 65,000 women in nearly 500 women's groups around the world, come to this issue out of our affirmation of the supreme value of human life and the equal dignity of every human being. We also share a longstanding commitment to the principle of religious liberty that has lifted up people of all faiths while providing more protections, rights and opportunities than have been known anywhere else throughout history. We are committed to fulfilling the mandate of the Prophets of Israel who bade us to pursue justice, seek peace, and build a society of loving-kindness among all of God's creatures.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States is a nation dedicated to the ideals of equality, liberty and justice. (*See infra* Section I.) Adhering to these principles under changing domestic and international circumstances is a continuous work in progress. Throughout the history of the United States, and frequently with respect to immigration, our ideals have been tested. Sometimes the nation rises to meet the challenge, upholding the values that make America exceptional. (*See infra* Section II.) At other times, when prejudice and fear predominate over reason and compassion, we falter, often with devastating consequences. (*See infra* Section III.) We turned our backs on the *St. Louis*, a ship with nearly 1,000 Jews fleeing Nazi Germany, condemning hundreds of them to their deaths; we passed laws that overtly excluded and discriminated against the Chinese; and we rounded up more than 100,000 Japanese Americans and interned them in prison camps in the 1940s. In each instance, when we later realized that we had strayed from our principles, we were left to apologize to the people who had suffered, or to their descendants, or to the memory of those who perished without descendants, in each case promising to learn from our mistakes and not to repeat them.

ADL was created at a time when fear and prejudice against Jews were so great that a Jewish man, Leo Frank, was convicted of murder after a trial marked by overt anti-Semitism and then dragged from his prison cell and lynched in 1915.[2] ADL regularly confronts discrimination against perceived outsiders, foreigners and strangers. As an organization founded by immigrants and sworn to protect the interests of religious and ethnic minorities, ADL believes that when our nation's values are threatened, we are duty-bound to return to the founding principles that propelled this nation of immigrants—in the hope that future generations can celebrate and maintain our resolve. Furthermore, JCPA, URJ, CCAR, and WRJ believe that in accordance with our core American principles of equality, fairness and due process of law, those entering the country legally with the intention to settle here permanently should not be subjected to discriminatory administrative procedures.

ARGUMENT

With this brief, *Amici Curiae* provide insight into our country's checkered history with refugees and immigrants to demonstrate that the decisions of the Federal District Court and Fourth Circuit in *International Refugee Assistance Project v. Trump (IRAP)* and the Federal District Court and Ninth Circuit in *Hawaii v. Trump (Hawaii)* should not be disturbed. *Amici Curiae* also seek to show that the Federal District Courts, the Fourth Circuit, and the Ninth Circuit correctly determined that the public interest lies squarely in support of injunctive relief, as America has always been at its best when it opens its doors to refugees and immigrants.

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[2] *See* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. TIMES, Mar. 8, 1982. After the lynching, armed mobs ran through the streets of Atlanta, forcing Jewish businesses to shutter their doors and about half of Georgia's Jewish population to flee. Sixty years later, Georgia posthumously pardoned Frank on the grounds that the State failed to protect him while he was in its custody. *See* STATE BOARD OF PARDONS AND PAROLES, Pardon of Leo Frank (Mar. 11, 1986), http://www.gpb.org/files/georgiastories/nsouthfrank176.jpg. *See also* Leonard Dinnerstein, *Leo Frank Case*, NEW GEORGIA ENCYCLOPEDIA, http://www.georgiaencyclopedia.org/articles/history-archaeology/leo-frank-case.

I. AMERICA'S ASPIRATIONS AS A REFUGE FOR THE OPPRESSED.

The promise of America has been manifest since before the American Revolution. John Winthrop, while still on his transatlantic voyage to the New World, admonished the future colonists of Massachusetts always to remember that their new community would be "as a city upon a hill," with the entire world watching.[3] In fulfilling this vision, the country welcomed in its early years those disfavored and persecuted in their homelands based on their religious beliefs, including the Pilgrims, the Puritans and the Huguenots. Since then, our nation's wisest leaders have been guided by Winthrop's inspiring vision and have strived toward a more inclusive democracy.

The birth of the United States came in part because the Founders sought to cast off the shackles of Europe's endless religious wars and sectarian conflict in order to form a more perfect union. In beseeching the country to separate from England, Thomas Paine recognized that Europe was "too thickly planted with kingdoms to be long at peace" and believed the discovery of America had a divine purpose: "to open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety."[4]

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[3] John Winthrop, *A Model of Christian Charity* (1630).

[4] Thomas Paine, *Common Sense* (Jan. 10, 1776).

Seven months later, the Declaration of Independence enunciated the "self-evident truths" that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Less quoted from the Declaration is the Founders' burning grievance that the English King had restricted free immigration, having "endeavoured to prevent the population of these States; for that reason obstructing the Laws for the Naturalization of Foreigners [and] refusing to pass others to encourage their migrations hither."[5]

After the United States won its independence, it faced the challenge of designing laws that embodied the enlightened vision of the new nation. In 1785, James Madison published "Memorial and Remonstrance Against Religious Assessments" in opposition to a bill proposed to Virginia's General Assembly that would have levied a modest tax to support Christian education.[6] Madison warned that any measure, no matter how slight, that gave a preference to one religion over another would constitute "a dangerous abuse of power" and would betray the vision of America as a shining city upon a hill:

> Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy?

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[5] Declaration of Independence (July 4, 1776).

[6] James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 9 (Jun. 20, 1785).

> *Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution.* . . . Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent, may offer a more certain repose from his Troubles.[7]

Virginia recognized Madison's wisdom. It rejected the establishment bill and instead adopted Thomas Jefferson's "Statute for Religious Freedom," which firmly separated church from state and enshrined the principles of religious liberty for all.[8] When Madison went to the Constitutional Convention in 1787, he fought for Jefferson's view to become the law of the land, and it became a bedrock of the rights confirmed by the First Amendment.

Although the makeup of the United States was overwhelmingly Christian at its birth, our Founders were clear that the nation's new laws prohibiting religious discrimination extended to people of all faiths and backgrounds. When Jefferson later reflected on his Statute for Religious Freedom, he extolled the broad application of the law, which was evidence that the legislators "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the

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[7] *Id.* (emphasis added).

[8] Virginia's Statute for Religious Freedom (Jan. 16, 1786).

Christian and the Mahometan [Muslim], the Hindoo [Hindu], and Infidel of every denomination."[9]

The American values of accepting people into this country regardless of their faith, race or nationality have been celebrated by our leaders. In 1855, Abraham Lincoln confronted the burgeoning anti-immigrant "Know Nothing" movement, soundly rejecting the Know Nothings' vision of an America in which "all men are created equal, except negroes, and foreigners, and Catholics."[10] He said of the movement: "When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty—to Russia, for instance, where despotism can be taken pure. . . ."[11]

The vision of the "shining city upon a hill" has also inspired poets. In 1856, Walt Whitman wrote: "These States are the amplest poem, here is not merely a nation but a teeming Nation of nations."[12] Emma Lazarus's immortal sonnet, enshrined on the pedestal of the Statue of Liberty, urges "ancient lands" to give America "your tired, your poor, your huddled masses yearning to breathe free. . . . Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"[13]

These values have endured to the modern day. In his 1959 book, *A Nation of Immigrants*, future President John F. Kennedy studied the history of immigration in this country, both in terms of those subject to religious persecution and those facing other overpowering hardship. He wrote: "America has always been a refuge from tyranny. As a nation conceived in liberty, it has held out to the world the promise of respect for the rights of man."[14]

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[9] Thomas Jefferson, *Autobiography*, Works 1:71 (1821).

[10] Abraham Lincoln, *Letter to Joshua F. Speed* (Aug. 24, 1855).

[11] *Id.*

[12] Walt Whitman, *Preface to Leaves of Grass* (1855).

[13] Emma Lazarus, *The New Colossus* (1883).

On the eve of his election as President in 1980, Ronald Reagan also took inspiration from Winthrop's vision of America:

> These visitors to that city on the Potomac do not come as white or black, red or yellow; they are not Jews or Christians; conservatives or liberals; or Democrats or Republicans. They are Americans awed by what has gone before, proud of what for them is still . . . a shining city on a hill.[15]

II. AMERICA IS AT ITS BEST WHEN IT HONORS ITS COMMITMENT TO ITS CORE VALUES.

There are numerous examples where the United States has met its aspirations as Winthrop's "shining city upon a hill," opening itself to "anyone with the will and the heart to get here."[16] At its best, the United States has been a beacon of hope for refugees from war-torn countries, victims of religious persecution, natural disasters or other emergencies, fulfilling what President Kennedy described in *A Nation of Immigrants* as the "natural humanitarian impulses of the American people which is in keeping with our traditions of shelter to the homeless and refuge for the oppressed."[17] Indeed, many of these refugees have contributed immeasurably to the fabric of America.

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[14] John F. Kennedy, *A Nation of Immigrants* 7 (Harper Perennial, January 2008).

[15] Ronald Reagan, *Election Eve Address* (Nov. 3, 1980).

[16] Ronald Reagan, *Farewell Address to the Nation* (Jan. 11, 1989).

With the Truman Directive in 1945, and the Displaced Persons Act of 1948, the United States – for the first time since its founding – began explicitly to seek to become a sanctuary for those fleeing persecution, as the first Americans had done hundreds of years earlier.[18] President Truman led the assistance and reconstruction effort to resettle hundreds of thousands of European Jews and others displaced from their home countries who could not return after World War II.[19]

These new laws gave truth to Thomas Paine's prophecy that the United States would "open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety." The refugees welcomed to the United States during or after World War II have made immeasurable contributions to politics, science, literature, music, art, and social and scientific studies. Refugees from that period include Madeleine Albright, Hannah Arendt, Bela Bartok, Marc Chagall, Marlene Dietrich, Albert Einstein, Enrico Fermi, Henry Kissinger, Raphael Lemkin, Thomas Mann, Vladimir Nabokov, Claude

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[17] Kennedy, *supra* note 14 at 46.

[18] David W. Haines, "Learning From our Past: The Refugee Experience in the United States," AMERICAN IMMIGRATION COUNCIL, Nov. 25, 2015, http://www.americanimmigrationcouncil.org/research/refugee-experience-united-states.

[19] *Id.* In so doing, as set forth below, the United States began the process of making amends for the tragic consequences of its turning away Jewish refugees during World War II, dooming many of them to death or excruciating years in concentration camps.

Levi-Strauss, Dr. Ruth Westheimer, and Billy Wilder. American culture and science stand on the shoulders of many of these individuals and their contributions.

With the onset of the Cold War, Congress began assisting groups of refugees from Communist regimes including those seeking freedom from the Soviet Union, Cuba, Hungary, Poland, and Yugoslavia, as well as those fleeing Southeast Asia after the Vietnam War. The openness to asylum seekers reflected in these efforts also demonstrated a growing recognition that many refugees have significant education, skills, strong family structures and commitment to hard work and success that make them ideal new citizens.[20] Examples of notable refugees that came to the United States from this period include: Sergey Brin, Joseph Brodsky, Gloria Estefan, Milos Forman, Wyclef Jean, Miriam Makeba, Thomas Peterffy, Regina Spektor and David Tran.

In the wake of the publication of *A Nation of Immigrants*, Congress enacted the Immigration and Nationality Act of 1965, which allowed increased numbers of people to migrate to the United States from South America, Asia, Africa, the Middle East, and Southern and Eastern Europe, abolishing the quotas that had been set based on national origin. In 1968, the United States was one of the first countries to sign the United Nations Protocol Relating to the Status of Refugees, a key treaty in international refugee law. The 1974 Jackson-Vanik Amendment ultimately permitted approximately 500,000 Jews, evangelical Christians and Catholics to escape religious persecution in the former Soviet Union by coming to the United States. And in 1980, Congress signed the Refugee Act, which standardized the resettlement process and services for all refugees admitted to the United States.

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[20] Haines, *supra* note 18.

Since the 1980s, the United States has resettled refugees from Darfur fleeing genocide and violence; refugees from Bhutan forced out of their country; and Syrian, Iraqi and Afghan refugees displaced by war. In addition, the U.S. has facilitated the naturalization of Hmong veteran refugees who served in Laos in support of U.S. forces and during the Vietnam War;[21] assisted the children of Vietnamese re-education camp survivors through the "McCain Amendment;" assisted former Soviet and Indochinese nationals with a credible fear of persecution through the "Lautenberg Amendment;" and assisted Iranian religious minorities through the "Specter Amendment."[22] Since 1975, the U.S. has settled over 3 million refugees.[23]

It should come as no surprise, then, that more than 40 percent of Fortune 500 companies were founded by recent immigrants or their children (even though such immigrants account for roughly 10.5 percent of the U.S. population); or that the revenue generated by these companies is greater than the GDP of every country in the world outside the U.S. except China and Japan; or that successful global companies founded by American immigrants and refugees or their children span all sectors of the economy, including some of the most valuable brands in the world (Apple, Google, eBay, AT&T, General Electric, IBM, McDonald's).[24] At least 18 percent of all scientists living in the U.S. are immigrants or refugees,[25] and over 25 percent of all physicians and surgeons in the United States are born abroad.[26] And as of 2016, roughly 2 million veterans of the U.S. Armed Forces living in the U.S.—of a total 18.8 million—are refugees/immigrants or have refugee/immigrant parents.[27] As President Kennedy observed, "[t]here is no part of our nation that has not been touched by our immigrant background."[28]

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[21] William J. Clinton, "Statement on Signing the Hmong Veterans Naturalization Act of 2000" (May 26, 2000).

[22] Andorra Bruno, CONG. RESEARCH SERV., RL31269, "Refugee Admissions and Resettlement Policy" (Nov. 30, 2016).

[23] Ruth Igielnick and Jens Manuel Krogstad, "Where Refugees to the U.S. Come From," PEW RESEARCH CENTER, (Feb. 3, 2017), http://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/.

The Executive Order betrays that history, and would exclude the talents, ideas and work ethic of immigrants and refugees who, just as with generations past, would help build and protect our nation and strengthen our economy.

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[24] P'SHIP FOR THE NEW AMERICAN ECONOMY, "The 'New American' Fortune 500" (June 2011), http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf.

[25] Flora Lan, Katherine Hale, and Emilda Rivers, "Immigrants' Growing Presence in the U.S. Science and Engineering Workforce: Education and Employment Characteristics in 2013," NATIONAL CENTER FOR SCIENCE AND ENG'G STATISTICS (Sept. 2015), https://www.nsf.gov/statistics/2015/nsf15328/nsf15328.pdf.

[26] Nicole Fisher, "25% of Physicians Are Born Outside the U.S. Can Immigration Reform Fix The Shortage?" FORBES: PHARMA & HEALTHCARE (Jul. 12, 2016), http://www.forbes.com/sites/nicolefisher/2016/07/12/25-of-docs-are-born-outside-of-the-u-s-can-immigration-reform-solve-our-doc-shortage/#446de1bc702b.

[27] Jie Song and Jeanne Batalova, "Immigrant Veterans in the United States," MIGRATION POLICY INST. (Oct. 13, 2016), http://www.migrationpolicy.org/article/immigrant-veterans-united-states.

[28] Kennedy, *supra* note 14, at 3.

III. WHEN AMERICA CLOSED ITS DOORS AND ALLOWED ITS CORE VALUES TO BE COMPROMISED, THE COUNTRY LATER LOOKED BACK IN SHAME.

In sharp contrast to the times when the United States has shown its "natural humanitarian impulses," there have been times when the country has closed itself off and succumbed to fear or bigotry, with tragic consequences. Sometimes the victims of this xenophobia and prejudice were Jews (the *St. Louis* tragedy and the denial of visas) or other religious minorities, sometimes they were from nations that were regarded as undesirable (the Chinese exclusion) and sometimes they were groups the government assumed to be disloyal (the Japanese internment during World War II). In each case, the United States apologized years later, after it was too late.

A. The *St. Louis* and Jewish Refugees During the Holocaust

The tragedy of the vessel *St. Louis* illustrates the devastating consequences that can result when the United States turns its back on refugees in need. In May 1939, on the eve of World War II and after *Kristallnacht*,[29] the *St. Louis* left Hamburg, Germany, carrying 937 passengers, nearly all of whom were Jews fleeing Nazi persecution. The ship was headed to Havana, Cuba with the hope of having its passengers granted sanctuary in the United States.

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[29] *Kristallnacht*, or the "Night of Broken Glass," occurred in November 1938, when almost 100 Jews were murdered, countless more were attacked, and as many as 30,000 Jewish men were arrested and sent to concentration camps. *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEMORIAL MUSEUM, "Kristallnacht," https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201.

Prior to the ship's departure, most of the Jewish passengers had obtained valid paperwork permitting their entry to Cuba and had also applied for U.S. visas, planning to stay in Cuba only until their entry to the U.S. was approved. By the time the *St. Louis* arrived in Cuba on May 27, 1939, however, the Cuban president had invalidated most of the passengers' travel certificates.[30] While United States-based Jewish organizations negotiated with Cuban officials to persuade them to admit the other passengers, the United States refused to intercede formally on the refugees' behalf or publicly pressure the Cuban government to admit them.[31]

After negotiations with Cuba failed, the *St. Louis* headed towards Miami in June 1939, coming within sight of the Florida coastline. Despite pleas from passengers on board, President Roosevelt and the State Department refused to accept the Jewish refugees into the United States,[32] a decision that reflects the anti-immigrant and anti-Semitic sentiments prevailing at the time.[33] A State Department telegram to a passenger on the ship explained the government's position that the passengers must "await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States."[34]

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[30] HOLOCAUST ENCYCLOPEDIA, U.S HOLOCAUST MEMORIAL MUSEUM, "Voyage of the St. Louis," https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267.

[31] *Id.* *See also* Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX (Jan. 27, 2017, 8:12 AM). http://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust.

[32] Kristine Guerra, *What the U.S. Learned from Turning Away Refugees who Fled the Nazis,* WASH. POST (Jan. 29, 2017) https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/what-the-u-s-learned-from-turning-away-refugees-who-fled-the-nazis/?utm_term=.e91085b6c047.

[33] A Gallup poll taken in January 1939 asked Americans if the government should allow 10,000 refugee children, mostly Jewish, from Germany to be taken care of in American homes; 61 percent were opposed. *See* Ishaan Tharoor, *What Americans Thought of*

Ultimately, the United States refused entry to the passengers of the *St. Louis*, forcing it to sail back to Europe, as this archival photograph shows:[35]

A woman cries as the St. Louis pulls away from Havana, 1939. | Keystone-France via Getty Images

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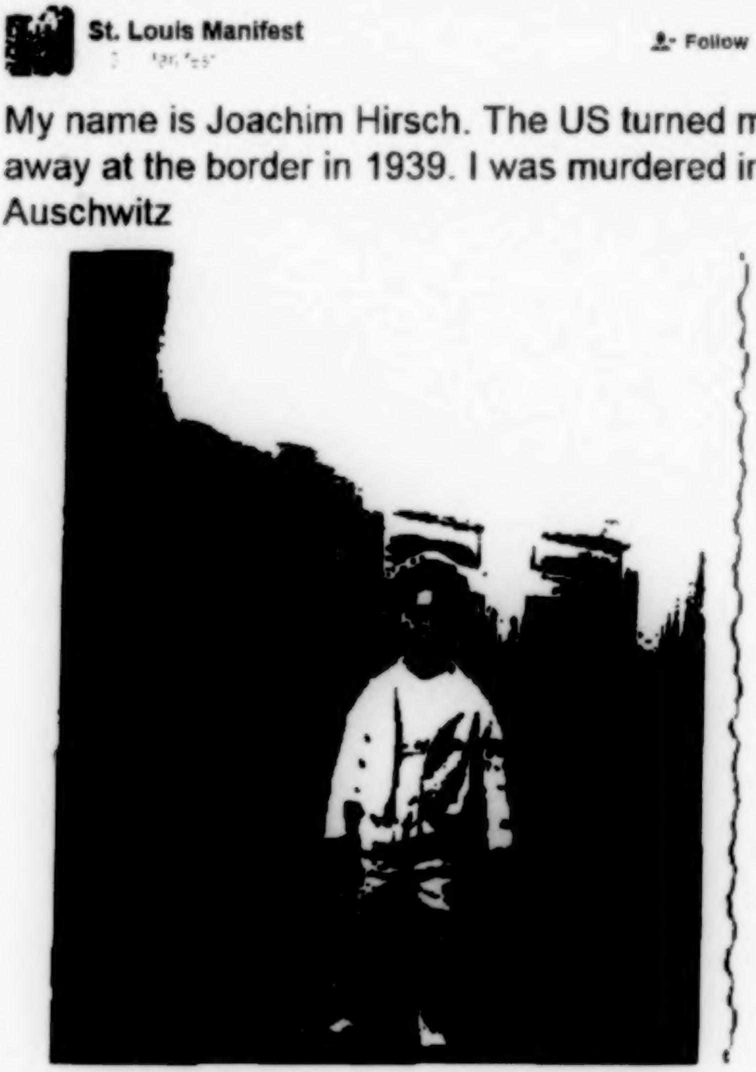
Jewish Refugees on the Eve of World War II, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii/?utm_term=.a67eb4b68817.

[34] *See* "Voyage of the St. Louis," *supra* note 30.

[35] *See* Lind, *supra* note 31. Recent images of refugee-seekers being sent back to the countries they fled recall the *St. Louis* passengers who were turned away within sight of U.S. sanctuary.

Historians estimate that more than a quarter of the *St. Louis* passengers – 254 people – were killed in the Holocaust, including a number at Auschwitz, after being refused entry to the U.S.[36] On Holocaust Remembrance Day, January 27, 2017, a Twitter account (@Stl_Manifest, accessible at https://twitter.com/stl_manifest), shared passengers' stories, including:



St. Louis Manifest

My name is Joachim Hirsch. The US turned me away at the border in 1939. I was murdered in Auschwitz

In April 2009, at a commemoration for Yom HaShoah (Holocaust Remembrance Day) at the U.S. Capitol attended by the President and members of Congress, Fred S. Zeidman, chairman of the U.S.

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[36] *See* "Voyage of the St. Louis," *supra* note 30.

Holocaust Memorial Council, recalled the "infamous ship called the *St. Louis*" and reminded those gathered of the "shameful result" and the consequences of inaction.[37] Three years later, the United States government issued a formal apology for the country's refusal to provide refuge for the Jewish passengers aboard the *St. Louis*.[38] Addressing the 14 surviving passengers, a State Department official stated: "To the survivors of the *MS St. Louis*, on behalf of the president and Secretary of State, I am honored to say what we should've said so long ago, welcome."[39]

The passengers of the *St. Louis* were not the only victims of America's refusal to grant visas to Jews and other minorities during the Holocaust. Before the *St. Louis* sailed, Congress rejected a bill that would have allowed 20,000 imperiled German children to settle in this country. Opponents took an "America-First" approach to reject the proposal, arguing that America should first focus on its own needy and homeless citizens. The wife of the United States immigration commissioner, Laura Delano Houghteling, refused to be swayed by the children's vulnerability, testifying that "20,000 charming children would all too soon grow into 20,000 ugly adults."[40] Countless Jews denied visas to enter the United States ultimately perished in Nazi concentration camps, including the Dutch teenager Anne Frank.[41] Historian Richard Breitman reminds us that if not for an immigration policy steeped in fear, an elderly Anne Frank could still be living in the United States today.[42] Instead she was murdered at Bergen-Belsen, made immortal by the teenage diary that survived her. The Executive Order – signed on Holocaust Remembrance Day – ignores the tragic lessons our nation learned from turning our back on Jewish refugees during World War II, and would again close America's doors to some of the world's most vulnerable refugees and immigrants.

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[37] AMERICAN JEWISH JOINT DISTRIBUTION COMMITTEE ARCHIVES, "Fred S. Zeidman's Remarks, Days of Remembrance Commemoration" (Apr. 23, 2009), http://archives.jdc.org/assets/documents/stlouis_fredszeidmanremarks2009.pdf.

[38] Kamrel Eppinger, *State Department apologizes to Jewish refugees*, SCRIPPS HOWARD FOUNDATION WIRE (Sep. 26, 2012) http://www.shfwire.com/state-department-apologizes-jewish-refugees/.

[39] *Id.*

[40] *See* Lind, *supra* note 31.

B. The Chinese Exclusion

In the late 1860s and early 1870s, Chinese immigrants, including both skilled and unskilled laborers, enjoyed easy passage to this country under the terms

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[41] In 1938, Otto Frank first applied for immigrant visas for himself, his wife Edith, and their two daughters Margot and Anne. *See* Richard Breitman, *Blocked by National Security Fears?: The Frank Family and Shifts in American Refugee Policy, 1938-1941*, YIVO INSTITUTE FOR JEWISH RESEARCH (Feb. 14, 2007), https://www.yivo.org/cimages/richardbreitman-ottofrank-whitepaper.pdf?c=. The family was placed on a waiting list, which by 1939 had grown to 300,000. *Id.* at 2. Despite having multiple people willing to provide affidavits for the Frank family, Otto faced impediments including the quota on German refugees, the requirement of proof of booked transportation to the U.S. and verification that no close relatives remained in German territories. *Id.* at 5. Ultimately, the Frank family was denied refugee status, and Anne, along with her mother and sister, all died in the concentration camps.

[42] Elahe Izadi, *Anne Frank and her family were also denied entry as refugees to the U.S.*, WASH. POST, (Nov. 24, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/11/24/anne-frank-and-her-family-were-also-denied-entry-as-refugees-to-the-u-s/?utm_term=.6e028f50e0dd.

of a treaty between the United States and China.[43] Even so, annual Chinese immigration never exceeded 40,000 people, and in 1890 there were only 107,000 Chinese nationals living in the United States.[44] Nevertheless, hostility towards the Chinese escalated within certain segments of the American public, who blamed wage decreases and other economic difficulties on Chinese labor.[45] Although Government leaders initially resisted constituent pressure to stop Chinese immigration,[46] a "campaign of organized violence against Chinese communities took form, and the hysteria led to public pressure too violent to be resisted."[47]

The Chinese Exclusion Act of 1882, signed into law by President Arthur, was the "first federal law ever passed excluding a group of immigrants solely on the basis of race or nationality."[48] The thrust of the Chinese Exclusion Act was that it barred Chinese laborers from entering the United States for 10 years,[49] but it also put in place other discriminatory systems, including a registry for all Chinese who were then legally present in the United States.[50]

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[43] *See* H.R. Res. 683, 114th Cong. (2014) (as passed by House, June 18, 2012). *See also* Kennedy, *supra* note 15 at 40.

[44] Kennedy, *supra* note 14 at 40.

[45] HARVARD UNIVERSITY LIBRARY OPEN COLLECTIONS PROGRAM, *Chinese Exclusion Act (1882)*, http://ocp.hul.harvard.edu/immigration/exclusion.html.

[46] President Arthur initially vetoed the bill, which he viewed as incompatible with the Burlingame Treaty. *See* Chester A. Arthur, "Veto of the Chinese Exclusion Act" (Apr. 4, 1882).

[47] Kennedy, *supra* note 14 at 41.

[48] S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[49] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (hereinafter "Chinese Exclusion Act.").

[50] *Id.*

Additionally, if Chinese laborers already in the country wished to leave temporarily, they had to obtain a "certificate" permitting them to return.[51] The Act also prohibited all courts from naturalizing people of Chinese origin, regardless of whether they were legally in this country.[52] These sweeping restrictions were explained only by this statement in the law's preamble: "in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof[.]"[53]

The Chinese Exclusion Act was the first of a series of laws designed to exclude the Chinese from the United States, both physically and politically. The Scott Act of 1888[54] precluded Chinese laborers from leaving and reentering the United States entirely and cancelled all "certificates" previously issued under the Exclusion Act.[55] This cancellation prevented the return of approximately 20,000 Chinese who had lawfully-obtained certificates permitting them to re-enter.[56] It also froze the migration of an additional 600 Chinese who were *en route* to the United States at the time of its enactment.[57] When the Chinese Exclusion Act was set to expire in 1892, Congress passed the Geary Act,[58] which extended Chinese exclusion for another 10 years and introduced additional restrictions.[59] It was not until 1943 that Congress finally began repealing certain – and eventually all – of these discriminatory laws.[60]

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[51] *Id. See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014)

[52] Chinese Exclusion Act, § 14. *See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[53] Chinese Exclusion Act, preamble.

[54] The Scott Act (1888), ch. 1064, 22 Stat. 504 (1888) (repealed 1943).

[55] S. Res. 201, 112th Cong. (2014) (as passed by Senate, Oct. 6, 2011). *See also* H.R. Res. 683, 114th Cong.

[56] S. Res. 201, 112th Cong.

[57] *Id.*

The repeal of the Chinese exclusionary laws was a first step in re-establishing the ideals of the Founders. In October 2011, the United States Senate finally issued an apology for the Chinese Exclusion Act and other laws.[61] A similar report was announced by the United States House of Representatives[62] and, later, by the California State Legislature.[63] In each instance, the government noted that the Chinese Exclusion Act and its companion laws were "incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal[.]"[64] The announcements expressed a commitment to "diversity in the United States that contributes to the country's economic, cultural, technological, academic, and political growth[.]"[65]

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[58] The Geary Act, ch. 60, 27 Stat. 525 (1892) (repealed 1943).

[59] S. Res. 201, 112th Cong.

[60] *Id.*

[61] *Id.*

[62] H.R. Res. 683, 114th Cong. (2014).

[63] S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[64] S. Res. 201, 112th Cong. *See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014) (pointing out that, "[p]aradoxically, the very same year that the Chinese Exclusion Act was passed, financing abroad was completed for the Statute of Liberty. . . . While the Statute of Liberty was being built, legislators were contradicting those very ideals by discriminating against Chinese immigrants and lobbying Congress to do the same").

[65] S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

In its apology, the California legislature observed:

> The Chinese Exclusion Act set the precedent for racist foreign and national policy that led to broader exclusion laws and fostered an environment of racism that quickly led to the Jim Crow laws of the 1880s, and further segregation legislation that would tear our nation apart through most of the 20th Century[.][66]

Simply put, our nation's leaders recognized that racism breeds racism, and any governmental policies that conflict with the founding ideals of this country cannot be allowed to stand. The Executive Order is such a policy.

C. The Japanese Internment

The internment of Japanese-Americans was authorized by Executive Order 9066,[67] which President Roosevelt issued in early 1942, 10 weeks after the Pearl Harbor attack. Executive Order 9066 gave to the Secretary of War and the military commanders to whom he delegated authority the power to exclude any and all persons, citizens and aliens from designated areas in order to provide security against sabotage and espionage.[68] Executive Order 9066 makes no reference to the Japanese, just as the current Executive Order does not reference Muslims. However, within a week of the issuance of the order, Lt. General John L. DeWitt issued the first of 108 relocation orders resulting in the forcible evacuation of approximately 120,000 Japanese Americans, including 70,000 citizens, to internment camps in desolate areas of the United States for the duration of World War II.[69]

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[66] *Id.*

[67] 7 Fed. Reg. 1407 (Feb. 19, 1942).

[68] *Id.*

The justification for Executive Order 9066 was "military necessity."[70] However, Congress has since acknowledged that "these actions were carried out without adequate security reasons and . . . were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[71] This conclusion was bolstered by the absence of any effort to invoke Executive Order 9066 to intern German Americans or Italian Americans.[72]

In 1976, President Gerald Ford issued a proclamation acknowledging that "not only was that evacuation wrong, but Japanese Americans were and are loyal Americans." In 1982, the Commission on Wartime Relocation and Internment of Civilians issued a report entitled, "Personal Justice Denied." The report set the stage for President Ronald Reagan's historic signing in 1988 of the Civil Liberties Act, which offered a formal apology and reparations for the "grave injustice" of evacuating, relocating and interning Japanese

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[69] *See* Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II*, 33, 104 (1972).

[70] U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, REPORT: PERSONAL JUSTICE DENIED at 6-8 (96th Cong.) (1982).

[71] 50 U.S.C. § 4202. Anti-Japanese bias was palpable: polls taken in 1944 indicated that more than 60 percent of Americans thought that whites should be prioritized in hiring decisions over Japanese Americans. Stephen White, "Many Americans Support Trump's Immigration Order; Many Americans Backed Japanese Internment Camps, Too," WASH. POST (Feb. 2, 2017).

[72] *See* U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 71 at 3.

Americans.[73] In his remarks on signing the Act, President Reagan made clear that the internment of Japanese Americans was a "grave wrong."[74] Congress too acknowledged that this measure – carried out under the false banner of "national security" – amounted to a "fundamental violation[] of the basic civil liberties and constitutional rights of [] individuals of Japanese ancestry" and caused "enormous damages, both material and intangible, . . . which resulted in significant human suffering[.]"[75]

Like Executive Order 9066, the Executive Order here invokes national security as its justification. Leaving aside the legal standards regarding how much deference such an invocation deserves, the history of the Japanese internment counsels that we must take an especially hard look at actions that undermine core values and freedoms in the name of national security. In this regard, we note the statements by other federal courts that there is "no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States" and that the sequence of events leading up to the Executive Order raises questions as to whether national security concerns in this regard are "rational." *Washington v. Trump*, 847 F.3d 1151, 1168 (2017); *see also Aziz v. Trump*, --F. Supp. 3d--, No. 117 CV 116 (LMB) (TCB), 2017 WL 580855, at *3 (E.D. Va. Feb. 13, 2017).

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[73] *See* 50 U.S.C. § 4201 *et seq*.

[74] Ronald Reagan, *Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians* (Aug. 10, 1988).

[75] 50 U.S.C. § 4202.

CONCLUSION

ADL, JCPA, URJ, CCAR, and WRJ believe that the lower courts' decisions in *IRAP* and *Hawaii* to enjoin Section 2(c) of the Executive Order (and, in the case of *Hawaii*, further enjoining Section 6), are consistent with the principles underlying the Constitution. These lower courts correctly determined that, absent injunctive relief, there will almost certainly be irreparable harm to countless people, just as there was when the United States turned away the desperate passengers of the *St. Louis*, excluded immigrants from China and interned Japanese Americans. Just as in all these situations, an apology years later is woefully insufficient to address the damage done. *Amici Curiae* believe that enforcing the Executive Order risks once again sacrificing the nation's core values in favor of prejudice and fear—a sacrifice that history has repeatedly proven has profound consequences both to the persons targeted by the Order and to our still-vibrant vision of the shining city upon a hill.

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State of Hawaii et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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BRIEF FOR THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND OTHERS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1876 and based in Washington, D.C., the Association of American Medical Colleges is a not-for-profit association dedicated to transforming healthcare through innovative medical education, cutting-edge patient care, and groundbreaking medical research. Its members comprise all 147 accredited U.S. medical schools; nearly 400 major teaching hospitals and health systems, including 51 U.S. Department of Veterans Affairs medical centers; and more than 80 academic societies. Through these institutions and organizations, the AAMC serves the leaders of America's medical schools and teaching hospitals and their nearly 167,000 full-time faculty members, 88,000 medical students, and 124,000 resident physicians. The AAMC's member teaching hospitals rely heavily on non-U.S. health professionals and, therefore, face acute and widespread workforce and patient-care risks attributable to the abrupt and destabilizing changes announced in Executive Order

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[1] All parties have consented to the filing of *amici*'s brief. *See* S. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, or their counsel made such a monetary contribution. *See id.* R. 37.6.

No. 13,780,[2] which the Fourth and Ninth Circuits correctly enjoined before it became effective.[3]

The AAMC is joined in this brief by the **Academic Pediatric Association**; the **Alliance for Academic Internal Medicine**; the **American Academy of Family Physicians**; the **American Academy of Pediatrics**; the **American Association of Colleges of Nursing**; the **American Association of Colleges of Pharmacy**; the **American College of Healthcare Executives**; the **American College of Obstetricians and Gynecologists**; the **American College of Physicians**; the **American Dental Education Association**; the **American Nurses Association**; the **American Pediatric Society**; the **American Psychiatric Association**; the **American Public Health Association**; the **American Society of Hematology**; the **Association of Academic Health Centers**; the **Association of Medical School Pediatric Department Chairs**; the **Association of Schools and Programs of Public Health**; the **Association of Schools of Allied Health Professions**; the **Association of University Programs in Health Administration**; the **Endocrine Society**; the **Greater New York Hospital Association**; **Hispanic-Serving Health Professions Schools, Inc.**; the **Infectious Diseases Society of America**; the **National Medical Associa-**

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[2] 82 Fed. Reg. 13,209 (Mar. 9, 2017) (J.A. 1416), *amended*, Memorandum on the Effective Date in Executive Order 13780, 2017 Daily Comp. Pres. Doc. 401 (June 14, 2017) (J.A. 1441).

[3] *Amici* use the adjective "non-U.S." to refer to individuals born in a country other than the United States.

tion; the **National Resident Matching Program**; the **Physician Assistant Education Association**; the **Renal Physicians Association**; the **Society for Pediatric Research**; and the **Society of General Internal Medicine**. Additional information regarding these organizations is provided in the Addendum to this brief.

SUMMARY OF THE ARGUMENT

The United States healthcare workforce relies upon health professionals and scientists from other countries to provide high-quality and accessible patient care. Accordingly, a fair and efficient immigration system strengthens the American healthcare system and advances the nation's health security.[4] Executive Order No. 13,780 jeopardizes those goals.

In this case, two district courts enjoined enforcement of key sections of the Executive Order, and the Fourth and Ninth Circuits affirmed those injunctions in relevant part.[5] This Court has permitted the lower-court injunctions to remain in effect, in part, pending its consideration of the merits, ruling that the suspension-of-entry provisions "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."[6] *Amici* believe the Fourth and Ninth Circuits have acted correctly in these cases, and *amici* urge the Court to affirm them or, at a minimum, make permanent the result of its June 26, 2017 order.

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[4] *Amici* use the term "immigration system" to refer to laws and policies governing foreign-born individuals who wish to live permanently or work or study temporarily in the United States.

[5] *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565–66 (D. Md.) (J.A. 164–66), *aff'd in relevant part en banc*, 857 F.3d 554 (4th Cir. 2017) (J.A. 170); *Hawai'i v. Trump*, CV. No. 17-00050 DKW-KSC, 2017 WL 1167383, at *8 (D. Haw. Mar. 29, 2017) (J.A. 1160–63), *aff'd in part and rev'd in part*, 859 F.3d 741 (9th Cir. 2017) (J.A. 1164).

The United States relies upon a significant number of health professionals and scientists who have entered this country through our immigration system. Health professionals who do not hold U.S. citizenship contribute to the health of our citizens. They care for patients, conduct research that leads to lifesaving treatments, and improve the quality of healthcare. Such professionals also address our nation's health-professional-workforce shortages, especially at Department of Veterans Affairs hospitals and in rural and other underserved communities. In addition, global collaboration among scientists and other biomedical researchers contributes to breakthroughs that benefit the United States and its citizens.

Congress has recognized the importance of non-U.S. professionals to the nation's healthcare system by establishing programs to attract physicians from other countries. Executive Order No. 13,780 threatens the balance struck by Congress by (1) exacerbating our nation's health-professional workforce shortages, (2) jeopardizing progress in medical innovation, and (3) inhibiting global research and public-health collaboration. These consequences will, in the judgment of *amici*, undermine the health security of our nation and weaken our ability to avert and respond to health-related national-security threats.

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[6] *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

ARGUMENT

I. Non-U.S. Professionals Are Important to America's Healthcare System.

A. Non-U.S. Professionals Fill Critical Shortages in the Nation's Healthcare Community.

1. The United States—Especially in Underserved Communities—Is Experiencing Healthcare Shortages.

The United States faces a growing shortage of health professionals.[7] For instance, according to the U.S. Bureau of Labor Statistics, the nation's healthcare workforce has a consistently high unmet demand for labor.[8] The AAMC estimates that the United States currently faces shortages of between 13,900 and 25,900 physicians.[9] That gap will only

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[7] Charlotte Oslund, *Which Industries Need Workers? Exploring Differences in Labor Market Activity*, Monthly Lab. Rev., Jan. 2016, at 5–6, https://www.bls.gov/opub/mlr/2016/article/pdf/which-industries-need-workers-exploring-differences-in-labor-market-activity.pdf.

[8] *Id.*

[9] IHS Markit, The Complexities of Physician Supply and Demand 2017 Update: Projections from 2015 to 2030, at 50 (Feb. 28, 2017), https://aamc-black.global.ssl.fastly.net/production/media/filer_public/a5/c3/a5c3d565-14ec-48fb-974b-99fafaeecb00/aamc_projections_update_2017.pdf. To address this physician shortage, U.S. medical schools have increased enrollment by thirty percent, and several new schools have been

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grow over time. By 2030, the U.S. population aged sixty-five and over is projected to grow by fifty-five percent.[10] As a result of this demographic change and other factors, the AAMC projects a shortfall of between 40,800 and 104,900 physicians by 2030.[11] Shortages will be experienced in other health professions as well. The Henry J. Kaiser Family Foundation estimates a nationwide shortage of almost 3,400 mental-health professionals and more than 8,100 dental-health professionals.[12]

These shortages are nationwide. Indeed, most states have hundreds of health-professional shortage areas ("HPSAs").[13] Texas, for example, has more than

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opened. Approximately ninety-five percent of U.S. medical-school graduates train in residency positions. Still, the AAMC projects physician shortages in all specialties and most notably in primary care.

[10] *Id.* at 16.

[11] *Id.* at 38.

[12] *Mental Health Care Health Professional Shortage Areas (HPSAs)*, Henry J. Kaiser Fam. Found. (last visited Sept. 15, 2017), http://kff.org/other/state-indicator/mental-health-care-health-professional-shortage-areas-hpsas/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D; *Dental Care Health Professional Shortage Areas (HPSAs)*, Henry J. Kaiser Fam. Found. (last visited Sept. 15, 2017), http://www.kff.org/other/state-indicator/dental-care-health-professional-shortage-areas-hpsas/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[13] The Health Resources and Services Administration defines an HPSA as having a shortage of primary-medical-care, dental, or mental-health providers; they may be geographic-, population-, or facility-based. *Health Professional Shortage*

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one thousand.[14] Nationwide, HRSA has identified 4,787 areas with a shortage of mental-health professionals.[15] The National Center for Health Workforce Analysis projects that 37 states will have a shortage of primary-care physicians in 2025.[16] The NCHWA similarly projects inadequate numbers of specialty physicians—cardiologists, gastroenterologists, hematologists, oncologists, and pulmonologists—to meet patient demand by 2025.[17] It also projects annual nursing shortages through 2025 in sixteen states.[18]

Areas (HPSAs), Health Res. & Servs. Admin. (last updated Oct. 2016), https://bhw.hrsa.gov/shortage-designation/hpsas.

[14] *Shortage Areas*, Health Res. & Servs. Admin. Data Warehouse (last visited Sept. 15, 2017), https://datawarehouse.hrsa.gov/topics/shortageAreas.aspx. HPSAs are but one category of health-professional shortage areas designated by the U.S. Department of Health and Human Services.

[15] *Id.*

[16] Nat'l Ctr. for Health Workforce Analysis, U.S. Dep't of Health & Human Servs., State-Level Projections of Supply and Demand for Primary Care Practitioners: 2013–2025, at 5 (Nov. 2016), https://bhw.hrsa.gov/sites/default/files/bhw/health-workforce-analysis/research/projections/primary-care-state-projections2013-2025.pdf.

[17] Nat'l Ctr. for Health Workforce Analysis, U.S. Dep't of Health & Human Servs., National and Regional Projections of Supply and Demand for Internal Medicine Subspecialty Practitioners: 2013–2025, at 4 (Dec. 2016), https://bhw.hrsa.gov/sites/default/files/bhw/health-workforce-analysis/research/projections/internal-medicine-subspecialty-report.pdf.

[18] Nat'l Ctr. for Health Workforce Analysis, U.S. Dep't of Health & Human Servs., The Future of the Nursing Workforce:

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Finally, based on the Kaiser Foundation's analysis of the government's data, as of January 2017, only 44.2% of the need for mental-health treatment is being met.[19]

There is a direct connection between health-professional shortages and our nation's health security. The National Health Security Strategy and Implementation Plan for 2015 through 2018, prepared by the Assistant Secretary of Health and Human Services for Preparedness and Response, calls for a workforce "large enough to meet both routine and surge demands" but finds that "the public health, healthcare, and emergency management workforces are all currently operating under significant constraints, with gaps in coverage in many communities."[20]

National- and State-Level Projections, 2012–2025, at 8–9 (Dec. 2014), https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/projections/nursingprojections.pdf. The sixteen states are Alaska, Arizona, California, Colorado, Georgia, Hawaii, Maine, Maryland, Montana, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, and Washington. *Id.*; *see also* Rebecca Grant, *The U.S. Is Running out of Nurses*, Atl. (Feb. 3, 2016), https://www.theatlantic.com/health/archive/2016/02/nursing-shortage/459741/.

[19] *Mental Health Care HPSAs*, *supra* note 12.

[20] Nicole Lurie, U.S. Dep't of Health & Human Servs., National Health Security Strategy and Implementation Plan: 2015–2018, at 26–27 (n.d.), https://www.phe.gov/Preparedness/planning/authority/nhss/Documents/nhss-ip.pdf.

Medically underserved communities,[21] many of which are in rural areas, will suffer the consequences of the health-professional shortage most severely. Those communities are already experiencing a shortage,[22] and restricting the entry of non-U.S. healthcare professionals will only exacerbate it.

2. Non-U.S. Professionals Comprise a Significant Part of the Nation's Healthcare Workforce, Especially in Underserved Areas.

Individuals from outside the United States play a crucial role in the delivery of healthcare in America. As of 2010, more than one in four physicians practicing in the United States was born in another country.[23] Individuals from other countries fill a similar number of positions in other healthcare occupations. [24] Non-U.S. health professionals hail from around the world, including from the six countries subject to the Executive Order's suspension of entry. For example, as of 2016, the University of Damascus in Syria ranked seventh among international medical schools with graduates holding active licenses to practice medicine in the United States.[25] Economists estimate that more than seven thousand physicians currently working in the United States received training in the six countries,[26] and that those doctors collectively provide fourteen million patient visits each year.[27]

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[21] HRSA designates medically underserved areas by taking into account the number of providers, the percentage of the population at the federal poverty level, the percentage of the population at age sixty-five and over, and the infant-mortality rate in a given area. *Medically Underserved Area/Population (MUA/P) Application Process*, Health Res. & Servs. Admin. (last updated Oct. 2016), https://bhw.hrsa.gov/shortage-designation/muap-process.

[22] *See, e.g.*, Darrell G. Kirch & Kate Petelle, Viewpoint, *Addressing the Physician Shortage: The Peril of Ignoring Demography*, 317 JAMA 1947, 1947 (2017).

[23] Kristen McCabe, *Foreign-Born Health Care Workers in the United States*, Migration Info. Source (June 27, 2012), http://www.migrationpolicy.org/article/foreign-born-health-care-workers-united-states; *see also* Anthony P. Carnevale et al., Geo. Univ. Ctr. on Educ. & the Workforce, Healthcare 102 (June 2012), https://cew.georgetown.edu/wp-content/uploads/2014/11/Healthcare.FullReport.090712.pdf (as of 2010, 27.56% of physicians and surgeons were foreign born).

Physicians from outside the United States do more than alleviate the nation's overall physician shortage. They disproportionately practice primary-care disciplines serving thousands of patients each year, including many Medicare and Medicaid beneficiaries.[28] Indeed, they serve "on the front lines of medical need," including rural and other underserved communities, Native American communities, and VA hospitals.[29] In Alabama, for example, "Syria ranks fourth as a source of doctors for medically-needy areas . . . behind India, Pakistan and the Philippines."[30]

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[24] Carnevale et al., *supra* note 23, at 102 (reporting that, as of 2010, 21.36% of dentists, 20.44% of pharmacists, 15.18% of registered nurses, and 13.74% of physician assistants were foreign born).

[25] Aaron Young et al., *A Census of Actively Licensed Physicians in the United States, 2016*, 103 J. Med. Reg., no. 2, 2017, at 7, 12.

[26] Matthew Basilico & Michael Stepner, *The Immigration Ban and the Physician Workforce*, Health Aff. Blog (Mar. 6, 2017), http://healthaffairs.org/blog/2017/03/06/the-immigration-ban-and-the-physician-workforce/.

[27] *Id.* This estimate is conservative, as national survey data estimates the number of patient visits provided annually by specialist physicians at 2,704 and by generalists at 3,521, which would result in a total of between 18.9 and 24.6 million patient visits annually. Esther Hing & Susan M. Schappert, *Generalist and Specialty Physicians: Supply and Access, 2009–2010*, at 2 (NCHS Data Brief No. 105, Sept. 2012), https://www.cdc.gov/nchs/data/databriefs/db105.pdf.

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[28] Marcia D. Hohn et al., Immigrants in Health Care: Keeping Americans Healthy Through Care and Innovation 2 (June 2016), http://immigrationresearch-info.org/system/files/health_care_report_FINAL_20160607.pdf; Padmini D. Ranasinghe, *International Medical Graduates in the U.S. Physician Workforce*, 115 J. Am. Osteopathic Ass'n 236, 238 (2015).

[29] Basilico & Stepner, *supra* note 26 (reporting on professionals trained in the countries subject to the Executive Order); *see also* Ranasinghe, *supra* note 28, at 238 (reporting that "a higher proportion of [international medical graduates] than other graduates serve socioeconomically disadvantaged populations across the United States" and that they "tend to fill the gaps in workforce demands in rural areas"); Katrina Armstrong et al., Perspective, *International Exchange and American Medicine*, 376 New Eng. J. Med. e40(1), e40(2) (2017); Akash Goel, *What Americans Will Lose When They Push Immigrants Away*, Time (Apr. 13, 2017, 12:45 pm), http://time.com/4733567/immigration-doctors-rust-belt/; Lauren Silverman, *Trump Travel Ban Spotlights U.S. Dependence on Foreign-Born Doctors*, NPR (Feb. 11, 2017, 5:47 am), http://www.npr.org/sections/health-shots/2017/02/11/514399475/trump-travel-ban-spotlights-u-s-dependence-on-foreign-born-doctors.

[30] Amy Yurkanin, *In Alabama, Doctors from Countries on Trump's Banned List Fill Medical Gaps*, AL.com (Feb. 4, 2017, 7:02 am), http://www.al.com/news/index.ssf/2017/02/in_alabama_doctors_from_countr.html.

The Executive Order directly impacts professionals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, but it could also chill interest among professionals from other nations in practicing in the United States, "exacerbat[ing] already strained areas of health care."[31]

B. Beyond Filling Shortages, Non-U.S. Professionals Play Important Roles in the American Healthcare System.

Health professionals from other countries make significant contributions to the nation's healthcare system. They facilitate America's participation in the global enterprise of researching health problems and devising solutions and therapies for patients. Their participation in America's healthcare community enhances our ability to respond to large-scale public-health threats, including disease-based threats, bioterrorism, and mass casualties resulting from conventional terrorism. And they increase the diversity of the professionals who treat patients, which in turn improves the quality of patient care.

1. Collaboration Between American Health Professionals and Non-U.S. Professionals Maximizes Research Efforts.

Diseases do not respect national borders and, therefore, effective responses must be global. "Collaborative international efforts, especially strengthening the capacity of national health systems, are essential to prevent and prepare for an array of threats, from infectious disease pandemics to the silent killers of chronic noncommunicable diseases."[32] Indeed, the American healthcare community includes many individuals from outside the United States who contribute daily to the effort to cure diseases and combat potential pandemics, such as the acquired immunodeficiency and severe acute respiratory syndromes and the Ebola and Zika viruses. Any constraint on the participation of recognized experts in the free exchange of scientific research and collaboration impairs the collective knowledge of our healthcare community and jeopardizes American lives.[33]

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[31] Aaron Carroll, *Immigration Reform's Potential Effects on US Health Care*, JAMA Forum (Mar. 8, 2017), https://newsatjama.jama.com/2017/03/08/jama-forum-immigration-reforms-potential-effects-on-us-health-care/.

Medical research in the United States benefits greatly from the contributions of non-U.S. professionals. A recent study found that more than forty percent of the cancer researchers at America's top cancer institutes are immigrants.[34] At the University of Texas MD Anderson Cancer Center, sixty-two percent of researchers were born in another country.[35] The federal government has recognized the value of working with global partners and provided financial support to U.S.-based institutions engaged in international-healthcare-research collaboration. The National Institutes of Health awarded grants in 2016 to Duke, Tulane, Vanderbilt, and Yale to "partner with West African academic centers to design training programs for their scientists and health researchers" who study "Ebola, Lassa fever, yellow fever and other emerging viral diseases."[36] Although these grants fund work by American professionals abroad, they complement programs hosting non-U.S. professionals here,[37] and they demonstrate the importance of the cross-border exchange of ideas in healthcare.[38] The government has similarly invested one billion dollars in the Global Health Security Agenda, an international, thirty-one-nation "partnership . . . designed to measurably address global vulnerability to . . . public health threats, strengthen systems, and ensure that a trained workforce has the tools needed to prevent, detect, and respond rapidly and effectively to infectious disease threats."[39]

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[32] Comm. on Global Health and the Future of the U.S., Nat'l Acads. of Scis., Eng'g & Med., *Global Health and the Future Role of the United States*, at ix (prepubl. copy 2017).

[33] *See* M. Ihsan Kaadan, *I'm a Syrian Doctor Who Treated Patients in Aleppo. I'm in the US To Give Back*, STAT (Feb. 6, 2017), https://www.statnews.com/2017/02/06/syria-aleppo-doctor-us/ (describing Syrian doctor's development of "novel ways to respond to the Zika epidemic"); *see also* Crystal Maynard, *Experts Delve into Issue of Wound Infections After Blast Injuries*, U.S. Army (Dec. 7, 2016), https://www.army.mil/article/179290/experts_delve_into_issue_of_wound_infections_after_blast_injuries (discussing program developed by the U.S. Department of Defense that gathers international expertise in battlefield injuries and infections and develops health solutions).

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[34] Stuart Anderson, Nat'l Found. for Am. Policy, The Contributions of Immigrants to Cancer Research in America 1 (Feb. 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226420.

[35] *Id.*

[36] *Ebola-Affected Countries Receive NIH Support to Strengthen Research Capacity*, Nat'l Insts. of Health (Oct. 26, 2016), https://www.nih.gov/news-events/news-releases/ebola-affected-countries-receive-nih-support-strengthen-research-capacity; *see also Joint West Africa Research Group To Foster Biopreparedness Collaborative Initiative To Focus on Expanding Research Capabilities in Region*, U.S. Army Med. Res. & Materiel Command (last updated July 20, 2016), http://mrmc.amedd.army.mil/index.cfm?pageid=media_resources.articles.biopreparedness_collaborative_initiative_in_west_africa ("The West African Ebola outbreak in 2014–15 highlighted gaps in global public health response and a lack of countermeasures. To help address this, the [Defense Department] invested in a strategic initiative called the Joint West Africa Research Group to leverage existing research platforms and relationships to improve biopreparedness in the region.").

Global collaboration among health professionals provides opportunities to share medical knowledge and cross-train the clinical skills necessary to address global medical challenges. The Executive Order's impact on other nations' abilities to collaborate with the United States will likely make such collaboration less robust, slowing advances in medical treatment that would otherwise benefit patients in the United States.

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[37] *E.g.*, Lisa Morris, *Engineers, Scientists Participate in International Exchange Program*, U.S. Army (Oct. 22, 2014), https://www.army.mil/article/136728 ("Currently, seven foreign engineers and scientists work at the USAMRMC through the [Engineer and Scientist Exchange Program] and one U.S. scientist works abroad.").

[38] *See, e.g.*, *Emerging Pandemic Threats Program: EPT-2*, U.S. Agency for Int'l Dev. (last updated Nov. 25, 2014), https://www.usaid.gov/ept2 (recognizing the importance of global networks to prevent and control pandemic threats); Christopher R. Braden et al., *Progress in Global Surveillance and Response Capacity 10 Years After Severe Acute Respiratory Syndrome*, 19 Emerging Infectious Diseases 864, 867 (2013) ("Perhaps the most important legacy of SARS is the recognition of the critical need for a multilateral response, led by [the World Health Organization], in the event of a rapidly moving but ultimately containable global epidemic.").

[39] Global Health Security Agenda, Advancing the Global Health Security Agenda: Progress and Early Impact from U.S. Investment 1, 2 (n.d.), https://www.ghsagenda.org/docs/default-source/default-document-library/ghsa-legacy-report.pdf?sfvrsn=12.

2. Inclusion of Non-U.S. Professionals in the American Healthcare Community Enhances America's Health Security.

The integration of health professionals from outside the United States into the nation's healthcare network improves more than global health security. It strengthens our domestic health security, advancing the express purpose of the Executive Order to protect Americans.

Shortly after the terrorist attacks on September 11, 2001, and the subsequent anthrax attacks, the government recognized the threat infectious disease presents to our national security.[40] This and other health-security threats persist, as illustrated recently in the rapid spread of the virulent Ebola virus.[41]

Teaching hospitals are critical to the health-security infrastructure of the United States.[42] These hospitals combine three missions—patient care, physician training, and medical research—and train the next generation of doctors, dentists, nurses, and other health professionals. Although they represent only 5% of all hospitals, teaching hospitals provide 95% of the nation's comprehensive cancer centers,[43] 71% of all Level I trauma centers,[44] 69% of all burn-care-unit-center beds,[45] 60% of pediatric intensive-care-unit beds,[46] and 33% of all charity care.[47] They are often on the front lines when America experiences terrorist attacks and large-scale health threats, as evidenced by the roles they played in the response to the 2013 Boston Marathon bombing,[48] the treatment of Ebola in teaching hospitals in Nebraska and At-

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[40] Gary Cecchine & Melinda Moore, *Infectious Disease and National Security: Strategic Information Needs* 22–23 (2006).

[41] Lena H. Sun, *Ebola Fight Remains a Priority for Obama*, Wash. Post, Dec. 3, 2014, at A3.

[42] *Why Teaching Hospitals Are Important to All Americans*, Assoc. of Am. Med. Colls. (Aug. 24, 2017), https://news.aamc.org/

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for-the-media/article/teaching-hospitals-important-americans/; *Teaching Hospitals: Bringing Together Patient Care, Research, and Education*, Assoc. of Am. Med. Colls. (Mar. 14, 2017), https://news.aamc.org/for-the-media/article/teaching-hospitals/.

[43] *Why Teaching Hospitals Are Important to All Americans*, *supra* note 42.

[44] *Id.* Level I trauma centers are "central to the trauma system" and "capable of providing total care for every aspect of injury—from prevention through rehabilitation." *Trauma Center Levels Explained*, Am. Trauma Soc'y (last visited Sept. 15, 2017), http://www.amtrauma.org/?page=traumalevels.

[45] *Why Teaching Hospitals Are Important to All Americans*, *supra* note 42.

[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, Atul Gawande, *Why Boston's Hospitals Were Ready*, New Yorker (Apr. 17, 2013), http://www.newyorker.com/news/news-desk/why-bostons-hospitals-were-ready.

lanta,[49] the locations of the members of the Global Virus Network's Zika Task Force,[50] and as recently as Hurricane Harvey in Houston and Hurricane Irma in Florida.[51]

For decades, teaching hospitals have benefitted from the diverse training and skills of health professionals from other nations.[52] The reliance of teaching hospitals on health professionals from outside the

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[49] *See* Michael J. Connor, Jr., et al., *Successful Delivery of RRT in Ebola Virus Disease*, 26 J. Am. Soc'y Nephrology 31, 31 (2015) (describing treatment of Ebola patient in Atlanta); Scott Neuman, *Why Ebola Patients Are Getting Treatment in Nebraska*, NPR (Oct. 6, 2014, 12:40 pm), http://www.npr.org/sections/thetwo-way/2014/10/06/354083214/why-ebola-patients-aregetting-treatment-in-nebraska (reporting treatment of a Liberian man in Nebraska because of a government-commissioned biocontainment facility at a teaching hospital there); *see also Why Teaching Hospitals Are Important to All Americans*, *supra* note 42.

[50] Global Virus Network, Zika Task Force Members 1–19 (n.d.), http://gvn.org/wp-content/uploads/2016/03/GVN-ZTF-Bios.pdf.

[51] Ricardo Nuila, *Treating Patients at Houston's Largest Emergency Shelter, as Hurricane Harvey Rages*, New Yorker (Aug. 29, 2017), https://www.newyorker.com/news/news-desk/treating-patients-at-houstons-largest-emergency-shelter-as-hurricane-harvey-rages; Pam Wright, *At Tampa Hospital in Evacuation Zone, 800 Patients and Staff Ride Out Hurricane Irma*, Weather Co. (Sept. 10, 2017, 3:15 pm), https://weather.com/storms/hurricane/news/hurricane-irma-tampa-hospital-evacuation-zone.

[52] *E.g.*, Declaration of Eric Scherzer ¶ 12, *Hawai'i*, 2017 WL 1011673 (ECF No. 154 Ex. 1 Ex. I) (detailing that of a New York hospital's 91 internal-medicine residents, 43 are on H-1B visas, 12 are on J-1 visas, and 20 have green cards).

United States makes such hospitals acutely vulnerable to disruptions in the immigration system. This includes the prospect of longer waits for veterans seeking healthcare, given the fact that many international health professionals provide care at VA health facilities.

3. Non-U.S. Professionals Contribute Their Diverse Clinical and Cultural Experiences to the American Healthcare Community.

Physicians and other health professionals cannot do their jobs effectively if they cannot relate to the patients that they serve. Health professionals provide better care to their patients if they have a broad cultural competence and understand the social and cultural factors that affect health and treatment.[53] Likewise, the highest-quality patient care results from the exchange of diverse perspectives and experiences.[54]

For these reasons, the participation in our education and healthcare systems of students, trainees, and professionals hailing from outside the United States materially improves the care available to patients inside the United States.[55] Limitations on the participation of students, trainees, and professionals in U.S. programs—which Executive Order No. 13,780 threatens—undercuts these benefits.[56]

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[53] *See* Joseph R. Betancourt et al., *Defining Cultural Competence: A Practical Framework for Addressing Racial/Ethnic Disparities in Health and Health Care*, 118 Pub. Health Rep. 293, 296 (2003) ("Racial/ethnic diversity in the health care workforce has been well correlated with the delivery of quality care to diverse patient populations.").

[54] *See* Heena P. Santry & Sherry M. Wren, *The Role of Unconscious Bias in Surgical Safety and Outcomes*, 92 Surgical Clinics North Am. 137, 143 (2012) ("Cultural competence is considered an expected skill of modern physicians and has been described as a requirement for physicians who wish to deliver high-quality care to all patients.").

II. Congress Has Recognized the Importance of Non-U.S. Professionals to the American Healthcare System.

Recognizing the global nature of our healthcare community, Congress has enacted laws designed to attract physicians from other countries. It has also created legal exceptions to otherwise applicable limits on the eligibility of medical-resident physicians to remain in the United States, provided that the professionals practice in underserved communities. These laws and related waivers—many of which are longstanding—have added thousands of physicians in places that have had difficulties attracting trained medical professionals.

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[55] *Cf.* Betancourt et al., *supra* note 53, at 296.

[56] *See* Armstrong et al., *supra* note 29, at e40(2) ("[I]mmigration policy that blocks the best from coming to train and work in the United States and blocks our trainees and faculty from safely traveling to other countries is a step backward, one that will harm our patients, colleagues, and America's position as a world leader in health care and innovation.").

A. Congress Established Programs To Attract Non-U.S. Professionals To Serve Medically Underserved Communities.

According to the federally funded Rural Health Information Hub, "rural areas often experience difficulties in the recruitment and retention of physicians" and, "[d]ue to these difficulties, many communities turn to the recruitment of non-U.S. citizen international medical graduates . . . who trained on a J-1 visa to fill their physician vacancies."[57] Congress has responded to this in part through the longstanding Conrad 30 waiver program, which enjoys broad bipartisan support.[58]

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[57] *Rural J-1 Visa Waiver*, Rural Health Info. Hub (last updated Feb. 24, 2017), https://www.ruralhealthinfo.org/topics/j-1-visa-waiver; *see also* Fred D. Baldwin, *Access to Care: Overcoming the Rural Physician Shortage*, Appalachian Reg'l Comm'n (last visited Sept. 15, 2017), https://www.arc.gov/magazine/articles.asp?ARTICLE_ID=98; Declaration of Marc Overbeck ¶¶ 3, 5, *Hawai'i*, 2017 WL 1011673 (ECF No. 154 Ex. 1 Ex. G) (describing J-1 visa program and its role in ensuring an adequate supply of healthcare providers in rural and other underserved areas).

[58] Press Release, Darrell Issa & Brad Schneider, Reps. Issa and Schneider Introduce Bipartisan Legislation to Help Address Physician Shortages (Apr. 25, 2017), https://issa.house.gov/news-room/press-releases/reps-schneider-and-issa-introduce-bipartisan-legislation-help-address. The most recent reauthorization of the Conrad 30 waiver program (that was not included within an appropriations measure) passed on unanimous consent in the Senate, 158 Cong. Rec. S6007 (daily ed. Aug. 2, 2012), and a 412–3 vote in the House, *id.* at H5972 (daily ed. Sept. 13, 2012).

The majority of physicians from other countries who serve their medical residencies[59] in the United States do so as "exchange visitors" under a J-1 visa.[60] Ordinarily, J-1 visa holders must return to their home countries for at least two years before they can seek certain nonimmigrant visas or permanent-resident status in the United States.[61] The Conrad 30 program, however, allows state health departments to recommend waiver of this requirement for up to thirty physicians per state per year if the physicians agree to be employed full-time for at least three years serving patients in medically underserved communities.[62]

More than fifteen thousand physicians have participated in the Conrad 30 program since it was first authorized in 1994.[63] For example, in the past ten

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[59] Medical residencies are a "vital component of American medical education," *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 525 (3d Cir. 1994), that provide new physicians "a supervised transition between the pure academics of medical school and the realities of practice," *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 549 (3d Cir. 2017).

[60] *See* Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2015–2016*, 316 JAMA 2291, 2302 (2016).

[61] *See* Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (2012).

[62] *See* Immigration and Nationality Act § 214(*l*), 8 U.S.C. § 1184(*l*) (2012); *Conrad 30 Waiver Program*, U.S. Citizenship & Immigration Servs. (last updated May 5, 2014), https://www.uscis.gov/working-united-states/students-and-exchange-visitors/conrad-30-waiver-program.

[63] *Conrad 30 Reauthorization Bill Earns Bipartisan Support*, Am. Med. Ass'n (May 18, 2017), https://wire.ama-

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years, Iowa has sponsored 292 Conrad 30 participants, utilizing 97% of the state's program allotment.[64] Iowa's high usage of the Conrad 30 program illustrates the importance of the program to directing medical professionals to areas in the United States that have a significant need for them.

Although the Conrad 30 waiver program is decentralized, many of the program's oversight and approval responsibilities remain with the federal government.[65] For example, the U.S. Department of State Waiver Review Division must review and recommend each Conrad 30 waiver forwarded by a state health department before the waiver may be considered by the U.S. Citizenship and Immigration Services, an agency within the Department of Homeland Security. In turn, USCIS has exclusive jurisdiction to approve or deny each such waiver. USCIS is also the sole agency responsible for approving petitions for H-1B status, a precondition for employment authoriza-

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assn.org/ama-news/conrad-30-reauthorization-bill-earns-bipartisan-support.

[64] Devan Patel, *Foreign Doctors Assist with Iowa's Physician Shortage*, Globe Gazette (Macon City, Iowa), Mar. 19, 2017, at C1. Iowa has over three hundred HPSAs. *Shortage Areas*, *supra* note 14.

[65] Davis G. Patterson et al., *Conrad 30 Waivers for Physicians on J-1 Visas: State Policies, Practices, and Perspectives* 2 (WWAMI Rural Health Ctr. Final Rep. No. 157, Mar. 2016), http://depts.washington.edu/fammed/rhrc/wp-content/uploads/sites/4/2016/03/RHRC_FR157_Patterson.pdf.

tion to fulfill the three-year-service commitment under the Conrad 30 waiver program.[66]

Physicians from other countries may also obtain a waiver of the J-1 visa two-year-return requirement by serving in a program providing care to underserved communities under the purview of federal agencies including the Appalachian Regional Commission, the Delta Regional Authority, and the Departments of Health and Human Services, Defense, and Veterans Affairs.[67] Since the start of the program, the Appalachian Regional Commission has placed more than a thousand physicians in more than two hundred Appalachian communities.[68] And the Department of Defense uses the J-1 waiver process to ensure an adequate number of physicians and scientists "in compelling cases to retain persons of unique and outstanding qualifications whose services are urgently required for programs of significant official interest to the Department of Defense."[69]

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[66] *About ECMFG*, Educ. Comm'n for Foreign Med. Graduates (last updated Apr. 2, 2013), http://www.ecfmg.org/about/.

[67] 22 C.F.R. § 41.63(c) (2017); *Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement*, Bureau of Consular Affairs, U.S. Dep't of State (last visited Sept. 15, 2017), https://travel.state.gov/content/visas/en/study-exchange/student/residency-waiver.html; Karen M. Pollins & Kristen A. Harris, Immigration Issues Impacting the Training, Recruitment, and Employment of Foreign Physicians by Academic Medical Centers 7 (Jan. 2015), http://harrisvisalaw.com/AHLA.AMC.Member.Briefing.pdf.

[68] Baldwin, *supra* note 57.

Some physicians from other countries continue to serve beyond the required three years in a medically underserved area, often in connection with the Physician National Interest Waiver Program. This program provides a path for physicians to obtain lawful-permanent-resident status. Under the program, a physician agrees to work full-time for five years in an area designated by HHS as having a physician shortage or at a healthcare facility under the jurisdiction of the Secretary of the Veterans Administration. This increases patient access to care by retaining physicians from other countries in medically underserved U.S. communities and in VA hospitals.[70]

B. Congress Established Programs for Non-U.S. Specialists and Others with Extraordinary Abilities.

Physicians from other countries are also eligible for USCIS-issued H-1B visas for specialty occupations under the sponsorship of a U.S. employer. Such physicians are subject to significant vetting. To provide direct patient-care services, physicians must have a medical license issued by the state (or states) in which they will practice medicine. Eligibility for a license, in turn, requires passing all steps of the United States Medical Licensing Examination, rigorous screening and formal certification by the Educational Commission for Foreign Medical Graduates (ECFMG), and successful completion of the required number of years in an accredited graduate-medical-education program.[71] In general, a physician from another country may obtain H-1B status for up to six years.[72] In 2016, the federal government approved certifications for more than ten thousand physicians to work under H-1B visas, including 1,467 in New York, 945 in Michigan, and 826 in Illinois.[73]

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[69] *Department of Defense Responsibility of Review of Waiver Requests*, Office of the Under Sec'y of Def. (Acquisition, Tech. & Logistics), U.S. Dep't of Defense (last visited Sept. 15, 2017), http://www.acq.osd.mil/ecs/review-request.html.

[70] *Green Card Through a Physician National Interest Waiver (NIW)*, U.S. Citizenship and Immigration Servs. (last updated Feb. 17, 2016), https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-through-physician-national-interest-waiver-niw.

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[71] *Certification*, Educ. Comm'n for Foreign Med. Graduates (last updated Sept. 7, 2016), http://www.ecfmg.org/certification/index.html; *Residency Program Requirements for International Medical Graduates*, Am. Med. Ass'n (last visited Sept. 15, 2017), https://www.ama-assn.org/life-career/residency-program-requirements-international-medical-graduates.

[72] Immigration and Nationality Act § 212(n)(1)(E)–(n)(1)(G), (n)(3), 8 U.S.C. § 1182(n)(1)(E)–(n)(1)(G), (n)(3); 20 C.F.R. §§ 655.736–.739 (2017).

[73] Peter A. Kahn & Tova M. Gardin, *Distribution of Physicians with H-1B Visas by State and Sponsoring Employer*, 317 JAMA 2235, 2235 (2017); *see also* Michael Ollove, *Changes to Visa Program Put Foreign-Born Doctors in Limbo*, PBS NewsHour: The Rundown (May 23, 2017, 3:46 pm), http://www.pbs.org/newshour/rundown/changes-visa-program-put-foreign-born-doctors-limbo/ (reporting that University of Arkansas for Medical Sciences "had 86 slots for H-1B visa holders in 2016" and "used the visa program to recruit pioneering researchers from around the world").

In addition, physicians and other health professionals from other countries may submit an immigrant petition on the basis of extraordinary ability reflected by national or international acclaim, or recognition as an outstanding professor or researcher with an offer of tenure or a tenure-track position at a U.S. institution of higher education.[74]

III. The Executive Order Threatens To Disrupt the Nation's Healthcare Workforce.

The Executive Order threatens to disrupt the carefully balanced immigration processes essential to the delivery of healthcare in the United States and the conduct of vital biomedical research. The changes contemplated by the Executive Order—nationality-based suspension of entry with an ill-defined waiver process and projected system backlogs—put patient care at risk. For example, a consular cable transmitted by the Secretary of State shortly after the Executive Order was issued recognizes that limiting visa interviews in connection with heightened scrutiny and vetting "may cause interview backlogs to rise."[75] While this Court appeared to rely on the Executive

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[74] *Employment-Based Immigration: First Preference EB-1*, U.S. Citizenship & Immigration Servs. (last updated Oct. 29, 2015), https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1.

[75] Cable from Rex W. Tillerson, U.S. Sec'y of State, to all diplomatic and consular posts ¶ 13 (Mar. 17, 2017), *reprinted in* Posting of Cassandra Garrison to live.reuters.com (Mar. 23, 2017, 9:12 am), http://live.reuters.com/Event/Live_US_Politics/791255396.

Order's waiver process in adjudicating the federal government's stay applications, [76] no substantive guidance has been issued by the federal government, undermining the ability of the waiver process to provide predictable processes for *amici* and their members.

After the Court's June 26, 2017 order staying in part the Fourth and Ninth Circuits' decisions, the Department of Homeland Security published "frequently asked questions" on enforcement of the Executive Order. Regarding waivers, DHS directed individuals to the Department of State, which would adjudicate waiver requests "on a case-by-case basis if a foreign national demonstrates that his or her entry into the United States is in the national interest, will not pose a threat to national security, and that denying entry during the suspension period will cause undue hardship."[77] But that language just repeats the vague standard in the Executive Order and does not further public understanding of how that standard would be applied.[78] The Department of State—to which the DHS FAQs refer readers—provided no additional information on the standard for a waiver and no process-related information except to "disclose during the visa interview any information that might qualify the individual for a waiver."[79]

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[76] *Trump*, 137 S. Ct. at 2088 ("[The Executive Order] itself distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category.").

[77] *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States*, U.S. Dep't of Homeland Sec. (last updated July 21, 2017), https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

[78] Exec. Order No. 13,780 § 3(c), 82 Fed. Reg. at 13,214 (J.A. 1429) (allowing waiver "if the foreign national has demonstrated to the officer's satisfaction that denying entry

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Even with the federal government's public statements about it, key questions relating to the waiver process remain unanswered:

> (1) Will signed, mutually binding contractual obligations between physicians and their graduate-medical-education programs and related participation in those programs be considered presumptive grounds for a waiver?
>
> (2) May a physician leave the United States temporarily to visit family members or otherwise tend to personal or professional matters, such as conferences or charity work, without jeopardizing visa issuance, visa renewal, or reentry?

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during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest").

[79] *Executive Order on Visas*, Bureau of Consular Affairs, U.S. Dep't of State (July 14, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html ("[C]onsular officers may issue visas to nationals of countries identified in the E.O. on a case-by-case basis, when they determine: that issuance is in the national interest, the applicant poses no national security threat to the United States, and denial of the visa would cause undue hardship.").

> (3) Will deadlines associated with the U.S. graduate-medical-education postgraduate year (July 1 through June 30), such as residency-position start dates, which are outside the control of the physician, be accommodated through the waiver process?
>
> (4) Will the cognizant agencies confirm the specific documentation from host graduate-medical-education programs, sponsoring employers, and host research organizations that they will deem probative in connection with a waiver application?[80]

In the absence of transparent criteria and timely decision making, *amici* believe there is a risk that highly qualified health professionals from other countries will choose to go elsewhere, to the detriment of our nation's patients.

Sudden changes in immigration processes and widespread backlogs present a significant complication for the "Match," the annual process that matches the preferences of individuals seeking a slot in a U.S. graduate-medical-education program to the preferences of the training program, resulting in assignments of residents and fellows. The 2017 Match had more than 43,000 applicants for graduate-medical-education training programs, including more than 10,000 non-U.S. citizens.[81]

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[80] *See* Declaration of Dierdre Heatwole ¶ 12, *Hawai'i*, 2017 WL 1011673 (ECF No. 154 Ex. 1 Ex. C) (stating that Executive Order's waiver process does not meaningfully diminish uncertainty related to approvals needed for entry and continued stay); Declaration of Eric Scherzer, *supra* note 52, ¶ 12 (same).

According to Congress, the Match "ha[s] been an integral part of an educational system that has produced the finest physicians and medical researchers in the world."[82] Congress also acknowledged the country's teaching hospitals and medical schools' "crucial missions of patient care, physician training, and medical research."[83]

In 2017, medical-school graduates from countries other than the United States and Canada matched to more than 2,000 of the internal-medicine residencies in the United States.[84] Graduates from other countries matched to 337 first-year family-medicine-residency positions and 253 first-year pediatrics-residency positions, providing much needed care in the types of practices where physician shortages are growing.[85]

The lower courts' injunctions reassured American residency programs that international applicants they selected in the Match this year would be able to start their programs on time. Accordingly, the Executive Order did not materially disrupt the 2017

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[81] Nat'l Resident Matching Prog., Results and Data: 2017 Main Residency Match 1 (Apr. 2017), http://www.nrmp.org/wp-content/uploads/2017/04/Main-Match-Results-and-Data-2017.pdf.

[82] 15 U.S.C. § 37b(a)(1)(A) (2012).

[83] *Id.* § 37b(a)(1)(E).

[84] Nat'l Resident Matching Prog., *supra* note 81, at 8.

[85] *Id.* at 7.

Match. However, continued uncertainty about the entry of physicians from other countries may adversely affect the 2018 Match and subsequent iterations if graduate-medical-education programs decline to select highly qualified candidates from the affected countries.

Medical residents comprise roughly twelve percent of all active physicians in the United States.[86] Of the 120,000 residents and fellows who served in graduate-medical-education programs in 2015, more than 18,000 were neither U.S. citizens nor lawful permanent residents.[87] In each year from 2011 through 2015, eight to nine percent of resident physicians held temporary visas.[88] This demonstrates that, despite the recent opening of several new medical schools, there are insufficient graduates of U.S. medical schools to meet the needs of U.S. medical-residency programs and the nation's overall need for physicians. Professionals from other countries fill these gaps serving as physician-trainees in accredited programs.

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[86] Brotherton & Etzel, *supra* note 60, at 2302; *2016 Physician Specialty Data Report: Number of People per Active Physician by Specialty, 2015*, Assoc. of Am. Med. Colls. (last visited Sept. 15, 2017), https://www.aamc.org/data/workforce/reports/458490/1-2-chart.html.

[87] *See* Brotherton & Etzel, *supra* note 60, at 2302.

[88] *Id.* J-1 or J-2 exchange-visitor visas were held by 6,568 residents; 3,167 residents held H-1, H-1B, H-2, or H-3 temporary-worker visas; and 403 residents held F-1 student visas, and approximately 60 residents held B-1 or B-2 temporary-visitor visas. *Id.*; *see also* Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2014–2015*, 314 JAMA 2436, 2446 (2015); Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2013–2014*, 312 JAMA 2427, 2437 (2014); Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education, 2012–2013*, 310 JAMA 2328, 2338 (2013); Sarah E. Brotherton & Sylvia I. Etzel, *Graduate Medical Education 2011–2012*, 308 JAMA 2264, 2273 (2012).

Medical residents, which include a significant percentage of non-U.S. physicians, are essential to the delivery by the VA of healthcare to our nation's veterans. In 2014, more than 40,000 medical residents, including those holding temporary visas, completed some or all of their clinical training in VA hospitals and other medical centers.[89]

The Department of State has designated the ECFMG as the visa sponsor for all J-1 exchange-visitor physicians who participate in clinical-training programs in the United States. To participate in graduate-medical-education programs, graduates from medical schools in countries other than the United States and Canada must achieve certification through the ECFMG. Certification involves verification of identity and graduation from a recognized medical school, successful performance on the same professional-knowledge and skills examinations that must be passed by U.S. medical-school graduates, and screening against the U.S. Department of Treasury Office of Foreign Assets Control Specially Designated Nationals List.[90]

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[89] *Medical and Dental Education Program*, U.S. Dep't of Vets. Affairs (last updated Feb. 28, 2017), https://www.va.gov/oaa/gme_default.asp.

[90] John R. Boulet et al., *The International Medical Graduate Pipeline: Recent Trends in Certification and Residency Training*,

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A destabilized and further backlogged immigration system will interfere with the ability of medical-residency programs to select the applicants deemed best qualified for their programs, patients, and communities, and it will disrupt the staffing of training programs. This harms both the hospitals and the patients they serve by reducing the number of qualified physicians available to provide necessary care to patients throughout the United States. Further, a reduction in the number of qualified medical-school graduates who participate in medical-residency programs will exacerbate the already growing physician-workforce shortage—a shortage felt most acutely in rural and urban underserved communities.[91]

Backlogged immigration processes also will disrupt the orderly transition between medical-residency program years, which occurs on or about July 1. If visa-related processing delays prevent a physician from reporting on July 1, even if the delays are short term, the adverse effect on patients will be immediate and potentially irreparable, beginning

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25 Health Aff. 469, 473–74 (2006); Educ. Comm'n for Foreign Med. Graduates, ECFMG Fact Sheet for Consular Officials 1–2 (Mar. 30, 2017), http://www.ecfmg.org/annc/fact-sheet-consular-officials.pdf.

[91] *See* Declaration of Marc Overbeck, *supra* note 57, ¶¶ 4, 6 (discussing hardship to state and harm to patients if J-1 visas are not available to doctors from affected countries); Declaration of Eric Scherzer, *supra* note 52, ¶¶ 12–13 ("As a result of the . . . Executive Order, physicians from the affected countries may not pursue entry to the U.S. in J-1 status and will thereby deprive underserved rural communities of the benefit of their service under a J-1 waiver after their training.").

with strains on coverage in critical care, surgical, and outpatient settings. Covering for a physician whose entry to the United States is in limbo will put unreasonable demands on colleagues in the form of extended duty hours and additional "on call" periods, creating risks associated with quality and safety.

Delays also threaten the viability of the Conrad 30 waiver program and other widely used pathways that rely on timely decisions on petitions for initial approval or changes in immigration status. As a result, highly skilled medical graduates from other countries are likely to pursue residencies outside the United States, in nations such as Canada and the United Kingdom.[92]

The absence of even one physician can have a significant impact.[93] This harm is more than hypothetical. Although the predecessor Executive Order was in effect for only a short period of time, it prevented licensed physicians from entering the United States, where they had responsibilities for patient care.[94]

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[92] Declaration of Eric Scherzer, *supra* note 52, ¶ 10.

[93] *Id.* ¶ 14; *see also* Mike Hixenbaugh, *Trump Issues Revised Travel Ban: Order Could Block Medical Graduates From Rural Areas in Need*, Hou. Chron., Mar. 7, 2017, at A1 (discussing importance of foreign physicians to rural and urban healthcare); *supra* note 27 and accompanying text.

[94] *See, e.g.*, Fares Alahdab et al., *Syrian Doctors and the American Dream: Practicing Medicine in a New Immigration Landscape*, Health Aff. Blog (Feb. 24, 2017), http://healthaffairs.org/blog/2017/02/24/syrian-doctors-and-the-american-dream-practicing-medicine-in-a-new-immigration-landscape/.

The Executive Order also has the potential to adversely affect patient care by constraining medical research and innovation.[95] In 2016, all six American winners of the Nobel Prize in economics and scientific fields were immigrants. Moreover, since 2000, immigrants have been awarded 40%—or 31 of 78—of the Nobel Prizes won by Americans in chemistry, medicine, and physics.[96] An analysis of the U.S. Patent and Trademark Office's online database shows that 76% of patents awarded to the top ten patent-producing U.S. universities in 2011 listed at least one inventor who had been born in another country.[97] During that same period, 56% of all patents were awarded to inventors who were students, postdoctoral fellows, or staff researchers from another country.[98] In the wake of the Executive Order and its predecessor, engineering schools have reported a sharp decline in the number of applications from international students, suggesting heightened fears among such students about the impact of the executive orders.[99] Because non-U.S. postdoctorate students are increasingly relied upon to counter a decrease in U.S. students pursuing biomedical research in this nation, chilling their participation could adversely affect U.S. biomedical research and our health security.[100]

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[95] *See* Susan Sauer Sloan & Tom Arrison, Nat'l Acad. of Sci., Nat'l Acad. of Med. & Inst. of Med. of the Nat'l Acads., *Examining Core Elements of International Research Collaboration: Summary of a Workshop* 1 (2011) (noting that "[t]he globalization of science, engineering, and medical research is proceeding rapidly" as governments recognize that "research and development . . . leads to economic growth, employment, and overall social well-being of their citizens").

[96] Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016, 10:48 am), https://www.forbes.com/sites/stuartanderson/2016/10/16/immigrants-flooding-america-with-nobel-prizes/#57237ef06cb6.

[97] P'ship for a New Am. Econ., Patent Pending: How Immigrants Are Reinventing the American Economy 1 (June 2012), http://www.newamericaneconomy.org/wp-content/uploads/2013/07/patent-pending.pdf.

[98] *Id.*

Finally, it is widely recognized in scientific fields that travel and global collaboration are essential incubators of research and innovation. Indeed, Congress has specifically recognized the importance of international collaboration in fields such as biomedical research.[101] The Executive Order inhibits such innovation. For example, the probability that some non-U.S. physicians currently working inside the United States will not be able to return if they travel to a conference abroad could have a chilling effect on this type of collaboration.[102]

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[99] Jeffrey Mervis, *Drop in Foreign Applicants Worries Engineering Schools*, 355 Sci. 676, 676 (2017).

[100] Howard H. Garrison et al., *Biomedical Science Postdocs: An End to the Era of Expansion*, 30 FASEB J. 41, 41, 43 (2016).

[101] *E.g.*, 21st Century Cures Act, Pub. L. No. 114-255, § 2072, 130 Stat. 1033, 1083 (2016) (expressing sense of Congress that it should "encourage a global pediatric clinical study network by providing grants, contracts, or cooperative agreements to support new and early stage investigators who participate in the global pediatric clinical study network" and that the Secretary of Health and Human Services "should engage with clinical investigators and appropriate authorities outside of the United States, including authorities in the European Union, during the formation of the global pediatric clinical study network to encourage the participation of such investigator and authorities").

The environment created by the Executive Order—even with the Court's denial in part of the federal government's motion to stay the lower courts' orders—presents real uncertainty for *amici* and their members.[103] As noted, the Executive Order's waiver process does not significantly elucidate matters,[104] and at least anecdotal evidence validates *amici*'s concerns about the interview-and-waiver process.[105] Facing this unpredictable immigration landscape, some health professionals have already abandoned their efforts to enter the United States.[106]

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[102] Declaration of Michael F. Collins ¶¶ 5, 10, 13, 15, *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017) (ECF No. 52-2); *see also* Declaration of Dierdre Heatwole, *supra* note 80, ¶ 12 (describing adverse effects on faculty, researchers, post-docs, graduate teaching assistants, and medical residents, including disruption of recruitment schedule; interference with plans to attend conferences, exchange programs, seminars, and symposia in other countries; and the prospect of losing prospective students and faculties to other countries).

[103] Mike Hixenbaugh, *Doctor Prepares To Resume Lifesaving Work in Iran*, Hou. Chron., June 29, 2017, at A1 (reporting that Iranian doctor's colleagues would not travel with him to Iran due to concerns stemming from the fact that "Iran has responded to Trump's policy by threatening to block U.S. residents from entering the country"); Rebecca Trager, *Science Community Still Wary as Trump's Travel Ban Partially Reinstated*, Chem. World (June 29, 2017), https://www.chemistryworld.com/news/science-community-still-wary-as-trumps-travel-ban-partially-reinstated/3007643.article (quoting government-relations director for the American Association for the Advancement of Science's concerns about the bona-fide-relationship standard and the continuing impression that the United States is "unfriendly" to non-U.S. professionals); Sara Reardon, *Court Revives US Travel Ban*, 546 Nature 584, 584–85 (2017) ("[M]any researchers worry that uncertainty over US immigration policy, and perceptions that the country is unwelcoming, may have already driven away some international students and scientists.").

CONCLUSION

Amici have a long history of collaborating with a diverse and highly skilled workforce of U.S. and non-U.S. health professionals to treat hundreds of millions of patients annually and to conduct groundbreaking research leading to medical breakthroughs. Health professionals and scientific experts from other countries are rigorously screened, must satisfy strict standards of qualification set by our government, and are addressing compelling needs in our communities.

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[104] *See supra* pp. 27–30.

[105] *See, e.g.*, Izzy Rossi, *Virginia Tech Student Returns to Campus After Being Blocked by Travel Ban*, Collegiate Times (Blacksburg, Va.) (June 27, 2017), http://www.collegiatetimes.com/news/virginia-tech-student-returns-to-campus-after-being-blocked-by/article_8eaf75d0-5b69-11e7-b342-6b7504bb0075.html (discussing efforts of student to reenter United States from Iran).

[106] *See, e.g.*, Jennifer McDermott, *Syrian Doctor Caught in Travel Ban Gives Up, Moves to Canada*, Bos. Globe (June 28, 2017), https://www.bostonglobe.com/news/politics/2017/06/28/syrian-doctor-caught-travel-ban-gives-moves-canada/QqkVo4RNsnAdjyhQspNcpL/story.html ("Khaled Almilaji said Wednesday there's too much uncertainty, even though he possibly could get a student visa under the scaled-back version of the ban."); Susan McCord, *AU Medical Residents in Visa Trouble*, Augusta (Ga.) Chron., July 6, 2017, at 1A (describing hurdles encountered by foreign residents obtaining visas to begin medical-training program).

Amici believe that their work to ensure our nation's health security—through critically needed patient care and cutting-edge biomedical research—contributes to our national security. In doing so, *amici* rely upon immigration processes to operate fairly and efficiently. *Amici* are deeply concerned that the Executive Order, and similar actions barring or discouraging health professionals and scientists from coming to the United States, will reduce patient access to care, inhibit medical innovation and biomedical research, and set back efforts to prevent pandemics and other public-health threats to Americans.

For the reasons provided above, as well as those presented by Respondents, *amici* urge the Court to affirm the decisions of the Fourth and Ninth Circuits and maintain the injunctions against Executive Order No. 13,780. At a minimum, *amici* urge the Court to maintain the lower courts' injunctions to the extent permitted by its June 26, 2017 order.

Dated: September 18, 2017

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ADDENDUM

AMICI CURIAE

Association of American Medical Colleges—represents all 147 accredited U.S. medical schools; nearly 400 major teaching hospitals and health systems, including 51 U.S. Department of Veterans Affairs medical centers; and more than 80 academic societies.

Academic Pediatric Association—a professional medical organization for academic pediatricians specializing in primary-care research and healthcare services.

Alliance for Academic Internal Medicine—empowers academic internal-medicine professionals and enhances healthcare through professional development, research, and advocacy. The Alliance includes more than 11,000 faculty and staff in departments of internal medicine at medical schools and teaching hospitals.

American Academy of Family Physicians—represents 129,000 family physicians, family-medicine residents, and medical students from all fifty states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Uniformed Services of the United States.

American Academy of Pediatrics—a not-for-profit professional organization of 66,000 primary-care pediatricians, pediatric-medical subspecialists, and pediatric-surgical specialists dedicated to the attainment of optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults.

American Association of Colleges of Nursing—represents 810 member schools offering baccalaureate and graduate programs in nursing at public and private universities nationwide.

American Association of Colleges of Pharmacy—represents pharmacy education in the United States, advancing pharmacy education, research, scholarship, practice, and service to improve societal health.

American College of Healthcare Executives—an international professional society of 40,000 healthcare executives who lead hospitals, healthcare systems, and other healthcare organizations.

American College of Obstetricians and Gynecologists—is a not-for-profit educational and professional organization with more than 58,000 members dedicated to the healthcare of women.

American College of Physicians—represents 152,000 internal-medicine physicians (internists), related subspecialists, and medical students.

American Dental Education Association—the "Voice of Dental Education," with members that include all 66 U.S. dental schools, over 800 allied and advanced dental-education programs, 66 corporations, and more than 20,000 individuals.

American Nurses Association—represents the interests of 3.6 million registered nurses, has more than 179,000 members through both state associations and individual membership, and has 35 national organizational affiliates that collectively represent approximately 420,000 registered nurses in specialty areas.

American Pediatric Society—a pediatric academic society comprised of well-established child-health researchers who are recognized leaders in child health.

American Psychiatric Association—represents more than 37,000 members involved in psychiatric practice, research, and academia representing the diversity of the patients for whom they care. As the leading psychiatric organization in the world, APA now encompasses members practicing in more than 100 countries.

American Public Health Association—champions the health of all people and all communities, strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public-health issues and policies grounded in research.

American Society of Hematology—the world's largest professional society of hematologists, including clinicians and researchers, who are dedicated to furthering the understanding, diagnosis, treatment, and prevention of disorders affecting the blood.

Association of Academic Health Centers—a not-for-profit association dedicated to advancing the nation's health and well-being through the vigorous leadership of academic health centers.

Association of Medical School Pediatric Department Chairs—represents the department chairs of departments of pediatrics at leading academic medical centers.

Association of Schools and Programs of Public Health—represents more than 100 schools and programs accredited by the Council on Education for Public Health.

Association of Schools of Allied Health Professions—a national association comprised of 115 not-for-profit universities focused on issues impacting allied-health education.

Association of University Programs in Health Administration—a global network of colleges, universities, faculty, individuals, and organizations dedicated to the improvement of health and healthcare delivery through excellence in healthcare management and policy education and scholarship, by promoting the value of university-based management education for leadership roles in the health sector.

Endocrine Society—the world's oldest and largest organization of scientists devoted to hormone research and physicians who care for people with hormone-related conditions, with more than 18,000 members, including scientists, physicians, educators, nurses, and students in 122 countries.

Greater New York Hospital Association—represents more than 160 hospitals and health systems located throughout New York, New Jersey, Connecticut, Pennsylvania, and Rhode Island. All of GNYHA's members are either not-for-profit entities, charitable organizations, or publicly sponsored institutions that provide services that range from state-of-the-art, acute tertiary services to basic primary care, and, with their related medical schools, provide medical education and training and undertake cutting-edge medical research.

Hispanic-Serving Health Professions Schools, Inc.—represents 44 schools of medicine, public health, nursing, pharmacy, and dentistry that strive to strengthen the nation's capacity to increase the Hispanic health workforce and advance the health of Hispanics.

Infectious Diseases Society of America—represents physicians, scientists, and other healthcare professionals who specialize in infectious diseases to improve the health of individuals, communities, and society by promoting excellence in patient care, education, research, public health, and prevention.

National Medical Association—represents and promotes the interests of physicians and patients of African descent.

National Resident Matching Program—a private, not-for-profit organization established in 1952 to provide an orderly and fair mechanism for matching the preferences of applicants for U.S. residency positions with the preferences of residency-program directors.

Physician Assistant Education Association—represents over 200 physician-assistant programs across the nation.

Renal Physicians Association—a national medical-specialty society representing more than 5,000 nephrology practitioners in their pursuit and delivery of high-quality kidney care.

Society for Pediatric Research—a membership organization for pediatric researchers focused on creating a network of multidisciplinary researchers to improve child health.

Society of General Internal Medicine—represents more than 3,600 of the world's leading academic general internists, who are dedicated to improving access to care for vulnerable populations, eliminating healthcare disparities, and enhancing medical education.

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BRIEFS.

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Nos. 16-1436 & 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,
v.
STATE OF HAWAII, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF ART MUSEUM DIRECTORS, THE AMERICAN ALLIANCE OF MUSEUMS, THE ASSOCIATION OF ACADEMIC MUSEUMS AND GALLERIES, THE COLLEGE ART ASSOCIATION, AND 101 ART MUSEUMS IN SUPPORT OF RESPONDENTS

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MoMA Takes Quiet Stand Against Trump Travel Ban—and a Canadian Artist Is Part of It, CBC News (Feb. 7, 2017), http://www.cbc.ca/news/entertainment/moma-muslim-art-protest-1.3968411 7

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are four organizations that serve the art museum community (the Association of Art Museum Directors, the American Alliance of Museums, the Association of Academic Museums and Galleries, and the College Art Association) and 101 art museums located throughout the United States.[2] The mission of the museums, supported by the organizations, is to serve the public by making great works of art, representing the full range of human experiences, available to a wide audience. This mission is threatened by Executive Order 13,780 (the "Order"), which prevents museums in the United States from presenting certain works of art and performances that reflect the experiences of people from the six countries covered by the Order, as well as from other parts of the world.

The Order has already caused some of the *amici* museums to cancel or postpone planned exhibitions. These exhibitions, which would have showcased important works by artists from the covered countries, are jeopardized because the artists themselves, or other necessary personnel (such as the lenders, collectors, couriers, and curators), are not able to travel to the United States under the Order. Even artists and other contributors not directly covered by the Order have canceled museum events in the United States because of the uncertainty and fear that the Order has created for many foreign nationals. By limiting the range of artistic expression available in the United States, the Order will continue to cause substantial and irreparable harm to the *amici* and the American public.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

[2] The full list of *amici* art museums is included in Appendix A.

This brief describes a recent performance in the United States that would not have occurred had the Order been in place at that time, as well as planned exhibitions and performances that are now jeopardized by the Order.

SUMMARY OF ARGUMENT

> *"[T]he life of the arts, far from being an interruption, a distraction, in the life of a nation, is very close to the center of a nation's purpose—and is a test of the quality of a nation's civilization."*[3]

Art has played a pivotal role in defining the United States since its inception. As the primary means by which the public experiences art, museums are an anchor of American culture and democratic society. By fostering creativity, tolerance, and cultural enrichment, our museums promote American values, both at home and abroad.

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[3] John F. Kennedy, The Arts in America, Look, Dec. 18, 1962, at 106.

The *amici* museums serve the American public by presenting visual arts and performances that cover the full range of human artistic expression. In support of this mission, the *amici* museums regularly host exhibitions with international impact that welcome artists, performers, and visitors from the United States and other countries. These exhibitions foster important cross-cultural exchanges and spark healthy public discussions, which are now threatened by the Order.

On January 27, 2017, President Donald J. Trump signed Executive Order 13,769, which suspended for 90 days "immigrant and nonimmigrant entry into the United States of aliens" from seven predominantly Muslim countries.[4] Following several successful legal challenges to that order, on March 6, 2017, the President issued Executive Order 13,780, which went into effect on March 16, 2017, and originally barred (with certain exceptions) the nationals of six Muslim-majority countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "Designated Countries")—from entering the United States for at least 90 days.[5]

The Order will have a significant negative impact on the *amici*'s ability to conduct the kind of cross-cultural, dynamic global exchanges that make Americans more informed, and thereby, America stronger. Many of these exhibitions and performances are dependent upon the presence of participants who are citizens of one of the Designated Countries. The negative effects of the Order are already being felt, as several museums have postponed or canceled future exhibitions that require foreign artists, lenders, collectors, curators, scholars, couriers, and others whose ability to contribute can no longer be assured.[6]

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[4] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

[5] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

One of the primary objectives of the Order is "to protect . . . citizens from terrorist attacks."[7] For many foreign artists, their work is a vehicle for political dissent and social commentary, and is frequently among the most effective critiques of the inequities in their countries and the corruption in their governments. By denying entry to all nationals from six predominately Muslim countries, the Order limits the kinds of international collaboration and artistic expression that foster tolerance and understanding of others, which help protect us from the very threats the Order is intended to mitigate.

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[6] In many instances, the Order will not only prevent the exhibition of important works of art in the United States, but it will do so in contravention of national policy. Many exhibitions involving loans of art from foreign countries receive immunity under 22 U.S.C. § 2459. Before granting the protections of the statute, the State Department must determine that the exhibition is in the national interest. In those cases, if the Order causes the exhibition to be canceled, the national interest is, by definition, negatively affected.

[7] Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,209 (Mar. 9, 2017) (Section 1(a)).

ARGUMENT

A successful art exhibition or performance represents the culmination of the time, talent, and expense of dozens of individuals. The *amici* museums cannot commit to launching a significant exhibition or performance if there is a substantial risk that one or more of the key persons involved will not be able to contribute as required.

Although the Order's ban on travel purports to be temporary, it can be renewed, leaving many of the *amici* unable to commit to exhibitions or performances involving artists, scholars, or curators from the Designated Countries even after the expiration of the 90-day period. The loss of these art projects causes substantial harm to the *amici* and the public in general. It does so by depriving Americans of important works of art, great performances, and scholarly presentations, thereby denying them opportunities to gain insights into the history, culture, and aspirations of the people of the Designated Countries.

Addressing the Order's violation of the Establishment Clause, the District Court of Maryland correctly stated that it is in the public interest to "avoid sowing seeds of division in our nation."[8] As the examples below illustrate, many of the art exhibitions that will not be shown and performances that will not occur because of the

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[8] *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017).

Order promote the kind of understanding that makes us less divided and less prone to conflict.

A. An Important Performance That Would Not Have Occurred at the Cleveland Museum of Art

As part of its mission, the Cleveland Museum of Art ("CMA") organizes performances of musicians and other artists from many areas of the world. At these events, thousands of people are able to hear, see, and experience music, dance, and film from across the globe. In the recent past, these performances have included at least one artist from a Designated Country, who would not have been able to participate had the Order been in place at that time. Through his performance, the musician exposed the large audience to musical traditions from the Designated Countries and, by fusing Eastern and Western genres, promoted understanding and tolerance of individuals from the Designated Countries generally. If the Order had been in effect at that time, CMA's efforts to provide the public with the most diverse, inspiring, and thought-provoking music from around the world would have been curtailed.

B. The Order's "Chilling Effects" Has a Detrimental Effect on Amici and the American Public

The text of the Order provides that it is applicable only to citizens of the Designated Countries, but its effects would not be so limited. Nationals of the six Designated Countries—the foreign artists, lenders, curators, scholars, couriers, and conservators who make these exhibitions possible—live all over the world. Many of them, although not directly covered by the Order, are unwilling to travel to the United States because of the perceived risks associated with attempting to enter the country and a sense of animus that the Order has created toward people from certain countries.

Prominent sculptor Parviz Tanavoli—a dual-national of Iran and Canada—has decided that although one of his sculptures is currently on display at New York's Museum of Modern Art, he will not be traveling to the United States in part "to avoid the risk of being held and interrogated just because I was born in Iran."[9] Tanavoli has been hailed as "an Iranian cultural ambassador and described as one of the most prominent contemporary artists in the Middle East."[10] He has previously been detained in Iran and accused of "disturbing the public peace" because of his provocative artwork.[11]

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[9] Gareth Harris, Iranian Art Market Branches Out, Financial Times (Mar. 17, 2017), https://www.ft.com/content/3f1a3b30-fe81-11e6-8d8e-a5e3738f9ae4.

[10] Zulekha Nathoo, MoMA Takes Quiet Stand Against Trump Travel Ban—and a Canadian Artist Is Part of It, CBC News (Feb. 7, 2017), http://www.cbc.ca/news/entertainment/moma-muslim-art-protest-1.3968411.

[11] Rachael Pells, Iranian Artist Parvis Tanavoli Accused of 'Disturbing Public Peace' with Nude Artworks, Independent (July 11, 2016), http://www.independent.co.uk/arts-entertainment/art/news/iranian-artist-parviz-tanavoli-accused-of-disturbing-public-peace-with-nude-artworks-a7131386.html.

The Portland Art Museum similarly has become concerned about its ability to obtain the proper visas for internationally renowned Syrian calligrapher, Khaled Al-Saa'i. Al-Saa'i uses Arabic calligraphy as a medium of expression to create dramatic abstract compositions, such as a mural representing the Syrian civil war.[12] He has previously exhibited in the United States and has taught as visiting faculty at several American institutions. Al-Saa'i is slated to create a mural covering the Portland Art Museum's indoor sculpture court, but that is now in question due to the Order.

These examples, which are by no means exhaustive, will grow in number so long as the Order continues to create uncertainty and fear for those foreign artists and other necessary participants who would otherwise contribute to exhibitions and performances in the United States.

The Order also jeopardizes exhibitions that are made possible through site visits by nationals of the Designated Countries, including representatives of the individuals or institutions who own the collections, scholars who write and speak about the art, curators who co-organize the exhibitions, and couriers and conservators who accompany and protect the artworks.

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[12] Marion Kudla, Khaled Al-Saa'i Brings Calligraphy Art to Swarthmore, Phoenix (Mar. 31, 2016), http://swarthmorephoenix.com/2016/03/31/khaled-al-saai-brings-calligraphy-art-to-swarthmore/.

The Museum of Fine Arts Houston ("MFAH") is preparing an important exhibition of the premier collection of Persian art, from antiquity to the nineteenth century, in private hands. Over 600 items, examples of some of the finest Persian manuscripts, carpets, ceramics, and metalwork anywhere, have been placed on loan in Houston by the collector, an Iranian expatriate who left Iran prior to 1979 and has since lived in Europe and the Middle East but still holds an Iranian passport. Although the objects have been legally imported into the United States with the appropriate licenses, the Order would prevent the owner of the objects from visiting the exhibition of his own property. Because this collector could, at any time, ask for the immediate return of his collection, there is a significant risk that animus generated by Order could lead to a recall of his art, which would cause this important exhibition to be canceled. It is this kind of uncertainty that has discouraged museums like MFAH from planning future exhibitions that rely on the support of persons who are nationals of the Designated Counties. When these types of exhibitions are canceled, or never planned, because of the Order, the American public is denied the opportunity to view and study unique works of art that provide an invaluable window into world culture.

The full consequences of the Order to the *amici* can only be appreciated by multiplying these examples many times over. Other similar exhibitions and events will not occur, because lenders, curators, and scholars will be unable to attend the exhibitions, speak at the openings, and work with their American colleagues on the catalogues in the United States.

C. The Waiver Provision Does Not Prevent This Harm

The Order's waiver provisions do not protect the *amici*'s interests. Section 3(c) of the Order provides for discretionary waivers of an otherwise-barred foreign national if he or she can show that a denial of entry "would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest."[13] Neither "undue hardship" nor "national interest" is defined in the Order and the Government has provided no official guidance on how it will interpret and apply these terms. Section 3(c)(iii) provides that a waiver may be appropriate for a foreign national "enter[ing] the United States for significant business or professional obligations and [where] the denial of entry during the suspension period would impair those obligations."[14] What might amount to "significant business or professional obligations" is not further defined or clarified in the Order or elsewhere.

Museums plan exhibitions and performances months, and often years, in advance. The uncertainty of whether artists or other necessary personnel will receive discretionary waivers, based on ambiguous and undefined criteria, will effectively prevent the *amici* museums from planning many exhibitions and performances that are dependent on persons covered by the Order.[15]

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[13] Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,214 (Mar. 9, 2017) (Section 3(c)).

[14] *Ibid* (Section 3(c)(iii)).

CONCLUSION

The Order harms the *amici* and the public by preventing or discouraging many artists, lenders, curators, and scholars from traveling to the United States. Without their presence, *amici* museums will, in many cases, be unable to hold performances and showcase art originating from the Designated Countries, as well as other parts of the world—art and performances that often foster the tolerance and understanding needed to deter the kinds of conflict that the Order purports to be trying to prevent. The Court should affirm the court below and allow this important art to be shown and performances to be held in the United States, which make a significant contribution to our culture and the richness of American society.

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[15] Moreover, the Order does not specify the process for obtaining a waiver. Even if the *amici* wanted to plan an exhibit involving a barred individual, it is unclear how they or the artist would obtain a waiver, adding further to the uncertainty the *amici* face.

Respectfully submitted,

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September 18, 2017

APPENDIX

APPENDIX

The following is a complete list of the 101 *amici* art museums:

Ackland Art Museum
(Chapel Hill, NC)
Albright-Knox Art Gallery
(Buffalo, NY)
Allen Memorial Art Museum
(Oberlin, OH)
American Folk Art Museum
(New York, NY)
Andy Warhol Museum
(Pittsburgh, PA)
Art Institute of Chicago
(Chicago, IL)
Asian Art Museum of San Francisco
(San Francisco, CA)
Barnes Foundation
(Philadelphia, PA)
Bronx Museum of the Arts
(Bronx, NY)
Brooklyn Museum
(Brooklyn, NY)
Carnegie Museum of Art
(Pittsburgh, PA)
Chrysler Museum of Art
(Norfolk, VA)
Cincinnati Art Museum
(Cincinnati, OH)
Clark Atlanta University Art Museum
(Atlanta, GA)

Cleveland Museum of Art
(Cleveland, OH)

Clyfford Still Museum
(Denver, CO)

Colby College Museum of Art
(Waterville, ME)

Columbus Museum of Art
(Columbus, OH)

Contemporary Arts Museum Houston
(Houston, TX)

Contemporary Arts Center
(Cincinnati, OH)

Crocker Art Museum
(Sacramento, CA)

Crystal Bridges Museum of American Art
(Bentonville, AR)

Currier Museum of Art
(Manchester, NH)

Denver Art Museum
(Denver, CO)

Des Moines Arts Center
(Des Moines, IA)

Detroit Institute of Arts
(Detroit, MI)

Dia Art Foundation
(New York, NY)

Fralin Museum of Art at the University of Virginia (Charlottesville, VA)

Frances Lehman Loeb Art Center
(Poughkeepsie, NY)

Frick Collection
(New York, NY)

Frist Center for the Visual Arts
(Nashville, TN)

George Eastman Museum
(Rochester, NY)
Herbert F. Johnson Museum of Art
(Ithaca, NY)
High Museum of Art
(Atlanta, GA)
Hillwood Estate, Museum & Gardens
(Washington, DC)
Hood Museum of Art
(Hanover, NH)
Honolulu Museum of Art
(Honolulu, HI)
Indianapolis Museum of Art
(Indianapolis, IN)
Institute of Contemporary Art, Boston
(Boston, MA)
Institute of Contemporary Art, University of Pennsylvania (Philadelphia, PA)
Isamu Noguchi Foundation and Garden Museum (Long Island City, NY)
J. Paul Getty Trust
(Los Angeles, CA)
Jewish Museum
(New York, NY)
Jordan Schnitzer Museum of Art
(Eugene, OR)
Laguna Art Museum
(Laguna Beach, CA)
List Visual Arts Center
(Cambridge, MA)
Los Angeles County Museum of Art
(Los Angeles, CA)
Memorial Art Gallery, University of Rochester
(Rochester, NY)

Memphis Brooks Museum of Art
(Memphis, TN)

Metropolitan Museum of Art
(New York, NY)

Michael C. Carlos Museum of Emory
University (Atlanta, GA)

Mildred Lane Kemper Art Museum,
Washington University (St. Louis, MO)

Minneapolis Institute of Art
(Minneapolis, MN)

Missoula Art Museum
(Missoula, MT)

Montclair Art Museum
(Montclair, NJ)

Morgan Library & Museum
(New York, NY)

Muscarelle Museum of Art
(Williamsburg, VA)

Museum of Art, Rhode Island School of Design
(Providence, RI)

Museum of Contemporary Art Chicago
(Chicago, IL)

Museum of Contemporary Art Cleveland
(Cleveland, OH)

Museum of Contemporary Art Denver
(Denver, CO)

Museum of Contemporary Art, Los Angeles
(Los Angeles, CA)

Museum of Contemporary Art San Diego
(San Diego, CA)

Museum of Contemporary Art Santa Barbara
(Santa Barbara, CA)

Museum of Fine Arts, Boston
(Boston, MA)

Museum of Fine Arts, Houston
(Houston, TX)

Museum of Fine Arts, St. Petersburg
(St. Petersburg, FL)

Museum of Modern Art
(New York, NY)

Nasher Museum of Art at Duke University
(Durham, NC)

Nasher Sculpture Center
(Dallas, TX)

Nelson-Atkins Museum of Art
(Kansas City, MO)

New Museum
(New York, NY)

New Orleans Museum of Art
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Norman Rockwell Museum
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North Carolina Museum of Art
(Raleigh, NC)

Oakland Museum of California
(Oakland, CA)

Peabody Essex Museum
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Pennsylvania Academy of the Fine Arts
(Philadelphia, PA)

Philadelphia Museum of Art
(Philadelphia, PA)

Philbrook Museum of Art
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Portland Art Museum
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San Antonio Museum of Art
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Seattle Art Museum
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Smith College Museum of Art
  (Northampton, MA)
Solomon R. Guggenheim Museum
  (New York, NY)
Telfair Museums
  (Savannah, GA)
Toledo Museum of Art
  (Toledo, OH)
Virginia Museum of Fine Arts
  (Richmond, VA)
Wadsworth Atheneum Museum of Art
  (Hartford, CT)
Walker Art Center
  (Minneapolis, MN)
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  (Baltimore, MD)
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  (Greensburg, PA)
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  (Columbus, OH)
Whitney Museum of American Art
  (New York, NY)
Williams College Museum of Art
  (Williamstown, MA)

Worcester Art Museum
    (Worcester, MA)
Zimmerli Art Museum at Rutgers University
    (New Brunswick, NJ)

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 18 2017
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Nos. 16-1436 and 16-1540

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
—v.—
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
—v.—
HAWAII, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICI CURIAE* HUSSAM AYLOUSH, ZAHRA BILLOO, ROBERT McCAW, COREY SAYLOR, JULIA SHEARSON, HASSAN SHIBLY, AND IMRAAN SIDDIQUI IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici are prominent Muslim American citizens who work for community organizations across the United States and have witnessed the harms from the President's executive orders restricting travel from predominantly Muslim countries. *Amici* have seen increased discrimination, hate speech, and threats of violence as a result of the anti-Muslim animus that underpins this policy. They therefore have "...a unique perspective [and] specific information that can assist the court beyond what the parties can provide." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, C.J. in Chambers). *Amici* offer their experiences in support of Plaintiffs-Respondents and in support of affirmance of the circuit court decisions below.

Amici are leaders of the Council on American-Islamic Relations ("CAIR"), the country's largest Muslim civil rights organization, with local chapters throughout the country. Each chapter shares a common mission to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding.

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[1] The parties' letters consenting to the filing of all *amicus* briefs have been filed with the Clerk's office. Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to fund the preparation or filing of this brief. This brief does not purport to represent the position of NYU School of Law.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). The pernicious lesson of Executive Order No. 13,780[2] is that discrimination against Muslims is not only acceptable, but officially encouraged under the Trump Administration. Anti-Muslim animus was the motivation for this policy, and that officially-sanctioned discrimination has activated and legitimated additional acts of hatred against Muslims. If this Court does not rule on the merits of this case, the pernicious lesson of the Order will persist.

Amici are prominent American Muslims who are active in affected Muslim communities across the United States. They offer their accounts of how the pernicious lesson of the Executive Order has affected their communities, well beyond the denial of visas. They recount incidents of religious hatred that have taken place in American cities throughout this country since the Order was issued. They describe the discrimination, legitimated by the Order, which continues to feed fears and intimidate their communities.

The Fourth Circuit found that the Order "drips with religious intolerance, animus, and discrimination," and is likely to violate the Establishment Clause of the First Amendment. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572; 601 (4th Cir. 2017). The Ninth Circuit held that it likely violates the

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[2] Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (hereinafter the "Executive Order" or the "Order").

Immigration and Nationality Act, which forbids discrimination on the basis of nationality. *Hawaii v. Trump*, 859 F.3d 741, 779 (9th Cir. 2017), *cert. granted sub nom., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017). *Amici* ask the Court to uphold these decisions – to reinforce a corrective lesson – and with the authority of this Court, to reject the stigma sanctioned by President Trump's Executive Order.

Amici seek judicial condemnation of such discrimination and confirmation that it is contrary to the laws and founding principles of this country. While the travel ban is nominally of limited duration, some of its harms have no expiration date. In short, this case is not moot for *Amici*. It is not moot for the American Muslims who have suffered a spike in anti-Muslim discrimination. It is not moot for the more than 85 American mosques that have been vandalized with pro-Trump graffiti. It is not moot for the American victims of anti-Muslim hate crimes, which have surged by 91 percent this year.

In sum, this case is not moot for the millions of American Muslims who continue to be stigmatized by the Executive Order. *Amici* ask this Court to be a good teacher, and to say, clearly and unmistakably, that executive actions based on religious animus are unlawful and repugnant to the Constitution. Neither the country nor the Constitution can tolerate conspicuous silence on this score from the highest Court in the land.

Even if the Court does find the case moot, it should not vacate the decisions below, as proposed by the government. Pet'r Br. at 37-38. Vacatur is an extraordinary equitable remedy and is wholly unjustified in this case. Instead, this Court should uphold the substance of the decisions below. It should rule on the merits and convey, to President Trump as well as all Americans, that discrimination on the basis of religion will not be tolerated now, or in the future.

ARGUMENT

When granting *certiorari*, the Court instructed the parties to address "[w]hether the challenges to §2(c) became moot on June 14, 2017." *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080, 2087 (2017). Here, the "only conceivable basis for a finding of mootness" is the government's voluntary conduct – a shifting, self-imposed expiration date for implementation of the travel ban in §2(c). In the circumstances of voluntary cessation, a mootness claim requires the Petitioners to bear the heavy burden of persuading the Court that the challenged conduct cannot reasonably be expected to start up again. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000). In addition, the Order falls within an exception to the mootness doctrine as a controversy that is "capable of repetition, yet evading review." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

The Order has also inflicted lasting harmful stigma on American Muslims across the country, beyond the denial of visas, which will linger long after any arbitrary expiration date. The remedy for these wrongs is a ruling from this Court upholding, not vacating, the decisions below.

I. The Ban Is "Capable of Repetition, Yet Evading Review"

This is a classic controversy that is "capable of repetition, yet evading review." *Kemna*, 523 U.S. at 17; *S. Pac. Terminal Co. v. Interstate Commerce*

Comm'n, 219 U.S. 498, 515 (1911). There is a longstanding exception to the mootness doctrine for situations where, as here, (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "'there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Kemna*, 523 U.S. at 17 (brackets in original) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curium))); *Weinstein v. Bradford*, 423 U.S. 147 (1975). This case squarely satisfies both criteria.

The duration of §2(c) may be too short to be fully litigated before it formally expires. But as Petitioners have already acknowledged, the duration of §2(c) is malleable, has already been extended, and is subject only to the whim of the Executive. Second, Petitioners continue to assert the legality of the ban, which counsels firmly against a finding of mootness. Both factors indicate that the President would be "free to return to his old ways" if given half a chance. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982) (quoting *United States v. W. T. Grant Co.,* 345 U.S. 629, 632 (1953)).

A. The Duration May Be Too Short

As this Court suggested, it is conceivable that §2(c) became moot on June 14, 2017. *Trump,* 137 S. Ct. at 2087. By its own terms, the ban has a 90-day clock that arguably began on March 16. Exec. Order No. 13,780, 82 Fed. Reg. 13209, 13218 (Mar. 6, 2017). Ninety days from March 16 was June 14, 2017. Based on that reckoning, the ban had expired before the Court hears this case.

Nonetheless, it is "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite,* 455 U.S. at 289. Rather, "[v]oluntary cessation of challenged conduct moots a case ... only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968)); *see also, Davis v. Fed. Election Comm'n,* 554 U.S. 724, 735 (2008) (campaign dispute not moot due to election); *Fed. Election Comm'n v. Wis. Right to Life, Inc.,* 551 U.S. 449, 462 (2007) (same).

Here, Petitioners have already 'clarified' the expiration date once. *See* Effective Date In Executive Order 13780, 82 Fed. Reg. 27965, 27965 (Jun. 14, 2017). President Trump simply decreed that the "effective date of the enjoined provisions ... is delayed or tolled until those injunctions are lifted or stayed," *id.*, an event that did not occur until this Court's grant of *certiorari* on June 26, 2017, when it partially lifted the injunctions below. *Trump,* 137 S. Ct. at 2089. By Petitioners' own watch, the ban would not expire until at least September 24, 2017.

Thus, while the duration of the ban may appear too short by some calculations, it is also extendable at the discretion of the Executive. Indeed, both parties agree that the ban could be extended at any time. Pet'r Br. at 37; Resp't Br. at 26. There is also nothing preventing the President from issuing another version of the edict tomorrow. The Order is therefore demonstrably capable of repetition, if not outright extension.

B. Continuing Assertion of Legality

As this Court has recently recognized, even "…voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur…." *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 n.1, (2017) (internal citation omitted). Here, far from voluntarily ending the challenged executive order, the President has repeatedly expressed the intention of keeping it in place. Throughout the summer, the "official statements of the President"[3] on Twitter have included the following:

- June 5, 2017 – "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!"[4]
- June 13, 2017 – "Well, as predicted, the 9th Circuit did it again – Ruled against the TRAVEL BAN at such a dangerous time in the history of our country. S.C."[5]
- August 18, 2017 – "Radical Islamic Terrorism must be stopped by whatever means necessary!

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[3] *See* Mark Moore, *Spicer: All of Trump's tweets are his official statements*, N.Y. Post (Jun. 6, 2017), *available at* http://nypost.com/2017/06/06/spicer-all-of-trumps-tweets-are-his-official-statements/.

[4] @realdonaldtrump, Twitter (Jun. 5, 2017, 9:20 PM), https://twitter.com/realdonaldtrump/status/871899511525961728.

[5] @realdonaldtrump, Twitter (Jun. 13, 2017, 6:44 AM), https://twitter.com/realdonaldtrump/status/874578159676665857.

> The courts must give us back our protective rights. Have to be tough!"[6]

President Trump continues to assert that the challenged Executive Order is legal and necessary. There is, thus, a "reasonable expectation" based on a "demonstrated probability" that "the same controversy will recur involving the same complaining party." *Wisconsin Right to Life*, 551 U.S. at 463 (internal citation omitted).

Faced with the President's ongoing enthusiastic defense of the Executive Order, there can be no assurance that the religiously discriminatory policy underlying it will not be re-implemented. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). This is a textbook example of a controversy capable of repetition yet evading review.

II. Continuing Effects and Lasting Harms

In addition to the "tangible" harms inflicted on family and friends of visa applicants, the animus embodied by the Executive Order and President Trump's public justifications for it have had collateral consequences for American Muslims that continue to this day. These injuries do not stem from a visa denial, but they are nonetheless "concrete" under this Court's precedents. See *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)); see also *Turner v. Rogers*, 564 U.S. 431, 439 (2011) ("release from prison does not moot a criminal case because 'collateral consequences' are presumed to continue") (citing *Sibron v. New York*, 392 U.S. 40, 57 (1968)

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[6] @realdonaldtrump, Twitter (Aug. 18, 2017, 9:06 AM), https://twitter.com/realdonaldtrump/status/898531481185689600.

(holding that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.")); *Kemna*, 523 U.S. at 7-8 (same).

The impact of the Executive Order extends beyond the immigration context to a branding of Muslims as terrorists, precipitating an increase in incidents of anti-Muslim discrimination and hate speech, as well as threats of violence explicitly tied to the Executive Order. Accordingly, this Court should uphold the injunctions below in order to "eradicate the effects" of the Executive's past conduct on the present. *Rezaq v. Nalley*, 677 F.3d 1001, 1009 (10th Cir. 2012) (quoting 13C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.7 (3d ed. 2008)).

As illustrated by *Amici* below, this case is far from moot. The Executive Order continues to stigmatize American Muslims, spurring vitriol and vile insults assaulting their faith while legitimizing discrimination. This case will not be moot unless and until these the effects have been "completely and irrevocably eradicated." *Comer v. Cisneros*, 37 F.3d 775, 800 (2d Cir. 1994). *Amici* demonstrate that the ban may go away, but the stigma will stay. This case therefore cries out for a decision on the merits, a pronouncement from the highest court in the country that orders violating the First Amendment will not go unchecked by the judiciary.

A. Corey Saylor – Washington, D.C.

Corey Saylor is a resident of Virginia and works at the headquarters of the Council on American-Islamic Relations ("CAIR") as its Director of the Department to Monitor and Combat Islamophobia.

Corey has monitored anti-Muslim incidents since 1998, using data reported by CAIR offices across the country. The data collected by CAIR indicates that the issuance of the travel ban has coincided with an unprecedented 91 percent surge in hate crimes against Muslims in the United States through June 2017.

Spikes in anti-Muslim sentiment are predictably common in at least two circumstances: after a terrorist attack, and around an election cycle. In 2016, Corey documented a 44 percent increase in anti-Muslim hate crimes from the previous year. But in the past, anti-Muslim sentiment has returned to more 'normal' levels after an election cycle. Instead, anti-Muslim hate crimes have spiked by 91 percent.[7] In the first half of 2017, there have been 85 anti-Islamic incidents at mosques, more than any year between 2009 and 2015.[8] These incidents include 24 cases of property damage and vandalism, 30 cases of intimidation, and four instances of alleged anti-Muslim bias in rejecting proposals to build mosques. *See* Christopher Ingraham, *American mosques – and American*

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[7] *2017 on Track to Becoming One of the Worst Years Ever for Anti-Muslim Hate Crimes*, CAIR (Jul. 19, 2017), https://goo.gl/MJkQdH, (70 hate crimes reported in the first half of 2016); CAIR, *The Empowerment of Hate: Civil Rights Report 2017* (2017), *available at* https://goo.gl/Uq59tq; CAIR, *Civil Rights Data Quarter One Update: Anti-Muslim Bias Incidents January – March 2017* (May 2017), *available at* https://goo.gl/X43YgU (65 hate crimes reported in Q1); CAIR, *Civil Rights Data Quarter Two Update: Anti-Muslim Bias Incidents April – June 2017* (July 2017), *available at* https://goo.gl/XhzZdd (69 hate crimes reported in Q2) (134 hate crimes reported in 2017's Q1-Q2 as compared to 70 in 2016's Q1-Q2).

[8] *Id.*

Muslims – are being targeted for hate like never before, Wash. Post (Aug. 8, 2017);[9] *see also* CAIR, *The Empowerment of Hate* (2017).

In sum, based on CAIR's data and Corey's analysis, the Trump Administration's travel and visa restrictions continue to fuel anti-Muslim sentiment and hate crimes to an extent never seen before.

B. Imraan Siddiqui – Arizona

Imraan Siddiqui lives in Arizona where he works as the executive director of CAIR's Arizona chapter. In this capacity, he oversees the organization's services to the Arizona Muslim community, including legal and advocacy work focused on defending the civil rights of Muslims and challenging anti-Muslim activity. Imraan is also very active on social media, particularly within the Muslim community across the country.

Imraan observed that Executive Order 13,769 – the initial version that first established the ban[10] – triggered social media scorn against Muslims and Islam from those who supported the Trump Administration's travel and visa restrictions. On Twitter, individuals opposed to the ban organized many of their postings via the hashtag #NoBanNoWall. In response to these efforts, individuals who embraced the travel ban coined the hashtag #YesBanYesWall to organize their own postings, which used the arrival of the ban as a vehicle to justify expressions of contempt for Muslims and Islam.

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[9] *Available at* https://www.washingtonpost.com/news/wonk/wp/2017/08/08/american-mosques-and-american-muslims-are-being-targeted-for-hate-like-never-before.

[10] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Mar. 6, 2017).

A representative refrain was to denigrate Muslims as somehow inherently deviant while embracing the ban as a protection against that deviance. For example, one user posted the following two days after the first executive order establishing the ban: "When one says #NoBanNoWall, I imagine they are ok with young children being assaulted by sexually repressed Muslims. #YESbanYESwall."[11] Others used the order to advocate for the exclusion of Islam in America: "Hey ho, hey ho, Islam has got to go!"[12] Still others heaped scorn on the Muslim community and its religion categorically: "...#YesBanYesWall[,] Fuck you and fuck #islam."[13] In short, the ban provided a validating platform for individuals to openly express animosity towards Islam and Muslims.

On March 6, 2017, after President Trump signed Executive Order 13,780, individuals on Twitter used the hashtag #banislam to organize their anti-Muslim postings. One individual "thank[ed]" President Trump for keeping us safe" using the #banislam hashtag, and exclaimed "No Rapefugees!!"[14] Another individual linked to an article regarding the signing of the Order and commented: "#banislam FOREVER."[15] Others used the Order as an occasion to suggest the unique deviance of Islam — claiming that Muslims are inherently "violent" and that they "kill" and "rape." While anti-Muslim hate speech is not new, what stands out for Imraan is the degree to which it was linked to a specific policy adopted by a U.S. administration and fed by the statements of a sitting American president.

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[11] @EladHutch, Twitter (Jan. 28, 2017, 9:58 PM), https://twitter.com/EladHutch/status/825583961791414272.

[12] @Velvethammer, Twitter (January 29, 2017) https://twitter.com/velvethammer/status/825581260391133184.

[13] @Will_TrashDove, Twitter (Jan. 29, 2017. 1:43 AM), https://twitter.com/Will_TrashDove/status/825640446688890316. *Amici* do not wish to offend the Court with obscene quotes, but believe it is important to provide an accurate account of the vitriol Muslims continue to encounter related to the ban. *See Cohen v. California*, 403 U.S. 15, 16 (1971).

[14] @Uluvsaz, Twitter (Mar. 6, 2017, 3:13 PM), https://twitter.com/uluvsaz/status/838890400458866693.

C. Hussam Ayloush – Anaheim, California

Hussam Ayloush has been the executive director of CAIR's Los Angeles chapter ("CAIR-LA") since 1998. Hussam oversees various efforts to advocate for and defend the rights of Muslims in the Greater Los Angeles Area. His office provides legal services to Muslim immigrants as well as individuals discriminated against because of their Islamic beliefs and practices — two groups particularly implicated by the Trump Administration's travel ban.

Since the executive orders took effect, the CAIR-LA office has received, in Hussam's estimation, triple the amount of electronic and regular mail compared to 2016. These messages often express vulgar anti-Muslim views, regularly refer to the ban to justify their bigotry, and indicate that the Trump Administration's policies have bolstered their anti-Muslim views. In one particularly shocking instance, Hussam received an email in July 2017 with the subject line "Muslim sewer rats." The email went on to call Hussam "Muslim PIG SWINE" and claimed that there were millions of "PATROITS [sic] armed to the teeth with HUNDREDS of millions of weapons, with literally over 50 BILLION rounds of horrific, violent camel jockey piercing rounds of ammo." Tellingly, in threatening war against Hussam and the Muslim community, the sender noted that "We have a LEADER in the White House, now standing for JUDEO-Christian values."

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[15] @o_MIRACLE_o, (Mar. 6, 2017, 12:30 PM), https://twitter.com/o_MIRACLE_o/status/838849326524870660.

As the executive director of CAIR-LA, Hussam has witnessed firsthand how President Trump's executive orders have amplified anti-Muslim sentiment, as the above message exemplifies. The orders have been interpreted as lending the credibility and stature of the White House to the notion that Muslims must be excluded from America.

D. Zahra Billoo – San Francisco, California

Zahra is the executive director of CAIR's San Francisco chapter ("CAIR-SFBA"), which provides legal services to the Muslim community, educates Muslims and others about their rights, and works with allies on shared social justice and civil rights goals. She has served as the director for eight years.

Zahra monitored the 2016 presidential campaign as well as the Trump Administration's efforts to prevent visitors from Muslim countries from coming to the U.S., both of which contributed to a social climate of fear and intimidation in the Bay Area. Through her work with Muslim community members, Zahra has heard directly from individuals targeted in hate incidents that make up the 91% spike documented by CAIR.

The day after the November 2016 election, for example, a visibly Muslim college sophomore was walking to her car when a man grabbed her hijab from behind and pulled her back towards him. She was able to fight off the attacker but fell hard to her knees.

In another incident, during April 2017, at a town hall hosted by a Bay Area elected official, CAIR-SFBA's government affairs director spoke as a panelist and attempted to address the anti-Muslim sentiment that had increased and hardened since President Trump issued the travel ban. But as she began speaking, the crowd shouted her down, chanting in unison that she "denounce terrorism" and "denounce Sharia Law." The vitriol aimed at Zahra's employee was so threatening that police escorted her to her vehicle.

These types of incidents, in addition to the overall increase in hate crimes targeting Muslims reported by her colleagues at CAIR and in the press, led Zahra to fear for the safety of her fellow Bay Area Muslims, her employees, and herself. Zahra views incidents like this as reflecting the same anti-Muslim message endorsed by the Trump Administration in creating the travel ban.

E. Hassan Shibly – Florida

Hassan Shibly is executive director of CAIR's Florida chapter ("CAIR-FL"). Since the announcement of the ban, his office has seen a marked marked increase in the reporting of hate crimes against Muslims. In the aftermath of the ban, individuals called several mosques in Florida and threatened to bomb them. In one instance, during April 2017, a man threatened a Muslim family at gunpoint and shouted anti-Muslim slurs at them. "I'm going to kill all you Muslim motherfuckers, get out of my country."[16]

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[16] Dan Scanlan & Garrett Pelican, *Police: Armed with Guns and Racial Insults, Jacksonville Man Assaults Muslim Neighbor,*

Many of the hate crimes committed against Muslims in Florida, like the one described above, reference excluding Muslims from the United States. They draw support from the unmistakable message broadcast by the ban, and it is no coincidence that the increase in anti-Muslim hate crimes immediately followed the travel ban executive orders. Simply put, the message sent by the executive orders has frightfully altered the political landscape for Muslims in Florida.

F. Robert McCaw – Northern Virginia

Robert McCaw is the Director of Government Affairs for CAIR National, the nation's largest Muslim civil rights organization. Robert works with CAIR chapters throughout the country to increase Muslim civic participation. Because CAIR National's office is in Washington DC, and Robert lives nearby in Northern Virginia, his work and personal life have immersed him in the life of the Muslim community in and around the capital.

When President Trump signed the first travel ban order in January 2017, Robert was outside the country with a relative, who is a green card holder originally from Bangladesh, a country not affected by the order. Even though the order did not technically apply to Robert's relative, they saw it as being targeted at Muslims and were concerned that it would affect their ability to reenter the United States.

In another instance, a different family member, who wears hijab and has a South Asian complexion, was attempting to enter the U.S. when a customs official asked his colleague: "Why is she even here?" Robert

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jacksonville.com (Apr. 4, 2017, 9:24 p.m.), http://jacksonville.com/news/public-safety/2017-04-04/police-armed-guns-and-racial-insults-jacksonville-man-assaults-muslim.

understood the question as an indication that the customs official understood the travel ban as a directive to target Muslims. The question itself was an expression of anti-Muslim sentiment.

Based on his work with CAIR, Robert is also familiar with the tenor and frequency of hate mail that CAIR receives. Starting in January 2017, the messages CAIR received began to draw inspiration and justification from the travel ban order. For example, in May 2017, CAIR received correspondence that explained that "Trump is our president" and that "[b]y putting Trump in office we the people have spoken, and we the people believe that any Muslims who cannot assimilate to the American way of life, can just get the fuck out of our country!!" The sender went on to articulate the type of assimilation expected which would involve, in part, an abandonment of Islamic practice: "We here in America love pork, bacon, Christmas, Easter, bikinis, etc."

Another email from August 2017 proclaimed: "Now that Donald is president there, your religion of death & war is being exposed for its drive for martyrdom." And in June 2017, a sender asserted that the prophet of Islam was "a pig fucking pervert and a drunk," that the sender was "middle America and we are armed and ready," and that the "[d]eportations will be starting soon." The reference to deportations is a clear reference to the travel ban. In each instance, Robert understood the authors of these messages to draw support from Trump Administration's travel and visa restrictions and all of the anti-Muslim sentiment they embolden.

G. Julia Shearson – Cleveland, Ohio

Julia Shearson is the executive director of CAIR's Cleveland chapter. Based on her professional experience, President Trump's travel ban orders have encouraged anti-Muslim discrimination and anti-Muslim violence in Ohio. From Julia's perspective, the temporal sequence is telling: the executive orders precipitated an unmistakable rise in anti-Muslim activity.

On April 24, 2017, an anti-Muslim group called "ACT for America" sponsored a speech in Cleveland by Robert Spencer, a well-known purveyor of anti-Muslim myths. During the event, Spencer used the executive orders as a way to demonstrate that Muslims and Islam are dangerous.

The title of Spencer's talk was "The Truth about the War We're in."[17] He delivered his remarks to an engaged audience in Northeast Ohio, explaining that the travel ban is necessary given the unique challenges of 'vetting' Muslim travelers and immigrants. Spencer attributed the inability to vet Muslims to Islam itself, claiming that Islam contains in it a theological command to Muslims to deceive government officials in order to gain entry to the United States. Lying to gain entry to the United States, claimed Spencer, was viewed by Muslims as an "active virtue" and Muslims believe they are "serving their god by disassembling [sic]."[18]

The executive orders have provided this anti-Muslim speaker, and anti-Muslim activists in general, with government-endorsed legitimacy, which gives them the ability to deepen and foment anti-Muslim sentiment and gives credibility to other efforts to turn anti-Muslim sentiment into anti-Muslim action.

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[17] KRoseVideo, *Robert Spencer at ACT Cleveland 24apr2017*, YouTube (May 6, 2017), https://www.youtube.com/watch?v=sRQDc9YvgfQ.

[18] *Id.*

III. Vacatur Is Not Warranted

In the event that the Court finds that these cases are moot, it should not vacate the decisions below. Vacatur is a form of equitable relief, and Petitioners have the burden of showing their "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). As always, when federal courts contemplate equitable relief, the determination:

> ... must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, supra, 513 U.S. at 26-27 (citing *Kaisha v. U.S. Philips* Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

Judicial decisions are not only valuable to the legal community; they are valuable to the nation as a whole:

> [O]ne of the social values of litigation is the resolution of uncertainty in the law. This resolution is important not merely for its legal effect in subsequent lawsuits, but for its social impact as well. Judicial decisions influence our perception of what is right and wrong. A decision like that in Brown v. Board of Education decides more than the issue of the legality of a segregated public school system in Kansas."

Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 630 (1991) (footnotes omitted).

Petitioners have ignored the public interest and offered nothing to show how vacatur would serve it. *See* Pet'r Br. At 37-38. In fact, vacating the decisions below would disserve the public interest by sending a signal that the Executive Order was lawful. It would feed and validate anti-Muslim sentiment in this country.

CONCLUSION

For the reasons set forth above, *Amici* urge this Court to conclude that these cases are not moot and that the decisions of the Courts of Appeals should be affirmed. In the alternative, if this Court concludes that the cases are moot, the decisions of the Courts of Appeals should not be vacated.

For *Amici*, it is critical that this Court uphold the precedents set by the Fourth and Ninth Circuits, enjoining the order for what it is and always has been: a pernicious government lesson, stigmatizing Muslims and legitimizing Islamophobia.

Respectfully Submitted,

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RECORD
AND
BRIEFS

Nos. 16-1436, 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE FOURTH AND NINTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) suspends for 90 days the entry of foreign nationals from six Muslim-majority countries. Respondents allege, and each lower court that reached the question found, that the Executive Order impermissibly targets Muslims. The question presented is:

Whether the Executive Order's alleged religious targeting should in the first instance be evaluated under the Establishment Clause or the Free Exercise Clause.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket has long sought to protect minority groups from religious targeting by the government. Accordingly, Becket has appeared as counsel or amicus in many cases in which the government has singled out a particular religious group or practice for worse treatment than its secular analogues. See, *e.g.*, *Holt*, 135 S. Ct. 853 (counsel for Muslim petitioner seeking to grow a short religious beard where prison system allowed beards for nonreligious reasons); *Singh* v. *Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (counsel for Sikh plaintiffs successfully challenging refusal to let Sikhs serve in the military while observing religious requirement to wear beard and turban); *Merced* v. *Kasson*, 577 F.3d 578 (5th Cir. 2009) (counsel for Santería priest challenging municipal ban on religious animal sacrifice that allowed killings for secular reasons); Petition for Writ of Certiorari, *Stormans, Inc.* v. *Wiesman*, No. 15-862 (U.S. Jan. 4, 2016) (counsel for Christian pharmacists challenging state law prohibiting conscientious refusals to provide certain drugs but allowing refusals for business and other secular reasons); *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, 709 F.3d 487 (5th Cir. 2013) (counsel for observant Jewish prisoner seeking kosher diet).

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Becket has also long argued that the Establishment Clause should not be used to pit church and state against one another, and has in particular opposed application of the *Lemon* test. See, *e.g.*, *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (challenge to Pledge of Allegiance); *Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) (challenge to exhibition of "Ground Zero Cross" in museum); *New Doe Child #1* v. *United States*, No. 16-4440 (8th Cir. filed Dec. 13, 2016) (challenge to "In God We Trust" on currency).

Based on its expertise in this area, and in keeping with understandings of the Free Exercise and Establishment Clauses it has long advocated in a variety of contexts, Becket files this brief in favor of neither party on the merits. Rather, as a friend of the Court and of the First Amendment, Becket offers something that has been missing in the litigation thus far: a proper understanding of the complementary roles of the Establishment and Free Exercise Clauses and how they should apply in a case of alleged religious targeting.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The stakes in this case could not be much higher. On one side, there are claims that the government has targeted a particular religious group for disfavor, something repugnant to our constitutional traditions.

Singling out a particular religious group for punishment or mistreatment is always constitutionally suspect and, in fact, presumptively unconstitutional. Only in rare circumstances can the government hope to survive strict scrutiny and justify religious targeting.

On the other side, the government offers weighty national security interests and the preservation of American lives, in the context of a slew of terrorist incidents around the world that are claimed to be religiously motivated. These are, by any measure, interests of the highest order.

But the stakes here are higher still because of those Americans who are *not* before the Court. That is because this litigation will set the standard for how to balance these different interests for the many religious liberty cases that will arise in the future. What law this Court applies, how this Court applies that law, and how it balances the various interests at stake are questions that transcend the particular personalities and issues in this case and go instead to the very heart of the constitutional order.

The lower courts and Respondents did not address these questions. Instead, each court below that reached Respondents' constitutional claims used the wrong Religion Clause and the wrong legal test to root out claimed religious targeting. They used the Establishment Clause (which aims to prevent government involvement in religion) rather than the Free Exercise Clause (which protects religious individuals and groups from burdens on their religious beliefs and exercise). But as this Court indicated more than two decades ago in *Lukumi*, it is typically only efforts to control or "to benefit religion or particular religions" that can establish religion in violation of the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). By contrast, laws that "discriminate[] against some or all religious beliefs or * * * conduct" should be analyzed in the first instance under the Free Exercise Clause. *Ibid.*; see also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' * * * ." (quoting *Lukumi*, 508 U.S. at 542)).

Unfortunately, while other plaintiffs challenging the same Executive Order identified their claims as arising under the Free Exercise Clause, Respondents failed to do so. The litigants and courts then compounded that error of choosing the wrong Clause by applying the wrong test, using *Lemon*'s ahistorical "purpose" analysis rather than the historically grounded *Town of Greece* approach. To date, none of the lower courts in these two cases has been asked to analyze the question of religious targeting under the clause that most naturally prevents it: the Free Exercise Clause. Put differently, it is free exercise doctrine, not Establishment Clause doctrine, that gives courts the tools needed to determine whether the Executive Order is a benign national security measure or an invidious "Muslim ban."

These errors, if left uncorrected, would come at significant cost. The use of the wrong Clause and the wrong test led the courts below to decide important questions of First Amendment rights and national security by relying on inferences about the state of mind of a single government official. Worse still, because the lower courts used the Establishment Clause, they invalidated the Executive Order without weighing the government's claimed interest in protecting national security and by applying a very broad remedy—striking down the Order altogether.

That is a bad outcome for considering the government's interests, for considering religious interests, and for reducing church-state conflict. The national security interests weren't considered at all. And avoiding a formal balancing test ultimately harms religious liberty interests because it puts too much pressure on courts to balance by other, unstated means. The danger of informal balancing is all the greater here because the *Lemon* test depends so heavily on the state of mind of individual officials who will eventually no longer be in office. By contrast, under the Free Exercise Clause, courts can balance enduring interests through the time-tested affirmative defense of strict scrutiny. Moreover, courts can design remedies that are tailored to the specific plaintiffs before the Court, thus reducing the scope of church-state conflict.

Under a Free Exercise analysis, this Court's unanimous decision in *Lukumi* provides a roadmap for this case. There, the Court analyzed a law that was deliberately crafted to target one particular religious minority while allowing similar conduct for nonreligious purposes. That is the gravamen of the complaint here. Under *Lukumi*, there are many ways in which Respondents might show that the Executive Order is either not neutral or not generally applicable, and therefore merits strict scrutiny review.

But instead of looking to *Lukumi*, the courts and plaintiffs below chose to follow the *Lemon* will-o'-the-wisp, much to the detriment of both the resolution of this litigation and the constitutional order. Because the Order's constitutionality under the First Amendment has not properly been litigated below, the cases should be remanded.

ARGUMENT

I. The courts below incorrectly applied the Establishment Clause.

The courts that reached Respondents' constitutional claim below relied solely on the purpose prong of the *Lemon* test to enter a nationwide injunction against the Executive Order. But *Lemon* is a poor test for determining whether an act of government establishes religion. Under the appropriate historical analysis, the Executive Order does not establish religion.

A. *Lemon* provides a poor foundation for deciding Establishment Clause claims.

To say that *Lemon*'s three-pronged test has a troubled past is putting it mildly. In recent cases, the Court has treated the *Lemon* factors, at best, as "no more than helpful signposts." *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality) (quotation omitted). More often—and without exception in the last decade—it has not applied *Lemon* at all. See *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

The lower courts, however, continue to feel obligated—or empowered—to apply *Lemon* in the absence of clear doctrinal guidance on the Establishment Clause.

Lower court judges have criticized, and scholars have expressed frustration at, the inconsistent application invited by the subjective factors in *Lemon*. See, *e.g.*, *Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbrook, J., dissenting from *en banc* decision) (calling *Lemon* "hopelessly open-ended"); *Card* v. *City of Everett*, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring) ("The still stalking *Lemon* test and the other tests and factors * * * are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable."); Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1380-88 (1981) (*Lemon* an "important source of confusion"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118-20 (1992) ("the Court has contrived a formula for interpreting the Establishment Clause that contains inconsistencies within a single test").

One of *Lemon*'s many problems, as highlighted by this case, is that it wrongly places the focus on the subjective intent of lawmakers to determine whether an action is an establishment of religion. Whether a lawmaker had a religious or secular intent can be famously difficult to discern, and the focus on this question as the first prong of a disjunctive test leads to an overemphasis on extra-textual evidence of what a lawmaker's actions may mean, despite the Court's admonition to avoid "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005).

Here, application of the *Lemon* test resulted in an issue of national security and constitutional law turning in part on judicial interpretation of tweets and television interviews, Pet. App. 11a, 49a, and an assessment of how long the "taint" of those statements might last. *Id.* at 61a n.21. Absent from the analysis was any serious consideration of the historical elements of an establishment.

B. Both the majority and principal dissent in *Town of Greece* require a history-based approach to Establishment Clause claims.

This Court's most recent Establishment Clause precedent, *Town of Greece*, sets forth a far better mode of analysis—one that supersedes *Lemon* and provides the objective criteria lower courts need for evaluating whether a challenged government practice establishes a religion. *Town of Greece* rejected the idea that the allowance of legislative prayer in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), "carv[es] out an exception" to general Establishment Clause jurisprudence. *Town of Greece*, 134 S. Ct. at 1818. Instead, the Establishment Clause "must" be interpreted "'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989). Importantly, this focus on history was the approach also adopted by the principal dissent in *Town of Greece.* See *id.* at 1845-51 (Kagan, J., dissenting) (citing historical practice).

Town of Greece starts from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting what that means to courts today. Historical analysis has long played an important role in Establishment Clause doctrine. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *E.E.O.C.*, 565 U.S. 171, 181-87 (2012) (summarizing historical view of Establishment Clause); *Van Orden*, 545 U.S. at 686 (citing history); *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-16 (1947) (same). But before *Town of Greece*, courts often failed to begin with the all-important question: what is an establishment of religion? See *Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring) (considering "what constituted an establishment" at the time of the founding); see also Eric Rassbach, Town of Greece *v.* Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71 (2014). When courts objectively assess whether modern government actions mirror the establishments the Founders rejected, Establishment Clause jurisprudence will be clearer and more predictable.

Six features characterized founding-era establishments. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). Judge Kelly and Chief Judge Tymkovich employed those features in their dissenting opinion in *Felix* v. *City of Bloomfield*, 847 F.3d 1214 (10th Cir. 2017), *petition for cert. filed* (July 6, 2017) (No. 17-60). They are: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Id.* at 1216 (Kelly, J., dissenting) (quoting McConnell, 44 Wm. & Mary L. Rev. at 2131).

These categories should have been applied in this case and would have led to the conclusion that the Executive Order does not constitute an establishment of religion.

C. The Executive Order does not violate the Establishment Clause.

The Executive Order displays none of the six characteristics of a historical establishment.

1. The Executive Order does not create state control over doctrine, governance, and personnel of a church.

At the time of the founding, state control over the institutional church manifested itself in the control of religious doctrine and the appointment and removal of religious officials. McConnell, 44 Wm. & Mary L. Rev. at 2132; see also Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). Thus, colonial establishments typically included government appointment and removal of ministers, rendering religious groups "subservient" to their state masters. McConnell, 44 Wm. & Mary L. Rev. at 2140-41; see also *Hosanna-Tabor*, 565 U.S at 182-83 (describing government control over ministerial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Hosanna-Tabor*, 565 U.S. at 183 (citing 1 Annals of Congress 730-31 (1789)).

The Executive Order does not seek to control religious doctrine. No church is compelled by the Executive Order to adopt or reject religious doctrine, clergy, or governance.

2. The Executive Order does not compel church attendance.

Anglican colonies like Virginia followed England's example by fining those who failed to attend Church of England worship services. McConnell, 44 Wm. & Mary L. Rev. at 2144; George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 513 (Burt Franklin 1970) (1902); Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion").

The Executive Order has nothing to do with church attendance, compulsory or otherwise.

3. The Executive Order provides no financial support to any church.

At the time of the founding, public financial support took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147. Land grants, the most significant form of public support, provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148.

The Executive Order does not financially support any church.

4. The Executive Order does not prohibit worship.

As part of their efforts to prop up the state churches, colonies sometimes prohibited worship by adherents of non-state religions. Some colonial establishments were more tolerant than others, and those that were less tolerant singled out particular groups to banish.[2] McConnell, 44 Wm. & Mary L. Rev. at 2131, 2161. Some establishments tolerated "orthodox" dissents from the official state religion, some singled out particularly vexatious individual denominations (like Quakers) for persecution, and some outlawed any form of worship outside the strict doctrine of the state church. Virginia, for example, imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2119, 2166. Several states banned Catholic churches altogether. *Id.* at 2166. This element of an establishment took the form of control of religious belief and worship by the established church.

The Executive Order does not encourage or discourage worship of any kind.

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[2] The Church of England is an example of a modern "tolerant" establishment, where the church is given official status as the state religion, but dissenting worship is not prohibited. Saudi Arabia is an example of an "intolerant" establishment.

5. The Executive Order does not cede important public functions to church institutions.

A fifth element of establishment is government assignment of important civil functions to church authorities. At the founding, states used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. McConnell, 44 Wm. & Mary L. Rev. at 2169-76. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Virginia ministers were tasked with keeping vital statistics; and South Carolina recognized only those marriages performed in an Anglican church. *Id.* at 2173, 2175, 2177.

The Executive Order gives no important civil functions to any church. No religious group has the authority to determine immigration policy or entry criteria.

6. The Executive Order does not restrict political participation to members of any church.

The final feature of an establishment is the restriction of political participation based on church affiliation or the lack thereof. At the time of the founding, England allowed only Anglicans to hold public office and vote; many states took comparable measures. McConnell, 44 Wm. & Mary L. Rev. at 2177. Although religious tests were prohibited at the federal level by the Religious Test Clause of Article VI, *id.* at 2178, Maryland's version of religious disqualification lasted until 1961, when the Supreme Court struck it down. See *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

The Executive Order does not impose any religious test for political participation. Respondents present no claim that the Executive Order violates the ban on religious tests for office, limits voting rights, or interferes with other aspects of political participation.

II. Respondents' religious-targeting claim should be evaluated under the Free Exercise Clause instead.

That Respondents' Establishment Clause claim fails does not mean that the religious targeting they allege is without a First Amendment remedy; it means only that they have relied on the wrong Religion Clause. To the extent that *Lemon* sweeps religious-targeting cases into the Establishment Clause, it is inconsistent with this Court's modern Free Exercise jurisprudence.

In these cases, although Respondents have pled religious targeting, they have not properly labeled their claim as a free exercise claim. By contrast, other plaintiffs challenging the Executive Order have invoked the Free Exercise Clause. See Second Am. Class Action Compl. ¶¶ 271-276, *Doe* v. *Trump*, No. 2:17-cv-178 (W.D. Wash. filed May 8, 2017); First Am. Class Action Compl. ¶¶ 9, 110-16, *Al-Mowafak* v. *Trump*, No. 3:17-cv-557 (N.D. Cal. filed Mar. 13, 2017). For the reasons set forth below, the Free Exercise Clause provides the most appropriate avenue for a First Amendment religious targeting claim.

A. Targeting of a particular religious group has historically been viewed as a Free Exercise, not an Establishment Clause, problem.

The core of Respondents' theory is that the Executive Order is unconstitutional because it "singl[es] out" members of one particular religion—Muslims—"for disfavored treatment." First Am. Compl. ¶¶ 5, 63, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-361, ECF No. 93 (D. Md. Mar. 10, 2017). That claim sounds in Free Exercise, not Establishment, both historically and today.

To be sure, the historical establishments prohibited by the Establishment Clause sometimes included efforts to suppress minority faiths. Virginia, for instance, banned Quakers from immigrating and prosecuted and imprisoned Baptist preachers. McConnell, 44 Wm. & Mary L. Rev. at 2163, 2165-66. And Massachusetts Bay adopted an Act Against Heresy, which banished from the colony any person who denied the immortality of the soul, resurrection, sin in the regenerate, the need of repentance, redemption or justification through Christ, the morality of the fourth commandment, or infant baptism. *Id.* at 2161.

But these efforts to exclude and suppress dissent were *in addition to* laws affirmatively promoting or controlling the established church; they were a way to buttress the establishment but they did not constitute the establishment itself. McConnell, 44 Wm. & Mary L. Rev. at 2120, 2127-31 (explaining that establishments could be "tolerant or intolerant," with the difference being the extent to which they persecuted dissenters); see also *Torcaso*, 367 U.S. at 490 (discussing state establishments and the "consequent burdens" they "imposed on the free exercise of * * * nonfavored believers"). In other words, Virginia did not have an established church because it persecuted Baptists and excluded Quakers; it had an established church because it erected Anglican "churches * * * in every parish at public expense," selected the Anglican Church's ministers, and resolved theological matters by statute. McConnell, 44 Wm. & Mary L. Rev. at 2118-19.

Thus in both Virginia and Massachusetts it was not disestablishment that ended the regimes of excluding and suppressing dissenters—it was the enactment of free exercise provisions. McConnell, 44 Wm. & Mary L. Rev. at 2119-20 (the free exercise provision of the Virginia Declaration of Rights "effectively ended the persecution of Baptist and other preachers and granted all Virginians the right to practice religion freely" "[b]ut it did not disestablish the Church"); *id.* at 2124-26 (provision of the Massachusetts Charter of 1691 guaranteeing "liberty of Conscience * * * to all Christians" "eased" attempts "to maintain religious homogeneity by banishing or punishing dissenters," although the Massachusetts establishment did not end until 1833).

This dynamic repeated itself in the context of "Blaine Amendments"—state constitutional provisions, enacted largely in the late 19th century, that restricted public funding for "religious" or "sectarian" institutions. See Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 493-95, 516-23 (2003). As many Justices of this Court have recognized, Blaine Amendments were "bigot[ed]" measures, *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.), designed to prevent the funding of Catholic schools so as to "preserve the[] domination" of the public schools, which at the time were generically "Protestant in character." *Zelman*, 536 U.S. at 717-23 (2002) (Breyer, J., joined by Stevens and Souter, JJ., dissenting) (citing Philip Hamburger, *Separation of Church and State* 219, 287 (2002)). Thus, like the earlier efforts to suppress dissent in Virginia and Massachusetts, Blaine Amendments used discrimination against a religious minority as a means to *support* an otherwise existing state establishment—namely, the de facto "establishment of Protestantism" effected through the public school system. Hamburger at 219-21, 228-29; see also Philip Hamburger, *Prejudice and the Blaine Amendments*, First Things (June 20, 2017), https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments.

Nonetheless, because laws like Blaine Amendments did not themselves favor or control any particular church but instead "target[ed] the religious for special disabilities based on their religious status," the Court recently held that these laws are constitutionally "limited" not by the Establishment Clause, but "by the Free Exercise Clause." *Trinity Lutheran*, 137 S. Ct. at 2019, 2024 (internal quotation marks and citation omitted).

This history demonstrates that restrictions on religious minorities have consistently been addressed under free exercise provisions even when the restrictions were used to prop up an established church. But it is even clearer that when "restrictions on minority faiths are [*not*] part of any effort to establish some other religion, * * * such restrictions are * * * treated as a free exercise issue." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1800 (2006). Put simply, government disfavor toward one religion does not—standing alone—establish another. But it does potentially violate free exercise.

Lukumi proves this point. In *Lukumi*, all nine Justices agreed that the City of Hialeah had singled out a particular religion for disfavored treatment: it passed an ordinance prohibiting the "central element of the * * * worship service" of the Santería religion, and did so in order to "target[]" Santería. 508 U.S. at 534, 541-42. But the Court declined to rely on the Establishment Clause. Surveying precedent under both Religion Clauses, the Court noted that Establishment Clause cases "for the most part have addressed governmental efforts to benefit religion or particular religions," rather than the sort of "attempt to disfavor [a] religion" at issue there. 508 U.S. at 532. The Court therefore held that "the Free Exercise Clause [would be] dispositive in [its] analysis." *Ibid.*; see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994) (plurality op. of Souter, J.) (applying Establishment Clause where religious group was vested with civic power but noting that if the group had instead been "*denied*" "the rights of citizens simply because of [its] religious affiliations," that would be a "free exercise" case (emphasis added)).

On the theory urged by Respondents and adopted by the courts below, *Lukumi* should have been an Establishment Clause case—the ordinance "established a disfavored religion," Santería. See, *e.g.*, *Hawai'i* v. *Trump*, No. 17-50, __ F. Supp. 3d ____, 2017 WL

1011673, at *4 (D. Haw. Mar. 15, 2017) (characterizing challengers' claim as being that "the Government has established a disfavored religion," Islam). The government's opening brief, too, is confused on this point, oddly citing *Lukumi* for the notion that if a law's operation is neutral, then *Lemon*'s purpose prong cannot be met. Gov't Br. 70-71.[3]

But *Lukumi* got the division of labor between the two Religion Clauses right. The historical establishments prohibited by the Establishment Clause were designed to establish—to bring within state protection or control—certain religions or religious ideas, not just to target one of many religions for disfavored treatment. Eliminating claimed religious targeting is the job of the Free Exercise Clause.

B. *Lukumi* provides the proper framework for using the Free Exercise Clause to combat claimed religious targeting.

Not only is the Free Exercise Clause the right Clause for this case historically and doctrinally—it is also the Clause best suited to combat the sort of religious targeting alleged here.

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[3] This approach gets *Lukumi* triply wrong: First, as we demonstrate in section I above, *Lemon* is the wrong place to start with Establishment Clause analysis; using the historically-rooted *Lukumi* to rehabilitate the utterly ahistorical *Lemon* test is perverse. Second, *Lukumi* expressly disclaims any relation to the Establishment Clause. 508 U.S. at 532. Third, *Lukumi* holds that a law's mere operation—with or without animus—is sufficient to *prove* a violation of the *Free Exercise Clause*; it does not create a method to *disprove* a violation of the *Establishment Clause*.

The key question in this case is whether a law that (according to the courts below) is facially neutral with respect to religion in fact embodies hostility toward one particular religion, targeting it for disfavored treatment. See Pet. App. 52a-53a; *Hawai'i*, 2017 WL 1011673, at *12. That is a question Free Exercise doctrine is well equipped to answer. Because the Free Exercise Clause prohibits, among other things, lawmakers from "devis[ing] mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices," the *Lukumi* Court identified "many ways" that a plaintiff can demonstrate that a facially neutral law in fact constitutes "covert suppression of particular religious beliefs" or a "subtle departure[] from" religious neutrality. 508 U.S. at 533-34, 547 (internal quotation marks and citation omitted); see also *id.* at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."); *Trinity Lutheran*, 137 S. Ct. at 2021 (in *Lukumi*, "despite [the laws'] facial neutrality, the[y] had a discriminatory purpose easy to ferret out"). These carefully calibrated techniques for uncovering "masked," "covert," or "disguised" hostility toward religion stand in stark contrast to the ineffective *Lemon* test, which focuses on inherently subjective perceptions of the lawmaker's intent. See *County of Allegheny*, 492 U.S. at 675-76 (Kennedy, J., concurring in judgment in part and dissenting in part) (*Lemon* test requires courts to "[d]ecid[e] cases on the basis of * * * an unguided examination of marginalia" and using "little more than intuition and a tape measure.").[4]

In contrast, *Lukumi* illustrates at least seven ways a plaintiff can prove that a law is not "neutral and of general applicability" with respect to religion under the Free Exercise Clause. See *Lukumi*, 508 U.S. at 531-32 (citing *Emp't Div.* v. *Smith*, 494 U.S. 872 (1990)). This elaboration of neutrality and general applicability, not the *Lemon* test, should determine the constitutionality of the Executive Order here. The Court should therefore remand so that the parties can litigate under the Free Exercise Clause in the first instance, and the lower courts can consider whether any of the following paths to strict scrutiny is satisfied.

1. Does the law facially target religion?

First, a plaintiff can show that a law is not neutral and generally applicable by showing that the law facially targets religion. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. Thus if a law's benefits or burdens are determined by "refer[ence] to a religious practice without a secular meaning discernable from the language or context," the law is not neutral and generally applicable under the Free Exercise Clause, and strict scrutiny applies. *Id.* at 533-34.

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[4] Of course, while the gravamen of Respondents' claim is that the Executive Order is the result of anti-Muslim animus, "the Free Exercise Clause is not confined to actions based on animus," *Shrum* v. *City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.); and *Lukumi* illustrates many ways that a plaintiff can get to strict scrutiny without showing animus.

2. Does the law, in its real operation, result in a religious gerrymander?

Facial neutrality is the "minimum," but strict scrutiny applies even to facially neutral laws if "the effect of [the] law in its real operation" is to accomplish "a religious gerrymander." *Lukumi*, 508 U.S. at 535 (citation omitted). A gerrymander exists when a law—evaluated in light of its stated, nondiscriminatory purpose—is so underinclusive with respect to secular conduct, and so overinclusive with respect to religious conduct, that its "burden * * *, in practical terms, falls on adherents [of a particular religion] but almost no others." *Id.* at 534-37.

3. Does the law fail to apply to analogous secular conduct?

Short of a gerrymander, another way a plaintiff can prove a Free Exercise violation is to show that the law's "prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). Thus, in *Lukumi*, the law at issue was not neutral and generally applicable because it exempted animal killing for certain secular reasons, but not religious reasons, even though secular killings would endanger the government's purported interests in protecting public health and preventing animal cruelty just as much as or more than religious sacrifices. 508 U.S. at 533-34. The categorical-exemption inquiry is designed to prevent the government from making "a value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police*

Newark Lodge No. 12 v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

4. Does the law give the government open-ended discretion to make individualized exemptions?

Another way to show that a law is not neutral and generally applicable is to show that it gives the government open-ended discretion to make "individualized exemptions." *Lukumi*, 508 U.S. at 537. Individualized exemptions trigger strict scrutiny if they are capable of being "applied in practice in a way that discriminates against religiously motivated conduct," relative to secular conduct equally undermining the government's stated interests. See *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884).

5. Has the law been selectively enforced?

Even a law that is neutral and generally applicable on its face can violate the Free Exercise Clause if the plaintiff shows that it has "been enforced in a discriminatory manner." *Blackhawk*, 381 F.3d at 208. This is because "selective * * * application" of a facially neutral and generally applicable law "devalues" religious reasons for engaging in conduct just as much as a law that facially exempts analogous secular conduct. *Tenafly Eruv Ass'n, Inc.* v. *The Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002).

6. Does the law's historical background show that the lawmaker's purpose was to discriminate based on religion?

If a law by its terms is neutral and generally applicable and there is no evidence of selective enforcement, it could still trigger strict scrutiny if its "historical background"—including "statements made by members of the decisionmaking body"—indicates a purpose to discriminate based on religion. *Lukumi*, 508 U.S. at 540-42 (opinion of Kennedy, J., joined by Stevens, J.). The contours of this inquiry, however, are contested. Only two Justices agreed in *Lukumi* that this type of evidence could be significant, and two other Justices disagreed, arguing that the "evil motive[] of [a law's] authors" is irrelevant. Compare *ibid.* (plurality opinion) with *id.* at 558-59 (Scalia, J., joined by Rehnquist, C.J., concurring).

7. Does the law discriminate between religions?

Finally, laws that discriminate *between* religions, rather than just between religion and nonreligion, also violate the Free Exercise Clause. *Lukumi*, 508 U.S. at 536 (citing *Larson* v. *Valente*, 456 U.S. 228, 244-46 (1982)); *Smith*, 494 U.S. at 877 (same). Thus, in applying the other six categories of the *Lukumi* analysis, if a law's text, "object," exemptions, or (possibly) motive demonstrate a preference for conduct by members of some religions over others, rather than for secular conduct over religious conduct, the law nonetheless triggers strict scrutiny. *Larson*, 456 U.S. at 245-47 (describing this as a rule against "denominational preferences").[5]

C. Because Free Exercise claims are usually subject to strict scrutiny and relief is plaintiff-specific, the choice of Clause is particularly important.

Relying on the Establishment Clause rather than the Free Exercise Clause creates important problems concerning the balancing of interests and the scope of relief. First, by relying solely on the Establishment Clause, the parties litigated, and courts below decided, an important issue with potentially serious implications for national security without ever balancing the government's claimed interests. Second, the scope of the remedy granted—invalidation of the entire Executive Order—was far broader than necessary to provide relief to the specific plaintiffs before the courts.

The first practical problem derives from another key difference between the Establishment and Free Exercise Clauses: the extent to which each Clause accounts for the strength of the government's interest in enacting the challenged law. The Establishment Clause is a structural limitation on government power, so "Establishment Clause violations * * * are usually flatly forbidden without reference to the strength of governmental purposes." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.) (collecting cases). But Free Exercise claims generally *are* subject to an interest-balancing test—strict scrutiny. Under the Free Exercise Clause, once a law burdening religious exercise is determined not to be neutral or generally applicable, it still passes constitutional muster if it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal quotation marks and citations omitted).[6]

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[5] Although *Larson* invokes both the Establishment Clause and the Free Exercise Clause, this Court's decisions in *Smith* and *Lukumi* treat *Larson* as essentially Free Exercise precedent. See *Lukumi*, 508 U.S. at 536; *Smith*, 494 U.S. at 877; accord *Larson*, 456 U.S. at 245 ("Th[e] prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); see also *id.* at 255 (characterizing the law at issue as "religious gerrymandering"). That treatment is consistent with *Larson*'s application of strict scrutiny, 456 U.S. at 246-51—an analysis that typically occurs under the Free Exercise Clause, not the Establishment Clause. See *infra* section II.C.

Strict scrutiny plays an important role in the Free Exercise analysis. To be sure, it is a demanding test; when applied correctly, it is the "rare" law that survives it. *Lukumi*, 508 U.S. at 546. But strict scrutiny at least leaves open the possibility for courts to strike "appropriate[] balance[s]" between free exercise and serious government needs—balances that can account for "context" and "sensitivity to security concerns" when necessary. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-23 (2005).

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[6] The exception is for laws "targeting religious beliefs as such," which are "never permissible." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 533). This distinction goes all the way back to *Cantwell* v. *Connecticut*: "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." 310 U.S. 296, 303-04 (1940). The government cannot bring a strict scrutiny affirmative defense to the "absolute" claims. On remand, the parties should be given opportunity to explore under the Free Exercise Clause whether the Executive Order targets beliefs or status.

Because these cases, to date, have been litigated as Establishment Clause cases rather than Free Exercise cases, the courts below failed to analyze the Executive Order under strict (or any other level of) scrutiny. Instead, the courts held the Executive Order likely unconstitutional and enjoined it immediately upon concluding that it violated *Lemon*'s purpose prong. Pet. App. 64a-65a; *Hawai'i*, 2017 WL 1011673, at *15 (interest balancing not "necessary to the Court's Establishment Clause determination"); see also *Aziz* v. *Trump*, No. 1:17-cv-116, __ F. Supp. 3d ____, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) (Establishment Clause concerns "do not involve an assessment of the merits of the president's national security judgment."). That was error. As explained above, the Executive Order does not violate the Establishment Clause, and under the more appropriate Free Exercise Clause analysis, the parties and courts should address whether the order is neutral and generally applicable and then, if appropriate, whether the government can satisfy strict scrutiny.

The failure to apply strict scrutiny provides yet another illustration of how *Lemon* is problematic. With no interest balancing, *Lemon*'s purpose prong renders any law that targets religion unconstitutional. Pet. App. 47a-65a; *Hawai'i*, 2017 WL 1011673, at *12; see also *Aziz*, 2017 WL 580855, at *7. But that is flatly inconsistent with *Lukumi*, which holds that a showing of religious discrimination is not the end of the analysis, but just one way among many to trigger strict scrutiny. *Lukumi*, 508 U.S. at 533 (a non-neutral law is "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest").

The second practical problem with following *Lemon* rather than *Lukumi* here is that the scope of the remedies granted—worldwide injunctions against carrying out the Executive Order—is far broader than necessary to provide relief to Respondents. As we noted above, the natural result of a successful Establishment Clause claim is invalidation of the challenged provision, because the Establishment Clause acts as a structural constraint on government power, like the doctrine of separation of powers.

But at issue here is something more like a typical civil rights claim, where individuals and institutions need relief from the application of a particular government policy to their specific circumstances. The Free Exercise Clause, which allows for remedies tailored to the specific plaintiffs before the Court, is far better suited to resolving this sort of dispute than the relatively inflexible Establishment Clause. That outcome would also reduce the scope of church-state conflict by restricting the footprint of the remedy to only what is necessary to provide relief to the specific plaintiffs before the courts.

D. A proper Free Exercise analysis would focus on the facts concerning specific plaintiffs.

Respondents did not invoke the Free Exercise Clause below, although the plaintiffs in several other challenges to the Executive Order have done so, including some in which counsel for Respondents have appeared.[7] In order to approach this case correctly on remand, Respondents should be given an opportunity to make the argument that the Executive Order violates the Free Exercise Clause.

A proper Free Exercise analysis should focus on how the Executive Order applies to the specific circumstances of the specific plaintiffs before the courts. That is because religious liberty claims are best decided, and typically decided, on a retail rather than wholesale basis. The reason lies with the nature of Free Exercise claims, which must be rooted in religious conscience in order to be valid. In contrast to Free Speech claims, where the First Amendment protects the "marketplace of ideas," *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017), the Free Exercise Clause protects religious conscience as it manifests itself in public or in private. That is why a Free Exercise plaintiff must prove sincerity, while a Free Speech plaintiff need not. That is also why in making out her claim a Free Exercise plaintiff must explain the nature and religiosity of her beliefs. "[P]hilosophical and personal rather than religious" beliefs are not enough. *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972). The plaintiff's contested actions or omissions must be manifestations of a sincere religious belief. And because a Free Exercise plaintiff must prove up both sincerity and the specific nature of her religious beliefs and practices, it is difficult for courts to decide Free Exercise claims in gross.

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[7] See Second Am. Class Action Compl. ¶¶ 271-276, *Doe* v. *Trump*, No. 2:17-cv-178 (W.D. Wash. filed May 8, 2017 (ACLU appearing as counsel for plaintiffs); First Am. Class Action Compl. ¶¶ 9, 110-16, *Al-Mowafak* v. *Trump*, No. 3:17-cv-557 (N.D. Cal. filed Mar. 13, 2017) (counsel of record for Respondents in No. 16-1436 appearing as counsel for plaintiffs).

This retail focus is true as well of the government's strict scrutiny affirmative defense. As the Court put it in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), strict scrutiny under the Free Exercise Clause is evaluated "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." 546 U.S. at 430-31. "In [*Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Yoder*], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.*

Given this fact-specific, "to the person" approach, if Respondents wish to pursue a Free Exercise claim, on remand Respondents should establish, and the lower courts should determine, the factual circumstances of both the nature and sincerity of Respondents' claims, as well as the specific justifications the government has for applying the Executive Order to the "particular claimant[s]" who can make out a proper showing of burden on a sincere religious exercise. *O Centro*, 546 U.S. at 430-31.

For example, Respondents may make out a claim, based on their specific circumstances, that their religious exercise has been burdened by a regulatory system "in which individualized exemptions from a general requirement are available." *Lukumi*, 508 U.S. at 537. In such a situation, "the government 'may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Ibid.*, (quoting *Smith*, 494 U.S. at 884). If Respondents can identify a specific religious exercise that the government has burdened, and show that the Executive Order's "detailed provision permitting case-by-case waivers," Gov't Br. 10, constitutes a system of individualized exemptions that excludes waivers for religious hardship under *Lukumi*, they will have made out their *prima facie* case under the Free Exercise Clause.[8] Then the burden would shift to the government to demonstrate, with respect to the specific plaintiffs involved, that it has a compelling interest in imposing a burden on the religious exercise(s) identified by those plaintiffs.

Yet no one has had a chance to engage in this sensible fact-specific and plaintiff-specific approach because the parties in these particular cases did not press free exercise claims, and the lower courts have followed the failed *Lemon* test rather than the proven *Lukumi* analysis. "Like some ghoul in a late-night horror movie," *Lemon* continues to sow confusion in the lower courts, despite "being repeatedly killed and buried" by this Court. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment). The Court should resolve the confusion, and make clear that *Lukumi*, rather than *Lemon*, controls religious-targeting claims like this one.

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[8] *Amicus* does not address any of the government's justiciability arguments.

* * *

It is said that bad facts make bad law. But bad law can make bad law too. Taking the *Lemon* path rather than the *Lukumi* path in these cases guarantees the further proliferation of bad law. The Court can set this extremely important litigation on the right footing at the outset by reversing the decisions below, setting forth the appropriate Establishment Clause standard and clarifying the ways in which the Free Exercise Clause remains available if Respondents choose to press such a claim under the appropriate constitutional standard.

CONCLUSION

The decisions below should be vacated and remanded.

Respectfully submitted.

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., RESPONDENTS

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
v.
STATE OF HAWAII, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] wrote the Court a pre-certiorari brief in the instant case, and now supplements it with this merits brief.

SUMMARY OF ARGUMENT

President Trump's ending the White House Ramadan festival helps show Administration animus towards Muslims.

Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("The Order") may be baseless, and little better than "performance art".

The Court should remember the difficulty of life for immigrants and refugees.

The Court has its deriders, but its Members are still competent to handle issues like the Muslim ban, and much else.

The Order risks dishonoring America and its heroes, post-9/11.

ARGUMENT

I. TRUMP'S CANCELLATION OF THE RAMADAN FESTIVAL AT THE WHITE HOUSE HELPS SHOW GOVERNMENT ANIUMS TOWARDS ISLAM

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission by Petitioners to write briefs is filed with the Court, and Respondents have e-mailed Amicus letters of permission.

Monday was the sixteenth anniversary of "9/11", Osama bin Laden's terrorist attack on the United States. While appropriate measures must be taken to prevent another such attack, the Order is not one such measure, and could even make another attack more likely, since the Order may exemplify animus, which tends to cause unrest, hatred, and violence.

The Order, *see id.*, has no explicit condemnation of Muslims, but, as Respondents' merits briefs amply show, the Order seems to make relatively little sense as a national-security measure, especially in present context. Part of that context, Amicus notes, is Trump's cancellation of the White House Ramadan festival, *see, e.g.*, Jennifer Hansler, *Breaking with tradition, Trump White House forgoes Ramadan dinner*, CNN, updated 7:56 p.m., June 24, 2017, http://www.cnn.com/2017/06/24/politics/white-house-ramadan-celebration/index.html (all links in this brief last visited Sept. 12, 2017),

> For the first time in nearly two decades, the White House did not host an iftar dinner to commemorate Ramadan, the Islamic holy month of fasting.
>
> . . . .
>
> By not hosting a dinner, Trump breaks with an annual tradition upheld by the past three administrations. . . . They were typically attended by prominent members of the Muslim community as well as members of Congress and diplomats from Muslim countries.

> Secretary of State Rex Tillerson also broke with decades of tradition by rejecting a request by the State Department's Office of Religion and Global Affairs to host a reception marking Eid al-Fitr . . . .
>
> Since 1999, Tillerson's five Republican and Democratic predecessors have hosted either an iftar dinner to break the fast during Ramadan or an Eid al-Fitr reception at the end of the monthlong holiday. . . .

Id. Trump also issued a statement offering good wishes for Ramadan, *see id.*, but actions speak louder than words.

That cancellation contrasts greatly with the continuance of, e.g., the Passover festival, *see, e.g.*, Maya Rhodan, *White House to Host Passover Seder*, Time, Apr. 10, 2017, http://time.com/4732939/passover-2017-white-house-donald-trump/, "The White House will host a Passover seder Monday evening, continuing a tradition started under President Obama in 2009." *Id.* There is no reason for canceling *only* the Ramadan festival, and not other religious festivals, except for raw animus.

This is one reason that Amicus is writing a brief supporting Respondents this time, although his pre-certiorari brief supported neither party. Time has made it clearer that the Order lacks much, or any, rational underpinning at all. Is it a mere mirage of sorts, then?

II. THE ORDER CAN BE VIEWED AS "P.R." OR "PERFORMANCE ART", GIVING THE SHADOW OF SECURITY POLICY SANS REAL SUBSTANCE

As Amicus mentioned in his pre-certiorari brief: since "There is no compulsion in religion", *The Koran*, Sura 2:256, the Order thus may be *less liberal than the Koran*, in that the Order—like its earlier version—exerts a "TRAVEL BAN", says the President, @realdonaldtrump, Twitter, https://twitter.com/realDonaldTrump/status/871899511525961728 (June 5, 2017, 6:20 p.m.), on some largely-Islamic nations and risks illegal religious animus, per the court below.

Why is Saudi Arabia, donor of 15 9/11 hijackers, not travel-banned by the Order? Or, after Turkish President Erdoğan's bodyguards *physically attacked Americans* on May 16, 2017 in Washington, D.C., why was Turkey not banned? *See, e.g.*, Asbarez, *Breaking: House Unanimously Condemns Erdogan-Ordered Attack on Protesters*, ER.ANCA.org, https://er.anca.org/breaking-house-unanimously-condemns-erdogan-ordered-attack-on-protesters (undated).

So, the Order may be but a Baudrillard-style "hyperreality", a mere simulacrum of rational foreign policy, "extend[ing] the absence at the heart of politics", Jean Baudrillard, *The Spirit of Terrorism*, Le Monde, Nov. 2, 2001 (tr. Rachel Bloul), *available at* https://cryptome.org/baud-terr.htm. The Order almost resembles a type of "performance art" designed to make (some) Americans feel safer from "Islam", without actually producing safety.

Indeed, such a measure as the Order, in its arguable presentation of Arabs or Muslims as "generic enemy", may create the kind of animus that led Jeremy Christian—an ironic cognomen—to murder two defenders of women against Christian's Islamophobic abuse in Portland, Oregon on May 26, 2017. *See, e.g.*, Wikipedia, *2017 Portland train attack*, https://en.wikipedia.org/wiki/2017_Portland_train_attack (as of 14:15 GMT, Sept. 11, 2017).

III. LIFE AS AN IMMIGRANT OR REFUGEE IS NOT ALWAYS EASY

Amicus also urges the Court to remember the truth, even if a truism, that refugees and immigrants often have difficult lives. Thus, they should not be subject to additional needless misery by the Order. ...Popular culture reminds us of the ugliness of prejudice against newcomers: *see, e.g.*, the work of recently-deceased Walter Becker (RIP) and the rest of Steely Dan in *The Royal Scam*, *on* The Royal Scam (ABC 1976). The song, *see id.*, tells a harrowing tale of abuse against Puerto Rican or other immigrants. *See also, e.g.*, Tom Petty and the Heartbreakers, *Refugee*, *on* Damn the Torpedoes (Backstreet 1979): "Everybody's had to fight to be free/You see you don't have to live like a refugee (don't have to live like a refugee)", *Refugee*, *supra*.

So, while the Order may not be a "royal scam", it may not be humane or legal, either. —And one notes, as a practicality, that dealing with difficult problems like the Order can benefit from having a stable Court to deal with them.

IV. IN THESE DIFFICULT TIMES, OLD HANDS' RETIREMENT FROM THE COURT COULD MEAN INSTABILITY RE CONTROVERSIAL CASES LIKE THE INSTANT CASE—AND ALSO INSTABILITY FOR THE NATION

Naturally, the heading above refers to no one in particular. Amicus is just offering a general observation, that in these interesting times, with so much at stake, whether Muslim bans, gay-wedding cakes, partisan gerrymandering, etc., it could be damaging to the Nation for any experienced Justice to retire from the Court, when instead he or she could serve for many years more with distinction and honor, and keep someone else with less distinction and honor from being put on the Court. Amicus looks forward to the Court retaining its Members for many years.

However, and crazily enough, not everyone thinks the Court is terribly competent. A retiring (but not always retiring) Midwesterner, Richard Posner, has said

> that he thought the country's high court was "awful" and the result of a process that had become too political.
>
> "I think it's reached a real nadir," Posner said at the Seminary Co-Op Bookstore. "Probably only a couple of the justices, (Stephen) Breyer and (Ruth Bader) Ginsburg, are qualified. They're OK, they're not great."

Jason Meisner and Patrick M. O'Connell, *Richard Posner announces sudden retirement from federal appeals court in Chicago*, Chi. Trib., Sept. 1, 2017, 7:13 p.m., http://www.chicagotribune.com/news/local/breaking/ct-judge-richard-posner-retires-met-20170901-story.html. Wow. (If "Dick Po." knows so much, perhaps he could have been a one-man Supreme Court, all on his lonesome?)

Another colorful fellow has also lambasted the Court, *see, e.g.*, Liz Goodwin, *With swearing-in, Trump to come face-to-face with justice he has berated as a 'dummy'*, Yahoo News, Jan. 19, 2017, https://www.yahoo.com/news/with-swearing-in-trump-to-come-face-to-face-with-justice-hes-berated-as-a-dummy-155955664.html (Donald Trump uses words like "dummy", "bull---t", "disloyal", and "stupidity" to describe Chief Justice or his ideas).

But Amicus, like perhaps most Americans, does ***not*** see the Court as being pestiferous, dimwitted clowns. Moreover, the Court are not a bunch of Joe Arpaios. Amicus expects the Court to say and do things that make Americans, and decent immigrants and refugees who want to be Americans, proud.

* * *

One proud American was Humayun Khan, a Muslim soldier who died for the Nation, *see* Wikipedia, *Humayun Khan (soldier)*, https://en.wikipedia.org/wiki/Humayun_Khan_(soldier) (as of 21:14 GMT, Aug. 31, 2017). He represented, and represents, America's best.

Id. On that note, the Order risks dishonoring the memory of the victims of 9/11, and the memory of American heroes like Khan. And this honorable Court—being "honorable"—would not want to promote dishonor or oppression in our Nation, which is "the land of the free, and the home of the brave." Francis Scott Key, *The Star-Spangled Banner* (1814).

CONCLUSION

The Court should give Respondents at least the degree of relief previously given, or maybe the full relief Respondents request; and Amicus humbly thanks the Court for its time and consideration.

September 13, 2017 Respectfully submitted,

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Petitioners,

—v.—

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Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
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—v.—

HAWAII, *et al.*,
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ON WRITS OF CERTIORARI TO THE UNITED STATES
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QUESTIONS PRESENTED

The questions presented in Nos. 16-1436 and 16-1540 include "whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause," and whether the injunctions are impermissibly overbroad.

This brief presents the Court with an evidence-based policy analysis regarding the intersection of immigration and national security. *Amicus* hopes that this material is useful to the Court as it considers the justifications for the "travel ban," to the extent that those justifications are relevant to legal claims in this case and to the interests at issue.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato believes that those values depend on holding government to rigorous standards of evidence and justification for its actions.

Its scholars have significant experience studying immigration law and policy. *Amicus* therefore believes that it can assist the Court by providing evidence relevant to two key aspects of Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter *Executive Order* or *Order*], the so-called "Suspension of Entry for Nationals of Countries of Particular Concern" (Section 2(c)) [hereinafter *Entry Ban* or *Ban*], and the suspension of U.S. Refugee Admissions Program (*USRAP*) (Section 6(a)) [hereinafter *Refugee Program Suspension*].

INTRODUCTION AND SUMMARY OF ARGUMENT

The government claims that the Entry Ban and Refugee Program Suspension secure the United States against terrorist attacks. *Amicus* respectfully disagrees and submits that these justifications do not withstand scrutiny as a matter of policy.

As a procedural matter, the Court may consider real-world evidence about the Order's stated justifications and effects because each is part of the prevailing legal tests governing the claims here. Even under the government's view that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), governs this Court's assessment of Respondents' challenges to the Executive Order, it is appropriate for a court entertaining an Establishment Clause challenge to an exclusion order to probe whether there is a "bona fide reason" for the exclusion (Br. for Petitioners at 63 (quoting *Mandel*, 408 U.S. at 770)) and to consider whether the government "rationally could have believed" in the purposes for the exclusion (Br. for Petitioners at 64 (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-72 (1981))). And to the extent that the Court reaches the substance of the challenges, the threshold inquiries for Establishment Clause challenges to government actions, in addition to those of the Equal Protection Clause and the Religious Freedom Restoration Act (*RFRA*), require courts to decide whether those actions are motivated by a sincere permissible purpose. If government actions fail that threshold inquiry then prevailing doctrine requires courts to subject the actions to heightened scrutiny, which requires courts to consider evidence about whether the actions are appropriate means to advance the government's interests. In short, if the Court concludes that the present case implicates any of these doctrines, it must consider evidence about the Order's purposes and effects. *See* Part I.

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[1] No party's counsel authored any part of this brief and no person other than *Amicus* funded its preparation and submission. Parties were timely notified and petitioner has filed blanket consent. Respondents have provided their consent.

Should the Court reach any of these questions, it should conclude that real-world evidence supports neither the government's stated justifications for the Order, nor the government's claim that enjoining the Order will harm the public interest. The Entry Ban excludes from the United States persons who are nationals of six Muslim-majority countries: Iran, Syria, Somalia, Sudan, Libya, and Yemen (the "Designated Countries"). The Refugee Program Suspension excludes persons seeking refugee status regardless of nationality. The government justifies these measures by claiming that individuals from these categories pose a heightened threat of terrorism and that it needs time to identify information necessary to process visa applications. Yet not a single person from these countries has killed anyone in a terrorist attack in the United States in over four decades, and no refugee admitted since 1980 has killed anyone in a terrorist attack on U.S. soil. Nor does the government need a categorical ban on entry if it cannot gather information to adjudicate visa applications. Under the law, visa applicants bear the burden of proof. The government has no obligation to gather its own information to establish applicants' eligibility, and it can—and does—reject anyone who cannot prove that they do not pose a threat. In any event, by the time this Court will be deciding this case, the 90 days that the government claimed it needed to improve vetting procedures will have long passed.

ARGUMENT

I. THE CATO INSTITUTE'S ORIGINAL IMMIGRATION RESEARCH BEARS ON THE ORDER'S BASIS, WHICH IS MATERIAL TO KEY LEGAL QUESTIONS IN THIS CASE

The Court should consider evidence of the Order's actual purpose and effects—whether presented by those challenging the Order or by the government—because the legal tests in this case require it. Respondents have challenged the Executive Order under the Establishment Clause, Equal Protection Clause, and RFRA, and they obtained preliminary injunctions against the Order.[2] The prevailing doctrines governing these claims and remedies differ, of course, but they share one thing in common: They require courts to consider real-world evidence about some combination of the purposes, operation, or effects of the government actions being challenged.[3]

Even under the government's view that *Mandel* governs this Court's assessment of Respondents' challenges to the Executive Order, that case would require the Court to probe whether there is a "bona fide reason" for the exclusion (Br. for Petitioners at 63 (quoting *Mandel*, 408 U.S. at 770)) and to consider whether the government "rationally could have believed" in the purposes for the exclusion (Br. for Petitioners at 64 (quoting *Western & S. Life*, 451 U.S. at 671-72)). Thus, even under that deferential standard of review, the Court still must determine whether the government's stated reason for its action may be credited.

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[2] The Fourth Circuit upheld the injunction against the Order on Establishment Clause grounds, and the Ninth Circuit upheld the injunction based on other statutory grounds. Nevertheless, Equal Protection and RFRA arguments remain relevant because the Court may affirm the decision below on any grounds in the record, including those upon which the lower court did not rely. *U.S. v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924) ("[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."). Further, the Court has also considered arguments not pursued by the respondents, but rather argued by an *amicus curiae*. *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961).

[3] The Cato Institute takes no ultimate position on whether the present case triggers the doctrines above, or whether the prevailing doctrinal tests are correct.

If this Court reaches the substance of Respondents' claims, prevailing Establishment Clause doctrine calls for an assessment of the authenticity of the government's articulated secular purpose. The Establishment Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs,'" even in facially neutral laws. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citations omitted) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971) and *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). Courts applying the prevailing Establishment Clause test therefore must evaluate evidence about whether a government measure is motivated by a "secular purpose" that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). Moreover, courts probe the real purpose of state action by considering the operation of the government action, as "the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye*, 508 U.S. at 535. And when the "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action," such action is impermissible. *McCreary Cty.*, 545 U.S. at 863.

Here, the government justifies the Executive Order by asserting the need to "protect[] the nation from foreign terrorist entry into the United States." Cato's research, as set forth below, belies that claim. That evidence therefore bears on the Establishment Clause analysis.

Moreover, the Supreme Court has held that government actions that discriminate among religions require application of strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Strict scrutiny requires consideration of whether government action furthers a compelling government interest and whether the action is narrowly tailored to that interest. *Id.* at 246-247; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Critical to the inquiry is whether the government action "visits 'gratuitous restrictions'" that are unwarranted by the government's claimed interest. *Church of Lukumi Babalu Aye*, 508 U.S. at 538 (quoting *McGowan v. Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)). Where government action imposes such overinclusive restrictions, "[i]t is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that [such] a law . . . seeks not to effectuate the stated governmental interests," but rather to advance impermissible purposes. *Id.*; *see also Larson*, 456 U.S. at 248 ("Appellants must demonstrate that the challenged . . . rule is closely fitted to further the interest that it assertedly serves."). On the flip side, when a government action is materially ***under***inclusive by failing to restrict activities "that endanger[] [the government's] interests in a similar or greater degree than" those activities that the action does restrict, the government undermines its claim that it is pursuing a compelling interest and raises the specter that the government is using its stated objective to pursue prohibited discrimination. *Church of Lukumi Babalu Aye*, 508 U.S. at 543. To assess whether a government action's purported purpose is genuine, both law and common sense require courts to consider the extent to which the government has failed to take less-restrictive actions that would further its purpose. *See, e.g.*, *id.* at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540 ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of [the statute]."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (holding a law limiting signage as impermissible under the First Amendment because it left other threats to the town's asserted interests unprohibited).

The evidence presented by Cato below, which demonstrates a complete disconnect between the stated purposes of the Order and its actual operation and effects, bears on precisely these issues.

Similar doctrines apply, with variations not relevant here, to the Equal Protection and RFRA challenges to the Order. *See Adarand Constructors*, 515 U.S. at 227 (as to equal protection under the

Fifth Amendment); 42 U.S.C. § 2000bb–1; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (as to RFRA). RFRA governs actions that place burdens on the exercise of religion, 42 U.S.C. § 2000bb–1; equal protection doctrine governs government action that draws distinctions based on suspect classifications such as race, religion, or alienage, *see City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Where such distinctions exist, a court may engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985).

Under any of these doctrines of judicial review, there is ample evidence of a poor fit between the purpose of the Order and its effects.

II. THE CATO INSTITUTE'S ORIGINAL RESEARCH INTO THE RELATIONSHIP BETWEEN IMMIGRATION AND TERRORISM SUGGESTS THAT THE ORDER WILL NOT ADVANCE ITS STATED PURPOSES

If the real purpose of the Entry Ban is to protect against an attack in the United States by foreign terrorists, then the Ban fails. Its obvious design flaws mean that it will not meaningfully reduce the risk of terrorism on U.S. soil.

A. The Entry Ban Is Based on the False Premise that the Government Needs the Cooperation of Foreign Governments to Process Visa Applications.

The government justifies the designation of countries for the Entry Ban by claiming that the six countries are "[un]willing[] or [un]ab[le] to share or validate important information about individuals seeking to travel to the United States." Order § 1(d). It further states that the Ban is needed to allow time for the Secretary of Homeland Security to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country." *Id.* § 2(a). These explanations rely on a false premise.

It is ***applicants***, and not the government, who bear the burden to produce information showing their eligibility for a visa. The government has no obligation to obtain this information on its own, and may exclude any individual who fails to meet this burden. 8 U.S.C. § 1361. All evidence of which Cato is aware indicates that consular officers already enforce this burden of proof and have reacted to the changing conditions in each of the Designated Countries on a proper, individualized basis. For the past seven years, the B visa refusal rate (the share of applicants denied a business and/or tourism visitor visa for any reason) for the excluded nationalities has been an average of 79 percent higher than for all other nationalities. U.S. Dep't of State, *Calculation of the Adjusted Visa Refusal Rate for Tourist and Business Travelers Under the Guidelines of the Visa Waiver Program*, https://travel.state.gov/content/dam/

visas/Statistics/Non-Immigrant-Statistics/refusalrate language.pdf [hereinafter Dep't of State, *Adjusted Visa Refusal Rate*] (last visited Aug. 30, 2017); U.S. Dep't of State, *Visitor Visa*, https://travel.state.gov/content/visas/en/visit/visitor.html (last visited Sept. 6, 2017).

Table 1: B Visa Refusal Rate (% of Applicants) by Country

Country	2010	2011	2012	2013	2014	2015	2016
Somalia	70	67	62	66	52	65	64
Syria	28	33	42	46	60	63	60
Iraq	42	27	33	39	41	53	52
Yemen	54	48	48	44	44	54	49
Iran	39	31	38	48	42	39	45
Libya	14	31	39	34	34	43	41
Sudan	33	41	45	48	42	40	37
***Average*[4]**	*40*	*40*	*44*	*46*	*45*	*51*	*50*
***All other countries*[5]**	*26*	*25*	*24*	*25*	*25*	*26*	*27*

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[4] Average based on the simple arithmetic mean of the data for the seven countries shown in the table and not weighted by number of applicants.

[5] Average based on the arithmetic mean of the data for all countries excluding the seven shown in the table; data includes stateless persons.

Source: Cato Institute calculations based on data in Dep't of State, *Adjusted Visa Refusal Rate, supra.*

These denial rates reflect in part the existing availability of documentary evidence from visa applicants. While the average visa denial rate for all other countries has remained relatively constant in recent years, the average denial rate of the six Designated Countries (plus Iraq) increased from approximately 40% to 50% between 2010 and 2016—a rate increase of 25%. In particular, the conflicts in Libya and Syria coincided with refusal rates that more than doubled. *See supra* Table 1. Based on Cato's familiarity with the visa-application process, it believes that many of these rejections were likely a consequence of the inability of applicants to access documents and other evidence necessary to prove their eligibility for a visa, indicating that the government has no need to exclude nationalities on a categorical basis due to information deficits.

B. Visa Vetting Failures of Terrorists Are Very Rare and Have Not Occurred Primarily in the Designated Countries.

Even if the premise of the Order were valid, the security justifications provided in Section 1(h) of the Order for the purported necessity of revamping security screening do not support its sweeping prohibitions. The Order's central evidentiary assertion is that "[r]ecent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security," citing "hundreds of persons born abroad" who were convicted of "terrorism-related crimes in the United States" since 2001.

Order § 1(h). But it is factually inaccurate to claim that hundreds of people born abroad who were convicted of terrorism offenses entered "through our immigration system."

The Order inflates the number of crimes by including "terrorism-related" offenses and falsely implying that the offenders all entered the United States as a result of vetting failures in recent years. The below analysis reveals that since 2001, likely only four people from the six Designated Countries have improperly entered the U.S. due to vetting failures and gone on to commit terrorism offenses in the United States. Those four persons represent less than two percent of all terrorism offenders since September 11, 2001.

According to a list compiled by the Department of Justice's National Security Division, "terrorism-related" convictions include those for non-terrorism offenses if there was a link to a terrorism investigation. Nat'l Sec. Div., Dep't of Justice, *Introduction to the National Security Division's Chart of Public/Unsealed International Terrorism and Terrorism-related Convictions From 9/11/01 to 12/31/15* (Aug. 26, 2016), https://object.cato.org/sites/cato.org/files/wp-content/uploads/dojterrorismrelatedconvictions2015.pdf [hereinafter *NSD List*]. Almost half—approximately 45 percent—of the NSD List's "terrorism-related" convictions from 2001 to 2015 were for non-terrorism offenses. *Id.*; David Bier, *Very Few Immigration Vetting Failures of Terrorists Since 9/11, Cato Institute: Cato at Liberty* (Aug. 31, 2017), https://www.cato.org/blog/very-few-immigration-vetting-failures-terrorists-911 [hereinafter Bier, *Few*

Vetting Failures]. The non-terrorism offenses on the NSD List mainly include false statements to investigators, immigration violations, identity fraud, and drug convictions. *Id.*

As of March 2017 when the President signed the Order, less than two hundred foreigners had entered the United States legally through the immigration system and were convicted of or killed during terrorism offenses here. *Id.* Rather, a majority of U.S. terrorism offenders were either born in the United States or brought into the country by U.S. law enforcement for arrest or prosecution. *Id.* These individuals did not enter "through the immigration system." The "hundreds of persons" claim is therefore exceptionally misleading in context.

The Order further asserts that these "hundreds" entered the country in "recent history," particularly since September 11, 2001—that is, after the U.S. government substantially upgraded its immigration vetting processes. Order § 1(h). In fact, only 34 terrorism offenders entered through the immigration system since then. Bier, *Few Vetting Failures*, *supra* (reporting findings following a review of the NSD List, the Department of Justice web site, the George Washington University Program on Extremism, and the New America Foundation International Security Program). Again, this is far fewer than the "hundreds" claimed in the Order. These 34 offenders were born in 22 different countries, including eight countries that are non-majority Muslim. Three of the Order's Designated Countries—Yemen, Libya, and Syria—are not among those 22 countries, and 80 percent of the offenders came from non-designated countries. *Id.* This reinforces the conclusion that the Order's designations are not reflective of the best evidence on terrorism threats, and that nationality is not a useful predictor of terrorist activity.

Moreover, not all of these 34 offenders entered the country as a result of vetting failures. In publicly-available statements, the government has indicated that 11 of the 34 were radicalized prior to entry. Bier, *Few Vetting Failures*, *supra*. Many of the remaining 23 appear to have radicalized after entry. *Id.* Fourteen entered as juveniles, including nine children who were 15-years old or younger when they entered. *Id.* Six converted to Islam after their entry. There is direct evidence that others radicalized after entry, including Tamerlan Tsaernaev, one of the Boston bombers, who entered as a 16-year-old and who, according to the House Homeland Security Committee, likely radicalized during a brief trip to Russia after nearly a decade in the United States. Majority Staff of the Comm. on Homeland Sec., U.S. H.R. Comm. on Homeland Sec., *The Road to Boston: Counterterrorism Challenges and Lessons from the Marathon Bombings*, at 9-10, 15 (Mar. 2014), https://homeland.house.gov/files/documents/Boston-Bombings-Report.pdf. Defining "vetting failure" very broadly and including all of the uncertain cases, only 18 offenders who entered the United States "through the immigration system" after September 11 were likely radicalized prior to their admission to the United States, such that one could conclude that the terrorism vetting system failed to identify information that may have excluded them from entry. Bier, *Few Vetting Failures*, *supra*. This is again far fewer than the "hundreds" asserted in the Order.

The 18 likely vetting failures involved immigrants from 13 different countries. *Id.* Four of the six Designated Countries—Yemen, Libya, Syria, and Iran—had no vetting failures at all after 9/11. *Id.* Only four of the 18 likely vetting failures came from the Designated Countries, while 78 percent came from non-designated nations. The four vetting failures from the Designated Countries represent less than two percent of all terrorism offenders since 9/11. *Id.* This again reinforces the futility of attempting nationality-based discrimination as a form of visa security and highlights the disconnect between the Order and the reality of terrorism threats.

The threat posed by these 18 offenders hardly justifies a broad entry ban based on nationality. Only half of these 18 even planned an attack targeting Americans in the United States, and only one, Pakistani national Tashfeen Malik, killed anyone in the United States. Bier, *Few Vetting Failures, supra.* Thus, a vetting failure has allowed a single deadly terrorist to enter the country legally in more than a decade and a half—during a time when more than 360 million foreigners were granted visas or authorized to enter without visas—and this terrorist was not even a person from one of the Designated Countries. U.S. Dep't of Homeland Sec., *2015 Yearbook of Immigration Statistics* (last updated May 16, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2015; Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office: 2002-2016* (2017), https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports.html.

Far from contradicting these conclusions, the Order's specific examples of foreign-born terrorism offenders confirm them. The only example in the Order itself of a national of one of the Designated Countries engaging in terrorism could not have been prevented by improved vetting: The Order refers to a Somali refugee named Mohamed Mohamud who had concocted a plot with an undercover FBI agent to detonate a bomb in Portland (in which no one was ultimately killed); however, Mohamud had entered the United States as a toddler. *United States v. Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016). Although the claimed purpose of the Order is to "improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP," Order § 1(a), no additional procedures could determine which toddlers will become terrorists years later.

The only other evidence provided as justification for the Order's Entry Ban is similarly inapposite: The Order references two Iraqi refugees who had attempted to support a foreign terrorist organization in Iraq, and who were not planning an attack in the United States. Indictment, *United States v. Alwan*, No. 1:11-cr-00013 (W.D. Ky. May 26, 2011). Moreover, the Obama Administration already modified refugee screening procedures to account for the risk posed by these individuals. David Bier, *Deconstructing Trump's Security Defense of His Immigration Ban*, *Cato Institute: Cato at Liberty* (Mar. 9, 2017), https://www.cato.org-/blog/deconstructing-trumps-security-defense-immigration-ban. Following this case, the Obama administration imposed more extensive background checks on Iraqi refugees, in addition to reviewing the records of Iraqis who had already settled in the United States. Glenn Kessler, *Fact Checker: Trump's facile claim that his refugee policy is similar to Obama's in 2011*, Wash. Post (Jan. 29, 2017) https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?tid=a_inl&utm_term=.c5f6a065c41c.

C. The Designated Countries Are Not the Countries Whose Nationals Have Been Most Likely to Commit Lethal Acts of Terrorism on U.S. Soil.

In any event, the government's selection of the Designated Countries is not based on any meaningful national security risk when viewed in light of the "recent history" suggested by the Order. To the contrary, there is a total disconnect between the countries chosen and countries whose nationals, historically, have committed acts of terrorism on U.S. soil.

The Order asserts that the six Designated Countries were selected based on conditions within those countries, listing two situations to justify the designation: first, that the country is in the midst of conflict that involves a U.S.-listed Foreign Terrorist Organization (Somalia, Syria, Libya, and Yemen); and second, that the United States has recognized the government of the country as a State Sponsor of Terrorism (Iran, Sudan, and Syria). Order §§ 1(d)-(e); Bureau of Counterterrorism, U.S. Dep't of State, *Foreign Terrorist Organizations*, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Aug. 30, 2017). The government states that either situation "increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States," Order § 1(d), but offers no evidence for that claim.

To the contrary, despite hundreds of thousands of visas issued to nationals of these countries, the fact that a nation is a State Sponsor of Terrorism has not historically correlated with the likelihood of its nationals becoming terrorists in the United States. Bureau of Consular Affairs, U.S. Dep't of State, *Non-immigrant Visa Statistics, FY1997-2016 NIV Detail Table*, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-16_NIVDetailTable.xls (last visited Aug. 30, 2017) (reporting 655,463 non-immigrant visas issued to nationals of Iran, Sudan and Syria from fiscal year 1997 through 2016); Bureau of Consular Affairs, U.S. Dep't of State, *2016 Annual Report: Table XIV: Immigrant Visas Issued at Foreign Service Posts (by Foreign State of Chargeability)*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXIV.pdf (last visited Aug. 30, 2017) (reporting 104,245 visas issued to individuals chargeable to Iran, Sudan and Syria from fiscal years 2007 through 2016). The United States currently recognizes only Iran, Sudan, and Syria as State Sponsors of Terrorism, and there has not been a single death caused by terrorism on U.S. soil committed by a national of one of these three countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, Cato Institute: Cato At

Liberty (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons [hereinafter Nowrasteh, *Guide*] (showing zero terrorism murders committed by persons with national origins in Iran, Syria, and Sudan); U.S. Dep't Of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 7, 2017).

Since the United States began designating countries as State Sponsors of Terrorism in 1979, the United States has recognized a total of eight such countries: Cuba (1982–2015), Iraq (1979–1982, 1990-–2004), Iran (1984–present), Libya (1979–2006), North Korea (1988–2008), South Yemen (1979–1990), Sudan (1993–present), and Syria (1979–present). Certification Permitting Rescission of Iraq as a Sponsor of Terrorism, 69 Fed. Reg. 58,793 (Sept. 24, 2004); Certification on Rescission of Libya's Designation as a State Sponsor of Terrorism, 71 Fed. Reg. 30,551 (May 26, 2006); Certification of Rescission of North Korea's Designation as a State Sponsor of Terrorism, 73 Fed. Reg. 37,351 (Jun. 26, 2008); Rescission of Determination Regarding Cuba, 80 Fed. Reg, 31,945 (Jun. 4, 2015); Jimmy Carter, *Export Controls for Foreign Policy Purposes Letter to the Speaker of the House and the President of the Senate* (Dec. 29, 1979), *online by* Gerhard Peters and John T. Woolley, The American Presidency Project http://www.presidency.ucsb.edu/ws/index.php?pid=31886; U.S. Dep't Of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 7, 2017). From 1975 through 2016, nationals from these countries have killed only three people in

2017). The government states that either situation "increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States," Order § 1(d), but offers no evidence for that claim.

To the contrary, despite hundreds of thousands of visas issued to nationals of these countries, the fact that a nation is a State Sponsor of Terrorism has not historically correlated with the likelihood of its nationals becoming terrorists in the United States. Bureau of Consular Affairs, U.S. Dep't of State, *Non-immigrant Visa Statistics, FY1997-2016 NIV Detail Table*, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-16_NIVDetailTable.xls (last visited Aug. 30, 2017) (reporting 655,463 non-immigrant visas issued to nationals of Iran, Sudan and Syria from fiscal year 1997 through 2016); Bureau of Consular Affairs, U.S. Dep't of State, *2016 Annual Report: Table XIV: Immigrant Visas Issued at Foreign Service Posts (by Foreign State of Chargeability)*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXIV.pdf (last visited Aug. 30, 2017) (reporting 104,245 visas issued to individuals chargeable to Iran, Sudan and Syria from fiscal years 2007 through 2016). The United States currently recognizes only Iran, Sudan, and Syria as State Sponsors of Terrorism, and there has not been a single death caused by terrorism on U.S. soil committed by a national of one of these three countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, Cato Institute: Cato At

Liberty (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons [hereinafter Nowrasteh, *Guide*] (showing zero terrorism murders committed by persons with national origins in Iran, Syria, and Sudan); U.S. Dep't Of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 7, 2017).

Since the United States began designating countries as State Sponsors of Terrorism in 1979, the United States has recognized a total of eight such countries: Cuba (1982–2015), Iraq (1979–1982, 1990–2004), Iran (1984–present), Libya (1979–2006), North Korea (1988–2008), South Yemen (1979–1990), Sudan (1993–present), and Syria (1979–present). Certification Permitting Rescission of Iraq as a Sponsor of Terrorism, 69 Fed. Reg. 58,793 (Sept. 24, 2004); Certification on Rescission of Libya's Designation as a State Sponsor of Terrorism, 71 Fed. Reg. 30,551 (May 26, 2006); Certification of Rescission of North Korea's Designation as a State Sponsor of Terrorism, 73 Fed. Reg. 37,351 (Jun. 26, 2008); Rescission of Determination Regarding Cuba, 80 Fed. Reg, 31,945 (Jun. 4, 2015); Jimmy Carter, *Export Controls for Foreign Policy Purposes Letter to the Speaker of the House and the President of the Senate* (Dec. 29, 1979), *online by* Gerhard Peters and John T. Woolley, The American Presidency Project http://www.presidency.ucsb.edu/ws/index.php?pid=31886; U.S. Dep't Of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 7, 2017). From 1975 through 2016, nationals from these countries have killed only three people in the United States in acts of terrorism. Nowrasteh, *Guide, supra*; National Consortium for the Study of Terrorism and Responses to Terrorism, *Global Terrorism Database*, [Data file], https://www.start.umd.edu/gtd (last visited Sept. 1, 2017) [hereinafter, *Global Terrorism Database*]. All three murders were committed by Cuban nationals in 1975 and 1976—that is, ***before*** the U.S. government designated Cuba (or any other country) as a State Sponsor of Terrorism. Nat'l Sec. Research Div., RAND Corp., *RAND Database of Worldwide Terrorism Incidents*, https://www.rand.org/nsrd/projects/terrorism-incidents/download.html (last visited Sept. 1, 2017); *Global Terrorism Database, supra*.

Similarly, that a person is a national of a country in civil war has not predicted whether that person would present a terrorism risk. Cato's analysis of data regarding intra-state wars indicates that, of the foreign-born terrorists who have committed attacks on U.S. soil since 1975, only one was committed by someone whose country was in the midst of a civil war involving a foreign terrorist organization at the time of the offense: the 2015 shooting in San Bernardino, California, committed in part by Pakistan-born (but Saudi-raised) Tashfeen Malik. Mehreen Zahra-Malik, *Exclusive: Investigators Piece Together Portrait of Pakistani Woman in Shooting Massacre*, Reuters (Dec. 4, 2015), http://www.reuters.com/article/us-california-shooting-pakistan-idUSKBN0TN1YX20151204; Meredith Reid Sarkees & Frank Wayman, *Resort to War: 1816–2007*, Washington DC: CQ Press (Oct. 28, 2010), http://cow.dss.ucdavis.edu/data-sets/COW-war (last visited Sept. 1, 2017); Global Conflicts Tracker, *Islamist Militancy in*

Pakistan, Council on Foreign Relations, https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/islamist-militancy-in-pakistan (updated Sept. 7, 2017) (describing Pakistan's offensive against militants in North Waziristan from 2014-2016). Pakistan, which has had a long-simmering insurgency in some regions, is not among the six Designated Countries.

Table 2 provides the number of deaths and the historical probability of death on U.S. soil from a terrorist attack by nationals of countries that meet the conditions the Order describes.

Table 2: Risk of Death by Terrorism by Nationality by Country Conditions, 1975-2016

Security Categories and Comparators	Deaths	Historical Annual Chance of Death
Current State Sponsors of Terrorism	Zero	Zero
States in Civil Wars[6]	14	1 in 802.55 million
Other Non-U.S. Countries	3,010	1 in 3.73 million
United States and unknown	429	1 in 26.19 million
Six Designated Countries	Zero	Zero

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[6] Sarkees & Wayman, *supra* (the intra-state wars dataset "encompasses wars that predominantly take place within the recognized territory of a state" and further classifies wars as civil wars when they involve the government of the state against a non-state entity).

Sources: Cato Institute calculations based on data cited in Nowrasteh, *Guide*, *supra*; Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 *Cato Institute Policy Analysis* 1, 3, 6 (Sept. 13, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf [hereinafter Nowrasteh, *Terrorism and Immigration*]. *Amicus* updated the calculations in Nowrasteh, *Terrorism and Immigration* and Nowrasteh, *Guide* through the end of 2016 by including the six deadly terrorist attacks in 2016, none of which was known to be committed by foreign-born terrorists, as listed in *Global Terrorism Database*, *supra*. Annual chance of death was calculated according to the methodology used in Nowrasteh, *Terrorism and Immigration*, *supra*, at 2-4.

As noted above, terrorists from State Sponsors of Terrorism did not kill anyone in terror attacks on U.S. soil from 1975 to 2016. In that period, the annual chance of dying at the hands of terrorists from states in civil war involving a foreign terrorist organization was 1 in 802.55 million. By comparison, the annual probability of death in an act of terrorism committed by other foreign nationals was 1 in 3.73 million. In other words, the historical chance of dying in an attack on U.S. soil committed by a foreign-born terrorist from a country that does ***not*** fit the government's criteria, and is not included on the list of Designated Countries, was 215 times greater than being killed by one who did.

The government's misguided criteria for designating countries produces a bizarre result: Based on data from 1975 through 2016, ***no one*** has been killed in a terrorist attack on U.S. soil by nationals from any of the six Designated Countries. Nowrasteh, *Guide*, *supra*. Once again, this is compelling evidence that nationality is simply not a useful predictor of terrorism threats.

While the future need not replicate the past, the government purports to base its security assessment in part on evidence of crimes committed in the past. Order § 1(h). But as discussed above, the historical record undermines, rather than supports, the government's claims. Moreover, there are good reasons to believe that the risk of terrorism will be managed more effectively in the future: beginning after 9/11, the United States has revamped its visa screening process. To name but a few changes, it expanded and automated terrorist watch lists, instituted biometric identity verification, linked various agency databases, instituted Department of Homeland Security review of visa applications for terrorism links in many consulates worldwide, and expanded intelligence sharing with allied countries. Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies* 5-6, 13-20 (Nov. 18, 2015), https://fas.org/sgp/crs/homesec/R43589.pdf; *see generally*, Kristin Archick, Cong. Research Serv., RS22030, *U.S.-EU Cooperation Against Terrorism* (Dec. 1, 2014), https://fas.org/sgp/crs/row/RS22030.pdf. These changes suggest that a categorical ban is not the best way to effectuate the government's stated purpose.

As telling, however, is the simple fact that the Order does not designate all countries fitting its stated criteria. As noted above, Pakistan is effectively engaged in a civil war involving a Foreign

Terrorist Organization, and individuals born in Pakistan have committed terrorist attacks on U.S. soil, but Pakistan is not covered by the Order. This implies that the government's stated criteria are not, in fact, a complete statement of its reasons for adopting the Ban.

D. The Entry Ban Excludes Individuals Based on Legal Nationality Rather than Any Meaningful Connection to the Six Designated Countries.

To the extent the Entry Ban is based on evidence at all, it is based on evidence regarding ***countries***—more precisely, "conditions in six of the previously designated countries"—rather than ***nationals*** of those countries, who are the actual subjects of the Ban. Order § 1(e). But individuals often have the legal status as a "national" of a country even if they have no meaningful connection to it, or a connection that is irrelevant under the circumstances. The converse is also true. A person may have a meaningful connection to a country despite lacking the status of "national." Evidence relating solely to a country itself therefore cannot justify a ban on nationals of that country.

According to the United Nations Population Division, 11.2 million nationals of the Designated Countries were living as migrants in another country in 2015. Population Div., U.N. Dep't of Econ. & Soc. Affairs, *By Destination and Origin: Table 16*, International Migrant Stock 2015 (Dec. 2015), http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml (last visited Sept. 1, 2017). According to the United

Nations High Commissioner for Refugees, 7.1 million nationals of these six countries were refugees or asylum seekers outside their country of birth in 2015. U.N. Refugee Agency, U.N. High Comm'r for Refugees, *Persons of Concern*, http://popstats.unhcr.org/en/persons_of_concern (last visited Aug. 30, 2017). Nationals from Syria and Iran need not have even been born or lived in the country at all to possess their country's nationality. Legislative Decree No. 276, of 24 Nov. 1969 (Nationality Law), Ch. 2 (Syria), http://www.refworld.org/pdfid/4d81e7b12.pdf; Civil Code No. 976 (On Nationality) (Iran), *available online at* Iran Data Portal (last modified Apr. 1, 2013) http://irandataportal.syr.edu/nationality-law. Likewise, an individual need not be a national of a country to reside in, identify with, or integrate into conflicts in that country. Indeed, the United Nations has recognized the threat posed by foreign terrorist fighters who leave their home countries and travel to conflict zones. S.C. Res. 2178, U.N. Doc. S/RES/2178, at 2 (Sept. 24, 2014). Legal nationality is therefore an inappropriately blunt tool for judging whether an individual actually has substantial ties to the country of nationality, let alone whether the individual poses any threat to the United States.

E. The Refugee Program Suspension is Unsupported by Evidence.

Although the Order suspended the entry of all refugees under the U.S. Refugee Admissions Program—regardless of nationality—there is no clear evidence that refugees pose greater "threats to our national security" than other foreign-nationals in the U.S. Order § 1(h). Indeed, the opposite has historically been true.

If anything, available evidence indicates that refugees have historically been ***less*** likely than other foreign nationals—and even U.S. citizens—to kill in terrorist attacks in the United States. The Cato Institute has produced what it understands to be the only comprehensive analysis of the threat of terrorism based on admission category of foreign-born terrorists. Nowrasteh, *Terrorism and Immigration*, *supra*, at 2. From 1975 through 2016, the United States admitted more than 3.2 million refugees. U.S. Dep't Of State, *Refugee Processing and Screening System* (Jan. 20, 2017), https://www.state.gov/j/prm/ra/266458.htm (last visited Aug. 30, 2017). The Cato report finds that only three—each from Cuba—engaged in any deadly acts of terrorism during that time in the United States (0.00009 percent). Nowrasteh, *Terrorism and Immigration*, *supra*, at 13.

Historically, the chance of dying in a terrorist attack on U.S. soil committed by a refugee has been 1 in 3.8 billion a year. *See infra* Table 3. Of the four general categories of admission—permanent residency, temporary nonimmigrant, asylum, and refugee status—the refugee category has been the ***least*** risky. U.S. residents were nearly 1,000 times more likely to be killed in a terrorist attack by tourists than by refugees on U.S. soil. U.S. residents were 100 times more likely to be killed by a US-born person in a domestic terrorist attack than by a refugee.

Table 3: Annual Chance of Being Killed in an Attack on U.S. Soil, Based on Immigration Status of Terrorist, 1975-2016

Category	Deaths	Annual Chance of Being Killed
Tourist	2,834	1 in 3.96 million
U.S.-Born or unknown	429	1 in 26.19 million
Student Visa	159	1 in 70.67 million
Fiancé Visa	14	1 in 802.55 million
Permanent Resident	8	1 in 1.41 billion
Asylee	4	1 in 2.81 billion
Refugee	3	1 in 3.75 billion
USRAP	0	Zero

Sources: Cato Institute calculations based on data cited in Nowrasteh, *Terrorism and Immigration*, *supra*, at 4-5; *Global Terrorism Database*, *supra*.

F. The Government's Failure to Pursue Its Goals Consistently Undermines Its Claim that It Is Pursuing Vital Interests in the Least Restrictive Manner Possible.

Finally, the government has failed to take less restrictive steps to protect national security, including steps mandated by the Order itself. That fact bears on whether the Executive Order in fact serves the important purposes that it purports to.

See, e.g., *Church of Lukumi Babalu Aye*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting *Florida Star*, 491 U.S. at 541-42 (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540; *Reed*, 135 S. Ct. at 2232. Both the Order and the now-revoked order, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter *Revoked Order*], suspended entry of refugees and of nationals from certain countries while the Secretary of Homeland Security produced a worldwide report with recommendations to improve vetting and screening protocols. But the government apparently has not made meaningful efforts to improve vetting, as demonstrated by two facts:

First, the duration of the current Order is precisely the same as that of the Revoked Order: 90 days for the Entry Ban. But, by the time the second Order would have been made effective, 48 days had passed during which the government should have been working to improve vetting and screening protocols pursuant to the Revoked Order. Therefore, the duration of the current Order should have been reduced by a commensurate 48 days. That the duration had not been reduced suggested that the Government had not made progress improving vetting and screening protocols.

Indeed, by the time the Court hears this case, the original 90-day period will have long expired, as will have the 90-day period from the issuance of the stay. *Trump et al. v. Int'l Refugee Assistance Project, et al.*, 137 S. Ct. 2080 (Jun. 26, 2017); Effective Date in Executive Order 13,780, 82 Fed. Reg. 27,965 (Jun. 14, 2017) (changing the effective date of the Order from March 16, 2017 until injunctions against Sections 2 and 6 are "lifted or stayed"). Assuming that the government has been improving vetting during this time, there will be no further reason for the Entry Ban. And if the government has not made progress, that failure undermines the government's claims to be pursuing a compelling government interest in a properly tailored manner.

Second, the government apparently has not produced the required vetting reports. The Revoked Order required the Secretary of Homeland Security to submit a report that provides "a list of countries that do not provide adequate information" for vetting "within 30 days of the date of this order." Revoked Order § 3(b). (The new Order requires the same, but within 20 days. Order § 2(b).) The Department of Homeland Security apparently produced two draft intelligence assessments—finding that "citizenship is an unlikely predictor of terrorism" and that "most foreign-born, U.S.-based violent extremists [are] radicalized after entering." U.S. Dep't of Homeland Sec., *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, 1 (Feb. 24, 2017), https://fas.org/irp/eprint/dhs-7countries.pdf; U.S. Dep't of Homeland Sec., *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist*, (Mar. 1, 2017), http://i2.cdn.turner.com/cnn/2017/images/03/03/dhs.intell.assessment.pdf. But President Trump reportedly dismissed these assessments as "not the intelligence assessment [he] asked for." Shane Harris, *Donald Trump Rejects Intelligence Report on Travel Ban—Tension with Intelligence Officials Rises as Homeland Security Contradicts White House on Terror*, Wall St. J. (Feb. 24, 2017, 8:53 PM), https://www.wsj.com/articles/-donald-trump-rejects-intelligence-report-on-travel-ban-1487987629. There is no evidence to indicate that the requested report reviewing screening procedures was ever submitted.

Accordingly, although issued as a means of "protecting the nation from foreign terrorist entry into the United States," the Executive Order does not further its purported goal, as Cato's research shows. Should the Court apply the prevailing doctrines under the Establishment Clause, Equal Protection, RFRA, and preliminary injunction analysis, it should consider Cato's research, which weighs in favor of upholding the District Court's injunction.

CONCLUSION

Amicus respectfully submits that the Court should consider the foregoing evidence in assessing the statutory and constitutional challenges to the Executive Order and the government's challenge to the preliminary injunction.

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

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v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,

Respondents.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICI CURIAE* CERTAIN IMMIGRANT RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are the following organizations:

1. Kids in Need of Defense ("KIND") is a national non-profit organization that works to ensure that no child faces immigration court alone. KIND provides direct representation, as well as working in partnership with law firms, corporate legal departments, law schools, and bar associations that provide *pro bono* representation, to unaccompanied children in their removal proceedings. KIND advocates for changes in law, policy, and practices to improve the protection of unaccompanied children in the United States. KIND staff and KIND *pro bono* attorneys seek to ensure that every child in removal proceedings receives the full measure of due process protections that the law affords.

2. Public Counsel is the nation's largest *pro bono* law firm based in Los Angeles, California. Founded in 1970, Public Counsel's primary goals are to: (1) protect the legal rights of disadvantaged children; (2) represent immigrant victims of torture, persecution, domestic violence, trafficking, and other crimes; and (3) foster economic

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[1] Pursuant to Rule 37.3(a), *amici* certify that Petitioners have filed a blanket consent with the Clerk, and Respondents have consented to the filing of this brief. Copies of the consents have been filed with the Clerk. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

justice by providing underserved communities with access to quality legal representation. In support of these goals, Public Counsel represents indigent immigrants from around the world in their claims before the United States Citizenship & Immigration Services, the Executive Office for Immigration Review, and the federal courts. Public Counsel attorneys provided free legal services to individuals detained at Los Angeles International Airport after the issuance of President Trump's Executive Orders, dated January 27, 2017 and March 6, 2017.

3. Immigration Justice Corps ("IJC") is the country's first immigration legal fellowship program. IJC seeks to expand access to counsel by increasing the quantity of immigration lawyers and the quality of the immigration bar. IJC currently has over 75 Justice and Community Fellows placed with more than 30 legal service providers in the greater New York area. IJC has two Fellows placed at the Arab American Association of New York. IJC's Fellows regularly represent clients from countries subject to the Executive Order, including clients from Yemen and Syria.

4. The Legal Aid Society ("the Society") is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. Founded in 1876, The Society has a long-standing proven track record of providing targeted services to meet the essential legal needs for the most vulnerable New Yorkers in all five boroughs of the City. With its annual caseload of more than 300,000 legal matters, the Society brings a depth and breadth of perspective that is unmatched in the legal profession. In addition, the Society's law reform representation for clients benefits some 2 million

low-income families and individuals in New York City and the landmark rulings in many of these cases have a Statewide and national impact. Its Immigration Law Unit has represented and filed habeas petitions in federal court on behalf of noncitizens affected by the Executive Order.

5. HIAS and Council Migration Services, Inc. of Philadelphia d/b/a HIAS Pennsylvania ("HIAS Pennsylvania") is a non-profit 501(c)(3) organization that was founded in 1882 to assist Jewish immigrants fleeing persecution from Europe. Today it provides legal and supportive services to immigrants, refugees and asylum seekers from all backgrounds in order to assure their fair treatment and full integration into American society. HIAS Pennsylvania advocates for just and inclusive public policies and practices.

6. Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since its founding in 1996, AI Justice has served over 100,000 immigrants from all over the world. AI Justice's clients are unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking; immigrants facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum, and citizenship. Part of AI Justice's mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued. In Florida and on a national level, AI Justice champions the rights of immigrants, serves as a watchdog on immigration detention policies, and speaks for immigrant groups who have compelling claims to justice.

7. The Door's Legal Services Center ("LSC") has provided legal representation and advice to at-risk youth, ages 12-24, for 25 years on matters including public assistance, housing, foster care, education, family law, and immigration. In particular, the LSC focuses on representing undocumented children and youth who have fled violence around the world to seek safety and opportunity in the United States. The LSC seeks to ensure that its clients remain safely in the United States, obtain lawful status, and make a successful transition to adulthood.

8. Central American Legal Assistance has been representing Central American and other asylum seekers since 1985 and has a current caseload of over 2,000.

9. The U.C. Davis School of Law Immigration Law Clinic ("the Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Clinic provides direct representation to detained immigrants who are placed in removal proceedings. In addition, the Clinic screens unrepresented individuals in order to facilitate placement with *pro bono* attorneys and presents legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation.

10. Sanctuary for Families ("Sanctuary") is New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors and their children. Sanctuary's legal

arm, The Center for Battered Women's Legal Services ("The Center"), specializes in providing legal assistance and direct representation to indigent victims, mostly in family law and humanitarian immigration matters such as asylum, Violence Against Women Act Self-Petitions, and petitions for U and T nonimmigrant status. Legal services at The Center are carried out by Center staff through direct representation, in collaboration with volunteers from the private bar, law schools, and New York City's public interest community. In addition, The Center provides training on domestic violence and trafficking to community advocates, *pro bono* attorneys, law students, service providers, and the judiciary, and, in collaboration with a diverse range of local, national, international, private, and community organizations, plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded battered women and their children.

11. The Michigan Immigrant Rights Center ("MIRC") is a statewide legal resource center for Michigan's immigrant communities, including Michigan's large and diverse Arab American community. MIRC takes calls daily from immigrant and refugee community members seeking clarity about the law and assistance with travel and family reunification.

12. Washtenaw Interfaith Coalition for Immigrant Rights ("WICIR") was called into action nine and a half years ago to address the urgent needs of people victimized by punitive immigration enforcement tactics—people who make up a vital part of the fabric of our communities. WICIR believes in the right of all people to live in a safe and just society without fear of family separation

or removal from this country, which may be the only country they have known. WICIR provides advocacy, resources (financial and material), and legal referrals to unauthorized people; education to both the affected population and to the ally community; and support for the children and youth affected by the loss through removal of a parent or significant family member.

13. Safe Passage Project ("Safe Passage") is a small, highly-focused, nonprofit immigration legal services organization. Safe Passage provides free lawyers to refugee children living in the New York area who face deportation back to life-threatening situations, despite their strong legal claim to stay in the United States. Safe Passage was founded in 2006 at New York Law School and in 2013 fully incorporated as an independent nonprofit.

14. Catholic Migration Services ("CMS") is a nonprofit legal services provider whose mission is to serve and empower low-income immigrants in Brooklyn and Queens, regardless of religion, ethnicity, or national origin. Since 1971, CMS has defended immigrants facing deportation and has assisted hundreds of immigrants seeking to apply for asylum and other forms of relief. CMS has also helped thousands of immigrants file applications on behalf of their family members. In 2006, CMS began providing housing, legal, and advocacy services to low-income immigrant tenants. In 2009, CMS created a workers' rights program to help immigrant workers recover unpaid wages, report unsafe and life-threatening working conditions, and fight discrimination in employment. CMS is committed to protecting the human and civil rights of all immigrants.

15. The Asian Law Alliance ("ALA"), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. Through ALA's immigration program, it has assisted immigrants with immigration issues since 1980.

16. Community Legal Services in East Palo Alto ("CLSEPA") provides legal assistance to low-income individuals and families in East Palo Alto, California and the surrounding community. CLSEPA's practice areas include immigration, housing, and economic advancement. CLSEPA's mission is to provide transformative legal services, policy advocacy, and impact litigation that enable diverse communities in East Palo Alto and beyond to achieve a secure and thriving future. CLSEPA provides legal assistance and advice to over 6,000 community members per year, and has assisted hundreds of people seeking asylum.

17. New York Legal Assistance Group ("NYLAG") is a not-for-profit law office that provides free civil legal services to poor and near poor New Yorkers in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG is one of the largest immigrant services providers in New York City. Its Immigrant Protection Unit provides low-income immigrants with comprehensive legal services, including assistance with adjustment of status, family-based immigrant petitions, humanitarian parole, immigrant community education, and many others. NYLAG represents immigrants and refugees regardless of their beliefs or nationality,

including immigrants and refugees from, or with family in, the six countries subject to the Executive Order. NYLAG's clients have experienced acute hardship because of the Executive Order, including harm to their and their families' well-being.

18. The Public Law Center ("PLC") is a non-profit legal services organization located in Santa Ana, California serving low-income residents of Orange County, California. Founded in 1981, PLC's 35 staff members work with over 1,400 Orange County lawyers, paralegals, law students, and other volunteers annually to provide free civil legal services. Since 2003, PLC has operated an immigration program which has served thousands of low-income clients with immigration legal problems.

19. The City Bar Justice Center is the non-profit, legal services arm of the New York City Bar Association. Its mission is to leverage the resources of the New York City legal community to increase access to justice. Each year, the City Bar Justice Center assists more than 20,000 low-income and vulnerable New Yorkers to access critically needed legal services and matches over 1,200 cases with *pro bono* attorneys. Through direct representation and *pro bono* legal programs, the City Bar Justice Center's Immigrant Justice Project annually helps hundreds of immigrants who are at their most vulnerable: asylum seekers fleeing persecution, survivors of violent crimes and trafficking, and others seeking humanitarian protection. Operating within the New York City metropolitan area, which has long served as a gateway to America, the City Bar Justice Center is committed to helping immigrants and their families find safety and live in dignity in the United States.

20. The New York Immigration Coalition ("NYIC") represents nearly 200 organizational members and partners working on behalf of immigrants throughout New York State. The NYIC has taken a lead in coordinating legal services for immigrants, including running the legal efforts at JFK Airport during the travel ban and, more recently, organizing and running a collaborative of over 60 groups to provide legal rapid response to ICE enforcement, the end of the DACA program, and much more.

21. The Northwest Immigrant Rights Project ("NWIRP") is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born.

22. Dolores Street Community Services ("Dolores Street") nurtures individual wellness and cultivates collective power among low-income and immigrant communities. Dolores Street's Deportation Defense and Legal Advocacy Program provides *pro bono* legal services in San Francisco, California, specializing in complex removal defense cases. Dolores Street's clients include asylum seekers fleeing persecution and torture and individuals with impaired mental competency. Dolores Street's particularly vulnerable clients and their families depend on meaningful judicial review of unconstitutional executive action.

23. The Community Activism Law Alliance ("CALA") is a nonprofit organization that provides free legal assistance

to low-income, underserved populations in Illinois. CALA partners with community activist organizations to create community-located, community-operated, and community-directed law programs. CALA serves over 4,000 people each year, the majority of whom are immigrants and refugees. Additionally, CALA supports the work of many community partner organizations that assist and advocate on behalf of immigrants and refugees. CALA has experience with and knowledge of the actual and potential harm the Executive Order has had and would further have upon immigrants and their communities across the country.

SUMMARY OF ARGUMENT

As President George Washington wrote to a religious minority immigrant community, "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance."[2] From as early as the arrival of the Pilgrims, the Quakers, the Baptists, and the Anabaptists, this land has been a haven for immigrants, regardless of their faith and country of birth. Freedom of religion and freedom from the establishment of religion are, of course, enshrined in our First Amendment.

The President's Executive Order, issued on March 6, 2017 and entitled "Protecting The Nation From Foreign Terrorist Entry Into The United States" (the "Executive Order"), hews away at these foundations of our nation, baselessly labeling more than one hundred and eighty million citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen as potential terrorist threats and banning them from traveling here as immigrants or non-immigrants.[3] That the targeted countries are all predominantly Muslim nations,[4] and that the President repeatedly campaigned on a promise to ban the entry of Muslims, suggests that the Order was motivated by an unconstitutional disfavoring of Islam. This is not who we are as a country, and this is not allowed by our Constitution.

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[2] *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-06-02-0135.

I. The Government is wrong when it argues that this Court is powerless to decide whether the Executive Order violates the Constitution or the INA because such claims are "not justiciable."[5] The President's powers are derived from and circumscribed by the Constitution and delegated congressional authority. And, because we live in a nation "of laws, and not of men," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), it is the responsibility of federal courts to determine when that authority has been exceeded. Judicial review of executive action is part of the "fundamental structure of our constitutional democracy," *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam), *recons. en banc denied*, 853 F.3d 933 (9th Cir. 2017), *and*

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[3] *See Country Comparison :: Population*, U.S. CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (citing country populations).

[4] The six targeted countries are all at least 90% Muslim, and some are 99% Muslim. *See Table: Muslim Population by Country*, Pew Research Ctr. (Jan. 27, 2011), http://www.pewforum.org/2011/01/27/table-muslim-population-by-country/; *About Sudan*, United Nations Development Programme, http://www.sd.undp.org/content/sudan/en/home/countryinfo.html.

[5] Br. for Petitioners at 22-35.

recons. en banc denied, 858 F.3d 1168 (9th Cir. 2017), and now, more than ever, it is important to reaffirm this vital check and balance. The courts below had the authority—and, in fact, the duty—to review the Executive Order for compliance with the Constitution and federal law, *and* in finding that Respondents had a strong likelihood of success on the merits of their claims, did not abuse their discretion in ordering preliminary injunctive relief.

II. The Executive Order violates the Establishment Clause because it was issued with the purpose of disfavoring Islam. This Court should so hold regardless of which standard of review applies. Contrary to the Government's argument, it does not require "judicial psychoanalysis" to determine that a presidential candidate who repeatedly vows to implement a "Muslim ban" if elected, and who within one week of inauguration orders that nationals of seven countries (now six) that are at least 90 percent Muslim be temporarily banned from entry to the United States, is motivated by an improper religious purpose. That most such statements were made by the President "before assuming office, while still a private citizen and political candidate,"[6] is no reason for this Court to ignore them. Those statements form part of the record on which this Court must determine whether an improper religious purpose motivated the Executive Order. Words matter. When they are the words of a sitting President or a candidate for that highest office, they matter profoundly.

Further, this Court should be particularly vigilant in reviewing potential Establishment Clause violations that affect immigrants. As a country that welcomes refugees and asylees escaping persecution, it would be the height of hypocrisy to permit a travel ban that bears the hallmarks of the discrimination from which many such immigrants seek to escape.

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[6] Br. for Petitioners at 71.

III. In entering injunctions preliminarily enjoining implementation and enforcement of the Executive Order, the lower courts correctly took into account the broader public harm that the Executive Order would otherwise cause. As organizations committed to serving and advocating on behalf of the nation's immigrant communities, *amici* are acutely aware of these potential harms. Every U.S. resident who has family members in one of the targeted countries would be deprived of visits from those family members, as well as the ability to sponsor family members for immigrant visas. Our nation's colleges and universities would be unable to admit students or recruit faculty from the targeted countries, hindering their ability to foster and maintain a rich, diverse, and inclusive educational environment. And employers in the public and private sectors would be unable to hire workers from the targeted countries, to the detriment of public institutions and businesses alike.

Aside from these concrete and tangible harms, the Executive Order works another less tangible but no less insidious harm: the marginalization of religious communities based on promulgation by executive action of the false notion that nationals of the six targeted countries are "the 'bad'"[7] and must be excluded on a blanket basis in the purported interests of national security. This is no mere "message"[8]—it is an egregious falsehood with the veneer of presidential approval. These harms are real and cannot be undone, as the lower courts recognized in granting preliminary injunctive relief.

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[7] Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 30, 2017, 5:31 AM), https://twitter.com/realDonaldTrump/status/826060143825666051.

Amici accordingly urge this Court to affirm.

ARGUMENT

I. THE COURTS SERVE A CRITICAL ROLE IN REVIEWING EXECUTIVE ACTIONS ON IMMIGRATION

More than two centuries of precedent instructs that we have a government "of laws, and not of men." *Marbury*, 5 U.S. at 163. The President's powers are derived from and circumscribed by the Constitution and federal law. The President may not "switch the Constitution on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). To constrain unlawful excesses of the executive branch, our democratic system obligates the judiciary to review and check executive actions alleged to be unconstitutional or to exceed delegated congressional authority. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province *and duty* of the judicial department to say what the law is." (emphasis added)). Contrary to the Government's argument, that judicial duty does not dissipate simply because the challenged actions relate to immigration or national security, or even where the legislative branch has delegated significant discretion to the Executive.[9] As the Ninth Circuit held in rejecting the Government's argument that the first Executive Order was "unreviewable," "[t]here is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy." *Washington v. Trump*, 847 F.3d at 1161.

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[8] Br. for Petitioners at 79.

Decisions of this Court emphasize that, notwithstanding the deference afforded to the political branches with respect to many aspects of immigration law, the political branches remain "subject to important constitutional limitations" in the immigration context. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (courts can review "whether Congress has chosen a constitutionally permissible means of implementing" its power over the regulation of noncitizens); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("In the enforcement of [immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process."). Indeed, the judiciary stands as a critical bulwark against invidious immigration exclusions by the political branches. *See, e.g.*, *Lesbian/Gay*

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[9] The Government's argument that this Court is powerless to decide whether the Executive Order violates the Constitution (Br. for Petitioners at 22-35) echoes assertions by the President's senior policy advisor that the President's exercise of powers concerning immigration and national security "will not be questioned." *See* Aaron Blake, *Stephen Miller's authoritarian declaration: Trump's national security actions 'will not be questioned,'* WASH. POST, Feb. 13, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/02/13/stephen-millers-audacious-controversial-declaration-trumps-national-security-actions-will-not-be-questioned/ (reporting televised public statements by President Trump's senior policy advisor, Stephen Miller, regarding the first Executive Order).

Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) (invalidating an Immigration and Naturalization Service policy of excluding noncitizen homosexuals from entry into the United States); *Landon v. Plasencia*, 459 U.S. 21, 32-35 (1982) (holding that a permanent resident returning from a brief trip abroad is entitled to due process in her exclusion hearing, and "[i]n evaluating the procedures in any case, the courts must consider the interest at stake for the individual," including whether the person "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual").

Nor does the presence of national security considerations immunize government actions from review. *See Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (upholding constitutional rights despite national security concerns); *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (denying that the president has "totally unrestricted freedom of choice" where a statute deals with foreign relations). Rather, complete deference to executive actions in the national security context would be an impermissible abdication of judicial authority. *Cf. Ex parte Quirin*, 317 U.S. 1, 19 (1942) ("[I]n time of war as well as in time of peace, [courts are] to preserve unimpaired the constitutional safeguards of civil liberty . . . ."); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . under all circumstances."). As this Court has noted, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of this Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

Moreover, even where, as here, Congress has delegated a measure of discretion to the President, that discretion is not unchecked. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake"). Here, the President relies on 8 U.S.C. § 1182(f) as the legal basis for the Executive Order. But that statute's grant of discretion to the President cannot plausibly be read to strip the courts of jurisdiction to review the President's actions. The Court has required "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review." *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). There is no evidence here of congressional intent to strip the courts of jurisdiction. To the contrary, the Immigration and Nationality Act's subsequent prohibition of immigration determinations based on nationality and other criteria squarely precludes any conclusion that the legislature intended to shield such discriminatory actions from review. 8 U.S.C. § 1152(a)(1)(A).

Finally, the Government's reliance on the so-called "doctrine of consular nonreviewability,"[10] a doctrine that this Court has not embraced and that "has a tarnished pedigree, having been first recognized by the Supreme Court in cases that authorized the expulsion of hapless Chinese laborers," *Samirah v. Holder*, 627 F.3d 652, 662 (7th Cir. 2010), is wholly misplaced. This Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015), make clear that judicial review is available where, as here, a U.S. citizen asserts that the exclusion of a noncitizen abroad infringes on the citizen's own constitutional rights. *See Mandel*, 408 U.S. 753 (considering the claim of U.S. citizens that a noncitizen's exclusion violated their First Amendment rights); *Din*, 135 S. Ct. at 2132 (plurality opinion) (reviewing visa denial where U.S. citizen asserted that the exclusion of her noncitizen husband violated her due process rights). Even lower courts that have endorsed the doctrine of consular nonreviewability have held that *Mandel* dictates an "exception" to the doctrine of consular nonreviewability where "the denial of a visa implicates the constitutional rights of American citizens." *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (citations omitted).[11]

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[10] Br. for Petitioners at 24-25.

The Government does not dispute this. *See* Br. for Petitioners at 26-27 (conceding that judicial review was available in *Mandel* and *Din* "because the plaintiffs asserted violations of their own constitutional rights as U.S. citizens"). In fact, as the Government's own authority reflects, judicial review is proper in cases that, like this one, involve "claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163 (D.C. Cir. 1999) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

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[11] In addition to the Establishment Clause rights implicated here, U.S. citizens and lawful permanent residents ("LPRs") with family members in the six targeted countries also have cognizable family reunification claims. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503; *see also id.* at 504 (noting that the constitutional protection of the family "is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family"); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring) (assuming *arguendo* that U.S. citizen had protected liberty interest in living with her noncitizen spouse in the United States).

Further, even absent the constitutional challenges present here, this case falls outside the narrow scope of the doctrine of consular nonreviewability. The doctrine accords deference to consular officers' decisions to grant or deny visas to *individual* applicants. *Saavedra*, 197 F.3d at 1159 (the doctrine of consular nonreviewability concerns the availability of judicial review of "the determination of the political branch of the Government to exclude a *given* alien" (emphasis added)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950) (finding that the exclusion of a noncitizen war bride was a valid exercise of executive authority where the Attorney General possessed "confidential information" specific to the excluded individual). The doctrine provides no immunity from constitutional or statutory review of the President's sweeping attempt here to temporarily ban all nationals from the six targeted countries, without factual justification for the exclusion of any given person.

The Government does not (because it cannot) cite any authority to the contrary. The Government seeks to rely on *Mandel* for the proposition that, where the Executive gives "a facially legitimate and bona fide reason" for the exclusion of a noncitizen, "courts will [not] look behind the exercise of that discretion."[12] But the executive action at issue in *Mandel* was based on facts particular to an individual. *Mandel*, 408 U.S. at 770.[13] The consular nonreviewability doctrine does not mandate the kind of extreme deference that would block this Court's review of the Executive Order.

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[12] Br. for Petitioners at 63.

In short, the courts below had the authority—and, in fact, the duty—to review the Executive Order for compliance with the Constitution and federal law, and they did not abuse their discretion in ordering preliminary injunctive relief.

II. THE EXECUTIVE ORDER VIOLATES THE ESTABLISHMENT CLAUSE

The Executive Order violates the Establishment Clause under the *Mandel* test as well as the *Lemon* test. The former instructs courts to look beyond the facial explanation given for an Executive Order where there has been a showing that the explanation is in bad faith. *Mandel*, 408 U.S. 753. The latter provides a framework for determining whether a government action violates the Establishment Clause. *Lemon v. Kurtzman*, 403

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[13] *See also Washington v. Trump*, 847 F.3d at 1162 ("[T]he *Mandel* standard applies to lawsuits challenging an executive branch official's decision to issue or deny an *individual* visa based on the application of a congressionally enumerated standard to the *particular facts* presented by that visa application." (emphasis added)); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (holding that, after *Din*, the *Mandel* "facially legitimate and bona fide reason test" requires that the consular official "cite an admissibility statute that 'specifies *discrete factual predicates* the consular officer must find to exist before denying a visa,' or there must be *a fact in the record* that 'provides at least a facial connection to' the statutory ground of inadmissibility" (emphasis added)).

U.S. 602 (1971) (requiring the government to show that an action challenged under the Establishment Clause: (1) has a secular purpose; (2) has a primary effect that does not advance or inhibit religion; and (3) does not foster government entanglement with religion).

Here, the President's numerous public statements consistently and unmistakably demonstrate the discriminatory motives for the Executive Order, highlighting not only the bad faith nature of the proffered justification, but also the lack of a secular purpose. Based on this record, the Court of Appeals for the Fourth Circuit, in ruling on the Executive Order, held that Respondents had "more than plausibly alleged" a bad faith reason for the Order under *Mandel. Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017). Likewise, the Fourth Circuit found that the available evidence created a "compelling case" that the Executive Order's "primary purpose is religious," concluding that it violated the Establishment Clause under the *Lemon* test. *Id.* at 594, 601.

Determining that the Executive Order has a discriminatory religious motive does not require "judicial psychoanalysis" or complicated inferences, contrary to what Petitioners argue.[14] Courts routinely review past statements and actions as evidence of intent in all areas of the law. Indeed, the"[e]xamination of purpose" is "the daily fare of every appellate court in the country." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861-62 (2005). In this case, the President and his advisors made repeated calls for a "total and complete shutdown of Muslims entering the United States"[15] and for the implementation of a "Muslim ban."[16] Moreover, as revealed by a senior policy advisor to the President, the revised Executive Order still has "the same basic policy outcome for the country" as did the first Executive Order.[17] After the repeated pronouncements by the President and his aides, the President's signing of an Order with a vastly disproportionate detrimental effect on Muslim immigrants creates a "direct link" between stated motive and action that allows for a straightforward analysis of purpose. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 599-600.

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[14] Br. for Petitioners at 71.

To say that such a finding requires "judicial psychoanalysis" where the President repeatedly promised a "Muslim ban," and then acted to substantially keep that promise, is to leave no role at all for the judiciary to review executive actions in any of the myriad areas of law that demand an analysis of intent. If explicit statements do not demonstrate purpose, then this Court's carefully developed Establishment Clause jurisprudence will be rendered toothless.

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[15] *See* Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA Today (May 8, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/ (providing the full text of President Trump's December 7, 2015 Statement on Preventing Muslim Immigration).

[16] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally,'* Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/.

[17] *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start*, Fox News (Feb. 21, 2017), http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis.html.

Contrary to the Government's argument,[18] the Court's purpose analysis is in no way complicated by the fact that many of the President's probative statements of intent were made while he was still a candidate for office. Although courts have acknowledged that many elected officials fail to keep promises made during election campaigns, it does not follow that such statements are irrelevant in determining the purpose of a subsequent government action. Courts should not ignore government actors' pre-election statements when analyzing discriminatory intent. *See, e.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1284-85 (11th Cir. 2003) (analyzing the campaign promises of an elected state judge in holding that his decision to erect a Ten Commandments monument in the state judicial building violated the Establishment Clause).

Even outside the Establishment Clause context, courts have readily accepted campaign rhetoric, advertisements, and private or unofficial statements as evidence of the purpose of a government action. *See, e.g.*, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1222 (2d Cir. 1987) (citing the campaign platform of the Mayor of Yonkers as evidence of discriminatory intent in an Equal Protection housing case); *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, 2017 WL 3611658, at *14 (D. Ariz. Aug. 22, 2017) (finding racial animus where a state senator, who later became Superintendent of Public Instruction, had posted discriminatory comments on a blog, reasoning that "[t]he blog comments are more revealing of . . . state-of-mind than his public statements because [the blog] provided . . . a seeming safe-harbor to speak plainly").

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[18] Br. for Petitioners at 73-78.

The Government argues that pre-inauguration statements by "candidate Trump" should be completely ignored by this Court when conducting its purpose analysis, on the grounds that the ceremony of inauguration washed away all previously expressed discriminatory religious animus and marked "a profound transition from private life to the Nation's highest public office."[19] The Government goes on to contend that this supposed rebirth upon taking the oath of office mandates that this Court determine the purpose of post-inauguration executive actions without having to navigate the quagmire of campaign rhetoric.[20] But the Government's argument would require the Court to cover its eyes and ears to salient evidence of intent. The Court is not being asked to enforce a candidate's campaign promise as if it were a binding contract; the Court is merely being asked to take into consideration pre-election statements by the President when determining the purpose of his post-election actions. No support can be found in case law or common sense for this Court to pretend that statements by a candidate for the highest office in the nation were never made and don't matter. They were made and they do matter.

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[19] Br. for Petitioners at 73.

[20] Br. for Petitioners at 73-78.

Further, since his inauguration the President has continued to make statements that bear upon his intent in issuing the Executive Order, which this Court should take into account as well. Many of these statements relate back to the President's purpose in issuing the first Executive Order. For instance, on February 16, 2017, following the Ninth Circuit's decision to enjoin implementation of the first Executive Order, President Trump said, "We can tailor the [second Executive Order] to that decision and get just about everything, in some ways more."[21] The following month, at a March 15, 2017 rally in Tennessee, the President asserted that the second Executive Order "is a watered down version of the first one. . . . I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place."[22] These and other statements revive the President's earlier campaign promises about the travel ban and make clear that there is no basis to draw a line between pre-election, post-election, and post-inauguration statements by this President when determining his purpose in issuing the Executive Order.

This Court should be especially vigilant in reviewing potential Establishment Clause violations that impact immigrant populations. The very founders of this country were immigrants seeking relief from persecution abroad, and this Court has recognized that the United States is "a country whose life blood came from an immigrant stream." *Ex parte Kumezo Kawato*, 317 U.S. 69, 73 (1942). The United States is a world leader in accepting refugees and asylum-seekers,[23] and U.S. immigration laws reflect a pronounced focus on protecting victims of persecution. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(B)(i) (providing asylum eligibility for applicants who have been persecuted on the basis of "race, religion, nationality, membership in a particular social group, or political opinion"). An Executive Order that codifies the same type of discrimination so many of these immigrants are fleeing undermines the immigration policies and constitutional values of the United States.

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[21] Stephanie Castillo, *Justice Department Says President Trump Will Pursue a New Travel Ban*, FORTUNE (Feb. 16, 2017), http://fortune.com/2017/02/16/trump-new-travel-ban/.

[22] Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* TIME MAG. (March 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

III. THE EXECUTIVE ORDER HAS ALREADY CAUSED IRREPARABLE HARM, AND WILL CAUSE MORE HARM IF FULLY IMPLEMENTED

In their work with immigrants, *amici* seek to strengthen diversity and promote justice and equality. Connected by our common humanity, *amici* believe that protection of the interests of individuals and organizations affected by the Executive Order reinforces the broader interests of American society. The individual and organizational harms faced by those affected by the Executive Order are irreparable, weighing in favor of affirming the preliminary injunctions below.

The harms caused by the deprivation of a constitutional right, no matter how brief the duration, are by their very nature irreparable. Unlike pecuniary harms, constitutional harms generally cannot be fully compensated *post hoc*. That is particularly true for harms to First Amendment rights. As this Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).[24] Here, the Executive Order threatens the constitutionally protected rights to be free of a government-established religion, to equal protection of the law, to international travel, and to family integrity.

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[23] *See Refugee Admissions*, U.S. DEP'T OF STATE, https://www.state.gov/j/prm/ra/ ("While UNHCR reports that less than 1 percent of all refugees are eventually resettled in third countries, the United States welcomes almost two-thirds of these refugees, more than all other resettlement countries combined.").

As *amici* know from their work with immigrants and refugees, U.S. citizens and lawful permanent residents ("LPRs") with family members in the six targeted countries will suffer concrete harms to their familial interests. Under the Executive Order's discriminatory nationality-based test, U.S. citizens and LPRs will be unable to receive visits from loved ones who live in the banned countries or to sponsor family members from those countries for lawful permanent residence in the United States, absent a waiver of the Executive Order's application to a particular individual. If fully implemented, the Executive Order would separate spouses and fiancés across continents, deprive family members of time with ill or elderly relatives, and force overseas visa applicants to miss births, weddings, funerals, and other important family events.

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[24] While *Elrod* dealt with freedom of speech, five circuits have recognized that *Elrod* applies to violations of the Establishment Clause. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 602; *Chaplaincy of Full Gospel Churches v. Eng.*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986). Moreover, the Third, Sixth, and Ninth Circuits have recognized that *Elrod's* reasoning applies to other constitutional rights. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (per curiam) (deprivation of right to marry constitutes an irreparable harm); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (violations of Fourth Amendment inflict irreparable harm); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) (limitation of Free Exercise Clause inflicts irreparable harm); *Ramirez v. Webb*, 787 F.2d 592 (6th Cir. 1986) (per curiam opinion) ("Unreasonable searches and seizures, particularly when premised on race and alienage, are demeaning to such a degree as to be practically uncompensatable.").

Immigrants and visitors from the targeted countries contribute to local and national life in numerous ways that will be stymied by the Executive Order. For instance, public and private colleges and universities recruit students, permanent faculty, and visiting faculty from the targeted countries. The Executive Order will prevent visa applicants from the banned countries from studying or teaching at U.S. universities, irrevocably damaging their personal and professional lives and harming our educational institutions throughout the country.[25] By way of further example, recent research by economists affiliated with Harvard and MIT shows that, across the United States, "14 million doctors' appointments are provided each year by physicians" from the six affected countries.[26] Preventing doctors from these countries from coming to the United States—or discouraging those already here from staying by preventing their family members from visiting or joining them here—will adversely impact medical institutions and curtail medical care throughout the United States.

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[25] For example, according to the Department of State, before the Executive Order was issued, thousands of Iranian students studied in the United States each year. *Study in the U.S.A.*, U.S. Virtual Embassy Iran, https://ir.usembassy.gov/education-culture/study-usa/; *see also* Anna Maria Barry-Jester, *Trump's Immigration Order Could Affect Thousands of College Students*, FiveThirtyEight.Com (Jan. 30, 2017), https://fivethirtyeight.com/features/trumps-immigration-order-could-affect-thousands-of-college-students/ (citing statistics from the Institute of International Education showing that more than 15,000 students from the six targeted countries studied in the United States during the academic year 2015-16).

Singling out and banning nationals from the six predominantly Muslim targeted countries, as the Executive Order does, causes further harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. While the Government seeks to belittle this harm and claims it to be not cognizable,[27] courts have recognized the inherent harm to a faith community "[w]here, as here, the charge is one of official preference of one religion over another," acknowledging that "such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 302 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

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[26] THE IMMIGRANT DOCTORS PROJECT, https://immigrantdoctors.org (analyzing statistics from Doximity, an online networking site for doctors that assembled this data from a variety of sources, including the American Board of Medical Specialties, specialty societies, state licensing boards, and collaborating hospitals and medical schools).

[27] Br. for Petitioners at 31-33.

The relentless anti-Muslim drumbeat during the President's campaign, coupled with the Executive Order itself, has made immigrants and Muslim citizens justifiably fearful. Against the backdrop of the recent rise in crimes targeting Muslims in the United States,[28] the Executive Order amplifies the sense of persecution that citizens and recent immigrants of Muslim faith are forced to suffer.

Further, the Executive Order's suspension of the U.S. Refugee Admissions Program ("USRAP") has had and will continue to have catastrophic consequences for innumerable individuals and families fleeing war, violence, and political or religious persecution. In the words of the United Nations High Commissioner for Refugees, the Executive Order "compound[s] the anguish" for people "who remain in urgent need of life-saving assistance and protection."[29] Individuals and families fleeing political or religious persecution in the six targeted countries are in a precarious state of limbo. The refugees hurt by the ban have included some of the most vulnerable individuals in the world, from children born with physical disfigurements, to trafficked girls who have suffered sexual violence, to LGBT persons persecuted around the world.[30]

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[28] *See, e.g.*, Matt Zapotosky, *Hate crimes against Muslims hit highest mark since 2001*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/world/national-security/hate-crimes-against-muslims-hit-highest-mark-since-2001/2016/11/14/7d8218e2-aa95-11e6-977a-1030f822fc35_story.html; *see also* Albert Samaha and Talal Ansari, *Four Mosques Have Burned in Seven Weeks – Leaving Many Muslims and Advocates Stunned*, BUZZFEED NEWS (Feb. 28, 2017), https://www.buzzfeed.com/albertsamaha/four-mosques-burn-as-2017-begins; David Neiwert, *Is Kansas' 'Climate of Racial Intolerance' Fueled by Anti-Muslim Political Rhetoric?*, SOUTHERN POVERTY L. CTR. (Mar. 2, 2017), https://www.splcenter.org/hatewatch/2017/03/02/kansas'-'climate-racial-intolerance'-fueled-anti-muslim-political-rhetoric.

[29] *UNHCR underscores humanitarian imperative for refugees as new U.S. rules announced*, UNHCR (Mar. 6, 2017), http://www.unhcr.org/en-us/news/press/2017/3/58bdd37e4/unhcr-underscores-humanitarian-imperative-refugees-new-rules-announced.html.

Likewise, suspension of refugee admissions under the Executive Order entails suspension of the Central American Minors ("CAM") Refugee Program. CAM was established in 2014, and expanded in 2016, to provide a process for Central American parents lawfully present in the United States to request refugee status for their children at risk of harm in El Salvador, Honduras, or Guatemala via the U.S. Refugee Admissions Program.[31] The program offers a safe, legal way for children in danger to reunite with family in the United States, as an alternative to the risk-filled journey that many children endure in order to seek protection in the United States. Yet the Executive Order has suspended interviews of children seeking protection through CAM, halted the processing of applications in the pipeline, and left children eligible to enter the United States stranded in harm's way.[32]

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[30] *See* Human Rights First, U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans 2 (2017), *available at* http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans.

[31] *See Central American Minors (CAM) Program*, U.S. Dep't of State, https://www.state.gov/j/prm/ra/cam/index.htm.

[32] *See* Nina Lakhani, *Thousands of young Central Americans at risk as refugee ban halts key program*, The Guardian (Feb. 2, 2017), https://www.theguardian.com/us-news/2017/feb/02/central-america-young-refugees-cam-trump-travel-ban.

These and other harms that would be caused by full implementation and enforcement of the Executive Order are not fleeting. The record in these two cases, and in the numerous other actions pending across the country that have challenged the Executive Order, shows that many people have already been affected in myriad ways following partial implementation of the Executive Order, and the upheaval they have experienced cannot be undone. *Amici* accordingly urge this Court to recognize these harms when considering affirmance of the courts below.

CONCLUSION

For the foregoing reasons, *amici* respectfully support Respondents' request that the Court affirm in full the judgments of the courts of appeals.

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BRIEF OF CHICAGO, LOS ANGELES, NEW YORK, PHILADELPHIA, AND OTHER CITIES AND COUNTIES, JOINED BY THE U.S. CONFERENCE OF MAYORS AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici include some of the largest cities and counties in the United States.[1] The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each city is represented in USCM by its chief elected official, the mayor. The National League of Cities (NLC), founded in 1924, is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans. *Amici* are categorically opposed to Executive Order 13780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("the Executive Order"), which discriminates invidiously on the basis of religion and national origin and will significantly undermine the safety, economic well-being, and social cohesion in our communities and across the United States.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief, in whole or in part, and no person other than *amici* contributed monetarily to its preparation or submission. Petitioners have provided a blanket letter of consent, and respondents have consented to the filing of this brief.

Our cities are heavily dependent on the contributions of immigrants.[2] Of the 16.6 million residents of Chicago, Los Angeles, New York City, and Philadelphia, more than five million are immigrants, who hail from 150 countries.[3] These cities account for almost one-fifth of the Nation's gross domestic product.[4] As of 2015, approximately 213,100 residents in the Chicago, Los Angeles, and New York City metropolitan areas were born in five of the six countries targeted by the Executive Order.[5]

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[2] *Immigrants & Competitive Cities*, Americas Society/Council of the Americas, http://www.as-coa.org/sites/default/files/ ImmigrantsandCompetitiveCities.pdf.

[3] Support for the data cited is in the appendix to this brief.

Chicago, Los Angeles, and New York City are some of their jurisdictions' largest employers, collectively employing approximately 365,000 people. In New York City, 34% of city workers are foreign-born; in Los Angeles, 22% are. Immigrants also make up a substantial portion of our cities' private workforces: 46% of the 4.3 million workers in New York; 26.5% of the 1.27 million workers in Chicago; and approximately 17% of the 640,000 workers in Philadelphia. At least 12,500 private employees work on international visas in Chicago alone, and Chicago is home to more than 100,000 immigrant entrepreneurs. Immigrants are a majority of New York City's business owners; 44% in Los Angeles; 27% in Chicago; and 14% in Philadelphia.

Chicago and Los Angeles welcome and resettle some of the largest numbers of refugees in the United

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[4] Ted Hesson, *Why American Cities Are Fighting to Attract Immigrants*, http://www.theatlantic.com/business/archive/2015/07/us-cities-immigrants-economy/398987/ (NYC, LA, Houston, and Chicago are roughly 1/5 of GDP).

[5] Alan Berube, *These communities have a lot at stake in Trump's executive order on immigration*, http://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration.

States. From October 2015 to September 2016, approximately 2,100 refugees were resettled in the Chicago area, including nearly 800 from the targeted countries. 2,800 were resettled in the Los Angeles area, including 1,900 from Iran alone. 682 refugees arrived in Philadelphia, including 176 from the targeted countries. Approximately 1,300 refugees have been resettled in New York City in the past five years.

Chicago, Los Angeles, New York City, and Philadelphia also operate or are served by large international airports. More than 400 international flights, bringing more than 60,000 passengers, arrive daily in Chicago and Los Angeles alone. Tourism in Chicago, Los Angeles, New York City, and Philadelphia generates roughly $70 billion a year in local revenue. In 2016, our cities hosted more than 20 million foreign visitors, who spent an estimated $6.3 billion in Los Angeles County, and $1.88 billion in Chicago, including $1.25 million by tourists from the six targeted countries. As a result of the Executive Order, New York City now predicts a 300,000-person drop in foreign visitors in 2017, which will result in a loss of $600 million in direct spending. Los Angeles stands to lose an estimated $736 million. More generally, "[f]ollowing President Trump's Jan. 27 executive order banning people from seven predominantly Muslim countries from entering the United States, the demand for travel to the United States took a nosedive, according to data from several travel companies and research firms."[6]

Chicago, Los Angeles, New York City, and Philadelphia together have 162 four-year colleges and universities, with approximately 100,000 international students. Chicago is also home to 44 major hospitals, and Philadelphia is home to 29, which serve thousands of international patients a year. The Middle East region is the top source of patients traveling to the United States for medical care.[7]

Amici are profoundly opposed to the Executive Order, which is as misguided as it is unconstitutional. Our cities serve as gateways for immigrants and refugees starting new lives in America. And when they have come, "[e]verywhere immigrants have enriched and strengthened the fabric of American life."[8] Indeed, perhaps uniquely in the world, the identity of American cities has been forged from the toil of immigrants.

But beyond our ideals, the Executive Order subverts the very national security purpose it claims to serve. With decades of experience policing neighborhoods that are home to immigrant populations, *amici* are keenly and uniquely aware that frightened or ostracized residents are reluctant to report crimes, against themselves or others, or behavior that should, in the interest of safety and national security, be reported as suspicious. Although this hurts the entire Nation, the effects on *amici* are especially profound. Chicago, Los Angeles, New York City, Philadelphia, and the other *amici*, as financial, political, and cultural hubs in the United States, draw unique attention from individuals looking to cause harm in this country. Additionally, local law enforcement officers play an increasingly important role in detecting and protecting against national security threats. For these and other reasons, cities are a crucial part of the first-line defense against terrorism.[9] To serve the purpose of national security, then, our cities must be able to work in coordination with everyone in our diverse communities Even at the strictly local level, the safety and security of our residents and visitors depends upon cooperation between the residents and local police. The United States Department of Justice's own Office of Community Oriented Policing Services has emphasized this fact time and again.[10] In short, by targeting immigrants based on religion and national origin, the Executive Order undermines trust between our law enforcement agencies and our immigrant communities, which in turn makes *all* of our residents and visitors, and indeed everyone in the country, less safe.

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[6] Shivani Vora, *After Travel Ban, Interest in Trips to U.S. Declines*, http://www.nytimes.com/2017/02/20/travel/after-travel-ban-declining-interest-trips-to-united-states.html.

[7] Kristen Schorsch, How Trump's T*ravel Ban Could Hit Medical Tourism Hard*, http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-ban-could-hit-medical-tourism-hard.

[8] John F. Kennedy, *A Nation of Immigrants* 3 (Harper rev. ed. 2008).

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[9] *E.g.*, Mitch Silber and Adam Frey, *Detect, Disrupt, and Detain: Local Law Enforcement's Critical Roles in Combating Homegrown Terrorism and the Evolving Terrorist Threat*, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2508&context=ulj; David Thacher, *The Local Role in Homeland Security*, 39 Law & Soc'y Rev. 635 (Sept. 2005), http://deepblue.lib.umich.edu/bitstream/handle/2027.42/73848/j.1540-5893.2005.00236.x.pdf?sequence=1; *DHS Announces Expansion of the Securing the Cities Program*, http://www.dhs.gov/news/2015/09/14/dhs-announces-expansion-securing-cities-program.

Overt discrimination presents other dangers. Foreign residents of our cities who feel unwelcome are more likely to cut themselves off from public life and participation in public programs. They may refuse to participate in public health programs such as vaccinations or seek medical care for contagious diseases. They may keep their children out of school to avoid harassment and stay away from mosques because of the fear that they will be unsafe. These effects will not be limited to individuals from the six targeted countries. Thousands of other Muslims in the *amici* cities and counties have reason to worry that the public will embrace the Executive Order's anti-Muslim stance. The Order therefore places millions of people at risk of harm or being driven underground, which makes both those residents and our cities less safe.

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[10] *E.g.*, *Community Policing Defined*, Dep't of Justice, Office of Community Oriented Policing Services (rev. 2014), http://ric-zai-inc.com/Publications/cops-p157-pub.pdf.

Worse still, the Executive Order's message that citizens of majority-Muslim countries threaten national security conveys that members of those communities, and other immigrant communities, are to be distrusted and feared. Thus, targeting Muslims makes these residents more vulnerable to victimization, and adds to the difficulty local governments face in trying to provide protection. At the extreme, this climate gives rise to hate crimes. The Southern Poverty Law Center reports that in the first 34 days following the 2016 presidential election, there were 1,094 hate crimes and lesser hate incidents; 315 were categorized as anti-immigrant, and 112 as anti-Muslim.[11] In cities across the country, hate crimes have risen dramatically since the 2016 presidential election. New York City reported twice the number of hate crime incidents in the three months after the election compared to the same period a year prior. In Los Angeles, hate crime incidents doubled in the month following the election. And in the first five weeks of 2017, the number of hate crimes recorded in Chicago was more than triple the number for the same period in 2016. Philadelphia received more reports of hate crimes in the first half of 2017 than in all of last year, and, if this trend continues, is on track to see more hate crimes in 2017 than in the previous three years combined.

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[11] *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, http://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election.

The Executive Order also undermines local laws prohibiting discrimination based on religion and national origin, among other invidious grounds, in all aspects of life – housing, employment, public accommodation, transportation, schooling, government services, and public employment. *E.g.*, Municipal Code of Chicago, Ill. §§ 2-160-010, 5-8-010, 9-115-180, 13-72-040; Los Angeles Charter §§ 104(i), 1024; Los Angeles Admin. Code §§ 4.400, 10.8, 10.13; New York City Charter § 900; N.Y.C. Admin. Code §§ 4-116; 6-108; Philadelphia Code §§ 9-1101, 9-1103, 9-1106, 9-1108. Such laws reflect *amici*'s strong commitment to equal opportunity and equal rights, as well as their belief that diversity enriches us, and diminishes no one. The Executive Order's blatant discrimination turns the clock back on these important civil rights guarantees.

Finally, the Executive Order deprives our communities and our residents of the opportunity to interact with persons from the targeted six countries, including not just people who are barred but others who decide not to travel to the United States, much less to live here. These individuals enrich us with their customs and celebrations, their hard work and perseverance, and their unique skills and training. Our cities would be bereft without them. Foreign residents and students also make an immeasurable contribution to America's ability to participate in the global economy, among other reasons because fewer than half of Americans have passports.[12] Thus, many Americans become acquainted with other cultures only if visitors and students from foreign countries come here.

The Fourth Circuit properly determined that plaintiffs were likely to succeed at least on their Establishment Clause claim and would suffer irreparable harm if the Executive Order were not enjoined. Further supporting those rulings, the Order, and the anti-immigrant principles behind it, will cause irreparable harm to cities and counties across the United States. It undermines trust and cooperation between local law enforcement and immigrant communities, which is necessary to effectively detect terrorist activity and combat crime. It also harms our businesses, educational institutions, and hospitals; limits our labor pool; decreases our tax revenues; and dampens tourism in our communities. And it tramples our cities' history; offends our values; and undermines our laws, including those prohibiting discrimination on precisely the invidious grounds reflected in the Executive Order. *Amici* file this brief to urge the Court to affirm.

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[12] Sally Herships, *Trump's travel ban worries international students*, http://www.marketplace.org/2017/02/08/world/overseas-students.

SUMMARY OF ARGUMENT

Presidential candidate Donald J. Trump promised that, if elected, he would impose a ban on Muslim immigration. And, in two Executive Orders since being sworn in as president, he has made good on his promise. In describing the first Executive Order, President Trump and his advisors publicly said that it accomplishes exactly what candidate Trump said he would do. Then, after the courts enjoined that Order precisely because of its unlawful purpose, President Trump replaced it with the Order under review in this case, which he described as just a "politically correct" version of his promised Muslim ban, reiterating: "I keep my campaign promises." Like its predecessor, the revised Executive Order is unlawful.

Nearly petitioners' entire argument that the Executive Order does not violate the Establishment Clause hinges on convincing the Court that it should not consider the pre-election statements of intent. That position squarely conflicts with the Court's settled Establishment Clause cases, which look to the very same indicia that would be plain to any "objective observer." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005). Here, moreover, President Trump has never disavowed his statements but has continued to act and speak in the same terms as the primary purpose he has articulated all along. In these circumstances, the attempt to repackage the Muslim ban as a religion-neutral ban should be rejected. Instead, the primary purpose and effect of the Executive Order is to implement animus toward one religious group.

Indeed, that animus is plain even absent those campaign statements. It is reflected in the Order's provisions, which target Muslim immigrants and refugees who are predominantly Muslim. The Order also refers to "honor killings," a stereotype associated with Muslims that has nothing to do with the Order's stated national security purpose. That stated purpose is a transparent guise, and cannot mask the Order's true purpose – to ban Muslims.

Petitioners' further attempt to put this Executive Order, which operates against nearly two hundred million people, into the range of Executive authority allowed for individual visa waiver decisions should also be rejected. At the outset, there is no facially legitimate and bona fide reason for the blanket exclusion here, and thus no basis for deference. And when the circumstances are examined, petitioners' reliance on what they now say is a neutral basis for the Order should not overcome the palpable illicit animus. Because an objective observer would see a Muslim ban, this Court should likewise see it, and should uphold the injunctions against it.

ARGUMENT

THE EXECUTIVE ORDER VIOLATES THE ESTABLISHMENT CLAUSE.

The Establishment Clause prohibits any "law respecting an establishment of religion." It enshrines, in the first words of the First Amendment, the special protection that the Framers intended for religion to have from governmental compulsion. Those words were "written by the descendants of people who had come to this land precisely so that they could practice their religion freely," and were "designed to safeguard the freedom of conscience and belief that those immigrants had sought." *McCreary County*, 545 U.S. at 881 (O'Connor, J., concurring); see also James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 8 THE PAPERS OF JAMES MADISON 299 (Robert A. Rutland ed., 1973) ("The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.").

Consistent with these principles, the "clearest command" of the Establishment Clause is that the government cannot favor or disfavor one religion over another. *Larson v. Valente,* 456 U.S. 228, 244 (1982); accord *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-36 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion . . . ."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)

(Establishment Clause "forbids hostility toward any [religion]"); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) ("[T]he State may not adopt programs or practices . . . which aid or oppose any religion. This prohibition is absolute.") (internal citations and quotation omitted).

The Executive Order violates the Establishment Clause by disfavoring Muslims. That the Order does not explicitly reference Islam is beside the point. The Establishment Clause "extends beyond facial discrimination" and "protects against governmental hostility which is masked, as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (citation and quotation omitted). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Ibid.* For this reason, it is "the duty of the courts" to distinguish a "sincere" secular purpose from one that is a "sham," or that is "secondary" to a "predominately religious" purpose. *McCreary County*, 545 U.S. at 862. Here, although the Executive Order in terms bans immigrants from six countries and all refugees, it is an admitted guise for discrimination against Muslims. The courts of appeals correctly ordered it enjoined.

A. President Trump's Statements Confirm The Executive Order's Religious Purpose.

As a candidate for President of the United States, President Trump promised that he would "preven[t] Muslim immigration" if elected.[13] True to his word, one of his first acts as President was to issue the original version of the Executive Order. Indeed, the day after the original Order was signed, presidential advisor Rudolph Giuliani acknowledged that President Trump had asked him to implement the promised "Muslim ban" legally, which he attempted to accomplish by banning citizens of the identified countries rather than explicitly saying "Muslims." J.A. 60. That is exactly how candidate Trump explained he intended to skirt legal challenges to his ban: by referring to "territories" instead of "Muslims." *Ibid.*

After the Ninth Circuit declined to stay enforcement of the injunction of the first Order, President Trump vowed he would issue a new version, stating: "I keep my campaign promises, and our citizens will be very happy when they see the result." J.A. 494. At a rally hours after the district court in Hawaii enjoined the revised Order, President Trump confirmed that the Executive Orders spring from the same discriminatory well as his campaign promise:

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[13] A portion of President Trump's many statements reflecting animus towards Islam are catalogued at J.A. 179-83.

> This is a watered down version of the first one . . . . And let me tell you something. I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place.[14]

Two months later, President Trump publicly complained that the Department of Justice "should have stayed with the original Travel Ban, not the watered down, politically correct version."[15]

President Trump has never disavowed any of his anti-Muslim statements but rather has reiterated them at every opportunity.[16] Given these very clear and consistent public statements, including those President Trump made after taking the oath of office, there is no need to engage in "psychoanalysis" of the President's "heart of hearts." Pet. Br. 70 (citing *McCreary County,* 545 U.S. at 862). President Trump himself has told us his motivation, and it is to ban Muslims. The Executive Order plainly reflects that purpose.

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[14] Available at http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

[15] http://twitter.com/realdonaldtrump/status/871675245043888128?lang=en. President Trump's description of the Executive Order as "politically correct" refers to criticisms of his promise to ban Muslims. At the January 14, 2016 Republican Candidates' debate, candidate Trump declined the opportunity to retract his comments about banning Muslims, explaining "Look, we have to stop with political correctness." http://www.presidency.ucsb.edu/ws/index.php?pid=111395.

[16] In some circumstances, it may not be appropriate to consider campaign statements, such as where a candidate promises to do one thing and does something plainly different as an elected official. But here, President Trump and his advisors have confirmed the discriminatory intent of the ban since he took office. Moreover, President Trump's formal statement calling for a ban on Muslim immigration remained on his website for months after he was elected, even after litigants and

Petitioners ask the Court not merely to discount the wealth of evidence of religious animus, but to pretend that none of it exists.[17] But it is very real for the Muslim communities that the President has disparaged and for those who seek to do them harm. Official pronouncements from the President that Muslims are dangerous have real-world effects on the perceived and actual safety of *amici*'s residents, and indeed the entire country. These consequences do not go away with palliative words in a brief.

Beyond that, petitioners misplace reliance on the Court's parenthetical comment in *Republican Party of*

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courts pointed to its continued presence as evidence of the President's intention. J.A. 179-80. Under these circumstances, "[j]ust as the world is not made brand new every morning," *McCreary County*, 545 U.S. at 866, intent is not made brand new simply by taking the oath of office.

[17] It bears noting in connection with this argument that petitioners also forward a boundless interpretation of 8 U.S.C. § 1182(f), Pet. Br. 39-43, and insist that judicial review of the President's actions is impermissible, *id.* at 24-25. The combined effect would leave intentional discrimination by the President completely unchecked.

Minnesota v. White, 536 U.S. 765 (2002), that "campaign promises are – by long democratic tradition – the least binding form of human commitment," *id.* at 780, to argue the campaign promises should be disregarded. At the outset, our point is not that President Trump's campaign promises are binding, and we are, of course, not trying to enforce them. Our point is that they are indicative of his intent. Moreover, petitioners acknowledge only part of what the Court said in that case. Petitioners omit to mention the Court's recognition that candidates may be reluctant to break their campaign promises: "A candidate who says 'if elected I will vote to uphold the legislature's power to prohibit same-sex marriages' will positively be breaking his word if he does not do so." *Ibid.* In any event, the post-inauguration evidence of religious animus is enough to invalidate the Executive Order, and, even as to pre-election statements, we do not ask the Court to read the President's mind or decide whether a promise was meant to be followed. The President himself has laid his intent bare for all to see, and has pointed to the Executive Order as evidence of his ability to deliver what he promised.

B. The Executive Order's Text and Operation Confirm Its Discriminatory Intent.

The Executive Order is also discriminatory towards Islam in its text and its operation. The Order refers to "so-called 'honor killings'" by foreign nationals. J.A. 1437 (§ 11(e)). As the Fourth Circuit observed, "EO-2 seeks information on honor killings – a stereotype affiliated with Muslims – even though honor killings have no connection whatsoever to the stated purpose of the Order." J.A. 224. The Order's reference to a practice associated with one religion is not neutral toward religion. See *Lukumi*, 508 U.S. at 533 ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.").

The Executive Order's operation likewise targets Muslims. There are Christian-majority countries (such as Venezuela and the Philippines) that satisfy the professed criteria in Section 1(d) of the Order. J.A. 310. Yet the Order does not restrict immigrants from those countries, but only immigrants from six Muslim super-majority countries. J.A. 173. Indeed, given current global conditions of civil war, ethnic conflict, drought, famine, and – yes – radical Islamic elements, most refugees worldwide come from predominately Muslim countries.[18] As the Hawaii district court noted, J.A. 1161, most of the 38,901 Muslim refugees admitted to the United States in fiscal year 2016 came from these six targeted countries.[19] The operation of the Order confirms its religious purpose, by targeting only Muslim countries in Section 2 and suspending the refugee program in Section 6.

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[18] *Figures at a Glance,* UNHCR (available at http://www.unhcr.org/en-us/figures-at-a-glance.html).

[19] Phillip Connor, *U.S. admits record number of Muslim refugees in 2016*, Pew Research Center (Oct. 5, 2016) (available at http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016).

To be sure, the Executive Order's use of national origin as a proxy for religious discrimination would also bar the few non-Muslims from the targeted countries as well as refugees of other faiths. That merely makes its religious gerrymander imprecise and inefficient; it does not make it constitutional. Overwhelmingly, the operation of the Executive Order is to exclude Muslims from entering the United States, precisely as President Trump has long promised. Collateral damage to non-Muslims is not evidence of a secular purpose.

Petitioners argue that the President's statements should be ignored and the Court's analysis confined to the "text" and "operation" of the Order. Pet. Br. 70-72. This Court's Establishment Clause cases do not support those blinders. To the contrary, the Court has consistently held that "our analysis does not end with the text." *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 699 (1994); see also *Lukumi,* 508 U.S. at 534 ("We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue."). Instead, in determining whether the challenged government action has a predominately religious or secular purpose, the courts "not only can, but must" examine "the circumstances surrounding [the] enactment," *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 315 (2000), to ascertain whether, in the eyes of an "objective observer," a religious objective "emerges from readily discoverable fact[s]," *McCreary*

County, 545 U.S. at 862. As the Court explained in *McCreary County,* it is "the duty of the courts" to distinguish a "sincere" secular purpose from one that is a "sham," or that is "secondary" to a "predominately religious" purpose. *Id.* at 864. Here the sham purpose could not be more transparent: the Executive Order, by President Trump's own prior and concurrent admissions, was designed to target Muslims.

In any event, petitioners' contention that the Order is "religion-neutral," Pet. Br. 71, fails on its own terms, as we explain. A religion-neutral measure does not single out a practice associated with one religion. Nor does it target only Muslim majority countries, or suspend a refugee program that predominately benefits Muslims.

C. The Executive Order's Professed National Security Rationale Cannot Mask Its Discriminatory Purpose.

The national security claims petitioners advance to support the Executive Order are a thin pretext. As the Ninth Circuit correctly observed when reviewing the prior Order, there is "no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States." *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017). Indeed, no foreign nationals from the targeted countries have committed any act of terror on U.S. soil since at least 1975.[20]

The Executive Order generally states that its restrictions are necessary to prevent "foreign nationals who may commit, aid, or support acts of terrorism" from entering the country. J.A. 1416 (§ 1(a)). But the circumstances surrounding the issuance of the Orders demonstrate that this veneer is just a cover for President Trump's attempt to ban Muslims. The original Order was issued just seven days after the inauguration, without vetting by any significant interagency policy or legal review process. Moreover, despite the claimed urgency of the ban's national security concerns and the injunction against the first Order, President Trump chose to delay signing the revised Order so that news of its issuance would not interfere with favorable press coverage of his address to a joint session of Congress on February 28, 2017. J.A. 1028.

It was only after the Ninth Circuit's ruling on the original Order that the President asked the Department of Homeland Security ("DHS") to belatedly compile an intelligence report justifying the Order's ban on aliens from the targeted countries. That report actually rejects the premise of the Orders, concluding that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." J.A. 1051. A subsequent DHS report reinforced this assessment, concluding that "most foreign-born, US-based violent extremists likely radicalized several years after their entry into the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." J.A. 1059-60. The very reports President Trump commissioned to justify the Executive Order refute its purported national security rationale entirely.

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[20] Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, Newsweek (Jan. 31, 2017).

Other assertions in the Executive Order do not support its targeting of the six Muslim countries. The Order states that Attorney General Sessions reported to President Trump that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation." J.A. 1424 (§ 1(h)). But the Order does not claim that any of these refugees came from the six countries targeted by this ban. Similarly, the Order asserts that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States." *Ibid.* But the Order does not restrict immigration based on the national origin of past convicted terrorists. Instead, it singles out immigration from six Muslim countries. Petitioners' national security claims do not withstand the barest scrutiny, underscoring that they are pretextual.

Also telling is the administration's abandonment of its original explanation of the professed need for the "temporary" suspension of aliens from the six targeted countries. The original Order claimed that this temporary suspension was necessary to afford the Secretary the opportunity to review the vetting procedures mandated by the Order, and it required the Secretary to report the results of that review to the President in 30 days, or by February 26, 2017. J.A. 1405-06 (§ 3(a)-(b)). The revised Order was issued after that deadline elapsed, and simply reiterated the directive that the Secretary of Homeland Security conduct that review and report to the President by April 5, 2017, J.A. 1425-26 (§ 2(b)), again claiming that the suspension was needed "[t]o temporarily reduce investigative burdens on relevant agencies during the review period." J.A. 1426 (§ 2(c)). The Ninth Circuit's June 12, 2017 decision cleared the way for such "internal review procedures" to begin. Pet. Br. 17. But President Trump has since stated that the suspensions are independent of this review. In a Presidential Memorandum issued on June 17, 2017, President Trump declared that the suspension periods required by the Order will begin to run at "the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." Memorandum from President Donald J. Trump to Sec'y of State, *Effective Date in Executive Order 13780* (June 14, 2017), http://www.whitehouse.gov/briefing-room/presidential-actions. This Court granted a stay on June 26, 2017, but to this day the federal government has not indicated that the review has been completed, or even undertaken, much less what it disclosed, or why the suspension will still be necessary after the time for the review has passed.

Instead, the Presidential Memorandum essentially severed the connection between the Executive Order's suspension and review provisions and makes clear that the President will, if permitted, implement the travel suspensions without regard to the supposed purpose in the Order. This likewise reflects that petitioners believe Congress has already granted the President the authority to indefinitely suspend immigration from any country and that his decision to do so is unreviewable. Pet. Br. 39-43. On those terms, the President may continue the suspension and apply it to additional countries for any reason, or no reason at all. That untethered Executive action is not necessary for national security, under any standard.

D. *Mandel* and *Din* Do Not Provide The Applicable Legal Framework.

Against the weight of authority under the Establishment Clause, petitioners offer *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din,* 135 S. Ct. 2128 (2015), to argue that the Court should defer to the President's professed national security rationale and not consider the evidence of his discriminatory intent. Pet. Br. 62. Those decisions do not support petitioners' sweeping position. Neither case involved the Establishment Clause or the constitutional limits it imposes on the federal government's immigration powers. Instead, both cases involved discretionary decisions made by executive officers to admit or deny specific aliens under statutory immigration restrictions, the constitutionality of which was not challenged. Here, by contrast, the issue is whether the Establishment Clause constrains the President's ability to categorically exclude nearly two hundred million aliens based on religious animus, on which this Court properly has the final say.[21] See *Fiallo v. Bell,* 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . ."); see also *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (federal government must choose "a constitutionally permissible means of implementing" immigration rules); *Chae Chan Ping v. United States,* 130 U.S. 581 (1889) (recognizing that federal government's power to exclude aliens is "restricted" by "the constitution itself").

Beyond that, the facts of *Mandel* and *Din* demonstrate that what was accepted there as a basis for the challenged executive action is not present here. In *Mandel,* the petitioners claimed that the Attorney General's decision not to grant a temporary nonimmigrant visa to a Belgian Marxist professor violated their First Amendment rights to hear him speak. At the time, the Immigration and Nationality Act prohibited the admission of aliens "who advocate the economic, international, and governmental doctrines of world communism" or

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[21] The population of the six targeted countries is more than 180 million. J.A. 254-55. Each is more than 90% Muslim, and indeed, Iran and Yemen are more than 99% Muslim. J.A. 119. And refuges worldwide are predominantly Muslim. *Supra* n.19.

"who write or publish . . . the economic, international, and governmental doctrines of world communism." 8 U.S.C. §§ 1182(a)(28)(D), (G)(v) (1964). The Attorney General had discretion to waive this prohibition and grant visas to aliens on an individual basis. *Id.* § 1182(d)(3). Mandel admittedly fell within the prohibited class, 408 U.S. at 756, which petitioners did not challenge. As the Court noted, petitioners "concede that Congress could enact a blanket prohibition of all aliens falling into th[at] class . . . and that First Amendment rights could not override that decision." *Id.* at 767. Thus, Mandel's only recourse was to apply for the Attorney General's exercise of discretion to admit him, which was denied. *Id.* at 757-59. That is what the Court upheld, based on what the Court perceived to be "a facially legitimate and bona fide reason" – namely, Mandel's violation of the conditions of a previous visa. *Id.* at 770.

Likewise, in *Din,* a U.S. citizen (Din) challenged the federal government's denial of a visa to her husband, a former employee of the Taliban government, 135 S. Ct. at 2131, but not the constitutionality of the law prohibiting her husband's entry. These provisions excluded aliens who engaged in "terrorist activities," such as those who provided support to a terrorist organization or served as its representative. 8 U.S.C. § 1182(a)(3)(B)(i), (iii)-(vi). The limited issue Din presented on appeal was whether the denial of her husband's visa denied her due process because it did not contain an adequate explanation of the reason for the visa denial. 135 S. Ct. at 2131. The plurality determined that Din was not deprived of any interest protected by due process, *id.* at 2138, but the concurring Justices concluded that, assuming that she had a protected interest, she had received all the process to which she was entitled, *id.* at 2141-42 (Kennedy, J., joined by Alito, J., concurring in the judgment). Justice Kennedy analogized the case to *Mandel,* because each case involved discretionary authority to grant waivers to immigration laws passed by Congress, where the laws themselves were not challenged. *Id.* at 2139-41. In that circumstance, the concurring opinion limited its inquiry to whether the federal government had provided a rationale that was "facially legitimate and bona fide for its action," *id.* at 2140 (quoting *Mandel,* 408 U.S. at 770), and found that it had because it cited the "specific statutory factors," *ibid.*, that controlled the consular officer's determination that Din's husband was ineligible for a visa, *id.* at 2141.

This case is very different from *Mandel* and *Din*. For one, in this case there was never a facially legitimate decision in the first place, since President Trump's religious animus and promise to act upon it predated the Order. As a result, there is no Executive decision entitled to the deference shown in *Mandel* and *Din*. For another, this case does not present individualized determinations whether to admit one alien based on circumstances particular to him and under a statutory system that was not challenged. Instead, President Trump has barred all immigrants from six Muslim countries and all refugees, on the basis of nothing particular to them, and without any consideration of individualized factors; and the legal basis for that decision is squarely challenged under the Establishment Clause. There is no basis for deference here.

In fact, in these circumstances, *Mandel* and *Din* are perfectly consistent with the Court's determination of intent in its Establishment Clause cases, since *Mandel* and *Din* call for the Court to consider the real reasons for the action when there is no facially legitimate basis, *or* where the basis is not bona fide. The term "bona fide" signifies "a thing done really, with a good faith, without fraud, or deceit, or collusion, or trust." *Ware v. Hylton*, 3 U.S. 199, 243 (1796). As Justice Kennedy explained in *Din*, *Mandel* allows courts reviewing immigration decisions to "look behind" the stated reasons for excluding an alien where there is "an affirmative showing of bad faith" on the part of the officer who denied the visa. 135 S. Ct. at 2141 (opinion concurring in the judgment). The Court's Establishment Clause cases likewise allow the courts to consider what is plain to any "objective observer." *McCreary County*, 545 U.S. at 862. As we recount above, here there is a mountain of evidence of bad faith, and of the Executive Order's improper religious purpose. Whatever else might constitute bad faith, the dogged determination to pursue the blatantly unconstitutional objective of excluding Muslims from the country because they are Muslim does. For this reason, petitioners' arguments fail even under *Mandel* and *Din*.

* * * *

In short, this case presents no national security imperative, or even a legitimate question of Executive power. Instead, President Trump claims unbridled and essentially unreviewable authority to exclude – on a blanket basis – hundreds of millions of Muslims because they are Muslim. The Establishment Clause does not permit the President to do so.

CONCLUSION

The judgments of the Courts of Appeals for the Fourth and Ninth Circuits should be affirmed.

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APPENDIX

APPENDIX

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CHICAGO

The population of Chicago is 2,717,534.[1]

Chicago has residents from more than 127 foreign countries.[2]

At least 572,066 of Chicago's residents are immigrants.[3]

3,731 of Chicago's residents were born in Iran, Libya, Somalia, Sudan, Syria, and Yemen, of whom 1,650 are non-citizens.[4]

Approximately 1.27 million people are employed in Chicago.[5] Of those, 26.5% are foreign-born immigrants,[6] including an estimated 976 non-citizen immigrants from the six targeted countries.[7]

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[1] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

[2] *Ibid.*

[3] *Ibid.*

[4] U.S. Census Bureau, American Community Survey PUMS 1-Year 2015 Data.

[5] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

[6] *Ibid.*

[7] *Ibid.*

Approximately 27% of Chicago's business owners are immigrants,[8] of whom an estimated 0.7% come from the six targeted countries.[9]

At least 12,500 private employees work in Chicago on international visas.[10] Chicago is home to 110,000 immigrant entrepreneurs.[11]

In 2016, approximately 2,091 refugees were resettled in Chicago, including 794 from the six targeted countries.[12]

Chicago has 34 four-year colleges and universities, with more than 13,789 international students in the 2015-16 academic year.[13]

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[8] http://www.americanimmigrationcouncil.org/research/new-americans-illinois.

[9] *Ibid.*

[10] http://ireports.wrapsnet.org/ (by destination and nationality).

[11] http://www.newamericaneconomy.org/city/chicago/.

[12] U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Admissions – Refugee Processing Center, http://ireports.wrapsnet.org/.

[13] http://www.collegesimply.com/colleges/illinois/chicago/four-year-collegeshttp://www.iie.org/Research-and-Insights/Open-Doors/Fact-Sheets-and-Infographics/US-State-Fact-Sheets/2016.

City Colleges of Chicago (CCC) has seven colleges, with approximately 558 international students in the 2015-16 academic year. 175 of these were born in, arrived on visas from, or are nationals of the six countries.[14]

Chicago's tourism industry accounts for $911 million a year in local tax revenue and $2.3 billion in hotel revenue.[15]

232 flights arrive at Chicago airports from international destinations every day, bringing 31,856 passengers.[16] Each international flight yields approximately $212,000 in local economic impact.[17]

In 2016, Chicago welcomed 54.1 million visitors,[18] 1.62 million of whom visited from overseas.[19]

Approximately 1,000 international visitors were from the six targeted countries.[20]

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[14] Jeff Donoghue, CCC, (includes credit students only).

[15] Alfred Orendorff, ChooseChicago.

[16] http://www.flychicago.com/business/CDA/factsfigures/Pages/airtraffic.aspx.

[17] Jonathan Leach, Chicago Department of Aviation.

[18] http://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2016/april/Mayor-Choose-Chicago-Announce-Record-Tourism-2015.html.

[19] U.S. Department of Commerce, National Travel and Tourism Office, http://tinet.ita.doc.gov/outreachpages/download_data_table/2015_States_and_Cities.pdf.

[20] Alfred Orendorff, ChooseChicago.

In 2015, tourism brought $14.66 billion in direct spending to Chicago. Annually, international visitors to Chicago spend an estimated $1.88 billion, generating $112 million in state and local taxes.[21]

The average overseas visitor spends about $2,313 per trip visiting Chicago.[22]

Tourists from the six countries account for an estimated $1.25 million of local economic impact per year.[23]

Chicago is home to 44 major hospitals,[24] which serve thousands of international patients a year. The Middle East is the top source of patients traveling to the U.S. for medical care.[25]

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[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] http://www.ihatoday.org/uploadDocs/1/hospcounty.pdf; http://www.cityofchicago.org/city/en/depts/cdph/supp_info/clinical_health/Find_a_clinic.html.

[25] http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-ban-could-hit-medical-tourism-hard.

Chicago established the Chicago Legal Protection Fund to increase legal services for immigrant communities across the city.[26] The Fund was allocated $1.3 million for FY2017 to support organizations – including Heartland Alliance's National Immigrant Justice Center (NIJC) and The Resurrection Project (TRP) – and serve more than 20,000 immigrants through community-based outreach, education, legal consultations, and legal representation.[27]

NIJC also received $150,000 from Chicago for fiscal year 2017 for its Immigrant Children's Protection Project, which provides legal services to unaccompanied children held in Chicago-area shelters.[28]

In calendar year 2016, NIJC and TRP represented clients from at least 132 countries, including all six targeted countries.[29]

In Chicago, there were twice as many arrests for hate crimes in the three months after the presidential election than during the same period in the prior year.[30]

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[26] Seemi Choudry, Director of Office of New Americans, Chicago.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

[30] Brandon Nemec, Mayor's Office liaison with Chicago Police Department.

In the first five weeks of 2017, the number of hate crimes recorded in Chicago was more than triple the number for the same period in 2016. Additionally, hate crimes categorized as anti-Muslim or anti-Arab hit five-year highs in Chicago in 2016.[31]

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[31] http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-hate-crimes-increase-st-0305-20170303-story.html.

NEW YORK CITY

The population of New York City is 8,550,405 as of 2015.[32]

New York has residents from more than 150 foreign countries.[33]

New York City is home to three million foreign-born New Yorkers, about 37% of the City's population. Approximately 49% of New Yorkers speak a language other than English at home.[34]

New York City is home to an estimated 26,566 individuals born in Sudan, Yemen, Syria, Iran, Somalia, and Libya.[35] An additional 36,123 individuals have ancestors from these countries.[36]

Approximately 4.3 million people are employed in New York City; of those, 46% are foreign-born immigrants.[37]

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[32] http://www.census.gov/quickfacts/table/PST045215/3651000.

[33] Our Immigrant Population Helps Power NYC Economy, Comptroller Scott Stringer, 2017.

[34] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

[35] *Ibid.*

[36] U.S. Census Bureau, 2015 American Community Survey 1-Year Estimate.

[37] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

New York City itself employs 287,000 people,[38] 34% of them foreign-born.[39]

As the largest gateway city in the country, New York City would be disproportionately affected by the travel ban. New York City is the initial U.S. destination for nearly 30% of all inbound international visitors with the next largest city being LA with about 12%.[40]

51% of New York City's business owners are immigrants.[41]

About 1,300 refugees have been resettled in New York City in the last five years.[42]

The tourism sector of New York City's local economy includes direct visitor spending in 2015 of $42.2 billion.[43]

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[38] http://www.nytimes.com/2016/10/12/nyregion/bill-de-blasio-government-jobs.html?_r=0.

[39] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

[40] http://www.nycandcompany.org/research/nyc-statistics-page.

[41] Our Immigrant Population Helps Power NYC Economy, Comptroller Scott Stringer, 2017.

[42] Data compiled by the Bureau of Population, Refugees, and Migrants Office of Admissions—Refugee Processing Center.

[43] http://www.nycandcompany.org/research/nyc-statistics-page.

In 2015, New York City welcomed 58.5 million visitors, including 12.3 million foreign visitors.[44] New York City now predicts a 300,000-person drop in foreign visitors this year, which will result in a loss of $600 million in direct spending.[45]

New York City has 87 four-year colleges and universities, with approximately 50,000 international students.[46]

In the three months following the Presidential election, New York City has characterized 43 crimes as possible hate crime incidents,[47] an increase of 115% for the same three-month period.[48] In the six months following President Trump's first travel ban Executive Order, NYPD Hate Crime Task Force data show 215 incidents of bias crime have occurred in the city. This is an increase of 131% when compared to the same timeframe last year.

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[44] *Ibid.*

[45] Patrick McGeehan, *New* http://www.usatoday.com/story/news/world/2017/03/29/trumps-travel-ban-could-cost-18b-us-tourism-travel-analysts-say/99708758.

[46] 46,870 foreign students were enrolled during the 2012–2013 school year. http://www.nycedc.com/blog-entry/international-students-nyc.

[47] http://observer.com/2016/12/nypd-reports-huge-spike-in-hate-crimes-since-donald-trumps-election.

[48] http://www.ny1.com/nyc/all-boroughs/news/2016/12/5/since-election-day–nypd-reports-a-spike-in-hate-crimes-around-the-city-compared-to-last-year.html.

LOS ANGELES

The population of the Los Angeles metropolitan area (Los Angeles County) is 10.2 million people, with more than 3.9 million living in the city.[49]

Los Angeles has residents from more than 135 foreign countries, and 185 languages are spoken here.[50]

At least 1.5 million city residents are themselves immigrants, 37.8% of our total population. Approximately 43% of residents of Los Angeles County were born in another country.[51]

As of 2015, the Los Angeles metropolitan area had more than 152,000 immigrants from the six affected countries, including approximately 136,000 from Iran, 14,900 from Syria, 600 from Sudan, 500 from Somalia, and 100 from Yemen.[52]

Los Angeles employs approximately 45,000 people, 22% of whom are foreign-born immigrants. 44% of business owners in Los Angeles are immigrants.[53]

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[49] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

[50] *Ibid.*

[51] *Ibid.*

[52] http://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration.

[53] 2010 ACS single-year estimate.

Los Angeles stands to lose an estimated $736 million in direct spending due to the Executive order.[54]

Between October 2015 and September 2016, approximately 2,800 refugees were resettled in Los Angeles County, including approximately 2,000 from the six targeted countries, and 1,900 from Iran alone.[55]

185 flights arrive at LAX from international destinations every day, bringing 31,000 passengers, including more than 150 from the targeted countries.[56]

The tourism sector of the local economy accounts for $21 billion a year in direct spending by visitors to Los Angeles County and $260 million in hotel taxes. Tourism supports approximately 500,000 jobs in the leisure and hospitality sectors.[57]

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[54] http://www.usatoday.com/story/news/world/2017/03/29/trumps-travel-ban-could-cost-18b-us-tourism-travel-analysts-say/99708758/.

[55] U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Admissions – Refugee Processing Center.

[56] LAX officials.

[57] Discover LA.

In 2016, Los Angeles welcomed 47 million visitors, including 7.1 million foreign nationals who spent $6.3 billion. At least 160,000 visitors hail from the Middle East; they spent at least $185 million while in Los Angeles.[58]

Los Angeles has at least ten four-year colleges and universities, with approximately 25,000 international students.[59]

The Mayor of Los Angeles has reported that hate crime incidents doubled to 30 in the month following the presidential election.[60]

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[58] *Ibid.*

[59] University enrollment data.

[60] http://abc7.com/politics/garcetti-discusses-las-rise-in-hate-crimes-after-election/1651429/.

PHILADELPHIA

The population of the City of Philadelphia is approximately 1,526,006, [61] and approximately 6,051,170 for the Philadelphia Metropolitan Statistical Area.[62]

Philadelphia has residents from more than 130 foreign countries.[63]

At least 197,563 of Philadelphia's residents are immigrants.[64]

Approximately 1,456 Philadelphia residents were born in Iran, Libya, Somalia, Sudan, Syria, and Yemen.[65]

Approximately 640,661 people are employed in Philadelphia, and 108,010 of them are foreign-born (not including individuals who work in Philadelphia but reside outside the city).[66]

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[61] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

[62] U.S. Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014 – United States – Metropolitan and Micropolitan.

[63] U.S. Census Bureau, Place of Birth for the Foreign-Born Population in the United States, 2011-2015 American Community Survey 5-year Estimates.

[64] *Ibid.*

[65] *Ibid.*

[66] U.S. Census Bureau, Selected Characteristics of the Native and Foreign-Born Populations, 2011 American Community Survey 5-Year Estimates.

In 2013, immigrants made up 14% of business owners in Philadelphia; and immigrants are 28% of the area's "Main Street" business owners, including 23% of retail store owners and 34% of restaurant owners.[67]

From October 2015 to September 2016, approximately 682 refugees were resettled in Philadelphia, including 176 from the six targeted countries.[68] In the first seven months of 2017, the Nationalities Service Center, the largest refugee service organization in the Philadelphia region, resettled 155 refugees, including 39 from Syria alone.[69] This was a significant drop from the

previous seven months, in which the organization was able to resettle 373 refugees, including 131 from Syria.[70]

The Philadelphia Metropolitan Area is home to 31 four-year colleges and universities, with 21,273 international students.[71]

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[67] Americas Society/Council of the Americas and Fiscal Policy Institute, *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow*, at 16 (available at http://www.as-coa.org/sites/default/files/ImmigrantBusinessReport.pdf).

[68] U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Admissions – Refugee Processing Center, http://ireports.wrapsnet.org/.

[69] Juliane Ramic, Senior Director of Refugee and Community Integration, Nationalities Service Center.

[70] *Ibid.*

Philadelphia is home to 31 hospitals that, as of June 30, 2015, employed 53,883 full-time employees, and 14,339 part-time employees.[72]

In 2016, 42 million visitors spent $6.8 billion in the Philadelphia area. This direct visitor spending generated $11 billion in economic impact, supported 96,600 jobs, and generated $634 million in tax revenue for state and local governments.[73]

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[71] CampusPhilly; Christine Farrugia, Rajika Bhandari, Ph.D., *2015 Open Doors, Report on International Educational Exchange*.

[72] Pa. Dept. of Health - Division of Health Informatics, Report No. 6, Full-Time and Part-Time Personnel On Payroll (reporting period Jan. 1, 2016, through Dec. 31, 2016) (available at http://www.statistics.health.pa.gov/HealthStatistics/HealthFacilities/HospitalReports/Pages/HospitalReports.aspx#.WbAR2NKPIkI.

[73] http://files.visitphilly.com/Visit-Philadelphia-annual-report-2017.pdf.

In the three months following the Presidential election, eleven hate crimes were reported to Philadelphia police, a 157% increase over the seven reported in the three-month period around the same time the prior year.[74] In the same time period, the Philadelphia Commission on Human Relations received reports of 43 separate hate or bias incidents, as compared to just three reports during the same time last year, a 1433% increase.[75] In the first six months of 2017, Philadelphia police received reports of 27 hate crime incidents, more than in all of 2016 and on pace to surpass the total from the prior three years combined.[76]

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[74] Philadelphia Police Department, Research and Analysis Unit Statistical Section; see also Uniform Crime Reporting System, Monthly Summary Hate/Bias Motivation Report for Philadelphia City, http://ucr.psp.state.pa.us/UCR/Reporting/Monthly/Summary/MonthlySumHateUI.asp?rbSet=4.

[75] Philadelphia Commission on Human Relations.

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Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Petitioners*,

v.

STATE OF HAWAII, *ET AL.*

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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Brief *Amicus Curiae* of Citizens United, Citizens United Found., U.S. Justice Found., English First, English First Found., Public Advocate of the U.S., Gun Owners Foundation, Gun Owners of America, Inc., Policy Analysis Center, and Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, English First, Public Advocate of the United States, and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, United States Justice Foundation, English First Foundation, Gun Owners Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Several of these *amici* have worked on these issues for many years, including these in 2016-17: (i) a Legal Analysis of presidential candidate Trump's proposals to limit immigration from certain countries (Feb. 12, 2016); (ii) an *amicus* brief to the U.S. Supreme Court in support of a 26-State challenge to presidential executive actions that were clearly outside statutory authority (Apr. 4, 2016); (iii) Comments to the Department of State regarding the proposed number of refugees for 2017 (May 19, 2016); (iv) a Legal Policy Paper analyzing the constitutional authority for States to enter into an interstate compact regarding immigration (Sept. 2, 2016); and (v) Comments to the U.S. Citizenship & Immigration Service regarding amendments to the Registration for Classification as Refugee form (Nov. 17, 2016).

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Additionally, these *amici* filed five previous *amicus* briefs in this case, in the Fourth Circuit, the Ninth Circuit, and in this Court at the petition stage:

- Washington v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Feb. 6, 2017);
- Washington v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Feb. 16, 2017);
- IRAP v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Fourth Circuit (Mar. 31, 2017);
- Hawaii v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Apr. 21, 2017); and
- Trump v. IRAP, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (June 12, 2017).

STATEMENT OF THE CASE

During most of his administration, President Barack Obama promoted and implemented immigration policies which were highly controversial and divisive. Unable to persuade Congress to adopt his version of immigration law reform, comprehensive or otherwise, he asserted his belief that he was justified in implementing those failed legislative proposals administratively. *See* "Halting Obama's Immigration End-Run around Congress," National Review (May 28, 2015). President Obama defended his Deferred Action for Parents of Americans ("DAPA") program as an exercise of prosecutorial discretion, but it was challenged as a violation of his duty as President to "take care that the laws be faithfully executed." The DAPA program was enjoined by the federal judiciary for violation of the Administrative Procedure Act. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015) *aff'd by an equally divided Court sub nom.*, United States v. Texas, 136 S.Ct. 2271 (2016). Additionally, President Obama dramatically increased the number of refugees permitted to enter the United States from approximately 60,000 persons in FY 2008, to 85,000 persons in FY 2016 and, before leaving office, had approved a further increase to 110,000 persons for FY 2017.

Even senior officials within President Obama's Administration disputed the notion that adequate vetting of the immigrants and refugees he favored was possible. In a report prepared by the U.S. Department of Homeland Security ("DHS") during the Obama presidency, it was observed that: "**The immigration**

system is a constant target for exploitation by individuals who seek to enter the United States and who are otherwise ineligible for entry based on security grounds." *See* U.S. Department of Homeland Security, "Lack of Identity Documents in the Refugee Process" ("DHS Report") at 1 (emphasis added). The DHS Report further found that "**ICE's Refugee Program is particularly vulnerable to fraud** due to loose evidentiary requirements, where at times, the testimony of an applicant alone is sufficient for approval." *Id.* (emphasis added). According to this Obama Administration DHS Report, the problems with the vetting system were legion:

- the processing of refugees by DHS officers takes place in foreign refugee camps;
- vetting typically takes place in areas where it is difficult to verify claims;
- biometric tools such as DNA testing and fingerprinting are nonexistent;
- identity documents (with name and DOB) are frequently missing;
- attestations (such as former employers) are unreliable; and
- other supporting documents (medical, political activity, judicial papers) are frequently altered or counterfeited. [*See id.*]

As to the refugee program, the Obama Administration DHS Report admitted that "loose evidentiary requirements" allowed applicants to "exploit the system."

> The refugee and asylum laws purposefully contain **loose evidentiary requirements based** on the assumption that a true victim of persecution would not have the time or resources to obtain evidence of their persecution as they flee the country. This flexibility in the law, however, not only helps victims of persecution, it also allows others to **exploit the system**. [*Id.* (emphasis added).]

Because the DHS Report directly supported criticisms of immigration and refugee policy being made by candidate Donald Trump on the campaign trail, it is not surprising that the DHS memo was an internal one. The Report was made public by members of Congress concerned about "the number of refugees from dangerous countries."[2]

In November 2016, the People of these United States decided to chart a different course, electing Donald Trump as President of the United States, *inter alia*, to "build a wall" and "protect the nation from terrorism." As a first step to chart that new course, on February 1, 2017, newly elected President Trump issued an Executive Order designed to implement a pause on the policies of President Obama, as he sought to staff a new Administration, and fashion new and improved immigration policies and practices.

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[2] *Washington Times*, "DHS admits refugee fraud 'easy to commit.'" (Sept. 22, 2016). The *Washington Times* reported on DHS testimony that was elicited during hearings concerning President Obama's "'decision to increase overall refugee resettlement – and specifically that of Syrian refugees – ignor[ing] warnings from his own national security officials.'"

After litigation ensued, the First Executive Order (No. 13,769 (Feb. 1, 2017)), was replaced by the Second Executive Order (Executive Order No. 13,780 (Mar. 9, 2017)) which is the subject of this litigation. This Second Executive Order imposed a temporary suspension ("a brief period of 90 days") of immigration from seven specifically named countries, for a specific purpose: to review "existing screening and vetting procedures were under review." *Id.*, Sec. 1(b)(ii). The Second Executive Order further explained that the First Executive Order had been "halted by court orders that apply **nationwide** and extend even to foreign nationals with **no prior or substantial connection** to the United States." *Id.*, Sec. 1(c). The Second Executive Order was narrowed, applying to six rather than seven specified countries, and repealing the preference for persecuted minority religions. Nevertheless, in subsequent litigation, the Fourth Circuit and the Ninth Circuit upheld broad injunctions to the Second Executive Order that applied well beyond the plaintiff parties to these cases, were nationwide in scope, and even applied to individuals in other countries with no nexus to the United States.[3]

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[3] As explained by Judge Neimeyer, the Executive Order was a "modest action ... which imposes only a temporary pause of 90 days to assess whether the screening and vetting procedures that are applied to nationals from these high-risk countries are adequate to identify and exclude terrorists. Even this pause is accompanied by an authorization to issue waivers designed to limit any harmful impact without compromising national security." IRAP at 649 (Neimeyer, J., dissenting).

The Fourth Circuit affirmed a nationwide injunction of the implementation of Section 2(c) of the Second Executive Order. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (2017) ("IRAP"). Similarly, the Ninth Circuit upheld a nationwide order enjoining both Sections 2 and 6 of the Order. Hawaii v. Trump, 859 F.3d 741, 755 (2017). Both the Maryland and Hawaii district court judges actually went so far as to enjoin the President himself.[4] The Government briefs below challenged the legitimacy of an injunction against the President, and these *amici* briefed the impropriety of such an injunction at some length in both courts.[5] To their credit, both the Fourth and Ninth Circuits reversed this aspect of the district courts' injunctions, recognizing that courts generally lack jurisdiction to enjoin the President. *See* IRAP at 99; Hawaii at 788. Nonetheless, in issuing virtually unprecedented injunctions against the President of the United States, unelected district judges demonstrated their willingness to jettison traditional limitations on the injunctive power of the federal courts, in order to stop the newly elected President of the United States from implementing the political agenda which drove his election by the People.

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[4] The almost unprecedented act of naming President Trump in the lawsuit is consistent with strategies and tactics taught by Saul D. Alinsky, the subject of Hillary Clinton's Wellesley thesis, who counseled: *"[p]ick the target, freeze it, personalize it, and polarize it....* [A] target ... must be a personification, not something general and abstract...." S. Alinsky, Rules for Radicals (Vintage Books: 1971) at 130, 133.

[5] *See* Brief *Amicus Curiae* of United States Justice Foundation (Mar. 31, 2017), IRAP v. Trump at 22-28; Brief *Amicus Curiae* of United States Justice Foundation (Apr. 21, 2017), Hawaii v. Trump at 23-30.

SUMMARY OF ARGUMENT

In support of their claim that the President's Order is a forbidden by the Establishment Clause the plaintiffs have alleged only that the Order "disfavors" the Islamic religion. According to this Court's precedents, however, the Establishment Clause applies only to government actions that "advance" religion, not actions that only "disfavor" a religion as pled here. Therefore, the courts below erred by addressing Plaintiffs' Establishment Clause claim on the merits, instead of dismissing that claim on the sole ground that Plaintiffs have failed state a claim upon which relief can be granted.

The Ninth Circuit decision differed from that of the Fourth Circuit because it was based on statutory interpretation — not the Establishment Clause. The Ninth Circuit demonstrated that it fundamentally misunderstood the scope of the President's authority over immigrants and refugees. The Ninth Circuit assumed that the President had neither inherent authority over immigration as the Chief Executive Officer of a sovereign nation, nor constitutional authority over immigration, as President except for what powers Congress may have delegated. In truth, the scope of that delegation of Congressional powers under 8 U.S.C. § 1182(f) could neither have been more broad nor more clear. According to Justice Robert Jackson's famous concurrence in Youngstown Sheet and Tube Co., in issuing his Executive Order, President was operating at the zenith of his powers. That statute has been employed by Presidents of both parties for decades without successful challenge in federal court — until now. The injunctions below violated his Court's holding in Kleindienst v. Mandel. Moreover, even in the absence of statutory power, the position of the President requires that he protect the nation's borders. Lastly, the Ninth Circuit erroneously assumed the federal power over immigration is based in the constitution's naturalization clause, and those powers are vested only in Congress, but, as recognized by this Court for over a Century, the power of a nation to control its own borders is inherent in sovereignty.

As to the admission of refugees, the President's authority under federal law is equally clear. The Ninth Circuit accepted the bogus legal theory that President Trump was bound by the actions of a prior President designating the number of refugees that would be admitted in the fiscal year after he left office. The Ninth Circuit's statutory analysis was creative, but deeply flawed. Its effect was to negate the choice made by the American People in electing President Trump, and to continue a refugee admissions policy that even the Obama Administration understood was deeply flawed and susceptible to abuse. The Obama Administration even attempted to revise the refugee application form to omit key information necessary to demonstrate whether applicants meet the statutory test of being persecuted on the basis of race, religion, nationality, or membership in a social group or political opinion.

The Fourth Circuit's opinion not just sought to second guess the decision of the President in an area involving national security, but sought to psychoanalyze him, and then demonize him. The Fourth Circuit felt free to disregard the Executive Order's national security foundation because it perceived "drips with religious intolerance, animus, and discrimination." A finding of animus in the political branches is enormously helpful to a federal judge who seeks to impose his own policy preferences on the nation. A finding of animus gives an unelected judge the excuse to demean the officials elected by the people, disregard their positions the responsibilities, and frustrate and impede their actions. Indeed, both circuit courts violated the warning of Chief Justice Warren Burger, who instructed that "the Judiciary always must be hesitant to prove into the elements of Presidential decisionmaking." The Chief Justice Burger offered many reasons for that policy, not the least of which is that it could encourage the political branches "to probe into judicial decisionmaking." Particularly in a case where one of the counsel for respondents has conceded that the same Executive Order issued by a different President would have been unobjectionable, the courts should avoid imputing improper motives to a coordinate branch of government.

ARGUMENT

I. THE "NO ESTABLISHMENT" CLAUSE DOES NOT PROHIBIT GOVERNMENT "DISFAVORING" RELIGION AS PLED AND ARGUED HERE.

A. Respondents' Establishment Clause Claim Rests Solely on the Allegation that the Executive Order Disfavors the Muslim Religion.

In the IRAP litigation in the Fourth Circuit, the three respondents complained that the President's Executive Orders violated the Establishment Clause because the President was motivated by an "anti-Muslim" sentiment to disfavor the Islamic religion by sending a "'state-sanctioned message condemning [that] religion.'" Brief for the Petitioners ("Pet. Br.") at 13. The district court agreed, holding that the President's Order was "adopted for an improper 'religious purpose' of preventing Muslim immigration" and, upon that ground, entered a global preliminary injunction barring any enforcement of Section 2(c). Pet. Br. at 12. The Fourth Circuit affirmed, concluding that the president's order was based on "bad faith and was 'motivated by a desire to exclude Muslims from the United States,'" in violation of the Establishment Clause.[6] *Id.* By these actions, both the district court and court of appeals below endorsed the respondents' theory expressed in their complaint that the Establishment Clause was implicated by the expression of "anti-Muslim" views and attitudes "disfavoring" the respondents' religion.

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[6] In the Hawaii litigation in the Ninth Circuit, the district court held that "religious animus dr[ove] the promulgation of [President Trump's] Order," but did not reach the Establishment Clause issue, deciding that the president's authority exceeded that which Congress had granted him by statute. Hawaii at 761.

B. The Establishment Clause Does Not Support Any Claim Based on Government Action That Does Nothing More than "Disfavor Religion."

The Government Brief enumerates a number of reasons why the President's Order limiting entry from Muslim majority countries into the United States does not violate the Establishment Clause. *See* Pet. Br. at 62-78. While the Government Brief is, on the whole, persuasive, it was mistaken to have stated that the Establishment Clause is "implicated" by government action, the "'official objective' [of which] **favor[s] or disfavor[s]** religion."[7] Pet. Br. at 70 (emphasis added).

The very pinpoint citation relied upon by the Government does not support its concession that acts "favoring or disfavoring" a religion equally implicate the Establishment Clause. One will search in vain page 862 of McCreary County v. ACLU, 545 U.S. 844 (2005), for any statement supporting the Government's claim. Rather, the issue addressed in McCreary concerns the legitimacy of the judicial inquiry into **purpose** generally in Establishment Clause cases, not into the particular kind of **purposes** required. As for the particular purpose inquiry that is required, the Court had already addressed the issue in the immediately preceding pages. In those two pages, there is no language to support the claim that action

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[7] Here, the Government proves the aphorism attributed to Mark Twain: "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

"favoring or disfavoring religion" equally implicates the Establishment Clause.

To the contrary, the McCreary Court states that "[w]hen the government acts with the ostensible and predominant purpose of **advancing religion**, it violates that **central** Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *Id.* at 860 (emphasis added). Immediately following this statement of principle, McCreary explains further, quoting from Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987):

> Lemon's "purpose" requirement aims at preventing [government] from ... acting with the intent of **promoting** a particular point of view in religious matters... [McCreary at 860 (emphasis added).]

Then, in further explanation, McCreary states that "[b]y showing **a purpose to favor** religion, the government sends the ... message to ... nonadherents that they are outsiders, not full members of the political community...." *Id.* (emphasis added) (internal quotation marks omitted).

C. There Is No Such Thing as a Hybrid Establishment/Free Exercise Claim.

Not only does McCreary not support the respondents' claim that the Establishment Clause is equally implicated by actions favoring and disfavoring religion, it acknowledges that the two religion guarantees pose different questions requiring different analyses. As this Court explained in Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993):

> [Establishment Clause] cases ... for the most part have addressed governmental efforts to **benefit** religion or particular religions, and so have dealt with a question different ... in its formulation and emphasis, from [a claim based upon] an attempt to **disfavor** their religion because of the religious ceremonies it commands [where] the Free Exercise Clause is dispositive.... [*Id.* at 532 (emphasis added).]

As the McCreary Court itself pointed out, Lukumi required only evidence of a "discriminatory purpose" to support a Free Exercise claim that a city ordinance unconstitutionally singled out for punishment the conduct of a religious ceremony (*id.* at 862), whereas in Epperson v. Arkansas, 393 U.S. 97, 102-103 (1968), the constitutionality under the Establishment Clause of a state statute singling out the teaching of evolution required evidence of a "predominant purpose of advancing religion." *See* McCreary at 860.

Notwithstanding this distinction, respondents alleged in paragraph 221 of their Complaint that the President's Order "violates the Establishment Clause by singling out Muslims for disfavored treatment [for] the purpose and effect of inhibiting religion, and it is neither justified by, nor closely fitted to, any compelling governmental interest." In Lukumi, the

Supreme Court stated that the Free Exercise Clause requires proof of a "compelling governmental interest," and proof that it is "narrowly tailored," but only if the challenged law is not "neutral and of general applicability." *Id.* at 531. Shoe horning the religious freedom claim into a Free Exercise mold, the Complaint alleges that the President's Order "singl[es] out Muslims," and thus, the President's Order must be "closely fitted" to a "compelling governmental interest." Complaint Para. 221. However, the respondents here have brought their claim as an Establishment Clause one, not a Free Exercise one. The Court in Lukumi acknowledged that an Establishment Clause claim poses a "question different ... in its formulation and emphasis." Lukumi at 532. Typically, an Establishment Clause claim is governed by a three-part test designed to ferret out those government actions that "advance" religion — not actions that "disfavor" religion. *See* Lemon v. Kurtzman, 403 U.S. 602 (1990).

Oddly, in this case the respondents have pled an Establishment Clause claim, but urged the courts to apply the Lukumi Free Exercise test. *See* Pet. Br. at 70-71. And most noteworthy, the Government thus far has let them get away with it, having indicated in its opening brief that the validity of the President's Order be tested by the Free Exercise guarantee of nondiscrimination!

As these *amici* stressed in their brief in support of the Government's Petition for Certiorari, the distinction between a government act favoring religion and one disfavoring religion is not a semantic one, but one of constitutional dimension. The two rights — No Establishment and Free Exercise — are different. As Justice Joseph Story put it in his Commentaries, the Establishment Clause addresses the limits to which the government may rightly go in "fostering and encouraging religion," whereas the Free Exercise Clause sets the jurisdictional line protecting the people from civil government intrusion upon duties owed exclusively to God. *See* 2 J. Story, Commentaries on the Constitution, Sections 1872-77, at 630-32 (Little, Brown: 5th ed. 1891).

Having failed to allege that the predominant purpose of the President's Order was to "advance" a religion, the plaintiffs' Establishment Clause claim should be dismissed on the ground that they failed to state a cause of action upon which relief can be granted.[8] Further, any effort that the respondents might make at this stage of the proceedings to amend their Complaint and transform their Establishment claim into a Free Exercise claim should be rejected as untimely and prejudicial. *See* Rule 15(b)(1), FRCivP. The respondents should not be allowed to cherry pick from the two religion guarantees to reach their desired result.

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[8] *See* Rule 12(b)(6), FRCivP.

II. THE NINTH CIRCUIT FUNDAMENTALLY MISAPPREHENDED THE PRESIDENT'S POWER OVER THE ADMISSION OF IMMIGRANTS AND REFUGEES.

The Ninth Circuit bases its decision on a fundamental misunderstanding of the basis for the President's authority to restrict admission of immigrants and refugees to the country. The Ninth Circuit begins its analysis as to whether "EO2 violates the INA," with the statement:

> Under Article I of the Constitution, the power to make immigration laws "is entrusted exclusively to Congress." *Galvan v. Press* [347 U.S. 522, 531 (1954)]; see U.S. Const. art I. §8, cl. 4...; *Fiallo v. Bell* [430 U.S. 787, 792 (1977)] ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." .... In the INA of 1952, Congress delegated some of its power to the President through Section 212(f).... [Hawaii at 769.]

The unstated assumption of this analysis is that the President has neither constitutional nor inherent authority to control entry by foreigners into the United States — only limited delegated congressional authority. Not only is this untrue, but also none of the three authorities relied on by the Ninth Circuit support this proposition.

The first case cited, Galvan v. Press, addressed the meaning of the term "member"as used in the Internal

Security Act of 1950 with respect to members of the Communist Party. The case involved the Executive's deportation of an individual pursuant to the authorization of Congress. This Court simply refused to find that a challenged deportation violated the due process clause, on the ground that "the formulation of [immigration] policies is entrusted exclusively to Congress..." explaining that "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government...." Galvan at 531. The Court did not decide, or even discuss, the differences between the roles of the Executive and the Legislative Branches in governing immigration.

As to the second authority cited, Article I, Section 8, Clause 4 of the Constitution only addresses the issue of the naturalization of citizens — and provides no basis for the federal government's power to regulate the admission of aliens and refugees into the country. Failure to provide an express power over immigration was not an oversight by the Framers, because no nation needs to be granted an enumerated power to exercise the foundational power of a sovereign nation — the power to enforce borders by controlling the entry of aliens. As this Court explained in Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893):

> It is an accepted maxim of international law, that every sovereign nation has the power, as **inherent in sovereignty**, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such

> conditions as it may see fit to prescribe. [Emphasis added.]

Although at various times in the past, some have sourced the federal government's power over immigration to its enumerated power to regulate foreign commerce, and here it was sourced to the naturalization power, it is generally understood that:

> Congress does not derive its power to regulate immigration from a specific constitutional grant[,] [but] [i]t is simply regarded as a power **inherent to a sovereignty**. [J. Nowak, R. Rotunda & J. Young, Constitutional Law, § 14.11, p. 628, n.16 (3d ed., West: 1986) (emphasis added).]

As to the third authority cited, the Ninth Circuit quotes language from Fiallo v. Bell, that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admissions of aliens." Fiallo at 792. But again, in no way does that language address the relative roles of Congress and the President with respect to the immigration power. Rather, this Court denied a challenge by unwed natural fathers and their illegitimate offspring to the constitutionality of a section of the Immigration and Nationality Act of 1952 that was being enforced by the Executive Branch. The Fiallo Court identified the three factors governing this area of the law — including the role of the judiciary — all of which were ignored by the Ninth Circuit:

> Our cases "have long recognized the power to expel or exclude aliens as [i] a fundamental **sovereign** attribute [ii] exercised by the Government's **political departments** [iii] largely **immune** from judicial control. [*Id.* at 792 (emphasis added) (citations omitted).]

In Fiallo, as in Fong Yue Ting more than a century earlier, this Court recognized control over immigration into the country to be an inherent attribute of sovereignty. And the second and third points made by the Court in Fiallo must be considered together. The power to expel or exclude aliens is vested in what this Court called "the Government's political departments," making it, by definition, a power not to be exercised by the judiciary. Indeed, the Court in Fiallo went on to elaborate that "the power over aliens is of a political character and therefore subject only to narrow judicial review." Fiallo, at 792 (citations omitted).

In Fiallo, as below, the plaintiffs claimed that they did "not challenge the need for special judicial deference" to immigration policy, "but instead suggest that a 'unique coalescing of factors' makes the instant case sufficiently unlike prior immigration cases to warrant more searching judicial scrutiny." Fiallo at 793. Indeed, it would seem that every case presents a "unique coalescing of factors" by which litigants seek to carve out an exception to the governing rule — but it is the role of the court to apply the rule, even if judges would personally prefer a different outcome.

As in Fiallo, the President here was acting pursuant to an express delegation of virtually unreviewable authority to make a finding and issue a proclamation to implement a Congressional purpose. Indeed, here the Immigration and Nationality Act unquestionably empowered the President to issue his Second Executive Order, unhindered:

> Whenever the President finds that the **entry** of any aliens or of any class of aliens into the United States **would be detrimental** to the interests of the United States, he **may by proclamation**, and for such period as **he shall deem necessary**, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions **he may deem** to be **appropriate**. [8 U.S.C. § 1182(f) (emphasis added).]

Clearer language of unqualified delegation of authority to the President could not have been written. Given this clear Congressional authorization, Justice Jackson's familiar concordance in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), explains how this Court should assess the Second Executive Order issued by President Trump:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said ... to personify the federal sovereignty. If his act is held unconstitutional under these

> circumstances, it usually means that the Federal Government as an undivided whole lacks power. [*Id.* at 635-37.]

Lastly, as a power inherent in a sovereign nation, the President would have authority even in the absence of statute. And it is abundantly clear that, with respect to setting of immigration policy, there is no role whatsoever for the Judiciary to play.

Starting from a flawed premise about the President's lack of inherent and constitutional authority, the Maryland district court devised a theory to justify an injunction that stopped the President in his tracks. As Judge Neimeyer explained in his dissent to the IRAP decision, in issuing its injunction, the Maryland court seriously erred by refusing to apply this Court's holding in Kleindienst v. Mandel, 408 U.S. 753 (1972), fabricating a new proposition of law that campaign statements may be considered, and by radically extending Establishment Clause precedents. The majority, he writes, "grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited.... The majority, now for the first time, rejects [three Supreme Court opinions] in favor of its politically desired outcome." IRAP at 648 (Niemeyer, J., dissenting). The Fourth Circuit's decision, based on its understanding of the statutory scheme, cannot stand.

III. CREATIVELY INTERPRETING THE LAWS GOVERNING REFUGEES, THE NINTH CIRCUIT REWRITES THE LAW TO SUIT ITS POLITICAL AGENDA.

Sections 6(a) and (b) of the Second Executive Order temporarily suspended refugee admission for a period of 120 days, and then reduced the cap on total refugees for FY 2017 from 110,000 to 50,000. In upholding the injunction against these provisions, the Ninth Circuit rejected the President's claims of authority under both 8 U.S.C. § 1182(f) and 8 U.S.C. § 1157. Hawaii at 741. Section 1182(f) provides the President broad, unilateral, and virtually unreviewable[9] power to suspend "by proclamation" the entry of any alien whenever he finds such entry "would be detrimental to the interests of the United States." Section 1157 establishes a system where the President would establish the number of annual refugees, and a specific mechanism to increase the annual cap — but in no way does that statute mandate the admission of even a single refugee, instead always discussing those refugees who "**may** be admitted." (Emphasis added.) The government argues that "the Ninth Circuit's ruling rests on a fundamental misunderstanding of the

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[9] In addition to outright suspension of the admission of any class of aliens, including refugees, § 1182(f) permits the President a further option — to "impose on the entry of aliens **any restrictions he may deem to be appropriate**." This language clearly does not authorize judicial second-guessing. Why, then, would a direct suspension of aliens be reviewable by the Ninth Circuit, if an indirect suspension of aliens (through imposition of "restrictions") is not to court review?

[refugee] statute...." Govt. Br. at 38. That is putting it mildly, for the reasons set out below.

The Ninth Circuit ignored the clear and unambiguous text of both of these statutes, declaring not "what the law is" but asserting its policy preferences. The court rejected the determination of President Trump, mandating that this country return to the refugee policies that "[former] President Obama previously determined...." Hawaii at 775, 780.

A. Section 1182(f) Does Not Require that the Ninth Circuit Agree with the President's Findings.

As to § 1182(f), the Ninth Circuit claims that there is a "statutory precondition of [the President] exercising his authority under § 1182(f)...." Indeed, § 1182(f) "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." Hawaii at 770. But nothing in § 1182(f) requires the President to detail the basis for his facially sufficient finding to the satisfaction of the Ninth Circuit or any other court. Yet the Ninth Circuit reads into the statute the requirement that the President not only "find," but that he make a "sufficient finding," satisfactory to the court. Hawaii at 776.

As Petitioners' Brief explains, this "allows for impermissible judicial second-guessing of national-security determinations made by the President." Govt. Br. at 38-39. Indeed, the Ninth Circuit's opinion second-guesses not only the President's determination, but also the decision by Congress to delegate broad powers to the President. Reading into a federal statute a broad requirement of judicial review, three lower court judges on the Ninth Circuit — all three appointed by Democrat President Clinton — seek to override the decisions of not one, but two, other branches of government, both of which currently happen to be controlled by elected Republicans.

B. Section 1157 Is Not a One Way Ratchet.

The Ninth Circuit badly "misunderstands" § 1157 as well. As the court notes, § 1157(a)(2) provides a mechanism whereby the President can determine the number of refugees "who may be admitted" for the following year.[10] Hawaii at 780. And, as the Ninth Circuit points out, "in 2016, President Obama determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified...." *Id.* According to the Ninth Circuit, the statute "does not provide a mechanism for the President to *decrease* the number of refugees to be admitted mid-year." *Id.* In other words, President Obama's policies constrain President Trump's actions, long after President Obama has left office. While laws and regulations carry over between administrations, neither executive policies nor executive actions may bind successor presidents and thereby frustrate the will of the American public who voted for change.

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[10] Contrary to the Ninth Circuit's assertion that "[t]he statute requires the President to set the number of annual refugee admissions ... before the start of the new fiscal year" (*id.* at 780), it is not at all clear from the statute that the President is required to do anything unless he intends to exceed the statutory cap of 50,000 refugees. *See* Govt. Br. at 61 (quoting a House Report that "consultation with Congress with respect to numbers of refugees admitted is only required when the [statutory] limit is exceeded.").

The Ninth Circuit's conclusion defies the rules of sentence structure for statutory interpretation. In § 1157(a)(2), the subject of the sentence is "number" and the prepositional phrase "of refugees who may be admitted" modifies the subject. The phrase "shall be" is the verb — what the number shall be the next fiscal year. But the "number" the next year is still "the number of refugees who may be admitted" — not the "number" which was designated by President Obama, meaning it is a permissive rather than a mandatory requirement. Section 1157(d) provides further evidence, stating that the President "shall report ... regarding the **foreseeable** number of refugees who will be in need of resettlement...." As the government notes, § 1157 "refers to a ceiling — not the floor...." Hawaii at 780. Instead, the lower court's interpretation excises the "may" and inserts a "shall," rewriting the statute to read that "the number of refugees who **shall** be admitted ... **shall** be such number as the President determines...." The Court's interpretation of the statute is illogical. It is on this "misunderstanding" of the statute that the Ninth Circuit's decision hangs with respect to the refugee provisions of the Second Executive Order.

Consider a situation where there were not enough applicants for refugee status in a given year to satisfy the number set the prior year by the President. Should the President take steps to disrupt the Middle East in an effort to create enough refugees to meet a quota that satisfies the Ninth Circuit? Additionally, if the President's number set in a prior year is fixed in stone, as the Ninth Circuit argues, why would § 1157(a)(4) require that "the President shall enumerate ... the number of aliens who were granted asylum in the previous year" in a report to Congress. It would be entirely redundant for the President to choose 110,000 refugees to allow entry, and then later report the number that were allowed entry, if by law that would be exactly 110,000 refugees. The purpose of § 1157 is not to operate as a one-way ratchet to block reduction in the number of refugees who may be admitted. Rather, as the government points out, both the text and the context of § 1157 make it abundantly clear that "Congress wanted refugee admissions to be limited" (Govt. Br. at 60). The statute clearly does not require the admission of a minimum number of refugees.

C. The Ninth Circuit Has Thwarted the Will of the People.

President Trump was elected to fulfill a mission — to change federal immigration and refugee policy. In addition to building a wall along the southern border with Mexico to stem a ongoing human invasion, President Trump was elected to crack down on uncontrolled immigration from terror-prone regions of the Middle East and Africa. Part of that mandate, in turn, involved developing appropriate procedures to ensure that immigrants and "refugees" from those dangerous regions are sufficiently "vetted" prior to their entry. Although the American people, in electing President Trump, have chosen to chart a path to implement the view of President Reagan that "A nation without borders is not a nation,"[11] the courts below apparently preferred the policies of President Obama and his Secretary of State Kerry who rejoiced at a commencement address that "You're about to graduate into a complex and borderless world."[12]

The Ninth Circuit (and other federal courts) have imputed religious intolerance to President Trump's policies. However, in doing so, these judges impugn not only the President, but the tens of millions of Americans who voted for him. Contrary to these judges' cloistered view that the only possible motivation is "animus" of one form or another, there are numerous good reasons to have strict controls over those foreigners — especially so-called "refugees" — who are permitted to enter this country.

First, at least when it comes to Syria, the United States has little information about so-called "refugees." Although the Obama Administration famously described Syrian refugees as nearly exclusively women and children,[13] the long lines of refugees shown in television news broadcasts are overwhelmingly males in their twenties and thirties unaccompanied by women and children. Indeed, the American people can have no confidence that persons who claim to be Syrian refugees are, in fact, even from Syria.[14]

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[11] *See* Phyllis Schlafly, "Amnesty Isn't 'Reform' — It's Open Borders," Eagle Forum (Jan. 2004) https://www.eagleforum.org/psr/2004/jan04/psrjan04.html.

[12] P. Kasperowicz, "Kerry slams Trump's wall, tells grads to prepare for 'borderless world,'" Washington Examiner (May 6, 2016) http://www.washingtonexaminer.com/kerryslams-trumps-wall-tells-grads-to-prepare-for-borderless-world/article/2590596.

Second, it is important that this country's immigration policies admit only those persons willing to live peacefully in a constitutional republic. However, it appears that few emigrating from Muslim nations share American values. Many adhere to the religious and political system of Sharia law,[15] which is fundamentally incompatible with this nation's political system. Often, they fail to integrate into American society, as President Trump has noted: "Assimilation has been very hard. It's almost — I won't say nonexistent, but it gets to be pretty close. I'm talking about second- and third-generation.... [F]or some reason there's no real assimilation."[16]

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[13] It has been reported that a State Department spokesperson told the press: "Military-aged males unattached to families comprise only approximately two percent of Syrian refugee admissions to date," https://www.buzzfeed.com/andrewkaczynski/state-department-only-2-of-syrian-refugees-in-us-are-militar.

[14] The United Nations acknowledges that refugees crossing the Mediterranean are from Syria, Afghanistan, Iraq, Pakistan, Iran, Nigeria, Gambia, Somalia, Cote d'Ivoire, and Guinea, and reports the number of men at 45 percent — well over the 2 percent estimated by President Obama.

[15] Bill Connor, "Muslims Not the Enemy: But Sharia Law is clear and present danger to America," Times & Democrat (Dec. 20, 2015).

Third, even though the past Administration refused to use the words "Muslim" and "extremist" in the same sentence, the reality is that Islamic extremist views pose a real and present threat to the United States.[17] Federal courts are ill-equipped to assess the dangers of terrorist attacks by those from certain other countries. The judgment of the President on such matters should not be second guessed.

Finally, there is little assurance that persons admitted as refugees actually meet the statutory test set out in 8 U.S.C. § 1101(a)(42). Indeed, the Obama Administration in November of 2016 proposed to "revise" the USCIS Form-590 refugee form in several important ways. As *amicus* United States Justice Foundation pointed out in comments to USCIS, the revised form would have failed to gather certain key information to ensure that refugee applicants fall into the statutorily required categories of those persecuted on the basis of race, religion, nationality, or membership in a social group or political opinion.[18]

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[16] *See* http://www.thedailybeast.com/trump-muslim-american-assimiliation-close-to-nonexistent.

[17] Islam is not only a religion — it also is a political system. *See* J. Tayler, "Ayaan Hirsi Ali Explains How To Combat Political Islam," *Quillette* (Mar. 31, 2017). Consider how the lower courts would constrain President Trump from responding to the threat of immigrants from a Muslim country where the 109 verses of the Quran which call Muslims to war against nonbelievers to achieve Islamic rule are generally believed. *See* "What Does Islam Teach about Violence," http://www.thereligionofpeace.com/pages/quran/violence.aspx.

IV. FEDERAL JUDGES HAVE NO AUTHORITY WHATSOEVER TO PSYCHOLOGICALLY ANALYZE AN ELECTED PRESIDENT, AND PERCEIVING ANIMUS IN HIS HEART, TO ISSUE REMEDIAL ORDERS.

The Fourth Circuit decision was light on law, but heavy on politics. The self-aggrandizing language in its opening paragraph reveals more about the political views of the Fourth Circuit *en banc* court than it does about the legality of the Executive Order under review:

> The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in *Ex parte Milligan*, remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with **vague words of national security**, but in context **drips with religious intolerance, animus, and discrimination**.... It cannot go unchecked when, as here, the President **wields** it through an **executive edict** that stands to cause **irreparable harm** to individuals across this

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[18] http://lawandfreedom.com/wordpress/wp-content/uploads/2016/11/Joint-Comments-to-DHS-USCIS-on-Refugee-Form-I-590.pdf.

> nation. [IRAP at 572 (emphasis added) (citations omitted).]

A. The Courts Below Have Failed to Recognize the Primary Role of the President in Defending the Country.

The Fourth Circuit quite obviously viewed itself as the ultimate guardian of the Constitution against the actions of our nation's elected "rulers" — but never paused to consider the limitations that document imposed on unelected judicial "rulers." Indeed, the Fourth Circuit never seemed to doubt whether it had the right to look behind a facially valid Executive Order to psychoanalyze the President of the United States, and then to make what purports to be a finding of fact: that the President exhibited "religious intolerance, animus, and discrimination," and then to use that finding to assert its own will, negating the policies of the President.

The Fourth Circuit would have done well to consider that the President is the only official elected by all the People and that all of the executive power of the federal government is vested in him. Article II, Section 1. He is duty-bound to "take care that the laws be faithfully executed...." Article II, Section 3. Thus, the Constitution establishes the President of the United States as the nation's Chief Law Enforcement Officer.

The President is also empowered to serve as "commander in chief," and the power with the Senate to "make treaties" and to "appoint ambassadors" and "other public ministers," which together make him primary in most matters of foreign policy. Finally, the President is the only federal official whose oath is set out in the Constitution:

> I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States. [Article II, Section 1.]

In issuing the Second Executive Order, the President was exercising his responsibility of preserving, protecting and defending the Constitution — a higher level of duty than the federal judiciary's limited duty "to support this Constitution...." Article VI. Yet, based on a judicial assertion of animus, the courts below have enjoined the President's actions to defend the nation and its Constitution.

Truly animus is one of the most powerful judicially invented tools, as it invites judges to negate the legitimate actions of the political branches in an act of judicial supremacy over the people. A finding of animus becomes the predicate for the exercise of an unbridled judicial power to strike down any legislative or executive action that does not conform to judicial will. In one of the most important challenges to the principle of separation of powers, Chief Justice Burger warned:

> the Judiciary always must be hesitant to **probe** into the elements of **Presidential**

> **decisionmaking**, just as other branches should be hesitant to **probe into judicial decisionmaking.** [Nixon v. Fitzgerald, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring) (emphasis added).]

Unfortunately, the Fourth Circuit did not heed the Chief Justice, instead belittling the Executive Order's use of "vague words of national security," and melodramatically characterizing the President's action as one that "drips with religious intolerance, animus, and discrimination." IRAP at 572.

The correct approach to a case such as this is to evaluate the Executive Order for what it actually does, rather than what one district court judge — or even a majority of judges on a court of appeals — thought motivated it. As Justice Powell more specifically amplified in Nixon, "Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive...." Nixon at 756. The consequences of this Court sanctioning the approach taken here by the Fourth Circuit would "subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose." *Id.* at 756. If the Fourth Circuit's approach is sanctioned, there would be no stopping point: not only would motives be put on trial, but litigants would also be enticed to find some "forbidden purpose" to challenge the legality of any official act. The search for motive transforms the judicial process from an objective legal search for principles to a subjective psychological search to determine the state of the mind.

The 2016 presidential election was waged, in part, as a battle between open-border internationalists aligned with Secretary Hillary Clinton who embrace even illegal immigration, and nationalists who aligned with President Donald Trump, who promised to enforce the nation's borders. It is not the role of federal judges to operate "behind enemy lines" as a left-behind army tasked with impugning the President and impeding his agenda. Yet, for example, in a concurrence, one of the circuit court judges, Judge James A. Wynn, remarkably concluded that the President's statutory authority to ban entry to "'all aliens or any class of aliens'" conferred no authority "to deny entry solely on the basis of nationality and religion." IRAP at 609, 613. Judge Wynn then demonstrated hostility to the President through use of intemperate language, including "religious animus" and "invidiously discriminatory." *Id.* at 612-13.

B. The Decisions of the Courts Below Open the Judiciary to What Chief Justice Burger Termed a "Probe into Judicial Decisionmaking."

The saying goes that "what is good for the goose is good for the gander." If the Fourth Circuit is correct — that evidence of animus voids a decision of the political branches — then, as Justice Burger warned, would that not invite a "probe into judicial decisionmaking" by the political branches? Nixon at 761. Indeed, the President of the United States, as a coordinate branch of the federal government, would seem to have the same duty as the court, to examine the motives of the judges ruling on cases involving his authority, before determining whether to give deference to a judicial ruling. Indeed, when judges twist the Constitution and statutes of the nation so as to give effect to their political will, the judicial branch acts like a political branch of government, and ceases to have any legitimacy to order another co-equal branch of government to do anything.

For example, if the President were to determine that District Judge Chuang, who enjoined the Second Executive Order in Maryland, was agitated by the undoing of the work of a prior administration in which he served in a senior capacity, could the President conclude that the judge was motivated by his "animus" toward the current President and his policies? Should the judge's prior statements and acts be evaluated to determine if his service as Deputy General Counsel of the Department of Homeland Security from 2009 to 2014 colored his decision about an EO undoing the immigration policies of the last administration?[19] Can the judge's motives be discerned from the fact that, in his previous position, he reportedly "pursued policies that are diametrically opposed to those of President Trump [and from which] many legal scholars and political commentators ... suggest that the impartiality of Judge Chuang's ... ruling 'might reasonably be questioned'"? *Id.* Should the President then treat the judge's novel and constitutionally unsupportable injunction as being invalid and unenforceable?[20]

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[19] M. Leahy, "Impartiality of Federal Judge Who Blocked Trump EO May Be In Question," Breitbart (Mar. 21, 2017).

Indeed, counsel for respondents conceded his challenge was grounded in "never-Trumpism" in oral argument before the Fourth Circuit:

> Judge Niemeyer: "If a different candidate had won the election and then issued this order, I gather you wouldn't have any problem with that?"
>
> * * *
>
> Counsel for Respondents Omar Jadwat: "Yes, your honor, I think in that case, it could be constitutional."

CONCLUSION

For the foregoing reasons, the decisions of the Fourth and Ninth circuit courts below should be reversed, and all injunctions should be vacated.

Respectfully submitted,

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[20] No challenges to similar Executive Orders issued by prior presidents have been successful. *See* "A Legal Analysis of New Proposals to Limit Immigration from Muslim Countries into the United States," USJF Legal Policy Paper at 2-4 (Feb. 12, 2016).

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In The
Supreme Court of the United States

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DONALD J. TRUMP, ET AL.,

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v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

◆

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

◆

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Fourth And Ninth Circuits**

◆

BRIEF OF *AMICI CURIAE* CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

◆

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INTERESTS OF *AMICI CURIAE*

Amici, National Association for the Advancement of Colored People, Advocates for Youth, Center for Reproductive Rights, Chicago Lawyers' Committee for Civil Rights Under Law, Judge David L. Bazelon Center for Mental Health Law, Mississippi Center for Justice, National Center for Lesbian Rights, National Urban League, Southern Coalition for Social Justice, and Washington Lawyers' Committee for Civil Rights and Urban Affairs, are national and regional civil rights groups interested in the promotion of civil liberties throughout the country, and the elimination of discrimination in any form.[1]

1. The National Association for the Advancement of Colored People (NAACP) is the nation's largest and oldest civil rights grassroots organization. Since its founding in 1909, the mission of the NAACP has been to ensure the political, educational, social, and economic equality of all persons and to eliminate race-based discrimination. The NAACP has fought in the courts for decades to protect the guarantee of equal protection under law. To advance its mission, the NAACP has represented parties in landmark civil rights cases, perhaps most

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[1] *Amici* submit this brief pursuant to Sup. Ct. R. 37.3(a); all parties have consented to its filing. Pursuant to Sup. Ct. R. 37.6, *amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part; no party or party's counsel contributed any money that was intended to fund preparation or submission of the brief; and no person, other than *amici curiae*, their members and their counsel, contributed money that was intended to fund preparation or submission of the brief.

famously in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), which outlawed segregation in public schools. The NAACP also has filed numerous *amicus* briefs over its decades of existence in cases that significantly impact minority groups.

2. The Advocates for Youth (Advocates) is a nonprofit organization that helps young people make informed and responsible decisions about their reproductive and sexual health. For more than three decades, Advocates has partnered with youth leaders, adult allies, and youth-serving organizations to advocate for effective adolescent reproductive and sexual health programs and policies. In 2017, Advocates launched the Muslim youth Leadership Council (MyLC). MyLC is a yearlong Leadership Council dedicated to bringing together young Muslim-identifying people in the United States and furthering their goals of becoming leaders within their communities and beyond. Each year MyLC recruits and trains 15-20 young people who advocate for the inclusion of young Muslim-identifying people in the planning, implementation, and evaluation of Reproductive Justice related programming and policies at the local, state, and federal levels.

3. The Center for Reproductive Rights (CRR) is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, CRR's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care.

Since its founding in 1992, CRR has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). As a rights-based organization, the Center has a vital interest in protecting individuals who endeavor to exercise their fundamental rights free from unwarranted government intrusion and discrimination. CRR's ability to bring litigation challenging executive and regulatory action, and to seek relief where individuals are threatened with irreparable harm, is crucial to its mission.

4. The Chicago Lawyers' Committee for Civil Rights (CLCCR) is a non-profit public interest law organization founded in 1969. CLCCR works to secure racial equity and economic opportunity for all. CLCCR provides legal representation through partnerships with the private bar, and collaborates with grassroots organizations and other advocacy groups to implement community-based solutions that advance civil rights. In all practice areas, including education equity, fair housing, economic opportunity, hate crime prevention, and voting rights, CLCCR advocates for immigrants who have been subject to racially-discriminatory governmental practices and policies. CLCCR's goal is to ensure that America fulfills its promise of democracy and equal justice for all.

5. The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization

founded in 1972 to advance the rights of individuals with mental disabilities. The Bazelon Center advocates for laws and policies that provide people with mental illness or intellectual disabilities the opportunities and resources they need to participate fully in their communities. Its litigation and policy advocacy is based on the Americans with Disabilities Act's guarantees of non-discrimination and reasonable accommodation. People with mental illness or intellectual disability commonly face discrimination based on myths and stereotypes, and the eradication of such discrimination is among the Bazelon Center's primary goals.

6. The Mississippi Center for Justice (MCJ) is a non-profit public interest law organization founded in 2003 in Jackson, Mississippi and committed to advancing racial and economic justice. Supported and staffed by attorneys and other professionals, the Center develops and pursues strategies to combat discrimination and poverty statewide. One of *amicus*' original areas of interest involved predatory loan practices directed at migrant poultry workers, and MCJ has remained concerned about the plight of Mississippi's growing immigrant population for the last decade, particularly in the areas of access to healthcare, education, housing, and fair lending.

7. The National Center for Lesbian Rights (NCLR) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy

advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in combating discrimination and securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting the rights of LGBT immigrants and other immigrants to this country. Since 1994, NCLR's Immigration Project has provided free legal assistance to thousands of LGBT immigrants nationwide through, among other services, direct representation of immigrants in impact cases and individual asylum cases and advocacy for immigration and asylum policy reform.

8. The National Urban League is a civil rights organization dedicated to the empowerment of African Americans to achieve economic parity and racial equality. Founded in 1910 and headquartered in New York City, the League improves the lives of more than two million people annually across the nation through direct service programs, including education, employment training and placement, housing, and health. The Urban League seeks to ensure our civil rights by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational, or cultural.

9. The Southern Coalition for Social Justice is a non-profit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities in the south to advance their political,

social, and economic rights through the combination of legal advocacy, research, organizing, and communications. Originally, one of the SCSJ's primary practice areas was immigrants' rights, which remains important to its mission. SCSJ frequently advocates on behalf of immigrants who have been subject to racially-discriminatory governmental practices, and promotes the application of basic human rights principles to policies affecting migrant communities.

10. The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation. In furtherance of this mission, the Washington Lawyers' Committee has a dedicated Immigrant Rights Project, which has served as a critical resource for some of the most vulnerable populations in the Washington, D.C. area: newcomers and non-English speakers, who are often discriminated against on the basis of their religious background or national origin, and who are often unaware of their legal rights and protections.

SUMMARY OF ARGUMENT

In promotion of their interests, *amici* respectfully submit this brief to advance a key argument in support of affirming the lower courts' rulings. *Amici* submit that the balance of equities and public interest weigh heavily in favor of enjoining President Trump's March

6, 2017 Executive Order, "Protecting the Nation From Foreign Terrorist Entry into the United States" (the "Executive Order"), as the Executive Order improperly promotes social categorization and stereotyping that endangers the lives and well-being of individuals of the Muslim faith. The Executive Order is the product of several centuries of Muslim stereotyping in this country, and harms even those who are not the direct victims of specific attacks on immigrants. Here, the evidence demonstrates that, regardless of the Government's *post-hoc* explanations, it was motivated by animus toward Muslims and singled out, as a proxy, those born in the targeted majority-Muslim countries.

◆

ARGUMENT

Social Categorization and Stereotyping Creates Dangerous Conditions for Members of Minority Groups.

A. Stereotyping Minority Groups Creates a Climate for Discrimination.

The balance of equities and public interest in this case weigh in favor of enjoining the Executive Order due to the discrimination it promotes. As the U.S. courts have long recognized, laws such as the Executive Order promote social categorization and stereotyping of Muslims that lead to the endangerment of the lives of those who practice Islam, a minority religion.

The Court has repeatedly stated that discriminatory stereotypes can improperly affect decision making. Most recently, the Court recognized that disparate impact liability prevents segregated housing patterns that might otherwise result from the role of "covert and illicit stereotyping." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015); *see also Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring) (recognizing that "subtle forms of bias are automatic, unconscious, and unintentional and escape notice, even the notice of those enacting the bias") (citations omitted).

In *Price Waterhouse*, the Court recognized the role that sex stereotyping plays in employment discrimination cases, explaining that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075.

Similarly, in *Cleburne*, the Court explained that "race, alienage, and national origin" are "so seldom relevant" to state interests, meaning that "such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In *Griggs*, the Court held that the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

The circuit courts also recognize that social categorization and stereotyping can create fertile grounds for discrimination in areas such as housing, employment decisions, and police actions. *See*, *e.g.*, *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) (rejecting "appeals to 'common sense' which might be infected by stereotypes" as insufficient to justify police surveillance of Muslim individuals, businesses, and institutions) (quoting *Reynolds v. City of Chicago*, 296 F.3d 524, 526 (7th Cir. 2002)); *Ahmed v. Johnson*, 752 F.3d 490, 503 (1st Cir. 2014) (finding "lack of explicitly discriminatory behaviors" does not preclude a finding of "unlawful animus" in employment discrimination because "unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus") (quoting *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999)); *United States v. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005) (recognizing that racial stereotyping continues to play a role in jury selection and the outcome of trials); *Thomas*, 183 F.3d at 42 (holding that Title VII's ban on "disparate treatment because of race" includes "acts based on conscious racial animus" and "employer decisions that are based on stereotyped thinking").

Relevant research shows that a psychological triggering phenomenon known as "priming" exacerbates stereotyping and makes it more extreme.

Priming occurs when "subtle influences . . . increase the ease with which certain information comes to mind." Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 69 (2008). In the case of racial stereotyping, which shares many attributes with stereotyping of Muslims, priming an individual with race-based stereotypes can influence later decisions by that individual. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 489 (2004).

Social science research repeatedly demonstrates that individuals have a persistent tendency to defer blindly to priming from authority figures. *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 375-76 (1963). Therefore, as the Court's decisions in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493-94 (1954) and *Loving v. Virginia*, 388 U.S. 1, 8-12 (1967), demonstrate, discrimination with the sanction of law raises unique and particular dangers.

B. The Executive Order Is the Product of Centuries of Discriminatory Stereotypes About Muslims.

This country, ever since Colonial times, has had a long history of official stereotyping of Muslims as un-American and unworthy of becoming Americans. During the Colonial era, two of the most outspoken public figures who disseminated stereotypes of Muslims (then known as "Mahometans") were Cotton Mather and Aaron Burr – they consistently referred to "Mahometans" in highly derogatory terms, including denouncing "that false Prophet and great Imposter Mahomet."[2]

Even after this country became independent, prejudice against Muslims, as expressed through consistent stereotyping, continued throughout the nineteenth century and into the twentieth century.[3] For example, in discussing immigration legislation in 1910, Representative Burnett of Alabama repeatedly referred to "Syrians" – then a catch-all term for Middle Eastern immigrants who were Muslims – in derogatory terms, and made clear that he and his colleagues viewed those immigrants as "the dirty Syrian[s] of today," and among "the least desirable" aliens, because "the Syrians are the same way, mixed up with the Arabians and the people of African and western Asiatic countries, until they are not our kind of people; and they are not the kind of people from which those who settled this country sprang."[4] As set forth in Section C, *infra*, these are the same kind of statements recently made about Muslims.

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[2] Thomas S. Kidd, AMERICAN CHRISTIANS AND ISLAM: EVANGELICAL CULTURE AND MUSLIMS FROM THE COLONIAL PERIOD TO THE AGE OF TERRORISM 12 (2009); Thomas S. Kidd, *"Is It Worse to Follow Mahomet than the Devil?" Early American Uses of Islam*, 72 CHURCH HISTORY 766, 771-73, 779-80 (2003).

[3] *See, e.g.*, Erik Love, ISLAMOPHOBIA AND RACISM IN AMERICA 41, 86-89 (2017); Jeffrey L. Thomas, SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM 1-14 (2015); Peter Gottschalk & Gabriel Greenberg, *Common Heritage, Uncommon Fear: Islamophobia in the United States and British India, 1687-1947*, *in* ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE (Carl W. Ernst ed. 2013); Robert J. Allison, THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD 1776-1815 (1995).

In this century, the stereotyping of Muslims has continued unabated, leading to increased discrimination against Muslims, rising to the level of violence. Even prior to the Executive Orders in 2017, commentators documented and denounced the ongoing stereotyping of Muslims and the ensuing discrimination and violence.

Professor Perry recognized that "many commentators have suggested that Arabs generally and Muslims specifically may represent the last 'legitimate' subjects of slanderous imagery and stereotypes." Barbara Perry, *Anti-Muslim Violence in the Post-9/11 Era: Motive Forces*, 4 HATE CRIMES 172, 176 (Barbara Perry & Randy Blazak, eds. 2009). Political leaders have an outsized impact in fostering this stereotyping and its ensuing discrimination and violence: "Even more powerful in providing justifications for anti-Muslim violence is the explicit exploitation of public images and related fears by political leaders. To the extent that this is so, there emerges a climate that bestows 'permission to hate.'" *Id.* at 181. Thus, she concluded that:

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[4] HEARINGS BEFORE COMMITTEE ON IMMIGRATION AND NATURALIZATION, HOUSE OF REPRESENTATIVES, 61st Cong. 383, 386, 393, 396 (1910) (statement of Rep. John L. Burnett, Alabama).

> [S]tate practices provide a context and a framework for the broader demonization and marginalization of minority groups. Through its rhetoric and policies, the state absorbs and reflects back onto the public hostile and negative perceptions of the Other – in this case, Muslims. Public expressions of racism by state actors are constituted of and by public sentiments of intolerance, dislike, or suspicion of particular groups. **Thus, the state seems to reaffirm the legitimacy of such beliefs, while at the same time giving them public voice**.

Id. at 185 (emphasis added).

Professor Aziz, who testified to Congress on this issue, wrote, "In the United States, numerous polls show a rise in anti-Muslim bias that is manifesting into tangible hate crimes, mosque vandalism, employment discrimination, and bullying of Muslim kids in schools." Sahar F. Aziz, *Losing the "War of Ideas": A Critique of Countering Violent Extremism Programs*, 52 TEXAS INT'L L.J. 255, 265 (2017).

Professor Cashin wrote that "Explicit, public anti-Muslim comments do not appear to engender similar widespread outrage" as do racist remarks, and instead "appear to be on the rise," because of the lack of public rejection of such views. Sheryll Cashin, *To Be Muslim or Muslim-Looking in America: A Comparative Exploration of Racial and Religious Prejudice in the 21st Century*, 2 DUKE FORUM L. & SOC. CHANGE 125, 127-28 (2010). "In the wake of the 9/11 attacks, it is more socially acceptable to express explicit bias against Arabs or Muslims than against blacks or other racial/ethnic groups." *Id.* at 132.

Muslim stereotyping has manifested in the form of violence against Muslims, or even those who are erroneously perceived as being Muslims (such as Sikhs). Although the serious under-reporting of such crimes causes the available statistics to understate the actual prevalence of anti-Muslim violence,[5] it is well-documented throughout 2016,[6] and continuing into 2017. *See* Section D.2, *infra*.

Thus, from Colonial times to the present, this country has had a long and deliberate political tradition of officially stereotyping Muslims – a history that created an atmosphere that legitimizes and encourages discrimination and violence against Muslims.

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[5] Todd H. Green, THE FEAR OF ISLAM: AN INTRODUCTION TO ISLAMOPHOBIA IN THE WEST 282-84 (2015) (discussing statistics on crimes against Muslims and problems with underreporting); *see generally* U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report, HATE CRIME VICTIMIZATION, 2004-2015 (2017) (noting problems with underreporting and different methodologies for categorizing these crimes); U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report, HATE CRIMES REPORTED BY VICTIMS AND POLICE (2005) (same).

[6] *See, e.g.*, Aziz, 52 TEXAS INT'L L.J., *supra*, at 266-68 & nn. 65-80 (collecting examples from 2015 and 2016 of violence against Muslims).

C. The Executive Order Is Based on Stereotypes About Muslims as "Anti-American" and "Terrorists."

As in the cases cited above, the Muslim ban bears the imprimatur of the Executive Branch and engenders precisely the type of discriminatory harms that the Court has held cannot withstand constitutional muster. Since December 7, 2015, when then-candidate Donald Trump issued a written statement calling for a "total and complete shutdown on Muslims entering the United States" in the wake of the terror attack in San Bernardino, California, a "Muslim ban" has been a major item on his policy agenda.[7] At that time, his campaign explained that "there is great hatred towards Americans by large segments of the Muslim population." He also characterized a ban on Muslim entry into the United States as a way to stop our country from being the "victims of the horrendous attacks by people that believe only in Jihad."[8] He did so with no evidence other than extensive stereotyping.

Mr. Trump's labeling of Muslims as "terrorists" has been relentless. On January 4, 2016, the Trump campaign premiered its first television advertisement, in which Trump "call[ed] for a total and complete shutdown of Muslims entering the United States" until doubts about "radical Islamic terrorism" can be "figure[d] out."[9] The link the Presidential candidate drew between "radical Islamic terrorism" and all individual Muslims entering the United States was stated with no supporting evidence. Subsequently, candidate Trump, in a major foreign policy speech on April 27, 2016, stated that "The struggle against radical Islam also takes place in our homeland. . . . We must stop importing extremism through senseless immigration policies."[10] Again, he made these statements, relying entirely on stereotypes, and presenting no evidence or facts to support these claims.[11]

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[7] J.A. 179-180 & n.5 (*Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575-76 & n.5 (4th Cir. 2017) (*en banc*), *cert. granted*, 137 S. Ct. 2080 (2017)); *see also* Christine Wang, "Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing," CNBC.COM (May 8, 2017), https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html.

[8] J.A. 179-180 & n.5 (*Int'l Refugee Assistance Project*, 857 F.3d at 575 n.5).

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[9] Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to United States*, CNN POLITICS (Dec. 8, 2015), http://edition.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration; *see also* Jill Colvin and Steve Peoples, "*Trump's First TV Ad Pushes Proposal to Ban Muslims from Entering U.S.*," THE GLOBE AND MAIL (TORONTO), Jan. 5, 2016, at A9.

[10] N.Y. TIMES, *Transcript: Donald Trump's Foreign Policy Speech* (Apr. 27, 2016).

[11] Although President Trump has publicly labeled Muslims as dangerous "terrorists," he has failed to condemn the hate crimes perpetuated *against* them over the past year. *See*, *e.g.*, Jack Moore, *Trump's Failure to Condemn Minnesota Mosque Attacks Stirs Social Media Anger*, NEWSWEEK (Aug. 17, 2017), http://www.newsweek.com/trump-failure-condemn-minnesota-mosque-attack-stirs-social-media-anger-647694 (President Trump's silence following a January 2017 shooting at a Quebec mosque, June 2017 attacks in Virginia and London, and an August 2017 bomb attack at a mosque in Minnesota).

Just one week after his Inauguration, President Trump acted to fulfill his campaign pledge. On January 27, 2017, he signed Executive Order 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 FED. REG. 8977 (Feb. 1, 2017). Among other immigration restrictions, Executive Order 13,769 temporarily banned all nationals from seven majority-Muslim countries from entering the United States: Iran, Iraq, Syria, Sudan, Yemen, Libya, and Somalia.

While many surrogates of the current Administration pushed back at the characterization of E.O. 13,769 as a "Muslim ban," the President embraced it. He told the public via Twitter, "[c]all it what you want, [E.O. 13,769] is about keeping bad people (with bad intentions) out of country!"[12] Throughout his campaign, and now in office, President Trump has consistently labeled Muslims as "bad people" who must be kept out of America in the interest of national security.

After multiple lower courts enjoined enforcement of E.O. 13,769,[13] the Trump Administration announced plans to revise the order. On March 6, 2017, the Administration issued Executive Order 13,780, "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 FED. REG. 13,209 (Mar. 9, 2017). The revised Executive Order preserves several core provisions of the prior Order: it suspends the United States Refugee Admissions Program for 120 days, and it suspends the entry into the United States of nationals of six of the seven majority-Muslim countries designated in E.O. 13,769 for 90 days. *See* E.O. 13,780, §§ 6(a); 2(c). As did E.O. 13,769, the redrafted Order targets only majority-Muslim countries, as proxies for all Muslims.

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[12] Jane Onyanga-Omara, *British PM Criticizes Trump's Travel Ban; Theresa May Calls Controversial Move "Divisive and Wrong,"* USA TODAY, Feb. 2, 2017, at 5A.

[13] *Washington v. Trump*, No. 2:17-cv-141, Temporary Restraining Order, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *motion for stay denied*, 847 F.3d 1151 (9th Cir. 2017); *Tootkaboni v. Trump*, No. 1:17-cv-10154, Temporary Restraining Order, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Darweesh v. Trump*, No. 1:17-cv-00480, Temporary Restraining Order, 2017 WL

The official action of marking a social group, Muslims, as a dangerous "fifth column," drives societal biases against Muslims in this country. It creates conditions where violence against Muslims is seen as more acceptable because they are perceived, in President Trump's words, to be "bad people."

In 2011, the Pew Research Center surveyed Western cultures to determine which characteristics Western populations associate with people in the Muslim world. That survey found that about half of the

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388504 (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017) (preliminary injunction).

respondents characterized Muslims as "violent," and more than half characterized Muslims as "fanatical."[14]

Thus, it is no surprise that the Pew Research Center's 2017 survey of Muslims in this country found that discrimination against them was increasing, and that American Muslims are even more concerned in light of the President's Executive Orders.[15]

In a recent news analysis discussing ongoing social science research relating to stereotyping against the most recent Muslim immigrants in this country and Canada, *Science* magazine recognized that "Prejudice of course can be directed against any group by any other. But immigrants, and even more so refugees and asylum seekers, may be especially vulnerable because of their tenuous place in a larger society." Jennifer Couzin-Frankel, ***Battling Bias: How Can We Blunt Prejudice Against Immigrants?***, 350 SCIENCE 687, 688 (May 19, 2017). This applies with even greater force to child immigrants and refugees, who are even more vulnerable than their parents. (The recent escalation of deportation orders similarly harms child immigrants and refugees.)

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[14] Pew Research Center, Global Attitudes Project, *Muslim-Western Tensions Persist* (July 21, 2011), http://www.pewglobal.org/2011/07/21/muslim-western-tensions-persist/#.

[15] Pew Research Center, *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream* (July 26, 2017) http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/; *see also* Abigail Hauslohner, *Anti-Muslim Discrimination on Rise in U.S., Study Finds*, WASHINGTON POST, July 26, 2017, at A3.

Recent social science research demonstrates both the already-existing climate of prejudice against Muslims and Arabs and the unconscious nature of that bias. "Non-Arab and non-Muslim test takers manifested strong implicit bias against Muslims. These results are in sharp contrast to self-reported attitudes." Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL. 71, 93 (2010). A "sample of U.S. citizens on average viewed Muslims and Arabs as not sharing their interests and stereotyped them as not especially sincere, honest, friendly, or warm." Susan T. Fiske, *et al.*, *Policy Forum: Why Ordinary People Torture Enemy Prisoners*, 206 SCIENCE 1482-83 (Nov. 26, 2004).

D. Government Legitimization of Muslim Stereotypes Has Encouraged Violence Against Muslims, and Inhibited Millions of Muslims in the Practice of Their Religion.

There can be no doubt that, given its origin and history, the Executive Order is based on the social categorization of Muslims as "anti-American," "terrorists," those with "hatred for Americans," and "bad people." In this case, President Trump's repeated, unsubstantiated claims that Muslims are dangerous, and should be barred from entering the country, are just the "cue" needed to release otherwise suppressed and legally prohibited violence against Muslims. The President's deliberate stereotyping of Muslims as "dangerous" and "terrorists" and his ban on the immigration of Muslims, place an official "imprimatur" on those stereotypes, magnifying their effect.

This Court, in *Cleburne*, held that a city council's insistence that a group home for mentally impaired individuals obtain a special-use permit to operate was premised on unsubstantiated "negative attitudes or fears" of nearby property owners, which were impermissible bases for disparate treatment. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Although "'[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect'" *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Here, too, the law cannot give effect to private biases against Muslims.

1. Government Stereotyping Leads to Violence and Discrimination.

When someone in a position of authority, as President Trump, categorizes Muslims as dangerous and terrorists, he communicates that Muslims are "outsiders" and not full members of the political community. By way of comparison, the Court found unconstitutional a school sponsored religious message, delivered over the school's public address system, by a speaker representing the student body, under the supervision of the school faculty, and pursuant to a school policy. *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 309-10 (2000). The Court's reasoning was based on its view that the school policy created two classes of people – those who adhered to the favored religion, and those who did not. *Id.*

The President's steadfast support of what he calls a "Muslim ban" similarly sends the message that those who adhere to Islam as their religion are *not* part of American society, as opposed to Christians and other non-Muslims, who are favored by the ban. In doing so, he "sends a message to non-adherents [to the Christian faith] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Executive Order and the President's statements characterize Muslims as homogenous and a national threat and thereby engender a climate conducive to violence against Muslims.

2. The President's Statements Have Encouraged Violence.

This Administration has tolerated, if not encouraged, hate crimes against Muslims, through its determination to implement a travel ban affecting Muslims – in effect telling all Muslims (whether American-born or foreign-born) – that they do not belong here.

The February 22, 2017 shooting of Srinivas Kuchibhotla, Alok Madasani, and Ian Grillot in Olathe, Kansas is the most horrifying example of the social categorization of Muslims as enemies of the American people.[16] Kuchibhotla and Madasani, two engineers at a local technology company, and both Indian immigrants to the United States, had gathered with co-workers at a bar near their office to watch a local college basketball game. Also at that bar was Adam Purinton, a 51-year-old U.S. Army veteran who mistook both Kuchibhotla and Madasani as Iranians (which is one of the nationalities targeted by the Executive Order and its predecessor as barred from entry into the United States). Purinton approached and shot at Kuchibhotla and Madasani, telling them to "get out of our country!" Kuchibhotla was killed, and Madasani was wounded. Ian Grillot, a patrolman present at the scene, was wounded while attempting to intervene. Purinton fled across the state border into Missouri and told a bartender in a second bar that he needed to hide out because he had just shot two "Iranians." Putting aside Purinton's stereotyped view that his victims were Iranians simply because they were foreign-born immigrants, his actions demonstrate the danger that social categorization can cause by exaggerating both the distance between in-groups ("real Americans") and out-groups ("Iranians"), as well the homogeneity of the out-group.

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[16] Audra D. S. Burch, *Facing a Void Left by Hate*, N.Y. TIMES, July 9, 2017, at A1, A12-A13; Matt Stevens, *Justice Dept. Calls Killing in Kansas a Hate Crime*, N.Y. TIMES, June 10, 2017, at A18; John Eligon, et al., *Drinks at a Bar, Ethnic Insults, then Gunshots*, N.Y. TIMES, Feb. 25, 2017, A1, A17; *see also United States v. Purinton*, No. 2:17-cr-20028, Indictment (D. Kan. June 9, 2017).

The Administration's travel ban against Muslims does just that.

In addition, a rash of arsons and vandalism at mosques has plagued the United States following the issuance of E.O. 13,769. On January 28, 2017, one day after the first Order, a fire destroyed the Islamic Center of Victoria, Texas.[17] On February 24, 2017, a blaze broke out in the entrance of the Daarus Salaam Mosque near Tampa, Florida.[18] Combined with two arsons of mosques shortly before President Trump's inauguration, the United States has seen an unprecedented surge of hate crimes against the Muslim community.[19]

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[17] U.S. Attorney's Office, Southern District of Texas, *Victoria Man Charged with Hate Crime in Burning of Mosque* (June 22, 2017), https://www.justice.gov/usao-sdtx/pr/victoria-man-charged-hate-crime-burning-mosque; Anonymous, *Fire Destroys Texas Mosque in Early Hours*, N.Y. TIMES, Jan. 29, 2017, at A4; *see also United States v. Perez*, No. 6:17-cr-00035, Superseding Indictment (S.D. Tex. June 22, 2017).

[18] Tony Marrero, *Mosque Fire Deliberately Set*, TAMPA BAY TIMES, Feb. 25, 2017, at 1; Anonymous, *2nd Florida Mosque Hit by Arson in Past 6 Months*, ST. LOUIS POST-DISPATCH, Feb. 25, 2017, at A6.

[19] Albert Samaha & Talal Ansari, *Four Mosques Have Burned in Seven Weeks – Leaving Many Muslims and Advocates Stunned*, BUZZFEEDNEWS (Feb. 28, 2017), https://www.buzzfeed.com/albertsamaha/four-mosques-burn-as-2017-begins; Taylor Goldenstein, *Blaze Completely Destroys Islamic Center's Building*, AUSTIN AMERICAN-STATESMAN, Jan. 8, 2017, at B1.

Other recent attacks on mosques in the United States include an explosion at a mosque in Bloomington, Minnesota in August 2017.[20]

On March 3, 2017, a Sikh man was shot in his Kent, Washington driveway when a man approached him and said "go back to your own country."[21]

It is undeniable that the public interest in this country is best served by tolerance of different religions as the Constitution requires, and tolerance of both foreign-born and American-born adherents of different religions. The public interest is not served by discriminatory stereotyping against Muslims that legitimizes or encourages discrimination and violence in our country, or by a law which gives effect to private biases.

The insidious effect of the Muslim ban does not impact only those persons seeking to enter the United States from the seven designated countries. Instead, by promoting social stereotypes and priming individuals to act on those stereotypes, the ban creates fertile grounds for violence against all minorities. The Executive Order fundamentally threatens the

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[20] Nick Corasaniti, *Minnesota Mosque Shaken by an Early-Morning Blast*, N.Y. TIMES, Aug. 6, 2017, at A19; Kurtis Lee, *U.S. Muslims on Edge after Bombing; the FBI Is Leading the Investigation into an Attack that Damaged a Minnesota Mosque*, L.A. TIMES, Aug. 6, 2017, at A10.

[21] Ellen Barry, *U.S. and Indian Officials Condemn Shooting of Sikh*, N.Y. TIMES, Mar. 6, 2017, at A9; Cleve R. Wootson, *Sikh Man, 39, Shot in Suspected Hate Crime*, WASH. POST, Mar. 5, 2017, at A3.

American ideal of a diverse society working across divisions for the greater societal good.

3. Stereotyping and Discrimination Harms All Americans, Not Just Those Directly Affected by Specific Acts.

Social science research has consistently demonstrated that stereotyping of any group harms all individuals in that group, even those who are not directly affected by specific acts of violence or discrimination. For example, Professor McDevitt and several other researchers recognized that:

> Because bias crimes have the unique impact of reaching far beyond the primary victim, due to the dimension of victim interchangeability, every member of the minority group who is aware of the crime is affected by a solitary crime against one individual minority member.

Jack McDevitt, et al., *Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults*, 45 AM. BEHAVIORAL SCIENTIST 697, 712 (2001).

Similarly, Professor Thomas recognized that violent crimes on the basis of religious stereotypes, *i.e.*, against Muslims, have the same broader impact as do terrorist crimes:

> Nonetheless, terrorism and violent hate crimes . . . have at least one basic characteristic in common: the violence inflicted on the victims is also aimed at a

> larger community. . . . hate crimes directly target individual members of a social group but indirectly send a message of intolerance to the entire group. The victims of hate crimes are selected because of their symbolic value as representatives of the entire social group.

Jeffrey Thomas, SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM 137 (2015).

Senator John McCain recently recognized this fundamental principle when he criticized several fellow members of Congress who had made *ad hominem* attacks on a former government official due to that person's Muslim heritage:

> When anyone – not least a member of Congress – launches specious and degrading attacks against fellow Americans on the basis of nothing more than fear of who they are and ignorance of what they stand for, it defames the spirit of our Nation, and we all grow poorer because of it.

158 CONG. REC. S5106 (daily ed. July 18, 2012) (statement of Sen. John McCain).

Here, too, the Executive Order and the underlying statements by the President have only encouraged stereotyping of Muslims, which has adversely affected all Muslims, young and old, natives and recent immigrants.

◆

CONCLUSION

For the foregoing reasons, and those set forth in the briefs of the Respondents, the *amici curiae* respectfully request that this Court affirm the judgments of the Fourth and Ninth Circuits.

Respectfully submitted on September 13, 2017,

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Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAI'I, ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fourth And Ninth Circuits

BRIEF OF *AMICI CURIAE* COLLEGES AND UNIVERSITIES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are colleges and universities that submit this brief in support of Respondents. Though *amici* are located in the U.S., their missions and reach are global: they educate, employ, conduct research, and collaborate with students, faculty, and scholars from all over the world—individuals who speak different languages, practice different religions, and have wide-ranging life experiences. These individuals make significant contributions to their fields of study and to campus life by bringing their unique perspectives and talents to *amici*'s classrooms, laboratories, and performance spaces. They also contribute by making scientific discoveries, starting businesses, and creating literature and art, all of which redound to the benefit of others far beyond *amici*'s campuses. So too, by studying and engaging with other scholars in the U.S., these individuals gain a greater understanding of and appreciation for the values we hold dear, including democratic principles and respect for the rule of law, tolerance, and human rights—values which they may then share with citizens of their home countries.

Recognizing the invaluable contributions of international students, faculty, and scholars, *amici* make significant efforts to attract the most talented individuals from around the globe. In light of their educational missions, *amici* are deeply interested in ensuring that individuals from around the globe can continue to enter the U.S. and share their unique skills and perspectives.

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than *amici* or their counsel, made any monetary contribution intended to fund this brief. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk.

Boston University educates students "to be reflective, resourceful individuals ready to live, adapt and lead in an interconnected world." The University remains dedicated to the principle "that research, scholarship, artistic creation and professional practice should be conducted in the service of the wider community—local and international," and this principle endures in the University's insistence on the value of diversity. Boston University has more than 33,000 undergraduate and graduate students from more than 130 countries. In 2016, Boston University welcomed to its campus over 9,000 international students and 1,300 international scholars who hailed from 88 countries, and enrolled more than 2,500 students in the University's 90-plus study abroad programs offered in more than 25 countries on six continents.

Brandeis University affirms its unwavering commitment to creating and sustaining an educational and work environment that celebrates diversity, equity, and inclusion. We recognize the vital importance of preparing students to enter the workforce and the larger society with the knowledge, skills, and disposition needed to effectively engage with social differences. The diversity of our faculty, staff, and students is an essential ingredient in meeting these goals.

Brown University has undertaken, as its mission, service to "the community, the nation, and the world by discovering, communicating, and preserving knowledge and understanding in a spirit of free inquiry, and by educating and preparing students to discharge the offices of life with usefulness and reputation." Brown further states that its "strength is derived from the talent and dedication of its faculty, students, and staff, working in concert with local and global partners."

Bucknell University knows that providing an excellent undergraduate education to all students requires a firm and demonstrated commitment to diversity and inclusiveness. Since admitting its first international student in 1858—19 year old Maung Shaw Loo of Burma (now Myanmar)—Bucknell has benefited from and greatly valued the unique insights and experiences that its international students, faculty, and staff bring to campus. Bucknell is committed to continuing to encourage these individuals to join its community and fulfilling its mission to foster an environment in which students develop intellectual maturity, personal conviction, and strength of character, informed by a deep understanding of different cultures and diverse perspectives.

Carnegie Mellon University ("CMU") seeks to "build on leadership in world-class education and research outside the borders of a traditional university campus; focus on continued international engagement, and deeper and broader incorporation of the full CMU experience around the world."

Case Western Reserve University considers diversity and inclusion core institutional values. The University believes that the presence of people with a broad range of backgrounds and perspectives enhances the experiences of everyone on campus—and specifically improves the quality of education and research. The

University's last two strategic plans both have emphasized the "promotion of an inclusive culture of global citizenship" as essential to our mission of discovering new knowledge and deepening understanding. Since 2007 the proportion of undergraduates from outside the U.S. has quadrupled, climbing to 12% in the fall of 2016. Meanwhile, international students totaled a quarter of graduate and professional school enrollment last year. The University also has more than 250 research and educational partnerships with institutions around the world. In an increasingly global world, we have a societal obligation to help ensure that our faculty and students can engage effectively with individuals from cultures and countries around the world. We have made enormous progress, and we are committed to doing much more to fulfill that responsibility.

Columbia University "seeks to attract a diverse and international faculty and student body, to support research and teaching on global issues, and to create academic relationships with many countries and regions. It expects all areas of the university to advance knowledge and learning at the highest level and to convey the products of its efforts to the world."

Cornell University has made strong and committed statements of support for our international students, faculty, and staff who contribute enormously to the university and have been adversely affected by the recent Executive Orders on Immigration. Cornell's Interim President, Hunter Rawlings. sent the following message to the Cornell community on January 29: "President Donald Trump's recent executive order imposing a 90-day ban on immigrant and nonimmigrant entry to the United States from seven predominantly Muslim nations is deeply troubling and has serious and chilling implications for a number of our students and scholars. It is fundamentally antithetical to Cornell University's principles." That position has been reiterated by our new President, Martha Pollack.

Dartmouth College counts among its core values "embrac[ing] diversity with the knowledge that it significantly enhances the quality of a Dartmouth education," as well as "foster[ing] lasting bonds among faculty, staff, and students, which encourage a culture of integrity, self-reliance, and collegiality and instill a sense of responsibility for each other and for the broader world."

Duke University "promotes acquisition of knowledge in the service of society through an expansive view of global citizenship, which embraces freedom of inquiry, innovation without boundaries, and strength through diversity. . . . Duke is committed . . . to find solutions to global challenges and the education of leaders to understand and address those challenges." Duke further states that "[s]ince talent pools are now transnational, a university must draw the most powerful and creative minds from around the world to stay at the forefront of discovery."

Emory University's "mission is to create, preserve, teach, and apply knowledge in the service of humanity," and Emory "welcomes a diversity of ethnic, cultural, socioeconomic, religious, national, and international backgrounds, believing that the intellectual and social energy that results from such diversity is critical to advancing knowledge."

The George Washington University ("GW"), located in the nation's capital, relies on faculty and students from around the world to promote diverse points of view in the classroom and in research endeavors. These international faculty and students account for or contribute significantly to scientific breakthroughs and nurture the intellectual curiosity of their American counterparts. More than 4,000 international students are currently enrolled at GW, constituting approximately 15 percent of the student body.

Georgetown University is the oldest Catholic and Jesuit institution of higher learning in the United States. Guided by its Catholic and Jesuit identity, Georgetown University is deeply committed to inter-religious dialogue and providing an environment in which members of all faiths and backgrounds are welcomed. Since its founding, Georgetown University has been a global community, engaged in training future generations of global citizens to lead and make a difference in the world, and is made stronger by religious, cultural and international diversity.

Founded in 1636, **Harvard University** was formally chartered in 1650 for "the advancement of all good literature, arts, and sciences." Finding that such advancement is best accomplished by persons of all nations, for persons of all nations, Harvard presently enrolls more than 4,900 international students and hosts nearly 5,000 more international scholars at its Cambridge and Boston campuses. These figures reflect a "robust commitment to internationalism" that University President Drew Faust has described as "integral to all we do, in the laboratory, in the classroom, in the conference hall, in the world."

Johns Hopkins University's mission is "[t]o educate its students and cultivate their capacity for lifelong learning, to foster independent and original research, and to bring the benefits of discovery to the world."

Massachusetts Institute of Technology ("MIT") gains tremendous strength by attracting and nurturing talent from around the world. More than 40% of MIT's faculty, 40% of MIT's graduate students, and 10% of MIT's undergraduates are international. As MIT's President recently explained, MIT's faculty, students, scholars, and staff from 134 nations are what help ensure that MIT is a place of "rigor, ingenuity and real-world problem-solving where generations of bright young minds have come from every corner of the Earth to make something of themselves and work together to make a better world."

Middlebury College's commitment to global education and language learning is evident throughout our 37 international sites, graduate programs in international studies, and diverse faculty, staff and student body at all of our locations. Middlebury is devoted to building a world with a robust and inclusive public sphere, where ethical citizens work across intellectual, geographical, and cultural borders. The diversity of our faculty, staff, and students contributes in myriad ways to our "pursuit of knowledge unconstrained by national or disciplinary boundaries" as we prepare Middlebury students to address the world's most challenging problems.

Northeastern University remains committed to fostering a diverse, inclusive, and a truly global network of students and scholars. Even as we await the Court's final resolution of the ban's constitutionality, Northeastern will not waver from its core values and will continue to support affected members of our community. Northeastern remains deeply concerned by the travel ban's negative impact on the ability of students and scholars to collaborate across borders. Further, we remain concerned that the chilling effect of the Order—and the possibility it may be expanded or made permanent—will curtail the nation's ability to attract the world's best and brightest people.

Northwestern University is committed to the unencumbered pursuit of excellence and knowledge through exceptional teaching, innovative research, and the personal and intellectual growth of its students in a diverse academic community that reflects the world to which we are inextricably connected.

Princeton University, established in 1746, "advances learning through scholarship, research, and teaching of unsurpassed quality, with an emphasis on undergraduate and doctoral education that is distinctive among the world's great universities, and with a pervasive commitment to serve the nation and the world."

Rice University "aspires to pathbreaking research, unsurpassed teaching, and contributions to the betterment of our world," seeking to fulfill this mission "by cultivating a diverse community of learning and discovery that produces leaders across the spectrum of human endeavor." The University believes that "diversity of all types . . . enriches the learning environment at Rice and improves the quality of a Rice education for all students."

Stanford University "welcomes and embraces students and scholars from around the world who contribute immeasurably to our mission of education and discovery."

Tufts University has a reputation for shaping active citizens who give back to the global community of which we are all a part. With people from over 115 countries, the reach of Tufts' active citizenry literally spans the globe. Tufts maintains its fundamental commitment to its international students, faculty, and staff because they are as much a part of our community, as we are of theirs.

The University of Chicago states that "[d]iversity for the University is . . . particularly germane to our core perspective. We must ensure that our scholarly community is composed of a rich mix of individuals who, through their own distinctive viewpoints, contribute to the intellectually challenging culture of the University."

The University of Michigan states that "our ability to attract the best students and faculty from around the globe enhances our teaching, learning, research and societal impact and is in part responsible for our standing as a great public research university."

The University of Pennsylvania states that its "roots are in Philadelphia, the birthplace of American democracy. But Penn's reach spans the globe. . . . Penn research and teaching encourage lifelong learning relevant to a changing global society. Effecting potent positive impact in our neighborhoods, nation, and world are the bricks on which democracy and global citizenship are built, and are the cornerstones of a Penn education."

The University of Southern California ("USC") is, and has always been, a global university. As the university that traditionally hosts the largest number of international students among all universities, these scholars add great value to our richly diverse campus community. We support efforts to ensure all of our scholars, regardless of their national origin or religious affiliation, can continue to study, research, and teach at our university.

Vanderbilt University's mission is to serve as a center for scholarly research, informed and creative teaching, and community outreach nationally and abroad. In pursuit of this mission, Vanderbilt values inclusive excellence: intellectual freedom and advancement that facilitates open inquiry, honest dialogue, compassion, and cross-cultural sensitivity. Inclusive excellence is essential to Vanderbilt's vision of training "global citizens," and requires the support of its faculty, staff, students, and alumni, as well as an appreciation of their diverse backgrounds and experiences. At Vanderbilt, cultivating a culture of global citizenship is advanced through attracting and retaining the best students, scholars, and faculty from across the globe to engage in programs and advocacy geared toward ensuring a climate of justice, access, equity, and opportunity for all students and society at large.

At **Washington University in St. Louis**, we value a long tradition of drawing talented people from all around the world to our community. These students and scholars integrate global perspectives into classroom conversations, informal university gatherings, and the greater St. Louis community. We believe that we all draw strength through our differences, and this diversity is vital to the creation of knowledge, problem solving, and productivity.

Worcester Polytechnic Institute ("WPI") is a globally-engaged premier research institution founded in 1865 to create and convey to the next generation the latest science and engineering knowledge in ways that are most beneficial to society in the United States and around the globe. At present, WPI has 32 graduate and undergraduate students from the current six affected countries (29 from Iran, 2 from Syria, and 1 from Libya), and dozens of students from those countries apply for admission each year. In 2017, applications from the six affected countries were down by 18% from 2016, before the travel ban was announced. Over time, WPI expects the travel ban's restrictions will have a further chilling effect on its ability to attract and retain the finest students and faculty from around the world to further its academic mission.

Yale University is committed to improving the world today and for future generations through outstanding research and scholarship, education, preservation, and practice. Yale educates aspiring leaders worldwide who serve all sectors of society through the free exchange of ideas in an ethical, interdependent, and diverse community of faculty, staff, students, and alumni. Yale's reach is local and international, engaging with people and institutions in the U.S. and across the globe in the quest to promote cultural understanding, improve the human condition, and delve more deeply into the unknown. Yale is more than an institution of higher education; it is a community where people of diverse cultures and nationalities live, study, and work, connected by their similarities and enriched by their differences.

SUMMARY OF ARGUMENT

American colleges and universities have long recognized the importance of attracting international students, faculty, staff, and scholars. International scholars and faculty share important insights about conditions, traditions, and cultural values and practices in their home nations. Their work leads to critical advancements across all disciplines, from science and technology to arts and letters, often through cross-border collaborations that enhance their teaching and research. International students study here and return home as leaders in business, medicine, politics, and other fields. The benefits of international diversity in American higher education thus inure not only to colleges and universities themselves, but to the country and indeed the world as a whole.

The Executive Order issued on March 6, 2017, Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), (hereinafter, "EO" or "Order") impairs *amici*'s ability to attract talented individuals from around the globe and so to meet their goals of educating tomorrow's leaders. The Order suspends for 90 days the entry into the U.S. of nationals of six Muslim-majority countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen. EO § 2(c). Although the Order excludes certain visa-holders, it bars entry of nationals from the six affected countries who seek the categories of visas most commonly relied upon by *amici*'s international students, faculty, staff, and scholars. *Id.* §§ 2(c), 3(a) & (b). Despite the extensive individualized vetting a person must undergo to secure such visas, the Order would bar persons from the six affected countries from prospectively obtaining them, based solely on their nations of origin.

The Order directly threatens *amici*'s ability to attract persons not only from the six specified countries, but from around the world. The Order contradicts the values that American colleges and universities have traditionally touted as benefits of studying and working here, including the freedom of religion and equality embodied in the First and Fourteenth Amendments. Indeed, universities in other countries have used the Order to recruit international students, faculty, and scholars away from U.S. institutions. And large groups of scholars have threatened to boycott meetings and conferences hosted in the U.S. because of it.

Amici have already felt some of the Order's damaging effects. The Order was issued around the same time *amici* were sending admissions offers to prospective international students. Against the possibility that they might not obtain visas before the start of the fall semester, many of these admitted students may have chosen to pursue their education in other countries, rather than in the U.S. If permitted to stand, the Order will discourage many prospective international students from even applying to *amici*, or any other American university, during future application cycles. Similarly, international scholars and faculty advised many *amici* that they could not accept invitations and offers to work and teach here given the uncertainty surrounding the Order. Even worse, *amici* are harmed by the Order without any evidence that an appreciable number of nationals from these six countries—all of whom the government already vets before permitting them to study or work here—pose any threat to the safety or security of the U.S. or *amici*'s campuses. Upholding the Order will send the message that any country's citizens may be unjustly targeted for exclusion and the Order's negative effects will only worsen.

The harms of the Order to *amici* are not cured by limiting its scope to "foreign nationals who lack any bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087, 2088–89 (2017) (per curiam). This line has not resolved the uncertainty the Order injected into *amici*'s engagement with international students, faculty, and scholars, who are left to wonder at what point their relationship with *amici* becomes "bona fide." May prospective students enter the country to visit a campus before applying for admission? May a prospective faculty member visit the U.S. to give a job talk? May a scholar enter the country to attend but not speak at a conference? To accept an uncompensated academic appointment? Given these sorts of unresolved questions, the Order, even as partially stayed, has a pronounced chilling effect on persons who would apply to, or be recruited or invited by, *amici* in the future.

Because the Order both threatens American higher education and offends important, defining principles of our country, *amici* respectfully submit this brief in support of Respondents.

ARGUMENT

I. International Students, Faculty, and Scholars Are Vital to *Amici*, the U.S., and the World.

Amici's ability to foster rich educational environments depends in part on their ability to attract students, faculty, and scholars from around the globe. The international members of *amici*'s communities contribute to the vibrant campus life, world-class educational offerings, and research discoveries for which *amici* are known. These individuals' contributions redound to the benefit of all members of *amici*'s campus communities, the U.S., and the world.

A. Each *Amicus* Is Home to a Significant Percentage of Students, Faculty, and Scholars Who Are Citizens of Other Nations.

Amici are firmly committed to attracting the most exceptional individuals from all nations. In the 2015–16 academic year, U.S. universities welcomed more than one million international students.[2] *Amici*'s campuses reflect this trend. Each is home to a significant percentage of international students, faculty, and scholars—including many nationals of the six countries affected by the Order. This international presence is true across *amici*'s campuses even though *amici* vary in size, location, and focus.

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[2] Sara Custer, *Open Doors: U.S. Surpasses 1 Million International Students*, The Pie News (Nov. 14, 2016), https://thepienews.com/news/open-doors-us-surpasses-1-million-international-students/; Molly Land & Kathryn Libal, *Trump is Undermining Higher Education as a Global Enterprise*, The

For example, in fall 2016, Columbia University enrolled 1,416 international undergraduates (16% of Columbia's undergraduate population) and 7,571 international graduate and professional students (38.7% of its graduate/professional students). USC had 10,571 international students—24.1% of its student body—enrolled in fall 2016. At Duke, in fall 2016, 27% of the student population was international, including 13% of the undergraduate students, and 38% of the graduate students. The University of Pennsylvania's numbers are similar: 4,859 international students were enrolled in fall 2016, including 13% of the incoming freshmen and more than 25% of graduate students. As of October 2016, Stanford enrolled 4,164 international students, comprising 24% of the student population. In fall 2016, 6,764 international students were enrolled at the University of Michigan, comprising 15% of its student population.

Amici also benefit from the contributions of international faculty and scholars. More than 40% of MIT's faculty is international. At Princeton, approximately 30% of faculty appointees, 50% of

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Chronicle of Higher Education (Jan. 31, 2017), http://www.chronicle.com/article/Trump-Is-Undermining-Higher/239060.

academic professionals (professional researchers, specialists, librarians, and postdoctoral fellows), and 50% of visiting faculty and researchers are international (including lawful permanent residents). The University of Chicago counts as international (including lawful permanent residents) 24% of its faculty and other academic appointees, as well as 63% of its postdoctoral researchers and 10% of its staff members. At Cornell, 5.1% of faculty are international, as are 26.4% of other academic employees and postdocs. Yale's faculty is 10% international, as is approximately 65% of its postdoctoral research community. In fall 2016, Northwestern was home to 1,534 international scholars, in positions ranging from postdoctoral scholars to researchers and faculty. Thirty-four percent of Emory's 944 full-time research staff are nonresident aliens.

Amici's international students, faculty, and scholars include persons from the six countries affected by the Order. USC had 168 students from Iran alone enrolled in fall 2016. Princeton has more than 50 students and employees from the six affected countries, and its graduate school received approximately 150 applications for fall 2017 (and more than 700 applications in the past five years) from students from those nations. Over the past three years, Rice has hosted between 32 and 35 students from the six affected countries and received more than 600 applications from undergraduate and graduate students from those countries. Brown has more than 20 students and scholars from the countries affected by the Order. Penn has three undergraduate students, 32 graduate and professional students, and at least two students admitted for fall 2017 from the countries covered by the Order. The University of Chicago has 22 students from Iran, as well as two students from Sudan, two students from Syria and two recent graduates from Iran who are employed under Optional Practical Training (OPT) and University sponsorship.[8] In the past academic year, Northwestern welcomed 45 students and 22 scholars from Iran, as well as two students from Syria, one from Sudan, and one from Yemen, and extended offers of admission for the current academic year to at least 16 prospective students affected by the Order. Carnegie Mellon has 31 students and 10 faculty and scholars from the six affected countries at its U.S. locations. WPI has 32 undergraduate and graduate students and 29 faculty and scholars from the affected countries. Harvard counts 45 students and 63 scholars from the six affected countries who are present on nonimmigrant visas, along with 77 dependents from those countries, and has admitted 23 students from those countries for fall 2017. MIT currently has 58 degree and non-degree students, 53 scholars, and 6 recent graduates on OPT from the six affected countries. Emory hosts 40 faculty members and scholars from those countries. Twenty-one of Boston University's faculty and scholars are from three of the six countries. Tufts hosts 18 faculty and scholars from the affected countries. These are just a few of the universities where persons from the affected countries make invaluable contributions to *amici*'s communities.

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[8] "Optional Practical Training (OPT) is temporary employment that is directly related to an F-1 student's major area of study." U.S. Customs & Immigration Enforcement, *Optional Practical Training (OPT) for F-1 Students* (last updated Feb. 1, 2017), https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/optional-practical-training. Although most students can apply for 12 months of OPT employment authorization before or after completing their academic studies, certain students with degrees in science, technology, engineering, and math fields may apply for a 24-month extension of post-completion OPT. *Id.*

The international presence at *amici*'s campuses is no accident. *Amici* have invested significant time and resources to attract international students, faculty, and scholars. For example, *amici* have established many programs and centers focused on specific subjects like archaeology and the ancient world, including the Joukowsky Institute for Archaeology and the Ancient World at Brown and the University of Chicago's Oriental Institute for the study of ancient Near Eastern civilizations; schools dedicated to international relations like the School of International and Public Affairs at Columbia; residential communities focusing on cross-cultural collaboration like the Global Village at Dartmouth; and centers that serve as the focal point for international students, faculty, and scholars, like the Davis International Center and Mamdouha S. Bobst Center for Peace and Justice at Princeton, the Bechtel International Center at Stanford, the McDonnell International Scholars Academy at Washington University, and the World Fellows Program, Jackson Institute for Global Affairs, and MacMillan Center for International and Area Studies at Yale. Other programs focus on educating foreign ministers, including those from the six countries affected by the Order. For example, Harvard Kennedy School and T.H. Chan School of Public Health offer an annual Harvard

Ministerial Leadership Program, in which ten to twelve serving education, health, and finance ministers are invited to a rigorous summer course in Cambridge for leadership enhancement.

The success of these centers, programs, and offerings—and the success of *amici* in more generally attracting persons from around the world—depends on U.S. immigration policies. Many international students, faculty, and scholars are present on J-1 visas. This longstanding program is administered by the State Department to "foster[] global understanding through educational and cultural exchanges."[4] Indeed, the State Department's website expressly instructs J-1 visa recipients to "return to their home country…to share their exchange experiences."[5] As discussed below, many do—and the U.S. and the world benefit from their return, including advances in medicine and science, progress toward equal treatment of women and religious minorities, and respect for democracy and the rule of law.

The U.S. offers other types of visas to international students, faculty, and scholars as well. Many students attending full-time degree programs rely on F-1 visas, which allow them to remain in the U.S. for as long as it takes to complete their courses of study. And some university faculty, research scholars, and staff hold H-1B visas, which allow U.S. employers to fill gaps in the existing labor force with highly-skilled, temporary workers from other countries. Many researchers are employed through H-1B visas, most notably for positions in technology and the sciences.[6] Some universities also use the O-1 visa program, which enables professors or researchers with extraordinary demonstrated ability in the arts, sciences, education, business, or athletics to enter the U.S. temporarily to work in their specified field.[7]

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[4] Bureau of Educ. & Cultural Affairs, U.S. Dep't of State, J-1 Visa Exchange Visitor Program, Common Questions–Basics, https://j1visa.state.gov/basics/common-questions/ (last visited Sept. 15, 2017).

[5] *Id.* The importance of the J-1 Visa Program is underscored by the existence of J-2 visas, which permit "spouses and dependents . . . of J-1 exchange visitors [to] accompany or later join the J-1 holder in the United States." Bureau of Educ. & Cultural Affairs, U.S. Dep't of State, J-1 Visa Exchange Visitor Program, About the J-2 Visa, https://j1visa.state.gov/basics/j2-visa/ (last visited Sept. 15, 2017).

Amici's ability to accomplish their educational missions necessarily depends on clear, consistent, predictable, and nondiscriminatory application of American immigration policies. The many international students, faculty, and scholars who make *amici*'s campuses their homes and workplaces are thoroughly vetted through existing visa programs.[8] *Amici* must be able to assure international students, faculty, and scholars that once they have been cleared through standard vetting procedures, they may enter the U.S. to pursue their studies and scholarship.

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[6] *See, e.g.*, American Immigration Council, *Fact Sheet: The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2016), https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet (reporting that "the presence of research universities accounts for H-1B demand" in many metro areas, and that "[n]early two-thirds of requests for H-1B workers are for STEM occupations. There is also high demand for workers in healthcare, business, finance, and life sciences industries.").

[7] Bureau of Consular Affairs, U.S. Dep't of State, U.S. Visas: Temporary Worker Visas, https://travel.state.gov/content/visas/en/employment/temporary.html (last visited Sept. 15, 2017).

B. International Students, Faculty, and Scholars Contribute Significantly to *Amici*'s Campuses.

International students, faculty, and scholars make substantial contributions to *amici*'s campuses. International diversity facilitates regular interactions between individuals from different cultures with varied life experiences: a Muslim student from Iran brings something different to the seminar table than a Jewish professor from the Midwestern U.S. or a Christian graduate student from Western Europe. When individuals from different backgrounds with distinctive life experiences live and study together on the same campus, the resulting diversity promotes the free exchange of ideas, encouraging individuals to consider issues from a multiplicity of perspectives and providing a greater understanding of our global, pluralistic society.

This Court acknowledged these benefits when it held that universities have a compelling interest in obtaining the "educational benefits that flow from student body diversity." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (quoting *Grutter v. Bollinger*, 539 U.S.

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[8] Joint Decl. of Madeline Albright, Avril Haines, Michael Hayden, John Kerry, John McLaughlin, Lisa Monaco, Michael Morell, Janet Napolitano, Leon Panetta, and Susan Rice ¶ 6, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 28-2 (hereinafter "Government Officials Declaration").

306, 330 (2003)). "The academic mission of a university is a special concern of the First Amendment," and "[p]art of the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation." *Id.* at 2418 (internal quotation marks omitted; second bracket in original). The Court wrote that a diverse student body contributes to this atmosphere by fostering "enhanced classroom dialogue" and "lessening . . . isolation and stereotypes." *Id.* Accordingly, this Court has recognized that to "fulfill[] [their] mission[s]," universities must be able to recruit students (and, by extension, faculty and scholars) who will "contribute the most to the robust exchange of ideas." *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

International diversity is uniquely valuable. For many of *amici*'s students, enrollment in the university will be their first exposure to students, faculty, and scholars from other nations or other religious backgrounds. Such exposure both in and outside of the classroom enriches students' experiences and teaches them how to collaborate across ethnic and religious differences. Moreover, international students, faculty, and scholars provide particular insight into the world's current problems and potential solutions. A Syrian student who has lived through the country's ongoing civil war necessarily will have an important perspective on the causes of that conflict and on how the rest of the world might help alleviate it. These opportunities for cross-cultural understanding are integral to *amici*'s ability to provide some of the best educational programs in the world.

International students, faculty, and scholars also contribute to *amici*'s campuses through their academic interests and achievements. For example, many study, teach, and research in fields that are underpopulated by American-born students, faculty, and scholars, such as the sciences, technology, engineering, and mathematics ("STEM"). By one account, more than one third of international students during the 2015–16 year studied engineering, math, or computer science, and "many" of the 14% who participated in F-1 OPT worked in STEM fields.[9] Continuing to permit international students and faculty to study and work at *amici* universities is particularly important given the pressing need for scholarship and research in these fields.

C. The Enrollment and Employment of International Students, Faculty, and Scholars Benefit the U.S. and the World.

International students, faculty, and scholars make significant scientific, technological, social, and political contributions to the U.S. and the world, above and beyond the benefits to *amici*'s campus communities.

To begin, international students make significant contributions to the U.S. economy. One estimate provides that international students directly contributed $32.8 billion to the U.S. economy and supported or contributed to the creation of 400,000

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[9] Sara Custer, *Open Doors*, *supra*.

American jobs in the 2015–16 academic year;[10] others suggest that international students "inject hundreds of billions into the U.S. economy" and "support[] well over a million U.S. jobs."[11]

In addition, many international students choose to remain in the U.S. and become leading innovators, entrepreneurs, artists, and thought-leaders. One study found that more than one third of U.S. innovators were born outside the country, and another ten percent have at least one foreign-born parent.[12] Another analysis found that "[i]mmigrants have started more than one half (44 of 87) of America's startup companies valued at $1 billion or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies."[13]

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[10] NAFSA, NAFSA International Student Economic Value Tool, http://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/NAFSA_International_Student_Economic_Value_Tool/ (last visited Sept. 15, 2017).

[11] Government Officials Declaration ¶ 5(g) ("The Order will affect many foreign travelers, particularly students, who annually inject hundreds of billions into the U.S. economy, supporting well over a million U.S. jobs.").

[12] *See, e.g.*, Adams Nager, et al., Information Technology & Innovation Found., *The Demographics of Innovation in the United States* (Feb. 24, 2016), https://itif.org/publications/2016/02/24/demographics-innovation-united-states.

[13] Stuart Anderson, Nat'l Found. for American Policy, *Immigrants and Billion Dollar Startups* (Mar. 2016), http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf.

The benefits from international students, faculty, and scholars at American universities are not just economic. These individuals make significant discoveries and contributions in their fields. Since 2000, forty percent of all American Nobel prize winners in Chemistry, Medicine, and Physics have been immigrants—and in 2016, *all six* American winners of the Nobel Prize in economics and scientific fields were foreign-born.[14] These awards "represent great individual achievement but also reflect the state of research, openness and scientific advancement within [American] society."[15]

Amici have seen these successes up close. In 2014, the late Maryam Mirzakhani was the first woman to win the Fields Medal, known as the "Nobel Prize of Mathematics." Mirzakhani grew up in Iran before earning her Ph.D. at Harvard and becoming a professor at Princeton and then at Stanford.[16] Professor Muawia Barazangi came to the U.S. from Syria for graduate study after earning his undergraduate degree from the University of Damascus; he earned a Ph.D. from Columbia before joining the faculty at Cornell, where he became a U.S. citizen and had a long and distinguished research and teaching career in the field of Earth Sciences. Syrian-born Dina Katabi, a professor at MIT, came to the U.S. for graduate study at MIT, and has since won a Macarthur "Genius" grant for her work on improving wireless network efficiency and security.[17]

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[14] Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016, 10:48 AM), http://www.forbes.com/sites/stuartanderson/2016/10/16/immigrants-flooding-america-with-nobel-prizes/#3de213817f5f.

[15] *Id.*

[16] *See* Katie Rose Quandt, *Meet the First Woman to Win the "Nobel Prize of Mathematics,"* Mother Jones (Aug. 14, 2014), http://m.motherjones.com/mixed-media/2014/08/maryam-mirzakhani-first-woman-fields-medal-mathematics.

Education and employment at leading American universities also provide opportunities for individuals to experience life in the U.S. and gain a greater appreciation for American social, political, and cultural norms and ideas. These include democratic governance, respect for the rule of law and human rights, and tolerance of cultural, religious, and other differences. These individuals return to their home countries with a deeper understanding of and appreciation for the U.S. and its values—and, hopefully, a greater desire to engage in continuing discourse and exchange. They also return to their home countries with the tools necessary to improve conditions on the ground, such as through public health initiatives and good governance. This, in turn, promotes the economies of developing nations, and may stymie radicalization.[18]

International students, faculty, and scholars become leaders in their home countries. Yale counts among its distinguished alumni many foreign leaders, including Valdis Zatlers, former President of Latvia; Abd al-Karim al-Iryani, former Prime Minister of the Republic of Yemen; and Ernesto Zedillo, former President of Mexico. Alumni from MIT include Benjamin Netanyahu, Prime Minister of Israel; Kofi Annan, former Secretary-General of the United Nations; and Lucas Papademos, former Prime Minister of Greece. Pedro Kuczynski, President of Peru, attended Princeton. World leaders educated at Harvard include current Liberian President Ellen Johnson-Sirleaf (Africa's first elected female President) and former Prime Minister of Pakistan Benazir Bhutto. And Georgetown counts among its alumni many foreign leaders, including Abdullah II bin al-Hussein, the King of Jordan; José Manuel Barroso, former President of the European Commission; Saad Hariri, former Prime Minister of Lebanon; and Nasser Judeh, former Deputy Prime Minister and Minister of Foreign Affairs of Jordan.

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[17] Larry Hardesty, *Signal Intelligence*, MIT Tech. Rev. (Oct. 20, 2015), https://www.technologyreview.com/s/542131/signal-intelligence/.

[18] *See, e.g.*, Omer Taspinar, *The Problem With Radicalism*, 19 Cairo Rev. 76, 80 (2015) (noting that "[a]n agenda based on human development with equal emphasis on education reform, democratic reforms, and socioeconomic advancement can address the ideological as well as economic root causes of radicalization.").

II. Even as Partially Stayed by This Court, the Order Harms Students, Faculty, Scholars, and Universities.

The Order has serious and chilling implications for *amici's* students, faculty, and scholars. It separates current students from their families, impairs the ability of American universities to draw the finest international talent, and inhibits the free exchange of ideas. It is imperative to *amici* that the Court consider these and other detrimental effects of the Order.

First, the Order hurts American universities by prohibiting or deterring international students, faculty, and scholars from studying here. *Amici*, like other American universities, aim to attract the brightest, most talented students, faculty, and scholars from around the globe. The Order hampers *amici*'s ability to do so by arbitrarily excluding persons from six majority-Muslim countries and contemplating further categorical entry bans based on national origin. The exclusion of those persons diminishes the experience of studying at *amici* universities for everyone, and inevitably will deter persons from countries other than the six identified in the Order from choosing to study or work here.

Reducing the international presence on *amici*'s campuses will detract from the academic experience for those who do study in this country. As we have explained, the benefits of international diversity to American universities are manifold. And it is not merely the classroom experience that will suffer. The success of American laboratories, a major driver of our economy, depends on their ability to attract the best trainees and postdoctoral fellows wherever they may be found, and also on their ability to collaborate with foreign scientists in areas of science that have no defense or security implications. The Order diminishes *amici*'s ability to attract these scientists, who will otherwise go to foreign laboratories.

Indeed, international universities have noted this effect and issued statements criticizing the Order and its predecessor and touting their own opportunities for international students and scholars.[19] Regarding the first iteration of the travel ban, the Vice-Chancellor of the University of Cambridge, UK stated: "While we acknowledge that a country must have the right to manage its own borders, this ban is fundamentally at odds with the values of openness, tolerance and evidence-based decision-making that the University of Cambridge stands for."[20] He added: "We are determined to champion openness, and the free exchange of knowledge across borders. Even as governments around the world seek to curb freedom of movement, the University of Cambridge remains committed to welcoming the best and brightest students and staff—irrespective of their nationality."[21]

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[19] Chris Parr, *Response: international universities speak out against Trump ban*, The Times Higher Education (Jan. 31, 2017),

Contrary to the Government's suggestion, *see* Gov't Br. 34, the effects of the Order on prospective international students is not speculative. Some *amici* are already experiencing these negative effects. Many admissions letters for fall 2017 were sent in spring of this year, just after the Order was issued. Prospective international students had a short window to decide whether to attend a U.S. college or university. Faced with the prospect that they might not be able to obtain visas before the fall semester begins, many of these students reasonably have chosen to enroll in universities in other countries, rather than pursue their education here. Many *amici* received calls from concerned

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https://www.timeshighereducation.com/blog/response-international-universities-speak-out-against-trump-ban.

[20] *Id.*

[21] *Id.*

prospective and admitted students who questioned whether they could enroll in light of this uncertainty.

These very real difficulties extend to faculty and scholars. Yale's MacMillan Center Council on Middle East Studies and its Program on Iranian Studies are currently conducting searches for post-doctoral fellows and visiting scholars, with the most promising candidates being Iranian nationals who are currently abroad. The uncertainty of securing visas will affect acceptances of offers. The University of Pennsylvania has similar concerns, with three faculty recruits whose opportunities may be eliminated by the Order. Princeton and MIT, too, have received numerous inquiries from academic departments about how to handle the questions and concerns of faculty and scholar recruits and invited visitors who have expressed hesitation about coming to the U.S. in light of the Order.

Second, the Order harms the current members of *amici*'s campuses from the six affected countries. Even if this Order does not prematurely cancel their visas, it still separates members of *amici*'s communities from their family members living abroad. For instance, the spouses and children of scholars and researchers may be unable to enter the U.S. even for a short-term visit, creating a traumatic separation as a result of a person's decision to study and work here. Furthermore, given the arguments made to justify the Order, students, faculty, and scholars from countries affected by the Order are now wary of leaving the U.S., because they worry that their re-entry may be barred or challenged by immigration authorities. Many students from the affected countries have remained in the U.S. this past summer, in fear that leaving to work, study abroad, or visit their families would risk indefinite exclusion or detention upon their return. These individuals are deterred from conducting field research, attending academic conferences, or participating in international meetings in foreign nations; for some, travel concerns will cause them to set aside projects that simply cannot be completed without international travel. The Order also takes a personal toll because they may feel compelled to cancel any plans to visit family and friends abroad: fly home to attend the wedding or funeral of a family member, and one risks the loss of one's visa, separation from family and friends here in the U.S., and the loss of a job, an academic degree, and years of hard work and research.

Third, the Order's chilling effects extend beyond persons from the six targeted countries. Given the review of other countries directed by the Order, EO § 2(e), and the possibility that other countries will be added to the Order's scope, *all* international students, faculty, and scholars may reasonably fear that their immigration status may be revoked at any time for reasons having nothing to do with their conduct and based on no evidence whatsoever that they pose any security risk to this country. And should a new country find itself the target of a subsequent Order, the chaos resulting from the first Order would repeat itself, reinforcing feelings of doubt and insecurity about this nation.

Fourth, the Order will impede successful academic collaboration. American universities host thousands of conferences and symposia each year. These academic meetings convene scholars within and across disciplines of study. They are incubators for innovation and promote the free flow of information and ideas. By hosting these events, *amici* ensure that their participating scholars can encounter and collaborate with other scholars. The resulting collaborations are essential to addressing problems that are global in scope, such as geopolitical conflict, terrorism, and the spread of communicable diseases.

The Order threatens these efforts by prohibiting certain academics from traveling to the U.S., and by provoking a backlash from others who are not subject to the ban. Indeed, international universities have observed that the Order and its predecessor will impede collaborative partnerships with American universities.[22] And these effects are already being felt. The University of Pennsylvania had planned to invite three Iranian human rights activists to a conference in March 2017, but with the Order in effect, their participation would have been barred. Similarly, a faculty member at Dartmouth planning a conference for this fall has expressed concern that participants may not be able or willing to travel to the U.S., and one keynote speaker has wondered whether it "sends the wrong message" to attend a conference here at this time. Participants in a conference at the Harvard Center for Middle Eastern Studies voluntarily withdrew due to current U.S. immigration policies or perceptions thereof. The Sharmin & Bijan Mossavar-Rahmani Center for Iran and Persian Gulf Studies at Princeton expressly aims to advance understanding of Iran and the Persian Gulf; if the Center cannot invite Iranian guest speakers, the Center obviously will be impeded in serving its mission.

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[22] Parr, *supra* (quoting the President of McMaster University, Canada, as stating "This is a misguided and harmful step that is unnecessarily disruptive for students, faculty members and other partners. . . . As an internationally engaged research intensive university, this abrupt change in policy has a chilling impact on individual scholars and their families, and on the important relationships we have carefully built over the years. Our collaborative partnerships allow us to forge important research and educational programs and activities, which are threatened by arbitrary measures such as the one announced last week.").

What is more, faculty members from around the world already have called for a boycott of academic conferences in the U.S. in response to the Order and its predecessor.[23] A petition circulated online has drawn thousands of signatures from scholars in the U.S. and abroad pledging not to attend international conferences here because of the Order.[24]

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[23] *See* Shannon Najmabadi, *Academics Mull Boycott of U.S. Conferences as a Way of Fighting Travel Ban*, The Chronicle of Higher Education (Jan. 30, 2017), http://www.chronicle.com/article/Academics-Mull-Boycott-of-US/239047?cid=pm&utm_source=pm&utm_medium=en&elqTrackId=e9a82fa115e24765bc019b2dfc9d480e&elq=ef21be06f46043e287aeedd6a611eb6e&elqaid=12357&elqat=1&elqCampaignId=5023; Elizabeth Redden, *Boycotting the U.S.*, Inside Higher Ed (Jan. 31, 2017), https://www.insidehighered.com/news/2017/01/31/protest-trump-entry-ban-some-scholars-areboycotting-us-based-conferences.

[24] In Solidarity with People Affected by the 'Muslim Ban,' https://docs.google.com/forms/d/e/1FAIpQLSeNN_2HHREt1h-dm_CgWpFHw8NDPGLCkOwB4lLRFtKFJqI25w/viewform?c=0&w=1&fbzx=2104368019732744200 (last visited Sept. 15, 2017).

Academic conferences and meetings facilitate major breakthroughs and discoveries, candid discussion and debate, and face-to-face meetings that generate future collaborations and partnerships. Excluding scholars from the six affected countries—and other scholars who choose not to participate because of the Order—will hamper the success of these collaborations. American universities, students, and faculty will inevitably suffer when these meetings are shifted abroad to avoid the Order's effects.

Fifth, as *amici* have explained, they strive to foster a culture of diversity, inclusion, and tolerance on their campuses. *Supra* Part I. The Order undercuts those important efforts by making many of *amici*'s students, faculty, and scholars feel "less than," and signaling, from the highest levels of government, that discrimination and religious intolerance is not only acceptable but appropriate. Rather than securing American universities, this thwarts *amici*'s ability to foster a diverse environment in which individuals feel comfortable contributing to a robust exchange of ideas.

Finally, limiting the scope of the Order to "foreign nations who lack any bona fide relationship with a person or entity in the United States," *International Refugee Assistance Project*, 137 S. Ct. at 2087, does not rectify the Order's harms to *amici*. Though this Court offered some examples of which relationships would qualify as "bona fide," regrettably these examples did not resolve the uncertainty the Order has introduced into potential collaborations between *amici* and international students, faculty, and scholars.

Students who have already been admitted to American universities, and workers who have already accepted offers of employment from American companies, are two examples of qualifying bona fide relationships. 137 S. Ct. at 2088. But what about international scholars at *amici* universities who are not students or employees of *amici* or any other American entity? The populations of such international scholars at *amici* are sizeable. For instance, over 50 scholars from the six targeted countries contribute to Harvard's academic departments as visiting researchers, research and postdoctoral fellows, and interns. None of these scholars is a student at Harvard, or an employee of Harvard on a sponsored work visa. To Harvard, their relationship is surely bona fide, but the University has no assurance that the U.S. will not conclude otherwise at the border. The discretion afforded the government under this rule has harsh consequences; for example, scholars and students may be loath to publish research or other works critical of the government, its political preferences, or U.S. foreign policy, lest their immigration status be threatened as a result. The ambiguity and uncertainty inherent in the "bona fide relationship" test could well have a destructive chilling effect on scholars and students who have traditionally enjoyed an environment of academic freedom in this country.

The "bona fide relationship" carve-out also fails to account for the substantial class of *prospective* international students, faculty, and scholars. The Court has not specified whether § 2(c) may be enforced against individuals who do not currently have, but may in the near future enter into a relationship with an American entity. International students considering applying to *amici* in the 2017-2018 application cycle likely do not currently have a formal, documented relationship with any U.S. entity, and they will not unless and until they are accepted by an *amicus* university. So too for many international faculty and scholars not currently employed by *amici* universities, or any other American entity, whom *amici* universities may wish to recruit, interview, invite to lecture, or host for forthcoming conferences. Yet without the ability to visit campus and meet with potential colleagues or faculty, international students, faculty, and scholars are far less likely to select an American college or university. Even as modified by the stay, the Order thus places *amici* at a distinct disadvantage relative to international schools.

There are other problems with the Order as partially stayed. Although the Court made clear that "a lecturer invited to address an American audience" has a qualifying bona fide relationship with the inviting entity, 137 S. Ct. at 2088, it said nothing about a scholar who intends to attend an academic conference here. That scholar may informally participate in the conference by engaging with lecturers and other attendees, but he or she may not have been invited formally to do so. There is no telling whether that sort of relationship would qualify under the Court's test (or the government's interpretation thereof). These sorts of situations happen hundreds of times to thousands of scholars each year at American colleges and universities.

Because the "bona fide relationship" carve-out fails to account for the myriad ways in which *amici* universities collaborate with international students, faculty, and scholars, it may impede the creation of *amici*'s future bona fide relationships. Worse still, this carve-out will not prevent the potential long-term attrition at *amici* of international students, faculty, and scholars from the countries affected by the Order—and from other countries as well. Even in its more limited form, the Order harms American colleges and universities and should be invalidated.

CONCLUSION

Amici take seriously the safety and security of their campuses and the nation: if *amici*'s campuses were not safe, or the towns and cities in which they are located were not secure, *amici* could not maintain their world-renowned learning environments. *Amici*, however, believe that safety and security concerns can be addressed in a manner that is consistent with the values America has always stood for, including the free flow of ideas across borders and the welcoming of foreign nationals to our campuses. The Order falls far short of justifying its ban on individuals from the specified countries. Given this, as well as the significant burdens the Order inflicts on *amici*'s current and potential students, faculty, and scholars and its substantial impediment to *amici*'s ability to fulfill their educational missions, *amici* respectfully urge the Court to affirm the decisions below.

September 18, 2017

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Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars. They submit this brief to identify a distinct legal principle compelling the conclusion that the revised executive order is unconstitutional: the long-settled prohibition on governmental acts based on animus toward a particular religious group.

A full list of *Amici* is attached as an appendix to this brief.[1]

SUMMARY OF ARGUMENT

The Fourth Circuit properly protected religious liberty by affirming a preliminary injunction against Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "Order"). Relying on *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), it held that the Order is unconstitutional because a "reasonable observer would likely conclude that [its] primary purpose is to exclude persons from the United States on the basis of their religious beliefs." J.A. 236. Under settled law, that ruling should be affirmed.

But the Fourth Circuit also concluded that the Order cannot stand under a distinct legal principle—repeatedly confirmed in Religion Clause cases—that forbids the government from acting on the basis of animus toward any particular religious group. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1822

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money intended to fund preparing or submitting the brief. Petitioners have filed a blanket letter of consent. Respondents have consented to the filing of this brief.

(2014); *id.* at 1831 (Alito, J., concurring); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 722, 728 (1994) (Kennedy, J., concurring in the judgment); *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *Romer* v. *Evans*, 517 U.S. 620, 632-35 (1996). This fundamental rule has been recognized by jurists of many different persuasions in Establishment Clause cases. And as the Fourth Circuit concluded, it is directly applicable here. *See* J.A. 236 n.22 ("There is simply too much evidence that [the Order] was motivated by religious animus for it to survive any measure of constitutional review.").

Indeed, while the Fourth Circuit focused on *Lemon*'s secular purpose requirement, the facts that it considered even more clearly demonstrate anti-Muslim animus under familiar means of discerning improper motive. *See, e.g.*, *Town of Greece*, 134 S. Ct. at 1824-26; *Locke* v. *Davey*, 540 U.S. 712, 724-25 (2004); *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2693-94 (2013); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). That conclusion is compelling based solely on President Trump's *post*-inauguration statements. But it is even more forcefully confirmed by a careful review of his *pre*-inauguration admissions of anti-Muslim animus—which, under precedent, must be considered as part of the legal analysis, and which are necessarily incorporated by reference into more recent presidential statements.

The extraordinary record in this case demonstrates that President Trump's principal motive in issuing the Order—and in gerrymandering it in peculiar ways—was anti-Muslim animus. After repeatedly promising voters during the campaign that he would ban Muslims from entering the United States, upon taking office, President Trump promptly issued a sweeping, unprecedented, and bizarrely-structured order with no discernible connection to an actual national security threat. While not *explicitly* denominated a "Muslim Ban," the Order (even as subsequently revised) came close enough to realizing that goal to satisfy his anti-Muslim election-season promise. And in case the point somehow remained unclear, President Trump has since made numerous statements—as recently as a series of tweets on June 5, 2017—to the effect that excluding Muslims was the Order's true purpose. An extensive public record thus establishes that in issuing the Order, President Trump was following through on his animus-laden campaign promise, rather than acting for any constitutionally legitimate reason.

While the Government appears keen to distance itself from the President's troubling statements over the past year, the purpose of an Executive Order directed by the President can hardly be deemed speculative when the President himself has traveled the country telling us why he issued it. As the Fourth Circuit found, time and again President Trump has told the public that the Order exists to ban Muslims because they are a problem and they are not welcome here. Even as that message has come through loud and clear, on Twitter and at political rallies, virtually none of his statements have evinced concern for supposedly unique threats from the six Muslim-majority nations covered by the Order. His motives here are not inscrutable, as his lawyers have repeatedly (but implausibly) insisted.

Great mischief could follow from a holding that allowed the President to speak about the nature and purpose of his own executive orders without any legal consequence. If the President's words mean nothing to this Court—even as they mean everything to millions of people affected by his Order—then the rule of law may suffer. Indeed, if the Judiciary were to disregard President Trump's statements, the gap between lived reality and constitutional law would grow intolerably vast. As a matter of law and public legitimacy, it would be anomalous for this Court to test the constitutionality of the Order in a parallel reality, where statements broadcast (and tweeted) on a global stage are treated as non-existent.

This Court's decision will reverberate throughout American life. It will teach the people of this Nation—and migrants worldwide—about the meaning of freedom and the Constitution. If this Court upholds the Order, people of all faiths, but especially Muslims, will learn that the First Amendment permits the President to ban people from this Nation because he disapproves of their faith. Respectfully, that is not the law and this Court should not make it so.

Further, even if this Court were to conclude that national security concerns played some role in the Order's original enactment (and its baffling continuation over eight months later), that still would not save it. Animus may co-exist with legitimate motives. As this Court has explained, where the government acts on the basis of mixed motives, courts do not hesitate to invalidate official acts when animus was a *primary* or *essential* motive, as it was here. *See Windsor*, 133 S. Ct. at 2693; *Lukumi*, 508 U.S. at 535; *Larson*, 456 U.S. at 248.

In that respect, *Korematsu v. United States*, 323 U.S. 214 (1944), is instructive. As *Korematsu* teaches, the combination of animus and an actual (or perceived) national security threat is uniquely toxic: a veneer of noble motive can be invoked to justify the most horrid abuses. Even if an official begins with some good intentions, animus corrupts and distorts any motive it touches. Here, only by ignoring months of clear and consistent statements by the President could it be thought that he did not act on the basis of animus toward Muslims in following through on his promise to ban them from entering the United States. Not only did he ban many Muslims from entering the nation, but he has also repeatedly made anti-Muslim claims inflicting stigma and disability on Muslims nationwide. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . . ."). While the President often enjoys a presumption of regularity, here that presumption is rebutted by myriad instances of irregularity that comprise an assault on religious liberty in America.

In 1785, James Madison warned against any law departing "from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens." Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 9 (1785). He added:

> Instead of holding forth an Asylum to the persecuted, [the Bill] is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the

> last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent, may offer a more certain repose from his Troubles.

Id. The bill against which Madison remonstrated has been consigned to the dustbin of history. But the underlying evils against which Madison warned are still with us. This case does not present them in disguise. No, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). President Trump has repeatedly expressed the animus that motivated his promises, and subsequent acts, to ban persons of a single faith from entering the United States. For religious liberty to endure, the Order must be enjoined.

ARGUMENT

I. THE CONSTITUTION PROHIBITS GOVERNMENTAL ACTION BASED ON ANIMUS TOWARD RELIGIONS

As Justice Kennedy has explained, "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532. This prohibition against governmental action motivated by animus toward a religious group is so fundamental that it has been expressed not only in Establishment Clause doctrine, but also in cases arising under the Free Exercise and Equal Protection Clauses.

Together, these precedents teach that the anti-animus rule rests upon an abiding national commitment to equal treatment and religious freedom. Indeed, "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion [] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

A. The Establishment Clause

"[T]he Establishment Clause . . . [protects] one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another." J.A. 171-72; *see also Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). This rule is "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Religious freedom "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* As Justice Goldberg explained, the Religion Clauses recognize that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

This Court has thus held time and again that the Establishment Clause forbids official acts based on animus toward any particular religious group. That principle transcends many of the familiar divisions in Establishment Clause jurisprudence, and has been embraced by strict separationists, devotees of the endorsement test, those who believe that the Clause targets coercion, and jurists who see a very broad role for religion in public life. *See, e.g.*, *Locke*, 540 U.S. at 725 (Rehnquist, C.J.) (upholding a scholarship program against constitutional attack because "we find neither in the history or text of [the state law], nor in the operation of the [program], anything that suggests animus toward religion"); *Kiryas Joel*, 512 U.S. at 703 (holding courts must safeguard "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion"); *id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (holding the Establishment Clause "forbids hostility toward any [religion]"); *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968) (holding that "[t]he State may not adopt programs or practices . . . which 'aid or oppose' any religion"). There is a judicial consensus that government may not act on the basis of animus toward disfavored religious groups.

The Court recently reaffirmed the rule against governmental animus toward religion in *Town of Greece*, which upheld a town's practice of holding a prayer program at the start of monthly board meetings. 134 S. Ct. 1811 (2014). A crucial issue in *Town of Greece* was whether the town had established Christianity by adopting a rotational policy that led to mostly Christian prayers. The Court upheld the town's policy, concluding that some sectarian prayer is consistent with the nation's historical traditions, and that the town's prayer program did not result in religious coercion. *See id.* at 1819-25.

However, the Court's opinion contained a critical limitation:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Id. at 1823. The Court thus made clear that the town could not "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.* at 1826. Practices serving to "denigrate, proselytize, or betray an impermissible government purpose" would violate the Constitution and demean adherents of disfavored faiths. *Id.* at 1824; *accord Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) (stating religious accommodations would violate the Establishment Clause if they "discriminate against other religions").

In a concurrence in *Town of Greece*, Justice Alito echoed the majority's warning against official acts based on animus toward a disfavored religion. He noted that the town's lack of non-Christian prayer leaders "was at worst careless,"—adding, "I would view this case very differently if the omission of these synagogues were intentional." *Town of Greece*, 134 S. Ct. at 1831. Similarly, Justice Breyer stated that he would have viewed the case differently had there been proof of discriminatory intent. *See id.* at 1840

(Breyer, J., dissenting) ("The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite[.]").

As *Town of Greece* showed, and as many other precedents confirm, the Establishment Clause's prohibition against animus enjoys wide support among jurists of all methodological persuasions. This rule is also supported by historical evidence concerning the original understanding of the First Amendment. "A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). By the time the Bill of Rights was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

The Framers thus understood that their task was to design a "government for a pluralistic nation—a country in which people of different faiths had to live together." Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* 101 (2006). As George Washington wrote, "the government of the United States . . . gives to [religious] bigotry no sanction, to persecution no assistance." Letter from George Washington to the Jews (Aug. 18, 1790), in *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders* 110 (Forrest Church ed., 2004). Thomas Jefferson, in turn, saw the Establishment Clause as "proof that [the people] meant to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination." Thomas Jefferson, *Writings* 40 (Merrill D. Peterson ed., Library of Am. 1984).

Governmental acts based on animus toward a disfavored religious group are thus at war with the Establishment Clause, as a matter of principle, precedent, and history. This anti-animus rule follows directly from the Clause's purpose of protecting religious freedom for those sects not favored by the political majority: just as the government cannot coerce (or endorse) religious belief or practice, neither can it take action based on a desire to harm or suppress any faith. Given the centrality of religion in many peoples' lives—to their identity, social relations, and concept of the universe—courts look with the utmost doubt upon official acts based on hostility to any particular religion. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.").

This does not mean that government is unable to recognize the importance of religion—including majority religions—in our nation. Far from it: the anti-animus rule is perfectly consistent with broad views of religion's permissible role in public life. Rather, the Establishment Clause forbids officials from exercising governmental power on the basis of a desire to suppress, harm, or denigrate any particular religious sect or denomination. This limit, though narrow, is vital to religious liberty. *See Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 448 (1950) (Black, J., dissenting) ("Centuries of experience testify that laws aimed at one . . . religious group . . . generate hatreds and prejudices which rapidly spread beyond control.").

B. The Free Exercise Clause

The Free Exercise and Establishment Clauses speak as one against laws designed to oppress disfavored faiths. This reflects "the common purpose of the Religion Clauses," which is "'to secure religious liberty.'" *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

This principle received its fullest elaboration in *Lukumi*, where the Court struck down a local ordinance on the ground that it was based on animosity toward Santeria religious practices. *See* 508 U.S. at 542. The Court explained that "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547. Thus, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.*

Governmental acts based on religious animosity are wholly forbidden by the Free Exercise Clause. *Id.* That is true even if officials "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Id.* at 524.

Furthermore, in discerning animus, "[f]acial neutrality is not determinative" because the "Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534. Rather, when government effectively classifies on religious lines, courts guard against "impermissible attempt[s] to target [religious people] and their religious practices." *Id.* at 535.

Under *Lukumi*, evidence of improper purpose may come from the text and structure of an order, the order's real-world effect, or the degree to which the order is tailored to achieve legitimate ends. *See id.* at 533-38. Courts also assess "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540 (opinion of Kennedy, J.).

Thus, if the full circumstances of an official act disclose that it was based on animus toward a religious group, that act must be invalidated.

C. The Equal Protection Clause

Precisely because the Religion Clause rule against animus is grounded in the principle of equal treatment for all religions, Justice Kennedy has explained that application of that rule should be informed by insights from equal protection doctrine. *See Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

The Equal Protection Clause is instructive in the Establishment Clause context in at least three respects. First, on many occasions, this Court has equated religion and race as bases of discrimination inimical to our constitutional order. *See, e.g.*, *City of New Orleans*

v. *Dukes*, 427 U.S. 297, 303-04 (1976). That principle has been invoked in a wide array of circumstances: "Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); *see also Shaw* v. *Reno*, 509 U.S. 630, 648 (1993).

Second, equal protection jurisprudence offers a nuanced account of what constitutes impermissible animus. In many cases, the Court has invalidated acts on animus grounds without any finding that particular individuals were subjectively motivated by bigotry. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634. Rather, as Justice Kennedy has explained: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *accord Lukumi*, 508 U.S. at 524 (recognizing the possibility that officials "did not understand" or "failed to perceive" their animus toward Santeria).

Thus, the Court has remained sensitive to the subtle dangers posed by "unconscious prejudices and disguised animus," as well as the social harms of "covert and illicit stereotyping." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Finally, equal protection cases shed additional light on how to recognize animus. Several objective factors are often considered relevant: the text of an act; its novelty in our constitutional tradition; the full context leading up to and following enactment; the act's real-world effects; and the degree of fit between an act's stated purpose and its actual structure. *See Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448; *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-67 (1977); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 536-38 (1973). Religion Clause precedents, including those addressing official acts based on animus toward specific religious denominations, consider the same factors. *See Kiryas Joel*, 512 U.S. at 698-705; *Lukumi*, 508 U.S. at 534-36; *Edwards* v. *Aguillard*, 482 U.S. 578, 594-95 (1987); *see also Town of Greece*, 134 S. Ct. at 1824-26 (describing when a pattern of prayers would impermissibly function to "denigrate" or "betray an impermissible government purpose").

The link between the Religion Clauses and the Equal Protection Clause thus promotes a more refined application of the Establishment Clause's ban on governmental animus toward religion.

II. THE ORDER VIOLATES THE CONSTITUTION BECAUSE IT IS BASED ON ANIMUS AGAINST MUSLIMS

"For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). In defiance of that tradition, the President of the United States issued the

Order while maintaining a campaign website that—until May 2017—included his statement seeking "a total and complete shutdown of Muslims entering the United States." J.A. 219. Even acknowledging the deference due to the President in matters of immigration and national security, it is hard to imagine a clearer case of governmental action motived by animus toward a single religion. *See* J.A. 171 (concluding that the Order "speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination").

A. Evidence of Animus—Including But Not Limited to Campaign Statements—Is Overwhelming

In upholding the preliminary injunction, the Fourth Circuit relied in large part on public remarks by the President expressing anti-Muslim sentiments that animated his desire to ban Muslims from the United States. This evidence included a "Statement on Preventing Muslim Immigration," posted by then-candidate Trump on his campaign website, calling for a "total and complete shutdown of Muslims entering the United States." J.A. 219. (That statement was not removed until the eve of argument below.) The Fourth Circuit also considered statements by President Trump coinciding with entry of the Order, including: "Islam hates us"; "[w]e can't allow people coming into this country who have this hatred"; and "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 220. Such voluminous evidence, on its own, supports the Fourth Circuit's finding that the Order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it[.]" J.A. 236.

While the Fourth Circuit discussed these facts in relation to the *Lemon* test, the same evidence also reveals improper anti-Muslim animus: President Trump's Order and the oft-repeated campaign promise it fulfilled were based on a desire to exclude Muslims from the United States. While the Order does not exclude *all* Muslims, and does not single out Muslims by name, the unsubtle (and widely-noted) goal of the Order is to ban a large number of Muslims from the United States in satisfaction of President Trump's well-known promise to do just that.

Indeed, as explained above, this kind of evidence—the text of an order, its novelty, its real-world effects, the full context of its enactment, statements made by decisionmakers, and the degree of fit between an order's stated purpose and actual structure—is the standard fare of courts engaged in animus analysis. *See Town of Greece*, 134 S. Ct. 1824-26; *Locke*, 540 U.S. at 725; *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448. And as the Fourth Circuit and many others have concluded, the immigration and national security context of this litigation does not alter that bottom line. *See* J.A. 206. To be sure, the Court in *Kleindienst* v. *Mandel* deferred to a decision to exclude aliens based on "a facially legitimate and bona fide reason." 408 U.S. 753, 770 (1972). But here the President's improper anti-Muslim motive means that the Order was not "bona fide." *See id.*

The Government has asserted that the Fourth Circuit's decision was "based on speculation about officials' subjective motivations drawn from campaign-trail statements by a political candidate," which should not be considered. Pet. 13, 28-30. To be clear, that contention is a red herring. It is also incorrect as a matter of law and logic.

First, setting aside campaign statements, a review of *only* post-election and post-inauguration statements by the President and his senior advisors demonstrates that the Order is based on anti-Muslim animus. Some of the more notable statements from this period include:

> (1) More than a month after the election, President Trump was asked whether he would reevaluate his intention to ban Muslims. He responded: "You know my plans all along, and I've been proven to be right."[2]
>
> (2) Upon signing the initial Executive Order, President Trump read its oblique title "Protecting The Nation From Foreign Terrorist Entry Into The United States" and said, "We all know what that means."[3]
>
> (3) On January 28, 2017, Rudy Giuliani stated, "When [President Trump] first announced it, he said 'Muslim ban.' He called me up, he said, 'Put a commission together, show me the right way to do it legally.'"[4]
>
> (4) When President Trump's second Order was enjoined, he said he would rather "go all

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[2] *Trump: "You've Known My Plans" On Proposed Muslim Ban*, WASH. POST (Dec. 21, 2016).

[3] *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017).

[4] Amy B. Wang, *Trump Asked for a "Muslim Ban,' Giuliani Says*, WASH. POST (Jan. 29, 2017).

> the way, which is what I wanted to do in the first place."[5]
>
> (5) On June 5, 2017, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[6] He continued: "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to the S.C."[7]

These statements alone reveal the President's motives concerning the Order. And they must be considered in the context of other remarks by the President about Muslims. *See Santa Fe*, 530 U.S. at 315. For example, on March 16, 2017—the day that the Order was due to go into effect—President Trump sweepingly asserted that "the assimilation [of Muslims in the U.S.] has been very, very hard." More recently, invoking a false story about General John Pershing, he implied in a tweet that "Radical Islamic" terrorists should be executed with bullets dipped in pig's blood.[8] The President has not suggested committing such atrocities against terrorists—foreign or domestic—of any of other faith.

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[5] Bob Van Voris & Erik Larson, *Trump on Travel Ban Ruling: "Go Back To the First One,"* BLOOMBERG (Mar. 15, 2016).

[6] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. As then-White House Press Secretary Sean Spicer explained, President Trump's tweets are "considered official statements by the President of the United States." Elizabeth Landers, White House: Trump's tweets are "official statements," CNN (Jun. 6, 2017).

[7] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871675245043888128.

Accordingly, the resolution of this case does not turn on whether the Court considers pre-election expressions of animus. An assessment of the post-election record suffices to establish improper motive.

Second, as a matter of law, this Court has never suggested that campaign statements are uniquely irrelevant to motive analysis. To the contrary, courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (citing *Arlington Heights*, 429 U.S. at 268). These considerations reflect simple common sense: "[T]he world is not made brand new every morning." *McCreary*, 545 U.S. at 866.

Here, where President Trump issued this policy almost immediately upon taking office, the "series of events leading to the . . . official policy," and the "contemporaneous statements made by members of the decisionmaking body," necessarily include statements made by President Trump *while he was crafting the policy*—a process that unquestionably began *during* the campaign and pre-inauguration period. *Cf. Romer*, 517 U.S. at 623 (emphasizing "the contentious campaign that preceded" the adoption of a state constitutional amendment). Indeed, the connection in time, subject, scope, and substance between the President's campaign statements and the Order he then issued is extraordinarily tight.

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[8] Katie Reilly, *President Trump Praises Fake Story About Shooting Muslims With Pig's Blood-Soaked Bullets*, TIME (Aug. 17, 2017).

As the Fourth Circuit properly concluded, the Government's attempt to disassociate the second Order from the first—by asserting that the Order was revised to address the Ninth Circuit's concerns—is futile. Any distinction in the motivation behind the orders is belied by the President's own words, including a tweet in which he stated that the Order is merely "the watered down, politically correct version" of the original order.[9] The President's own prior statements—which often explicitly tied his refusal to be "politically correct" with his pledge to ban Muslim immigration[10]—leave no doubt that the "political correct[ness]" of the Order lies in its use of nationality as a pretext for religion. *See* J.A. 232-33 ("[T]here is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the

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[9] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. The continuity of the orders has been reaffirmed by President Trump's top advisors. *See* App. 14a; *see also Chris Cuomo, Trump aide tangle over 'travel ban' tweets*, CNN: POLITICS (Jun. 5, 2017), http://www.cnn.com/2017/06/05/politics/cuomo-and-gorka-spar-cnntv/. (Sebastian Gorka, then-Deputy Assistant to the President, stating: "The fact is, it's been the same since the beginning—from the first EO to the second EO, it's one thing.").

[10] Donald Trump, Remarks at Saint Anselm College in Manchester, NH (Jun. 13, 2016), *in* Gerhard Peters & John Woolley, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=117775; Donald Trump, Address at a Rally in Manchester, NH (Aug. 25, 2016), video available, http://www.dailymotion.com/video/x4qli4h.

'watered down' version of that plan that 'get[s] just about everything,' and 'in some ways, more.'").

Third, it would be improper to ignore President Trump's pre-inauguration statements because doing so would render unintelligible his post-inauguration statements that explicitly reference earlier remarks. For example, on the morning of June 5, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[11] Thus, contrary to the Government's characterization of the second Order as a facially neutral executive action distinct from the prior order or campaign promises, the President's statements make clear the continuity between his call for a "total and complete shutdown of Muslims entering the United States" and the Order he enacted. App. 10a.

Fourth, political speech protected by the First Amendment would not be chilled by consideration of the President's campaign statements. Contra *Washington* v. *Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), Slip. Op. at 9-14 (Kozinski, J., dissenting from denial of reconsideration en banc). What if a candidate announced a day before being sworn in that she planned to implement three policies for the sole purpose of harming Catholics—would that evidence be excluded in a subsequent lawsuit challenging policies apparently targeted at Catholics? Surely not. The First Amendment protects speech, but it does not allow politicians to evade all accountability if their words reveal that an unconstitutional purpose motivated their actions.

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[11] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

That is true *throughout* a politician's career. The Government's bizarre insistence that Donald J. Trump was a mere private citizen on January 19, 2017—one whose promises about how he would wield governmental power meant nothing at all—"taxes the credulity of the credulous." *Maryland* v. *King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

Finally, the Government's analysis is unworkable. If an incumbent were running for office, how would campaign statements be distinguished from others? That concern is not hypothetical in this age of the permanent presidential campaign. Indeed, the current president regularly holds assemblies that he describes as campaign rallies; are remarks made there uniquely off-limits to any future constitutional analysis? The Government's proposed rule is at odds with precedent and arbitrary in application.

It is therefore necessary and appropriate to consider all of President Trump's statements relating to the Order in assessing its constitutionality.

B. Invalidating the Order Is Not Novel

The Government asserts that the decision below is "novel" because it is "based on speculation about its drafters' supposedly illicit purpose." Petr. Br. at 27. That is mistaken.

To start, the animus motivating the Order is reflected on the very face of the document: for example, the Order calls on federal agencies to publicize so-called "honor killings" committed "in the United States by foreign nationals." As the Fourth Circuit concluded, this provision amounts to little more than an anti-Muslim dog whistle. *See* J.A. 224 n.17. Some context is important here: although "'honor killings' are believed to be rare in the U.S.," they are most often invoked by extremist groups to warn against "the potential 'Islamization' of America posed by allowing Muslim immigrants into the U.S." Nahal Toosi, *'Honor Killings' Highlighted Under Trump's New Travel Ban*, Politico (Mar. 3, 2017).

Nor would it be novel for the Order to be struck down based on a finding of animus. Indeed, a similar objection could have been raised each time the Court has identified animus in an Establishment Clause challenge. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 722, 728 (Kennedy, J., concurring in the judgment); *Larson*, 456 U.S. at 246. And the prohibition on animus is familiar in Free Exercise and Equal Protection challenges, where the Court has repeatedly invalidated state action based on a finding of animus. *See, e.g.*, *Lukumi*, 508 U.S. at 542; *Cleburne*, 473 U.S. at 450; *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634.

If anything, the Government's argument is especially weak compared to similar objections in analogous cases. Usually this Court seeks to discern the motives of a multi-member body, such as a town council or legislature, and faces hard questions about identifying group motive. Here, in contrast, the Court need only consider the motives of a single man who has made dozens of statements explaining his actions—none of which display a unique concern for distinct threats from the six covered nations, but all of which cohere into a narrative about excluding Muslims because they are not wanted here.

C. The Order Is Unlawful Even if Animus Was Not Its Sole Motive

Given the exceptional record in this case, it is reasonable to conclude that the Order was motivated *solely* by anti-Muslim animus (or, at the very least, by a decision to follow through on anti-Muslim campaign promises). Viewed from that perspective, the Order—whose scope and structure do not match even its own professed security purposes—is analogous to the amendment invalidated in *Romer v. Evans*: "Its sheer breadth is so discontinuous with the reasons offered for it that the [Order] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

In the alternative, it might be concluded that the animus documented by the Fourth Circuit co-exists with other motives. That is often true in cases evoking the animus principle. Thus, in *Lukumi*, the Court recognized that the subject did implicate "multiple concerns unrelated to religious animosity." 508 U.S. at 535. But those concerns were so "remote" from the ordinance under review that they could not save it. *Id.* So, too, in *Windsor*, where the Court acknowledged other legislative purposes, but nevertheless concluded that the Defense of Marriage Act's "principal effect" and "principal purpose" were to "impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694. And again in *Larson*, where Minnesota had a valid interest in "protecting its citizens from abusive practices in the solicitation of funds for charity," but where that interest could not explain the State's *de facto* denominational line-drawing. 456 U.S. at 248.

In short, where the government acts on the basis of mixed motives—as it often does—courts do not hesitate to invalidate governmental action when animus was a *primary* or *essential* motive. *Cf. McCreary*, 535 U.S. at 865; *see also* J.A. 236 n.22 ("[W]e think EO-2 would likely fail any purpose test, for whether religious animus motivates a government action is a fundamental part of our Establishment Clause inquiry no matter the degree of scrutiny that applies."). And here, for reasons well stated by the District Court and the Fourth Circuit, that conclusion is inevitable: both with respect to the existence of a travel ban in general, and with respect to the strange way that the Order is structured.

Ultimately, perhaps the most instructive precedent is *Korematsu v. United States*, 323 U.S. 214 (1944). There, too, an executive order built on animus was presented to courts as justified by national security concerns, which courts were forcefully urged to take at face value. There, too, the President acted on the basis of various motives, some of them legitimate and others (the decisive ones) emphatically not so. And there, too, evidence about the true motivations of the Executive Branch undercut much of the Government's factual argument to the Judiciary—though in 1944 that evidence remained buried, whereas here the President has admitted his motives and his own agencies have undercut his lawyers' claims. *See* Nora Ellingsen, *Leaked DHS Report Contradicts White House Claims on Travel Ban*, Lawfare (Feb. 27, 2017); Peter Irons, *Justice At War: The Story of the Japanese-Interment Cases* (1993); Leah Litman and Ian Samuel, *No Peeking?: Korematsu and Judicial Credulity*, Take Care (Mar. 22, 2017).

In *Korematsu*, the Supreme Court went along with a presidential demand for boundless deference, over a courageous dissent that called out the Court for upholding bigotry. *See* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."). The mere facade of a national security justification, even if actually in the mix of presidential motives, should not have saved an order that rested ultimately on prejudice and stereotype. As that case teaches, when otherwise valid motives are mixed with forbidden animus, inevitably the legitimate justification is itself corrupted and distorted. *See also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (warning that "race prejudice stems from various causes and may manifest itself in different forms"). For good reason, *Korematsu* is now taught as one of the most painful lessons in our history. *See Hassan v. City of N.Y.*, 804 F.3d 277, 307 (3d Cir. 2015) ("[T]he past should not preface yet against bending our constitutional principles merely because an interest in national security is invoked." (citing *Korematsu*, 323 U.S. at 223)).

This case tests the lesson of *Korematsu* in our own time. One of the most important reasons this country was founded was to welcome people of all faiths and to reject religious intolerance. Issuing an order with the primary purpose of keeping a large number of Muslims locked out is inconsistent with that principle as expressed through the First and Fourteenth Amendments. The President's Order cannot be saved by a *post hoc* (and ever-shifting) appeal to national security—particularly now that over eight months have passed since he first sought to justify this policy as a brief pause on entry pending review. It is now apparent that the President's many public statements about this Order's purpose, rather than the delicate veneer spun by his lawyers, explain why this Order was issued. Respectfully, the Court should not abide an Order widely—and correctly—understood to flow from anti-Muslim animus.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX

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SEP 18 2017

No. 16-1436 & No. 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
PETITIONERS,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
RESPONDENTS.

DONALD J. TRUMP, *et al.*,
PETITIONERS,
v.
STATE OF HAWAII, *et al.*,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following issue only:

1. Whether Sections 2(c), 6(a), and 6(b) of Executive Order No. 13,780 violate the Establishment Clause.

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INTEREST OF AMICI CURIAE[1]

This brief of amici curiae in support of Respondents is respectfully submitted by law professors with expertise in constitutional law. Amici submit this brief in order to present their view on the structural role of the Bill of Rights in our constitutional system, which contradicts the federal government's claim to virtually unlimited power over immigration free of constitutional constraints that apply to all other federal government powers. In particular, the First Amendment's Establishment Clause uniquely forbids the federal government from favoring some religious sects over others. Executive Order 13,780 ("the Executive Order") violates the Establishment Clause and therefore cannot stand.

A list of amici curiae appears as Appendix A.[2]

SUMMARY OF ARGUMENT

The Bill of Rights was added to the Constitution in 1791, not just to protect individual rights, but also to impose structural constraints on the federal government. These constraints sharply curb the powers granted in the un-amended Constitution, divesting the federal government of some of the authority it would otherwise have. Thus, Petitioners' claim, based on the so-called "plenary power" doctrine, of nearly unlimited authority over immigration that is immune from judicial review has it exactly backwards. No federal power can override the Bill of Rights. To the contrary, the Bill of Rights limits federal power in every sphere, including immigration.

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[1] The parties' written consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

[2] The views expressed herein are those of the individual amici, not of any institutions or groups with which they are affiliated.

In particular, the Establishment Clause was originally understood as preventing federal regulation of religion in order to preserve state autonomy in this sphere. Prior to the enactment of the Fourteenth Amendment in 1868, a State could establish a state religion, favor some religions over others, favor religion generally over non-religion, or adopt a policy of nondiscrimination. Whatever it opted to do, the Establishment Clause disqualified the federal government from interfering in that choice. The authority of the States in the domain of religion has now been curtailed by the Fourteenth Amendment. But the constraints the Establishment Clause imposes on the federal government remain in their original form: The federal government can neither establish a national religion, nor engage in discrimination based on religious animus, nor interfere with what remains of state authority in the religious domain.

The Executive Order, motivated by bias against Muslims, violates the Establishment Clause by disfavoring members of a particular minority religion in their efforts to enter the country. And because the Establishment Clause is a structural limitation on the power of the federal government, not just a source of individual rights, the Executive Order cannot be enforced even against foreign nationals, regardless of the extent of their connection to the United States.

The role of the Establishment Clause as a structural constraint on federal authority over immigration (as well as other federal powers) follows logically from the text, structure, and original meaning of the Bill of Rights. It is also consistent with this Court's precedents, properly understood. To the extent that the latter may nonetheless be read to give the federal government unwarranted authority to disregard the Bill of Rights, this Court should take the opportunity to clarify or, if necessary, overrule or limit them.

ARGUMENT

I. THE BILL OF RIGHTS LIMITS FEDERAL POWER OVER IMMIGRATION.

Petitioners contend that federal power to limit immigration is essentially unconstrained by the Bill of Rights. Immigration policy, they assert, is "exclusively entrusted to the political branches" and is "largely immune from judicial inquiry." Pet. Br. at 23 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). This cannot be right. Such claims are inconsistent with the role of the Bill of Rights as a structural limitation on federal power.

A. The Bill of Rights Consists Largely of Structural Constraints that Limit the Power of the Federal Government in Every Realm, Including Immigration.

The text, history, and original meaning of the Bill of Rights indicate that most of its provisions—including the Establishment and Free Exercise Clauses of the First Amendment—are structural limitations on federal government power. Their applicability is not limited to government actions within the territory of the United States, or those that target American citizens. This conclusion is supported by the clear and unequivocal phrasing of the text, and by Founding-era practice.

1. The Text of the First Amendment Does Not Limit Its Applicability Based on Either Territory or Citizenship.

The text of the First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Nothing in this text suggests that the Amendment is limited to government actions within the territory of the United States or those that target American citizens or legal permanent residents of the United States. Neither does it suggest that the force of the Amendment is somehow weaker when it comes to government actions abroad or those targeting noncitizens. To the contrary, the text creates a categorical structural limitation on federal power. Regardless of the location or citizenship status of its objects, "Congress shall make no law" that transgresses the bounds of the Amendment. The phrase "no law" is broad and categorical, and has no territorial limitations.

This Court has long recognized that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning" and that "[n]o word in the instrument . . . can be rejected as superfluous or unmeaning." *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 570–71 (1840). The "due force and appropriate meaning" of "no law" is clearly that of a generalized structural limitation, not a territorially limited rule or a privilege limited to some special category of people, such as American citizens.

The Constitution does reserve a few rights for citizens alone. Most notably, the Privileges and Immunities Clause of Article IV, Section 2, and the Privileges or Immunities Clause of the Fourteenth Amendment both protect the "privileges" and "immunities" of U.S. citizens against various types of interference by state governments. U.S. Const. art. IV, § 2; *id.* amend. XIV, § 1. But the fact that a few rights are explicitly reserved to citizens only serves to make clear that others are not. If there were an implicit assumption that all rights are reserved to citizens unless specifically indicated otherwise, there would be no need to explicitly indicate such a reservation with respect to any particular rights.

2. The Original Understanding of the Bill of Rights Does Not Set Territorial or Citizenship Status Limitations on Its Applicability.

The Bill of Rights was added to the Constitution at the insistence of the Anti-Federalists because they feared the extensive powers of the new federal government. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* ch. 1 (1998) (describing the historical origins of the Bill of Rights). Fueling this concern were the broad powers delegated to the federal government in the new Constitution. The Bill was thus understood in 1791 as not only protecting certain individual rights, but also establishing a set of structural bulwarks against federal power. *See id.* at chs. 1–6. Moderate Anti-Federalists in the key States of New York and Virginia voted in favor of the Constitution on the expectation that the federal government's new powers would be constrained by a bill of rights. It is because of this promise that we have the Union we know today. *See* Michael J.Z. Mannheimer, *The Contingent Fourth Amendment*, 64 Emory L.J. 1229, 1278–81 (2015). Any claim that the federal government has virtually unlimited power over immigration—and therefore can ignore the Bill of Rights when formulating immigration policy—has it exactly backwards: The Bill of Rights limits federal authority over immigration, not the other way around.

This structural account of the Bill of Rights is consistent with Founding-era practice, which made no distinction between the way the Bill's restrictions on federal power applied within the United States and the way it constrained U.S. government actions abroad, including those that targeted non-citizens. During the Founding era, potential conflicts between the Bill of Rights and the exercise of federal power against non-citizens abroad mostly arose in the context of efforts to combat lawbreaking in international waters. Many of these involved enforcement of federal laws authorized by Congress's Article I power to "define and punish Piracies and Felonies committed on the high Seas." U.S. Const. art. I § 8, cl. 10. They included efforts to suppress piracy and the slave trade, and catch violators of U.S. tariff and embargo policies. *See generally* Nathan Chapman, *Due Process Abroad*, Nw. U. L. Rev. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920776.

Both Congress and the executive branch consistently concluded that pirates could not be detained and punished without being afforded due process of law, as required by the Due Process Clause of the Fifth Amendment—including a trial in a regularly constituted federal court. *See id.* at 41–60. The same was true of the procedures for detaining and trying suspected slave traders and smugglers. *Id.* They too were afforded the protection of the Due Process Clause. Such prominent jurists and statesmen as Supreme Court Justice James Iredell, Albert Gallatin (Thomas Jefferson's Secretary of the Treasury and a leading Democratic-Republican spokesman on constitutional issues), and John Quincy Adams argued that this was required by the Constitution. *See id.* at 40, 51–52.

Importantly, these policies made no distinction between suspected pirates, smugglers, and slave traders who were foreign nationals and those who were American citizens. *See id.* As President John Adams' Attorney General Charles Lee instructed in 1798, suspected pirates were to be tried in ordinary federal courts, "according to the law of the United States, without respect to the nation which each individual may belong, whether he be British, French, American, or of any other nation." *Id.* at 55 (quoting Charles Lee, *Prize Ship and Crew—How to be Disposed of* (20 Sept. 1798), 1 Ops. Att'y. Gen. 85).

If the Due Process Clause of the Fifth Amendment applies to U.S. actions abroad, including those targeting noncitizens, the same goes for the First Amendment and other parts of the Bill of Rights. And if federal power to punish crimes "on the high Seas" is constrained by the Bill of Rights, that principle also applies to the power to regulate immigration. It would be strange indeed if captured pirates and smugglers were accorded greater protection under the Constitution than peaceful migrants and visa applicants.

3. The Structural Principle Advanced Here Is Consistent with the Way the Bill of Rights Constrains the Exercise of Other Federal Powers.

The claim that the federal government's "plenary power" over immigration gives it the authority to override the constraints of the Bill of Rights is flatly inconsistent with the way the Supreme Court has treated other federal powers, which are all subject to the Bill of Rights, regardless of how "plenary" they otherwise are. For example, Congress has long been understood to have plenary power to regulate interstate commerce. That authority is "plenary as to those objects" to which it extends. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). Yet it does not follow that the federal government has the power to forbid the use of interstate commerce to disseminate ideas critical of the president, or that it can bar interstate trade carried on by Jews, Muslims, or atheists.

Even the federal government's power over national defense—as fundamental and essential a federal power as any—is subject to the constraints of the Bill of Rights. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (ruling that this power is limited by the First Amendment's restrictions on prior restraint on speech). As Justice Black wrote in that case:

> When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms . . . . In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge . . . .
>
> [T]he Solicitor General argues . . . that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history.

Id. at 716 (Black, J., concurring).

If this principle restricts even Congress's and the President's specifically enumerated powers, such as the power to regulate interstate commerce and various federal powers over national defense, it should apply with at least equal force to federal authority over immigration. The latter is not enumerated in the Constitution, but merely assumed to exist by the Supreme Court because the power to "exclude aliens from its territory . . . is an incident of every independent nation" and therefore an "incident of sovereignty belonging to the government of the United States." *Chae Chan Ping* v. *United States*, 130 U.S. 581, 603, 609 (1889).

As Justice Scalia explained, "after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration," and "with the fleeting exception of the Alien Act [of 1798], Congress did not enact any legislation regulating immigration for the better part of a century." *Arizona* v. *United States*, 567 U.S. 387, 421 (2012) (Scalia, J., concurring in part and dissenting in part). James Madison, Thomas Jefferson, and other leading Founding Fathers argued that the Alien Friends Act was unconstitutional because the federal government lacked any general power to regulate immigration. *See* James Madison, Virginia Resolutions of 1798 (Dec. 24, 1798) (stating that the Act "exercises a power nowhere delegated to the federal government") *reprinted in* J. Powell, *Languages of Power: A Source Book of Early American Constitutional History* 134 (1991); Thomas Jefferson, Draft of Kentucky Resolutions (Oct. 4, 1798) ("ALIEN friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the US") *in The Papers of Thomas Jefferson* vol. 30, 536 (2003). It would be perverse to allow the plenary power doctrine to give a merely implied—and historically contested—federal power over immigration higher status than the federal government's specifically enumerated powers.

The Petitioners claim that "the exclusion of aliens abroad, over which the political branches have broad authority, calls for especially deferential review." Pet. Br. at 69. But the political branches also have broad—indeed plenary—authority over interstate commerce and many aspects of national defense. Yet it does not follow that the courts must engage only in "especially deferential review" of federal government actions in these fields. Indeed, precisely because the government has such broad authority, it is especially important to ensure that authority is not wielded in ways that violate constitutional rights. The breadth of federal power under the original Constitution is the main reason that the Bill of Rights was enacted in the first place.

Petitioners also contend that the use of the plenary power doctrine to circumvent the Bill of Rights in the immigration field is proper because "aliens seeking admission from abroad have no constitutional rights at all regarding entry into the country." Pet. Br. at 63. But even if the federal government does have "plenary power" over immigration in the sense that Article I of the Constitution gives it authority over the issue, it does not follow that this authority is exempt from the constitutional limitations that apply to every other exercise of federal government power. For example, Congress has the power to give or withhold Social Security benefits. *See **Flemming** v. Nestor*, 363 U.S. 603, 609–11 (1960) (holding that Social Security benefits are an entitlement that can be stripped by Congress, not a binding contract). That does not mean it is free to discriminate on the basis of race or religion in doing so. *See id.* at 611. While would-be recipients have no legal right to Social Security benefits (at least none that Congress cannot take away), they do have a constitutional right to expect that the government will not allocate benefits in ways that violate constitutional constraints, including by engaging in prohibited discrimination A law that restricted Social Security benefits to Christians or one that excluded Muslims or Jews would be unconstitutional. The same necessarily goes for a law or executive order that engages in similar discrimination with respect to potential immigrants

B. This Court's Precedents Belie the Notion that Immigration Policy Is "Largely Immune" from Judicial Review of Claims that It Violates a Provision of the Bill of Rights.

This Court's precedents are consistent with the principle that the Bill of Rights is a set of structural constraints that limit federal power over immigration. Indeed, these precedents show that claims that federal immigration policy violates a provision of the Bill of Rights have not been categorically barred by the Court. To the extent that any of the Court's precedents could be read as allowing Congress to ignore the Bill of Rights in the immigration context, it should take this opportunity to clarify, limit, or overrule those precedents.

For well over a century, this Court has recognized the obvious fact that the federal power over immigration is constrained by the Constitution. *See Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001) (observing that federal power over immigration law "is subject to important constitutional limitations"); *INS* v. *Chadha*, 462 U.S. 919, 940–41 (1983) (noting that the federal government must choose "a constitutionally permissible means of implementing [its] power" over immigration); *Chae Chan Ping*, 130 U.S. at 604 (observing that federal power over immigration is "restricted . . . by the [C]onstitution itself"). The Constitution that limits federal power over immigration is the same Constitution that limits all federal power, not some faint shadow.

Notwithstanding this established principle, Petitioners insist, based largely on *Kleindeinst* v. *Mandel*, 408 U.S. 753 (1972), that immigration policy is virtually immune from judicial review, even when it implicates a provision of the Bill of Rights. *See* Pet. Br. at 62–69. Petitioners misread that case. In *Mandel*, the Court addressed a First Amendment challenge to the Attorney General's decision not to grant a waiver to Mandel from his disqualification for a temporary visa pursuant to a federal statute that denied visas to anyone who advocated communism. *Mandel*, 408 U.S. at 755–57. Importantly, though, the appellees in *Mandel* did not challenge the federal statute on First Amendment grounds. Instead, they conceded that Congress's exclusion of those advocating communism was consistent with the First Amendment. *Id.* at 767 ("[A]ppellees . . . concede that Congress could enact a blanket prohibition against entry of all aliens [who advocate communism] and that First Amendment rights could not override that decision."). They claimed merely that the First Amendment prohibited the Attorney General's exercise of executive discretion not to issue a waiver in Mandel's particular case.

Thus, the Court's statement that withholding judicial review was appropriate so long as the executive's reason for refusing a particular waiver was "facially legitimate and bona fide," *id.* at 770, was premised on the concession that the general exclusion of communists was consistent with the First Amendment. So long as that general exclusion is constitutional, and a specific decision implementing that general exclusion rests upon a "facially legitimate and bona fide" reason, the courts will not look behind that reason.

The present case is wholly different. Respondents here challenge the Executive Order as a general matter, not just the manner in which it has been applied to a particular individual. Had the appellees in *Mandel* challenged the statute head on, the Court could have decided the case based on ordinary First Amendment principles.

Petitioners argue that ordinary constitutional principles do not apply to the immigration context. Again, this misreads the cases. It is true that the Court said in *Demore* v. *Kim*, 538 U.S. 510, 521 (2003), that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens" (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 79–80 (1976)). But aside from the obvious fact that, unlike citizens, non-citizens can be deported, *cf. Trop* v. *Dulles*, 356 U.S. 86, 92–93 (1958) (plurality), this sweeping dictum finds no support in precedent.

It appears to stem from *Harisiades*, 342 U.S. at 581–84, in which three aliens challenged deportation orders based on their prior membership in the Communist Party, which a federal statute made a ground for deportation. The Court rejected their First Amendment claims, but not because of any special deference or solicitude granted to Congress when it legislates in the immigration context. Rather, the Court relied on conventional First Amendment principles: *Dennis* v. *United States*, 341 U.S. 494 (1951), just nine months earlier had held that Congress could, consistent with the First Amendment, criminalize membership in the Communist Party. Thus *Harisiades* stands only for the simple notion that, if Congress could make membership in the Party by American citizens a crime without violating the First Amendment, it could also make such membership grounds for deportation of an alien. *See* 342 U.S. at 592 ("[T]he test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable." (citing *Dennis*, 341 U.S. at 494)). It was not that the federal government was owed special deference because *Harisiades* was an immigration matter. It was rather that the First Amendment itself was understood at the time to deny protection to Communists.

Petitioners also rely heavily on cases in which an alien brought a procedural due process challenge to an order of exclusion. Typical is *Shaughnessy* v *United States ex rel. Mezei*, 345 U.S. 206, 207 (1953), in which an alien challenged the Attorney General's decision to exclude him without a hearing. The Court rejected the claim, explaining: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). This broad dictum traces its lineage to *Nishimura Eiku* v. *United States*, 142 U.S. 651 (1892), on which Petitioners also rely. There the Court wrote that, as to aliens seeking entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law." *Id.* at 660.

But *Nishimura Eiku* merely reflects an era in which the concept of due process was thought to mean only that executive branch officials must follow the applicable statutory and common law procedures For example, in a roughly contemporaneous appeal in a state criminal case, the Court rejected the defendant's contention that his confession was coerced in violation of due process, writing that "if . . . the admission of th[e] testimony did not violate . . . the Constitution and laws of the state of Missouri, the record affords no basis for holding that he was not awarded due process of low [sic]." ***Barrington*** v. *Missouri*, 205 U.S. 483, 486–87 (1907).

The modern understanding of due process in both of these contexts is, of course, very different. *See Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem [under] [t]he Fifth Amendment's Due Process Clause."); *Mincey* v. *Arizona*, 437 U.S. 385, 398–400 (1978) (unwanted interrogation of hospital patient in "unbearable" pain in intensive care unit while "encumbered by tubes, needles, and breathing apparatus" violates Due Process

Clause of Fourteenth Amendment); *see also Boutilier* v *I.N.S.*, 387 U.S. 118, 123–24 (1967) (rejecting due process void-for-vagueness challenge to immigration statute under the same standards used in other void-for-vagueness cases).

Kerry v. *Din*, 135 S.Ct. 2128 (2015), as explained in Justice Kennedy's decisive separate opinion, is also a procedural due process case, in which the Court rejected a claim that the visa application of a foreign spouse of a U.S. citizen was denied without sufficient reason for the denial. *Id.* at 2139–42 (Kennedy, J. concurring in the judgment). Justice Kennedy did not deny that due process required the government to provide a reason. He simply determined that the State Department's citation of the applicable statutory provision barring from visa eligibility those who had engaged in "[t]errorist activities," coupled with the American spouse's concession that her husband had worked for the Taliban, provided a sufficient reason. *Id.* at 2140–41.

A determination of what process is due regarding an individualized assessment of a visa application is worlds apart from the contention that a large swath of immigration policy is virtually exempt from the Establishment Clause. Like *Harisiades*, *Nishimura Eiku* and its progeny, including *Din*, stand for the unremarkable proposition that constitutional claims in the immigration context are generally treated as they are in any other context. *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 Geo. Immig. L.J. 257, 258 (2000) (explaining that immigration cases have typically been "consistent with domestic constitutional law" as it existed when they were decided)

Finally, Petitioners rely on *Fiallo* v. *Bell*, 430 U.S 787, 788–89 (1977), in which this Court rejected a challenge to an immigration statute that gave preference to non-marital children of mothers who were citizens or lawful permanent residents, but declined to provide a preference for non-marital children of fathers having such a status. But, as in *Mandel*, the appellants in *Fiallo* conceded the government's claims to "special judicial deference" over immigration. *See id.* at 793 ("Appellants apparently do not challenge the need for special judicial deference to congressional policy choices in the immigration context.").

In addition, *Fiallo* essentially involved an equal protection claim. *See id.* at 791. By its terms, the Equal Protection Clause does not apply directly to the federal government. *See* U.S. Const. amend. XIV ("No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)). Equal protection principles constrain the federal government only indirectly, through the Fifth Amendment's Due Process Clause. *See, e.g.*, ***Bolling*** v. *Sharpe*, 347 U.S. 497, 499 (1954). The claim that an immigration statute violates a constitutional provision that applies only indirectly to the federal government is a far cry from the present case, which involves an executive order that violates the Establishment Clause, a protection that applies not only directly but with particular force to the federal government. *See infra* § II.A.

Importantly, Petitioners can cite no case in which this Court has approved a distinction based on religion in the immigration context, or even intimated that such a distinction would be subject to less than full constitutional scrutiny. Only two of this Court's immigration cases involve First Amendment challenges at all, and both are free speech/freedom of association cases: *Mandel*, in which the viewpoint-based distinction made by the immigration statute in question went unchallenged, and *Harisiades*, in which the Court subjected such a distinction to ordinary constitutional scrutiny. This Court's cases do not establish a broad-ranging plenary federal power to ignore the First Amendment.

Petitioners' claim that federal authority over immigration encompasses a general power to "make[] rules that would be unacceptable if applied to citizens,'" Pet. Br. at 64 (quoting *Demore*, 538 U.S. at 521), is at war with their acknowledgement that in *Mandel*, the case on which they most heavily rely, U.S. citizens were asserting their own constitutional rights. *See* Pet. Br. at 26–27. Their already problematic claim that the Bill of Rights does not limit federal power over aliens abroad devolves into the even more troubling claim that even the rights of U.S. citizens virtually evaporate in the face of such power. That cannot be right.

C. To the Extent that the Court's Precedent Does Cast Doubt on the Applicability of the Bill of Rights to Immigration Cases, It Should Be Limited or Overruled.

To whatever extent the Court's "plenary power" precedent is inconsistent with the principle that the Bill of Rights constrains all powers granted to the federal government, it should be overruled. The importance of the Bill of Rights as a check on abuses of federal power is such a fundamental element of our Constitution that this Court should not allow misguided or misunderstood precedent to negate it. This imperative is heightened by the painful reality that the plenary power doctrine has its origins not in the ideals of the Founding, but in the widespread racial and ethnic prejudices of the same era that gave rise to Jim Crow segregation and *Plessy* v. *Ferguson*, 163 U.S. 537

(1896). *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998) (describing the effects of racial prejudice on formation of the plenary power doctrine, and its connections with domestic racial segregation). A key factor that this Court considers in deciding whether to overrule precedent is whether it was "well reasoned." *Montejo* v. *Louisiana*, 556 U.S. 778, 792–93 (2009). A doctrine that is at odds with basic textual and structural principles of the Constitution and owes its origins in large part to racial prejudice surely is not.

Should the Court choose to apply the rule of *Mandel* to the present case, it can do so in a way that is compatible with the role of the Bill of Rights as a fundamental constraint on federal power, including over immigration. Petitioners rely on the passage in *Mandel* that indicates that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." *Mandel*, 408 U.S. at 770. Under this approach, the government is entitled to heavy judicial deference only if it offers a justification for exclusion that is both "facially legitimate" and "bona fide."

The Court should make clear that a justification cannot be "facially legitimate" if it contravenes the Bill of Rights—for example, by excluding potential immigrants based on their speech or religion. The very nature of a legitimate government interest assumes that it does not involve attacking a constitutional right. *See, e.g.*, *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973) (holding that an attack on the constitutional right to equal protection of the laws by attempting to "harm a politically unpopular group" does not qualify as a legitimate state interest).

In addition, to be "bona fide," the interest in question must be offered in good faith, and cannot be a mere pretext for indirectly violating the Bill of Rights, as is the case here. *See Din*, 135 S.Ct. at 2141 (Kennedy J., concurring in the judgment) (noting that "an affirmative showing of bad faith" would vitiate the judicial deference that might otherwise be due under *Mandel*); *Int'l Refugee Assistance Project (IRAP) v. Trump*, 857 F.3d 554, 590, J.A. 212 (4th Cir. 2017) (noting that "as the name suggests, the 'bona fide' requirement concerns whether the government issued the challenged action in good faith"), *cert. granted* 137 S.Ct. 2080 (2017). In this way, the Court can avoid having to overrule *Mandel*, while still vindicating the importance of the Bill of Rights as a constraint on federal power of every kind.

D. Because the Bill of Rights Constrains Federal Power over Immigration, It Is Permissible for Courts to Assess the President's Campaign Statements as Evidence of Discriminatory Motive.

Because the Bill of Rights constrains federal power over immigration, just as it does other government powers, courts can and should consider the President's many statements indicating that discrimination against Muslims was the true purpose of the Executive Order. *Cf.* Pet. Br. at 71–78.

Laws and executive actions that discriminate on the basis of religion are subject to strict scrutiny, much like those that discriminate on the basis of race or ethnicity. *See, e.g.*, *Trinity Lutheran Church* v. *Comer*, 137 S.Ct. 2012, 2019 (2017) (reiterating this rule under the Free Exercise Clause). This Court has long held that a facially neutral law or regulation may be invalidated if its true purpose was to discriminate on the basis of a prohibited classification. *See, e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (striking down facially neutral ordinance that was used to discriminate against the Chinese).

In assessing whether an impermissible discriminatory motive is present, this Court's precedents require judges to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he historical background of the decision" and "[t]he specific sequence of events leading up to the challenged decision." *Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.* 429 U.S. 252, 266–67 (1977). The president's numerous statements indicating that the true purpose of his ostensibly territorially based travel ban was to fulfill his campaign promise to impose a "Muslim ban" are undeniably key elements of "the historical background" of the Executive Order, and they are clearly part of the "specific sequence of events leading up" to it. *Id.*

On at least a dozen separate occasions, President Trump equated his territorial travel ban policy with the Muslim ban he advocated during the campaign, noting, for example, that the former was not a repudiation but actually an "expansion" of the latter. *See* David Bier, *A Dozen Times Trump Equated his Travel Ban with a Muslim Ban*, Cato at Liberty (Aug. 14, 2017); *see also IRAP*, 857 F.3d at 575–77, 594–95, J.A. 178–83, 219–22 (describing several of the President's statements to this effect in detail).

Campaign promises are an important indication of politicians' intentions. Despite the stereotype that candidates routinely break their commitments, empirical evidence suggests that presidents keep the vast majority of their campaign promises—generally two-thirds or more. And it is likely they at least attempt to keep an even larger percentage. *See* Timothy Hill, *Trust Us: Politicians Keep Most of their Promises*, FiveThirtyEight (Apr. 21, 2016), (summarizing relevant evidence) *available at* https://fivethirtyeight.com/features/trust-us-politicians-keep-most-of-their-promises/; François Pétry & Benoît Collete, *Measuring How Political Parties Keep Their Promises* (presenting historical data on presidential promise-keeping) *in Do They Walk Like They Talk?: Speech and Action in Policy Processes* 65 (Louis M. Imbeau ed., 2009). The President himself emphasized that he would issue the present order, after a prior one was struck down, in order to "keep [his] campaign promises," thereby demonstrating that those promises are indeed part of the "historical background" of both orders. *See IRAP*, 857 F.3d at 576, J.A. 183.

To ignore campaign statements in such a context would be to close judicial eyes to obvious political realities. It would also set a dangerous precedent for future cases. If even blatant discriminatory statements by decision-makers can be ignored if uttered during a campaign, future presidents and other policymakers would have a ready-made playbook for getting away with enacting a wide range of discriminatory policies. They could blatantly appeal to bigotry during the campaign, then moderate their rhetoric after the election and target racial, ethnic, or religious groups for discrimination by using facially neutral criteria that have a high correlation with the prohibited classification.[3] For instance, they could target

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[3] In the present case, the populations of all six countries covered by the Executive Order are 90 to 99 percent Muslim. *See Int'l Refugee Assistance Project* v. *Trump*, No. TDC-17-0361, 2017 WL 1018235, at *10, J.A. 119 (D. Md. Mar. 16, 2017), *aff'd*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S.Ct. 2080 (2017).

African-Americans by singling out people who live in majority-black neighborhoods.

The President's statements are particularly relevant in a case like the present one, where the challenged government policy was the product of a single decisionmaker, who made his intentions very obvious. In such a situation, courts do not face the same difficulties inherent in assessing the purposes of multi-member legislative bodies, where different participants in the process may have supported the same policy for widely divergent reasons.

Evidence of an impermissible motive does not by itself prove that the challenged government action must be ruled unconstitutional. The government can still vindicate its policy by proving that it would have been enacted in the same form even in the absence of illicit motivations. *See* ***Arlington*** *Heights*, 429 U S. at 270 n.21 ("Proof that the decision by the [government] was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the [government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."). But assessing evidence of motive is nonetheless a crucial part of the judicial role in cases like the present one, and the President's statements cannot be ignored in such an inquiry.

* * *

In sum, first principles and precedent point in the same direction in this case: Irrespective of the fact that the Executive Order operates in the immigration context, the Court may, and must, subject the Order to ordinary principles of constitutional law. Doing so would leave

Congress and the President with broad power to regulate immigration on a wide range of grounds. They could, for example, discriminate among potential immigrants on the basis of job skills, educational attainment, criminal record, presence of family members in the United States, and so on. Just as Congress retains broad authority over interstate commerce and other matters within its Article I powers, the same is true in the field of immigration. What the federal government cannot do, however, is discriminate on bases that violate the Bill of Rights or other constitutional provisions.

II. UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, THE EXECUTIVE ORDER IS UNCONSTITUTIONAL AND VOID EVEN AS TO FOREIGN NATIONALS ABROAD.

The Establishment Clause of the First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Because this case involves a challenge to a federal executive order, the First Amendment applies directly, unmediated by the Fourteenth.[4] But because most of the Establishment Clause jurisprudence over the past seventy years has addressed the Clause as incorporated against the States, the original understanding of the Clause as a constraint on uniquely federal power has been all but lost. That original understanding dictates that the federal government may neither establish a national religion, nor interfere with the primacy of the States in the field of religion. The challenge in this case goes to the latter constraint. By using entry restrictions to target a particular religious minority, the Executive Order interferes with state primacy in the religious domain: It hampers the ability of the States to attract Muslim residents and thereby enhance the States' religious diversity. Because the Clause acts as a structural limitation on the power of the federal government, and not just a source of individual rights, the Executive Order is void and cannot be applied to anyone, even foreign nationals abroad.

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[4] As the Court has implicitly recognized, see *Hein* v. *Freedom from Religion Found., Inc.*, 551 U.S. 587, 593–95 (2007) (addressing Establishment Clause challenge to Executive Orders), if the First Amendment prohibits Congress from passing a statute, it surely must prohibit the President from taking the same action unilaterally by executive order. Petitioners have not argued to the contrary.

A. The Executive Order, Which Targets Members of One Religious Minority, Violates the Establishment Clause Because It Interferes with State Primacy over Religious Matters.

The original understanding of the First Amendment's Establishment Clause was that it was a federalism provision, preventing the federal government from establishing a national religion or interfering with the States' exclusive sovereignty in the religious sphere. The Executive Order, directed at limiting entry into the country by Muslims, conflicts with the latter constraint.

This Court's modern Establishment Clause jurisprudence began with *Everson* v. *Bd. of Educ. of Ewing Tp.*, 330 U.S. 1 (1947), a challenge to a New Jersey statute authorizing reimbursement to parents of children who attended religious schools for the cost of transporting them to and from school. It was also in this case that the Court held that the Clause applies to the States via incorporation into the Fourteenth Amendment. *See id.* at 15. Since that time, the Court has not taken the opportunity to rule on the distinctive federalism strand of the Establishment

Clause, which specifically disqualifies the federal government from regulating religion. This case presents an opportunity to address that issue.

The Establishment Clause was originally understood, at least in part, as a federalism provision. Obviously, in 1791, it constrained only the federal government. That restriction on federal power was twofold. First, it prohibited the federal government from establishing a national religion or church. *See Amar, supra,* at 32. Second, it prevented the federal government "from interfering in the religious establishments of the states." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003).

While the first constraint is self-explanatory, the second requires some exploration of religious establishments and other arrangements by the States at the time of the adoption of the First Amendment. These arrangements ran the gamut from outright establishment of an official state church to an ecumenical embrace of all sects. On one end of the spectrum, Connecticut, Massachusetts, and New Hampshire essentially adopted a single Protestant sect—Congregationalism—as their state religion, though they did so indirectly, by delegating religious establishment to the local level through home rule provisions. See *Amar, supra,* at 32–33. South Carolina was somewhat more ecumenical, establishing Protestantism in general as its state religion by permitting taxation in support of all Protestant churches in the State. *See* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 52–58 (1994). Maryland and Georgia were more ecumenical still, by including Catholicism within their general establishment of Christianity as state religions. *See id.* Delaware, Pennsylvania, and Rhode Island had no official state religions and no state tax in support of any church, but still maintained "establishments" to the extent that they required religious tests to hold public office. *See Town of Greece* v. *Galloway*, 134 S.Ct. 1811, 1836 (2014) (Thomas, J., concurring in part and concurring in the judgment). New York also had no established church, having in the 1780s repealed taxes that had been levied for the support of the Anglican Church. *Gerard V. Bradley, Church-State Relationships in America* 53 (1987). And Virginia was furthest on the disestablishment side of the spectrum, neither permitting state taxation in support of religion nor requiring religious tests for office-holders. *Galloway*, 134 S.Ct. at 1835–36 (Thomas, J., concurring in part and concurring in the judgment); *Sch. Dist. Of Abington Twp.* v. *Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting). Thus, the several States in 1791 took drastically different approaches to church-state relations.

The Establishment Clause was originally designed to entrench the principle that religion was under the control of the States, by forbidding interference by the federal government in this sphere. "Each State was left free to go its own way and pursue its own policy with respect to religion" *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting); *see also* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191, 1200 (1990) ("[T]here was no consensus on proper church/state relations. The only agreement was that the issue was properly left to the state and local governments."). Thus, the Establishment Clause disqualified the federal government from interfering in state policy toward religion, whether that policy favored one or several religious sects, favored all religions, or was neutral as between religion and non-religion. As Justice Story wrote: "[T]he whole power over the subject of religion is left exclusively to the

State governments . . . ." 2 Joseph Story, *Commentaries on the Constitution of the United States*§ 1879 (4th ed. 1873).

This state authority, reserved to the States through the Establishment Clause, was subsequently limited by the Fourteenth Amendment, which incorporated the Bill of Rights against the States. This Court's cases, beginning with *Everson*, 330 U.S. at 15–16, make this clear. For example, States can no longer create an established church or favor one religious group over others. *Cf.* Amar, *supra*, at 253–54 (discussing the impact of incorporation on establishment of religion and religious discrimination by state governments).

Incorporation of the Establishment Clause against the States is not relevant to the present litigation, of course. Here, we deal purely with actions of the *federal* government. In such a context, the Establishment Clause applies in its original form, unaffected by the Fourteenth Amendment. Vis-à-vis the federal government, the Establishment Clause means in 2017 what it meant in 1791: The federal government may not assert authority over religion and church-state relations.

With these principles in mind, this is an easy case. Hawaii has made clear its commitment to diversity. *See* J.A. 1005 ("Hawai'i is the nation's most ethnically diverse State . . . ."); J.A. 1007 ("Hawaii's educational institutions have diverse faculties."). It values that diversity and has laws and policies in place in order to maintain, enhance, and promote it. *See* J.A. 1036 (discussing Hawaii's "commitment[] to . . . diversity embodied in the State's Constitution, laws, and policies"). Hawaii's commitment to diversity includes diversity of religion. Hawaii, of course, does not claim the authority to show favoritism toward Muslims, for such a policy would raise serious constitutional concerns. It simply seeks to make the State, including its agencies and schools, a place where adherents of all faiths, including Muslims, are tolerated and welcome. Such government policy towards religious diversity is a matter of church-state relations that was reserved to the States by the Establishment Clause, so long as it does not violate other parts of the Constitution. And it is part of the residual state authority over religious matters that survives the Fourteenth Amendment.

The regulation of religious diversity through the attraction (or repulsion) of religiously diverse newcomers was a matter of church-state relations in 1791. States chose more ecumenical or more exclusionary approaches to religion based in part on the goal of either attracting or repelling religious dissenters as emigrants. In Connecticut and Virginia, debates over whether and to what extent churches should be supported by public tax money included discussions over whether such arrangements would "discourage[] new settlers." Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 182 (1986). As Curry put it, "a state that made all its inhabitants pay for Christian ministers could hardly expect Jews and other non-Christians to bring their trade and skills there." *Id.* at 177. A few States exhibited hostility to members of some religious sects, thereby discouraging their emigration to those States. New York did this by requiring an oath by newcomers that made it virtually impossible for Catholics to become citizens. Bradley, *supra*, at 54. Maryland required a similar oath but one that was more welcoming of Catholics by providing that a new citizen declare "his belief in the [C]hristian religion." *Id.* at 45. Other States were far more welcoming of newcomers of different faiths. Pennsylvania adopted a policy of aid to all religions evenhandedly because lawmakers wanted to maintain their State as "a sectarian melting pot." *Id.* at 48. Georgia's reputation for religious tolerance was driven in part by a desire to attract a wide variety of settlers of various minority faiths *See* McConnell, *supra*, at 2129. Earlier in its history, South Carolina went to "extreme lengths in order to secure religious liberty as bait for dissenting settlers." John Wesley Brinsfield, ***Religion** and Politics in Colonial South Carolina* 6 (1983).

Of course, state naturalization provisions were preempted by the Constitution, which made naturalization an exclusive federal power. *See* U.S. Const. art. I, § 8, cl. 4. But after adoption of the Establishment Clause, Congress was prohibited from enacting similar naturalization provisions that made distinctions based on religion. And the States maintained more general power over religious matters within their boundaries which could be, and were, used to attract or repel newcomers of different religious faiths While policies designed to repel religious non-conformists to a State are now forbidden by the Fourteenth Amendment, those designed to attract religious minorities survive, at least to the extent that they do not adversely affect the constitutional rights of others and do not themselves discriminate on the basis of religion. In this case, Hawaii and other States seek to attract a diverse population by engaging in a policy of religious nondiscrimination, not favoritism.

The Executive Order interferes with this permissible state authority over religious matters and therefore violates the Establishment Clause.[5] Imagine that the Executive Order explicitly barred Muslims from entering the country. This would infringe Hawaii's interests in seeking a religiously diverse populace for the simple and obvious reason that if Muslims could not enter the country, they also could not enter the State of Hawaii. Such an order would exclude alien adherents of an entire faith from joining the community of Hawaiians, hampering the State's goal of promoting religious diversity. The same point applies even if, as in the present case, the federal government merely targets a subset of Muslims for exclusion, based on their religion.

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[5] For this reason, Respondent Hawaii has standing to enforce the constraints imposed by the Establishment Clause *See Massachusetts v E.P.A.*, 549 U S 497, 520 n.17 (2007) (observing that a State

The step from that case to this one is a short one. For the reasons discussed above, *see supra* Part I.D, and those demonstrated by Respondents and their other amici, the Executive Order was transparently motivated by anti-Muslim animus. On numerous occasions, both before and after the 2016 presidential election, the President characterized what would eventually become Executive Order 13,780 as an attempt to bar entry by Muslims. Despite Petitioners' attempts to persuade the judiciary to avert its eyes from the obvious, the Court has an obligation to recognize the motivation for the Executive Order, as it would in any other case raising an Establishment Clause claim.

Petitioners' plea for a unique form of deference—that "domestic [Establishment Clause] case law . . . has no sensible application to the President's foreign-policy, national-security, and immigration judgments," Pet. Br. at 69—once again has it backwards. Federal policies call for at least as much scrutiny as those made by state and local governments. The Establishment Clause in fact applies with unique stringency to the federal government, and

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has standing "to assert its [own] rights under federal law"); *see also* Amar, *supra*, at 33 ("[S]tate governments are in part the special beneficiaries of, and rights holders under, the [C]lause.").

particularly the federal executive, the one person in whom virtually unfettered power over the lives of millions would otherwise be vested. The sharp constraints imposed by the Establishment Clause not only permit but, in fact, require this Court to scrutinize the Executive Order for anti-Muslim animus.

B. The Order Is Void and May Not Be Applied to Anyone, Including Foreign Nationals with No Present Relation to the United States.

Given that the Establishment Clause is in part a structural provision that limits the power of the federal government, the Executive Order is null and void, and cannot be enforced against anyone, including aliens abroad.

Again, the Establishment Clause was designed to divest from the federal government "the whole power over the subject of religion." 2 Story, *supra*, § 1879. Like the Bill of Rights more generally, it is a structural constraint on federal power. Where the federal government has no power to exercise, that is the end of the inquiry.

Petitioners' claim that "[a]liens abroad have no . . . constitutional rights at all regarding entry into the country," Pet. Br. at 35 n.13, misses the point entirely. The question is not simply one of individual rights but also one of structural limitations on power. The Establishment Clause, and the rest of the Bill of Rights, divest the federal government of certain powers. Thus, to ask whether aliens abroad have Establishment Clause rights is to ask the wrong question. "[A] law 'beyond the power of Congress,' for any reason, is 'no law at all.'" *Bond* v. *United States*, 131 S.Ct. 2355, 2368 (2011) (Ginsburg, J., concurring) (quoting *Nigro* v. *United States*, 276 U.S. 332, 341 (1928)). An Executive Order beyond the power of the

President, likewise, is "no law at all." It cannot be enforced against anyone, here or abroad.

Such was the understanding of the Bill of Rights at the time of the Founding. *See supra* Part I.A.2. Scholars agree that the core, irreducible meaning of the Fifth Amendment's Due Process Clause, for example, was that the federal government, before depriving someone of "life, liberty, or property," had to abide by "standing law by a court proceeding according to appropriate procedures." Chapman, *supra*, at 27. The government, in other words, had to obey the law. If it did not, it was acting outside the authority granted by the Constitution. In short, an act beyond the constitutional powers of the federal government is entirely void and cannot be enforced against anyone, regardless of citizenship or location.

CONCLUSION

For the reasons stated above, the judgments of the U.S. Courts of Appeals for the Fourth and Ninth Circuits should be affirmed.

Respectfully submitted.

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ECORD
AND
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Supreme Court, U.S.
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In The Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE DECALOGUE SOCIETY OF LAWYERS

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INTEREST OF THE AMICUS[1]

The Decalogue Society was founded in 1934. It is the oldest continually functioning Jewish bar association in the United States. Decalogue maintains a broad range of programs to benefit its members, the Jewish community, the legal community, and the general public. Most Decalogue members practice in Illinois, but the membership includes lawyers located throughout the United States and in Israel and other countries. Decalogue believes that its members, through their membership and involvement in the organization's activities, seek to combine those attributes of our lives unique to being both attorneys and Jews. There are many methods for members to express and develop as attorneys and Jews separately, but Decalogue serves as a crucial and unique forum to combine those aspects in the activities, potential and strength of a bar association.

The goals and mission of the Decalogue Society of Lawyers include:

1. Acting to address special problems and opportunities available to its members as attorneys and Jews to enhance the goals of its members;

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

2. Devoting itself to special problems or opportunities, the solving or addressing of which will benefit our constituencies and bring increased dignity and honor to all members of the legal profession and appreciation for the inspiration provided by our Jewish heritage;

3. Fostering the traditions and ideals of American democracy;

4. Maintaining vigilance against public and private practices which are anti-social, discriminatory, anti-Semitic or oppressive and join with other groups and minorities to protect legal rights and privileges;

5. Raising the standards of the bar and the bench and educate the public to better understand and appreciate the function and status of the lawyer and judge in free society;

6. Fostering friendly relations, networking and goodwill among our members, and between our members and other attorneys, bar associations, the courts, and the public;

7. Helping to resolve legal controversies particular to the Jewish community;

8. Actively participating in social action, rendering useful community service and cooperating as lawyers, citizens and Jews in worthy movements for the public welfare;

9. Advancing and improving the law, administration of justice and legal profession and cooperate with other bar associations to attain those objectives; and

10. Promoting human rights.

As a bar association concerned with, and organized to combat, anti-Semitism and every other form of baseless hatred, the Decalogue Society has a special interest in combatting an insidious hatred, hatred and mistrust of Muslims and Arabs, that has swept this country of late.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Jewish community, unfortunately, has experience with nativist movements. While it is possible to support changes to the nation's immigration policies without giving into nativist fears, it appears all too clear that the president's Executive Orders are not based upon sound policy objectives, but rather on simple prejudice. They are neither facially neutral, nor neutral in their application. Rather, they penalize potential refugees to this great country on the basis of their religion – a massive betrayal of the values to which this great country aspires.

The Decalogue Society of Lawyers therefore urges this Honorable Court to find the Executive Orders that are the subject of these appeals unconstitutional.

ARGUMENT

Before the Court now is a consolidated appeal from decisions of the Fourth and Ninth Appellate Circuits. The Fourth Circuit's Opinion explicitly relies upon the Establishment Clause of the Constitution as the basis of its ruling, in contrast to the Ninth Circuit's later ruling, which declined to address the Establishment Clause. This Brief's focus will be the Establishment Clause, and it will reference the Fourth Circuit's Opinion as a result, for it is that Opinion which the Decalogue Society asks this Court to uphold.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). The Supreme Court has created a helpful test for identifying when a law runs afoul of the Establishment Clause. For a law to be upheld under the Establishment Clause, it (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (hereinafter "Executive Order," or, "Muslim Ban") violates the first and second prongs of this test.

A. The Jewish Community possesses the wisdom of unfortunate experience in the area of nativist crackdowns

The United States has a promised role as a refuge for the marginalized, and the predicament of those banned from entry by the Executive Order

The words of Emma Lazarus that have been immortalized at the base of the Statue of Liberty have never been more relevant to a generation of frightened Americans. "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!" E. Lazarus, "The New Colossus." The United Nations has estimated that conflicts in the Middle East and Northern Africa have created a refugee crisis affecting millions of people. Global Trends: Forced Displacement In 2015, United Nations High Commissioner for Refugees (http://www.unhcr.org/576408cd7.pdf). Of those, the lion's share of refugees are from two countries: 4.9

million of those refugees come from Syria, while 1.1 million come from Somalia, both countries that are targeted by the Muslim Ban. Id. For a Jewish bar association, that number – 6 million people – has special significance. See United States Holocaust Memorial Museum, Documenting Numbers of Victims of the Holocaust and Nazi Persecution, https://www.ushmm.org/wlc/en/article.php?ModuleId=10008193, (accessed July 4, 2017) (Numbers of Deaths. Jews: up to 6 million).

The same United Nations report estimated that 3.2 million people were active asylum seekers. In response to this humanitarian catastrophe, the White House has barred the "golden door," and doused Lady Liberty's torch.

The Executive Order is part of the current president's promised nativist crackdown, and it targets the Muslim community specifically. As an association of Jewish lawyers and judges, the Decalogue Society is familiar with this form of nativism. Not long ago, the Jewish community was its victim.

Indeed, the attacks against refugees from predominately Muslim countries are reminiscent of attacks on the Jewish community that it has faced throughout its history, and which continue to haunt the Jewish community even into the modern era. Henry Ford became a popular (and populist) figure in the wake of World War I, claiming that "international financiers are behind all war. *They are what is called the international Jew: German Jews, French Jews, English Jews, American Jews. I believe that in all those countries except our own the Jewish financier is supreme... here the Jew is a threat." Howard M. Sachar, A History of Jews in America, (New York: Alfred A. Knopf, 1992), 311. A decade after the war, he had not been convinced otherwise: "What I oppose most is the international Jewish money power that is met in every war. I oppose a power that has no country and that can order the young men of all countries out to death." S. Watts, The People's Tycoon: Henry Ford and the American Century, First Vintage Books Ed. (2006), 383.

When World War II broke out, one of the major forces preventing the United States from joining the war effort against Adolf Hitler's Germany was a strong nativist movement in America's conservative wing, which complained loudly that "the Jews" were behind the war. See Entry on Charles E. Coughlin, The Holocaust Encyclopedia, US Holocaust Museum (https://www.ushmm.org/wlc/en/article.php?ModuleId=10005516). One of the chief figures in that nativist movement was Father Charles E. Coughlin, who was of a mind with the likes of Joseph Goebbels on the question of who was responsible for the spread of Marxism in Europe: (Spoiler Warning: it was the Jews).

The accusations that Jews control the banks (or the media, or Hollywood, or the government, or whatever other entity a given anti-Semite finds himself upset at on any given day) have not abated in the modern era. Many within the American Jewish community heard echoes of it in then-candidate Trump's statement that "Hillary Clinton meets in secret with international banks to plan the destruction of global sovereignty in order to enrich these global interest powers, her special interest friends and her donors." N. Guttman, At Florida Rally, Trump Evokes Specter of 'International Banks' and Jews Cheer, Too, The Forward, Oct. 13, 2016 (http://forward.com/news/351984/at-florida-rally-trump-evokes-specter-of-international-banks-and-jews-cheer/).

Indeed, the claim that Jews secretly plot control is not new. In fact, it is the oldest form of incitement against the Children of Israel. The Bible recounts that Egypt's Pharaoh, in justifying the enslavement of the Jewish people, claimed "behold, the people of the children of Israel are too many and too mighty for us; come, let us deal wisely with them, lest they multiply, and it come to pass, that, when there befalleth us any war, they also join themselves unto our enemies, and fight against us, and get them up out of the land.'" Exodus, 1:9-10, Jewish Publication Society. Later in antiquity, the evil advisor to Persia's King Ahasuerus, Haman, argued

> there is a certain people scattered abroad and dispersed among the peoples in all the provinces of thy kingdom; and their laws are diverse from those of every people; neither keep they the king's laws; therefore it profiteth not the king to suffer them. If it please the king, let it be written that they be destroyed. Esther 3:8-9, Jewish Publication Society.

Jews are no strangers to the malignant claim that they have divided loyalties, and are biding their time for an opportunity to exercise national domination.

At the time of Decalogue's founding, the United States and the world confronted unprecedented hatred and animosity directed towards minorities and specific groups, including Jews. Americans in the 1930s were extremely concerned with the Depression and the economic impact of immigrants. During the 1930s Jews were often rejected for immigration based upon quotas in favor or those from certain countries and also based upon economic hardship issues. Even after the horrors of German anti-Semitism were known, the United States turned away more than 900 Jews who had fled Germany on the liner SS St. Louis. The Holocaust Encyclopedia, United States Holocaust Memorial Museum, Voyage of the St. Louis, https://www.ushmm.org/wlc/en/article.php?ModuleId

=10005267 (last visited March 19, 2017). Many of those refugees were sent back to face their persecutors, and joined the fate of the rest of European Jewry at the hands of the Nazis and their enablers.

Though this was one of the most visible and historically poignant examples of nativism exercised against the Jewish people in the history of this country, it was hardly the only the such example; nor was it the only example of nativism creating victims of immigrants and minorities hoping to benefit from the dream that America once hoped to offer a world full of sectarian strife and ethnic conflict. Five short years after the ill-fated voyage of the St. Louis, the United States Supreme Court institutionalized discrimination in rendering its infamous decision in the matter of Korematsu v. United States, 323 U.S. 214 (1944). In that matter, as here, the justification for what could only be an act of utmost prejudice was couched in terms of national security:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military

> urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this. *Id.* at 223.

Though that craven decision is a stain across this country's history, it would be inaccurate to say that brave members of the judiciary did not stand up to the constitution's "temporary" suspension. Justice Murphy's dissent demonstrated the appropriate deference to the constitution that the moment demanded:

> Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all

> times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution. *Id.* at 242.

The current situation similarly demands wisdom and dispassionate analysis that should be characteristic of the legal profession, and the bench.

B. The Executive Order is yet another iteration of unconstitutional animus being directed at a minority religious group

The president could not have been more clear about the animus underlying the Executive Order before he was elected to our nation's highest office. As the District Court of Hawai'i, and the Fourth Circuit Court of Appeals pointed out, at length, the president was not shy about identifying the religious nature of his anticipated immigration policy as a candidate for president: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world," explained candidate Trump. The American Presidency Project, Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri (Oct. 9, 2016), (https://goo.gl/iIzf0A).

Though the president himself has been trained not to use the expression "Muslim Ban," and his new official position is that the Muslim Ban is not, in fact, a Muslim Ban, his supporters are not fooled. Andrew

McCarthy, of the National Review, called the Muslim Ban a "a defensive war against sharia supremacism. A. McCarthy, The Travel Ban is about Vetting – Which Means Its about Islam, National Review, March 18, 2017, (http://www.nationalreview.com/article/445894/trump-travel-ban-executive-order-muslims-islam-sharia-supremacism-judge-derrick-watson). The article noted that "it is unfortunate that innocent, pro-American Muslims have to be put through more paces than other aliens. But it is not quite as unfortunate as the incontestable fact that inadequately vetted Muslims commit mass-murder attacks." It is hard to tell whether Mr. McCarthy is unwittingly referring to the Bowling Green Massacre – a made up event used by a White House Spokesperson to justify banning people from entry on the basis of their religion. S. Schmidt and L. Bever, Kellyanne Conway cites 'Bowling Green massacre' that never happened to defend travel ban, Washington Post, Feb. 3, 2017 (https://www.washingtonpost.com/news/morning-mix/wp/2017/02/03/kellyanne-conway-cites-bowling-green-massacre-that-never-happened-to-defend-travel-ban/?utm_term=.f3ba114af922). But Mr. McCarthy, like the White House, found himself unable to identify any refugees or immigrants from the six countries singled out who had committed mass murder attacks.

Despite the passage of the 90 day period during which immigration from the six targeted countries was to be enjoined, and despite the judiciary's injunction barring the Muslim Ban from taking effect during that time, this remains true. No mass murder events have taken place involving residents of the six countries singled out in the ban. The Muslim hordes have somehow failed to harm this nation, despite the judiciary's caving to the "bad dudes" in the world. See @realDonaldTrump's Twitter post (or Tweet) from January 30, 2017, https://twitter.com/realdonaldtrump/statuas/826060143825666051?lang=en. "If the ban were announced with a one week notice, the "bad" would rush into our country during that week. A lot of bad "dudes" out there!"

The Petition for Writ of Certiorari, for example, claims that the President is in a unique position to identify the national security needs of the nation. But it never identifies a credible and specific threat that a terrorist, whether allied with Al Qaeda, the Islamic State, or any other terrorist organization, might attempt to infiltrate this country and commit an act of mass murder here; and while the administration took to the media to defend its Executive Order in the weeks following the lower courts' issuance of injunctions, the Petition it filed here was notably sparse in identifying the national security threats that the Executive Order supposedly addressed.

Notably, the nation that produced Dzokhar Tsarnaev and Tamerlan Tsarnaev – Chechnya – was not one of the six nations singled out by the president. The Boston Marathon Bombings, One Year On: A Look Back to Look Forward, Hearing before the Committee on Homeland Security House of Representatives, 113-64, April 9, 2014 (https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88783/pdf/CHRG-113hhrg88783.pdf). Saudi Arabia, the nation that produced Osama bin Laden, and the majority of his minions who perpetrated the attacks on this country that occurred on September 11, 2001, cannot be found on the White House's list of countries singled out. See Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the US Senate Select Committee on Intelligence and US House Permanent Select Committee on Intelligence, December, 2002, (Accessed at: http://www.cnn.com/2016/07/15/politics/congress-releases-28-pages-saudis-9-11/). Instead, the six countries identified in the Order, Iran, Libya, Somalia, Syria, Yemen, and Iraq, have not produced any terrorists who have directly attacked this country.

The Order takes great pains to identify the connection between each of the six countries and terrorism. For example, Libya is described as "an active combat zone" where "violent extremist groups [...] have exploited these conditions to expand their presence in the country." Respectfully, Germany was an active combat zone during the Second World War. If a Jewish person had been denied entry to this country during that period due to concerns that he or she was a Nazi, that would be an absurd result. The Muslim ban is no less absurd for preventing those most victimized by the "active combat zone" from seeking refuge in this great nation.

The Muslim Ban should therefore be viewed properly as an attack on the Muslim community. This is underscored dramatically by the repeated references, among those who support the ban, to the specter of Sharia Law. Candidate Trump made references to Sharia Law during the campaign in conjunction with his then policy position of banning Muslims from entering this country. A news site that was frequently called his mouthpiece, Breitbart, quoted him as having said:

> In the Cold War, we had an ideological screening test. The time is overdue to develop a new screening test for the threats we face today," Trump said. "I call it extreme, extreme vetting. Our country has enough problems. We don't need more. And these are problems like we've never seen before.
>
> In addition to screening out all members or sympathizers of terrorist groups, we must also screen out any

> who have hostile attitudes toward our country or its principles — or who believe that Sharia law should supplant American law. Donald Trump Calls for Sharia Law Ban, August 16, 2016 (http://www.breitbart.com/2016-presidential-race/2016/08/16/huffington-post-donald-trump-calls-for-sharia-law-ban/).

These references, by candidate Trump, and to his supporters today, to Sharia Law are particularly worrisome to many in the Jewish community, because they so closely resemble the aforementioned attacks on the Jewish community, which is frequently accused of harboring the hope of world domination by acting as a fifth column within this Western democracy.

These claims about the Muslim community, that the White House plays into, and that many in the Alt-Right relish, are the same conspiracy theories in an updated wrapping. Somehow, people from war torn and beleaguered countries are using the strife that their homes are undergoing as a means to launch a long-game war against Western values by moving to the United States and biding their time until they can force good Americans to accept Sharia Law. The president's wink and nod to his own supporters invokes these fears, and seeks to quell them through the insidious Muslim Ban.

Islamophobia is a form of hatred that has, in many ways, augmented the anti-Semitism of old, becoming the nativist movement *du jour*. In the eyes of many members of the Jewish community, including the community of Jewish attorneys and jurists, it is no coincidence that this new strain of institutionalized hatred comes in tandem with a massive rise in anti-Semitism, and anti-Semitic hate crimes. See M. Strom, Love Thy Neighbor: An Interfaith Gathering Against Hate, The Decalogue Tablets, 9, Spring, 2017 (http://www.decaloguesociety.org/wp-content/uploads/2017/03/Spring-2017-Tablets-0315.pdf); A. Amend and J. Morgan, Breitbart under Bannon: Breitbart's Comment Section Reflects Alt-Right, Anti-Semitic Language, Southern Poverty Law Center, February 21, 2017 (https://www.splcenter.org/hatewatch/2017/02/21/breitbart-under-bannon-breitbarts-comment-section-reflects-alt-right-anti-semitic-language).

If the Executive Order has accomplished anything good, it has been to create alliances between beleaguered people in this country who have, for too long, sat at odds with one another. The Decalogue Society hereby joins many voices from many ethnic and legal communities in asking this Court to see discrimination for what it is, and uphold the decision of the Fourth Circuit, and the United States District Court of Hawai'i.

C. The Matter before the Court was not rendered moot by the passage of 90 days from the entry of the Executive Order.

Significantly, the government does not ask for a finding of mootness. That is likely because, despite the passage of 90 since the Executive Order went into effect, this administration will revive the Order as soon as it is able to do so. As long as the administration is free to reissue the Muslim Ban, the matter is not moot. United States v. WT Grant Co., 345 U.S. 629, 632 (1953). So long as the administration is "free to return to its old ways," the matter is not moot. *Id.* Indeed, there is a "public interest in having the legality of the practices settled," that "militates against a mootness conclusion." Id.

It is significant that this country has gone, without incident, for the full 90 days contemplated by the Executive Order, and the Muslim Ban was inactive during the bulk of that period. Instead of taking this as a sign that the purpose of the 90 day ban – protecting this great nation – was fulfilled, the administration seeks to reenact the ban if this Court gives it leave to do so. Perhaps no greater evidence exists that the purpose of the temporary ban was always to foster animus against Muslim immigrants, and not to protect the country. Either way, it is clear that the matter is not moot.

The issue of mootness was raised not by the government, but by the Respondents. The Decalogue Society asks that this Court not find the matter moot, because, one way or the other, this matter will rear its ugly head at some point in the near future. Indeed, in the same Order that granted Certiorari, this Court lifted the injunction against certain disputed aspects of the Executive Order. The matter has come to a head, and is far from moot. This great Country deserves some clarity about these issues. We will need it over the next four years.

CONCLUSION

The President, in issuing his Executive Order, violated one of this country's founding principles, that no religious group be singled out for unequal treatment without purpose. The purposes that the White House claims it is advancing in issuing this ban against travel from six countries, all of which are Muslim majority countries, and none of which has produced an individual who has committed a mass murder or terrorist attack on the United States, are pretextual. The Jewish people know, all too well, that promises of security can be used to justify discriminatory policies. The Decalogue Society, as the nation's oldest Jewish bar association, therefore has an interest in preventing these discriminatory policies from being put into place in the modern era – they are nothing more than what we have seen, too many times, in a past rife with discriminatory action taken for no good reason. This country, sadly, has not always made the right decision when it comes to guarding against discriminatory applications of law in the name of security. But the sins of our past need not be repeated, particularly in light of the wisdom we hopefully have gained from our ill experience.

Respectfully Submitted,

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On Writs of Certiorari to the U.S. Court of Appeals for the Fourth and Ninth Circuits

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of certain foreign nationals of six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, pending a review of screening and vetting procedures to assess what information is needed from foreign governments. Section 6(a) suspends for 120 days decisions on refugee applications and travel under the U.S. Refugee Admission Program for aliens from any country, pending a similar review of that program, and Section 6(b) reduces to 50,000 the maximum number of refugees who may be admitted in Fiscal Year 2017. The court of appeals in No. 16-1436 held that Section 2(c) likely violates the Establishment Clause and affirmed a preliminary injunction barring its enforcement against any person worldwide. The court of appeals in No. 16-1540 held that Sections 2(c), 6(a), and 6(b) likely exceed the President's authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and affirmed a preliminary injunction barring their enforcement against any person worldwide.

The questions presented are:

1. Whether respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s

temporary refugee suspension, and Section 6(b)'s refugee cap are justiciable.

2. Whether respondents' challenges to Section 2(c) became moot on June 14, 2017.
3. Whether Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA.
4. Whether Sections 2(c), 6(a), and 6(b) violate the Establishment Clause.
5. Whether the global injunctions are impermissibly overbroad.

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Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the Fourth and Ninth Circuits

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri.[1] For more than thirty-five years, EFELDF has defended American sovereignty, a strong national defense, and adherence to the separation of powers under the U.S. Constitution. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

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[1] This *amicus* brief is filed with written consent of all parties; petitioners lodged their blanket consent with the Clerk, and *amicus* lodged respondents' consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no

STATEMENT OF THE CASE

These consolidated actions concern the lawfulness of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (2017) (the "Order").[2] Section 2 of the Order paused and directed study of immigration from six state sponsors or shelters of terrorism; Section 6 of the Order similarly paused and directed study of refugee admissions and caps the number of refugees for 2017. Both sections implement authority delegated to the President by the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). *See* 8 U.S.C. §§1182(f), 1157(a)(2)-(3). The plaintiffs are the State of Hawaii, various individuals, and various organizations who claim that the Order violates due process and discriminates against Islam because the six covered nations all are Muslim-majority countries.

The Government seeks review of two preliminary injunctions. In No. 16-1436, it seeks review of the

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counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

[2] The Order is reprinted at Pet. App. 289a-312a. The Order followed on – and superseded – an earlier executive order, 82 Fed. Reg. 8977 (2017), which was also preliminarily enjoined. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

injunction upheld by the U.S. Court of Appeals for the Fourth Circuit in *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (*en banc*) ("*IRAP*"). In No. 16-1540, it seeks review of the injunction upheld by the U.S. Court of Appeals for the Ninth Circuit in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) ("*Hawaii*"). Although the Order is facially neutral with respect to religion, *IRAP* perceives violations of the Establishment Clause from anti-Muslim animus allegedly demonstrated in extra-record statements, primarily from the election campaign. Although it rejected the lower court's views on the Establishment Clause, *Hawaii* found that the President failed to make sufficient findings to support the Order, violated procedures that 8 U.S.C. §1157 purportedly requires to alter the annual cap on refugee admissions, and discriminated on the basis of national origin under 8 U.S.C. §1152(a)(1)(A).

SUMMARY OF ARGUMENT

At the outset, no party has standing to press the alleged religious-freedom issues found below because the Order does not affect *the plaintiffs'* religious rights and aliens abroad have no constitutional rights here (Sections I.B.2-I.B.3); similarly, plaintiffs would lack third-party standing to assert aliens' rights, if aliens abroad had any rights (Section I.B.1). The plaintiffs' claim that the Order stigmatizes them as Muslims fails because the Order does not target these plaintiffs and subjective, third-party stigma is insufficiently concrete for Article III (Section I.B.4); the plaintiffs' other injuries are insufficiently concrete or speculative (Section I.B.5). Because plaintiffs failed to exhaust the Order's hardship-waiver provision, any hardship-based claims are not ripe (Section I.C). Similarly, with respect to jurisdiction, the Order falls under the consular nonreviewability doctrine (Section I.D) and outside the waiver of sovereign immunity in the Administrative Procedure Act ("APA") as committed to agency discretion by law (Section I.E).

On the immigration merits, the Order implements plenary authority that INA delegates to the President with no law for a reviewing court to apply in checking the President's power (Sections II.A.1-II.A.2). As to the INA violations found in *Hawaii*, §1152(a)(1)(A) – which bars discrimination because of race, national origin, and other criteria – is best read as applying only within the class of *qualified* visa applicants, not to the entire universe of *potential* visa applicants. The class of qualified visa applicants protected by §1152(a)(1)(A) should exclude applicants disqualified based on other, *nondiscriminatory* criteria under §1182(f), such as applicants from failed states or state sponsors of terrorism. That reading not only is consistent with the canons of construction for anti-discrimination statutes, but also avoids a repeal by implication of §1182(f) without the required "clear and manifest" congressional purpose (Section II.A.3).

On religion, the Order is facially neutral, lacking the selective persecution necessary for facially neutral laws to violate the Free Exercise Clause (Sections II.B.2, II.B.3). Significantly, because the Order does not disparately regulate religiosity or any religion (or atheism) but merely allegedly persecutes Muslims, the Establishment Clause is not applicable (Section II.B.2). The Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA") does not apply because an alien abroad is not a protected RFRA "person" and plaintiffs here suffer no RFRA injuries (Section II.B.1). Finally, the plaintiffs have not made the strong showing needed to go beyond the administrative record to demonstrate impropriety (Section II.C.1) and – indeed – would exceed this Court's powers to fault the government for allegedly unconstitutional policy *proposals* (from the election campaign, no less) that both the campaign and subsequently the President amended to address constitutional concerns raised against the initial proposal (Section II.C.2), as recognized in *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84-86 (1961).

Even if it finds jurisdiction and an entitlement to a preliminary injunction, this Court should narrow the injunctions' overbroad scope. Basing a nationwide injunction on so slender an Article III basis violates the limits on facial challenges and class action that protect defendants: put simply, rather than a nationwide injunction based on cherry-picked and atypical facts, the plaintiffs deserved dismissal for failing to show the Order facially invalid under all circumstances (Section III.B). In any event, this type of overbroad injunction effectively denies the Court the opportunity for multiple circuits to address an issue and should thus be rejected (Section III.A).

ARGUMENT

I. THIS COURT HAS JURISDICTION, BUT THE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

"'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to ... the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). These cases demonstrate many of the potential Article III transgressions that Judge Bork and this Court have cautioned federal courts to avoid. It thus falls to this Court to reel in the lower courts' excesses here.

Although this Court has appellate jurisdiction over these matters, the plaintiffs lack jurisdiction to press their claims:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[. ...] And if the record discloses that the lower court was without jurisdiction[, ... and] we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 95 (1998) (quotations and citations omitted). Because plaintiffs' claims are not justiciable, this Court must remand these cases with orders to dismiss them.

A. These actions are not moot.

The Order did not expire after the originally contemplated review period because the injunctions prevented the Order from taking effect in the first place. In any event, the President has extended the term of the Order until a prescribed interval (*e.g.*, ninety days) *after* the Order takes full effect by the lifting of the injunctions. Gov't Br. at 36-37. As such, these cases are not moot and still require this Court's intervention.[3]

B. The plaintiffs lack standing.

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear,* 520 U.S. 154, 162 (1997) (interior quotations and citations omitted).

Plaintiffs must – and cannot – establish standing for each form of relief they seek: "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). The following five subsections emphasize how plaintiffs have failed to establish standing.

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[3] The Government's brief explains that two plaintiffs (Dr. Ismail Elshikh and Doe #1) have subsequently had their relatives receive visas, Gov't Br. at 20, which would moot whatever claim those plaintiffs had to get the relatives' visas.

1. **Plaintiffs lack standing to raise the rights of aliens abroad.**

Even if aliens abroad had constitutional rights, the plaintiffs here would lack third-party standing to assert those rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). While plaintiffs may assert their own rights, if any, they must do so under the standards applicable to those rights, without any heightened scrutiny applicable to the third parties' rights. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977).

2. **Plaintiffs do not – themselves – suffer cognizable religious injury.**

To the extent that they seek to assert free-exercise claims against the Order, plaintiffs must show how the Order coerces *their* religion, not the rights of third parties. *Harris v. McRae,* 448 U.S. 297, 320 (1980). As in *McRae*, however, the challenged action has no effect whatsoever on plaintiffs' religious exercise. *Id.* By the same token, membership groups cannot press these claims. *Id.* at 321 (*citing Abington Twp. v. Schempp,* 374 U.S. 203, 223 (1963)). Consequently, plaintiffs cannot assert religious rights of their own.

3. **Aliens abroad lack cognizable rights under the Constitution.**

The only people whom the Order affects directly – aliens abroad – simply do not have rights under our Constitution relevant to this litigation. *Boumediene v. Bush,* 553 U.S. 723, 755-62 (2008). Particularly, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia,* 459 U.S. 21, 32 (1982). Even an order banning Muslims on the basis of religion would not violate constitutional rights of would-be immigrants. Without a right, aliens abroad cannot suffer cognizable Article III injury.

4. Plaintiffs' claimed stigmatic injury is insufficiently concrete.

The claimed stigma injuries from the Order are insufficient because only "those ... personally denied equal treatment by the challenged discriminatory conduct" can assert stigma injuries. *Wright*, 468 U.S. at 755. With religious rights, a contrary holding effectively would eliminate the restrictions that this Court has placed on such litigation under *Abington Township*, *McRae*, and their progeny. If subjectively hurt feelings could satisfy Article III, anyone could sue about anything.

5. Plaintiffs' economic and other non-religious injuries are speculative.

The plaintiffs' other asserted injuries also fail. For example, Hawaii claims economic loss from tourists and lost student and faculty interactions with state universities. Without concrete particulars, this type of future injury is insufficient: "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Conversely, where sufficiently imminent injury is involved, the injury could be ameliorated under the Order's hardship provisions.

C. Plaintiffs' hardship-based claims are not ripe.

Although the Order allows case-by-case waivers for instances of undue hardship, Order, §3(c) (Pet. App. 301a-303a), plaintiffs never sought such waivers. As such, claims based on such perceived hardships are not ripe.

Specifically, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted); *cf. Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 12-13 (2000) ("principles of 'ripeness' and 'exhaustion of administrative remedies' ... normally require channeling a legal challenge through the agency"). It is unclear how plaintiffs' relatives, students, or lecturers would have fared under the Order's hardship provision, so claims based on perceived hardships are simply not ripe.[4]

D. The "consular nonreviewability" doctrine precludes judicial review.

In a doctrine related to aliens abroad lacking any cognizable right to enter the United States, courts also have found consular decisions to exclude aliens not open to judicial review. This doctrine of consular nonreviewability also precludes plaintiffs' suits to the extent that the suits rely on the rights or injuries of aliens abroad.

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[4] Significantly, injuries that qualify as sufficiently immediate under Article III can nonetheless fail to qualify under the higher bar for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). Either issue would independently justify reversal, either jurisdictionally (ripeness) or equitably (lack of irreparable harm).

By way of analogy, for most of our history, aliens detained *at our border* could challenge the detention only by *habeas corpus. Ekiu v. U.S.*, 142 U.S. 651, 660 (1892). In *Brownell v. We Shung*, 352 U.S. 180, 184-85 (1956), *abrogated by* PUB. L. NO. 87-301, §5(b), 75 Stat. 650, 653 (1961) ("[n]otwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise"[5]), this Court (briefly) allowed such aliens also to proceed via an APA suit. But *Brownell* expressly did "not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. Thus, even under *Brownell*, aliens abroad had no right to litigate the bases for their admission into the United States.

Other than that inapposite short window – which Congress slammed shut in 1961 – the federal courts have uniformly held consular immigration decisions regarding aliens abroad immune from judicial review. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999) (collecting cases). As this Court recently reiterated, such history provides "convincing support for the conclusion that Congress accepted and ratified the unanimous" judicial interpretations of a statute. *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). In APA parlance, the "agency action [here] is committed to agency discretion by law" under 5 U.S.C. §701(a)(2), and thus falls under one of the "limitations on judicial review" recognized in 5 U.S.C. §702(1), notwithstanding APA's otherwise generous judicial review.[6]

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[5] The post-1996 version of this provision is codified at 8 U.S.C. §1252(g).

E. Sovereign immunity bars relief.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).[7] Moreover, such waivers are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). In the 1976 amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has restrictions.

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[6] The lack of APA-INA review would not necessarily preclude *constitutional* review, *Webster v. Doe,* 486 U.S. 592, 603-04 (1988); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893), but plaintiffs here cannot establish any constitutional violations.

[7] The officer-suit exception in *Ex parte Young*, 209 U.S. 123 (1908), offers a limited exception to sovereign immunity, but only with *ongoing violations* of federal law. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985). Here, there is no ongoing violation of law.

Specifically, the APA waiver neither "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," nor "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. §702(1)-(2); *accord id.* at §701(a)(1) (no review "to the extent that ... statutes preclude judicial review"). In addition to restrictions on review in the organic INA itself, *see* Section I.D, *supra* (discussing doctrine of consular nonreviewability), review is also precluded "to the extent that ... agency action is committed to agency discretion by law." 5 U.S.C. §702(2). One sign that Congress has committed an issue to executive officers' discretion is when a reviewing court would have "no law to apply" in reviewing the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, Congress has not given a reviewing court the "law to apply" – much less access to the required classified information – needed to evaluate plaintiffs' claims.

II. THE EXECUTIVE ORDER IS ENTIRELY LAWFUL.

To the extent that jurisdiction exists for plaintiffs' claims, the claims lack merit under both INA and the

Constitution. Accordingly, this Court should vacate the injunctions.

A. Plaintiffs lack an INA cause of action, and the Order is lawful under INA.

The Constitution gives Congress, and thus its enforcement and rulemaking delegates in the Executive, plenary authority over immigration. U.S. CONST. art. I, §8, cl. 4; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Nothing in INA authorizes the lower courts' intrusion into the Government's handling of the national-security issues presented by the Order.

INA delegates exceedingly broad power to the President to regulate immigration in this context:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. §1182(f). In doing so, Congress neither gave plaintiffs nor the judiciary a basis for second-guessing (or even reviewing) the President's actions.

1. The President acted appropriately under §1182(f), which is not subject to review.

At the outset, as indicated, aliens abroad have "no constitutional rights" regarding admission into the United States. *Plasencia*, 459 U.S. at 32. Moreover and more generally under INA, "[j]udicial power over immigration and naturalization is extremely limited," *Miller v. Albright*, 523 U.S. 420, 455 (1998) (Scalia, J., concurring in judgment), because of the relative interests and powers of the three branches:

> "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"

Id. (*quoting Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Accordingly, *amicus* EFELDF respectfully submits that the lower courts' reliance on Justice Kennedy's concurrence – with Justice Alito – in *Kerry v. Din*, 135 S.Ct. 2128 (2015), is misplaced.

The concurrence posits that the wife of a denied applicant could "look behind" exclusion of an alien abroad, notwithstanding *Mandel*, upon making "an affirmative showing of bad faith on the part of the consular officer" who denied the alien's visa. *Id.* at 2141 (Kennedy, J., concurring). In making that claim, however, the concurrence expressly distinguished the statute at issue in *Din* from the one in *Mandel*:

> [U]nlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, §1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa.

Id. at 2140-41. Significantly, these cases involve the *President*, and *Mandel* involved the *Attorney General*, whereas *Din* involved a consular officer. Unlike the executive officers here and in *Mandel*, *Din* involved one officer of hundreds similarly situated in the agency, who as such is not entitled to policy-based deference, *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). Moreover, the statute there required him to make a factual finding. 8 U.S.C. §1182(a)(3)(B). By contrast, Congress did not require the same specificity from the President, 8 U.S.C. §1182(f), and a reviewing court would have "no law to apply" in reviewing the President's action. *Overton Park*, 401 U.S. at 410. In the President's case, therefore, judicial review is not available. 5 U.S.C. §701(a)(2). To say one consular officer of hundreds may be called upon for more specificity in that context does not authorize a reviewing court to compel *the President* to do so under §1182(f).

2. The Order is not subject to courtroom factfinding or judicial second guessing.

To some extent, courts' willingness to look behind executive or legislative action depends on the context. With regard to immigration decisions regarding aliens abroad and the First Amendment, it is enough that Congress or its delegates in the Executive Branch provide a "facially legitimate and bona fide" basis for exclusion, *Mandel*, 408 U.S. at 769, which equates to rational-basis review. *IRAP*, 857 F.3d at 589 n.14 (collecting cases) (Pet. App. 40a n.14); *accord Fiallo*, 430 U.S. at 794. This Court recently classified it as "minimal scrutiny (rational-basis review)." *Sessions v. Morales-Santana*, 137 S.Ct. 1678, __ (2017) (slip op. at 15). Under that deferential review, legislative choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Deference is particularly appropriate here, given the "extremely limited" review available in this context. *See* Section II.A, *supra*. This Court should follow *Mandel* and *Fiallo* by declining to second-guess the Executive on issues of national security.

3. The President's authority under §1182(f) is not bounded by §1152(a)(1)(A).

Hawaii found the Order to violate §1152(a)(1)(A) by discriminating on the basis of national origin against visa applicants from the Order's six targeted countries. *See* 8 U.S.C. §1152(a)(1)(A) ("no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence"). Notwithstanding the surface appeal of that text-based argument, the cited provision did not enact an equal-protection clause for alien visa applicants. As the Government points out, Gov't Br. at 50-54, this later-enacted clause did not repeal the more specific §1182(f) by implication.[8]

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[8] With regard to the Order's *reducing* the cap on refugee admissions, nothing in §1157 precludes the President's taking that action, whether announced in an executive order or not. Although that section has provisions for *increasing* the pre-arranged cap in case of an emergency, 8 U.S.C. §1152(b), the section does not impose any requirement that caps be met.

"[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007)) (alteration in original, interior quotations and citations omitted). With regard to "clear and manifest" intent to alter extant legislation, this Court's preemption cases choose the non-preemptive reading if plausible. *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) ("[w]hen the text ... is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption") (internal quotations omitted). EFELDF respectfully submits that the lower courts' reading of §1152(a)(1)(A) would impermissibly repeal §1182(f) by implication.

To avoid that result, this Court should recognize that the phrase that Congress used in §1152(a)(1)(A) – namely, "discriminated against [a person] ... because of the person's ... nationality, place of birth, or place of residence" – does not apply to permissible disparate treatment because of other nondiscriminatory criteria (*e.g.*, failed-state or state-sponsor-of-terrorism status). *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Failed states lack the governmental infrastructure needed to vet a visa applicant, and state sponsors of terrorism cannot be trusted to aid accurately in vetting visa applicants. Thus, excluding visa applicants from such states is done *because of* the failed-state or terrorism status, not *because of* the criteria in §1152(a)(1)(A). Of course, Congress would have been aware how courts read discrimination-because-of-status statutes and that "an individual's right to equal protection of the laws does not deny ... the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original). The Order is entirely consistent with precedent under disparate-treatment statutes.

To harmonize the two sections, this Court should read §1152(a)(1)(A) to apply only to the class of visa applicants who remain, after the Government applies any *nondiscriminatory* bases for exclusion. If read this way, §1152(a)(1)(A) would prohibit discrimination *because of* the listed criteria for all qualified visa applicants, without considering any would-be visa applicants disqualified by nondiscriminatory criteria under §1182(f).

B. The Order does not violate the religious freedoms of anyone.

IRAP enjoined the Order to halt the purportedly ongoing violation of religious rights. As explained in this section, no such rights have been violated.

1. Plaintiffs lack a RFRA cause of action.

Significantly, RFRA does not protect the religious interests of aliens abroad, and the plaintiffs here do not suffer RFRA injuries.[9] RFRA applies to "persons," and the scope of that term is not defined, but can be inferred from the pre-RFRA usage that Congress intended to restore. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2773-74 (2014); *cf. Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315-16, 318-19 (1978). Our courts have never entertained the free-exercise rights of aliens abroad, and the plaintiffs are not burdened in the exercise of *the plaintiffs'* religion. *See* Section I.B.2, *supra*. Accordingly, RFRA does not apply.

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[9] RFRA concerns laws that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §2000bb-1(a), which Congress enacted to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner*, 374 U.S. 398 (1963), in response to *Employment Division v. Smith*, 494 U.S.

2. Plaintiffs' religious claims fall under the Free-Exercise Clause, not the Establishment Clause.

Our Constitution both prohibits establishment of religion and protects the free exercise of religion. U.S. CONST. amend. I, cl. 1-2. "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *see generally* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 320-25 (2000). Although the lower courts analyzed these cases as Establishment-Clause cases, the gravamen of plaintiffs' claims is that the Order singles Muslims out for ill treatment, which – if true – would violate the Free Exercise Clause.

Even as plaintiffs misread it, the Order does not "demonstrate a preference for one particular sect or

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872, 890 (1990) (allowing as-applied infringement of religious freedom by facially neutral government actions). *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424 (2006).

creed (including a preference for Christianity over other religions)" under the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989). Instead, they see the Order as pitting Muslims against every other conceivable form of religiosity or non-religiosity (*e.g.*, atheists, Buddhists, Christians, Druids, Hindus, Jews, pagans). That would constitute persecution, not establishment:

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs... Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause. These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty*, for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it imposed special disabilities on the basis of religious status. On the same principle, in *Fowler v. Rhode Island*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993) (internal quotations, citations, and Court's alterations omitted). Of course, a secondary "purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel*, 370 U.S. at 432. But the Order advances neither atheism nor any one religion, even if it did punish Islam.

While the Establishment Clause applies to both "the advancement [and] inhibition of religion," *Sch. Dist. of Abington Twp.*, 374 U.S. at 222, the inhibition prong has always required some form of affirmative disparate regulation. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents").[10] The Order is religiously neutral, but even as plaintiffs misread it, the Order is simply an attack on Muslims, with no preference for any other religion or atheism. This Court should not extend the Establishment Clause to cover subjectively perceived targeting of one religion, with no governmental attempt to regulate religion.

3. **The Order does not violate religious freedom.**

Under *Smith*, 494 U.S. at 879 (interior quotation omitted), "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Because the Order is such as "valid and neutral law," plaintiffs fail to state a claim under the religious clauses, *unless* the Court not only allows the entry of information outside the Order's administrative record but also credits the information as establishing an impermissible motive. Section II.C, *infra,* rebuts the non-record information, and this section demonstrates the appropriateness of the Order under the religious clauses.

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[10] In more typical Establishment-Clause cases, the government *advances* religion, such as school prayers. *See, e.g.*, *Engel*, 370 U.S. at 430.

On its face, the Order is neutral with respect to religion, applying not only to the Muslim majorities in the affected countries but also to religious minorities who seek to emigrate. Similarly, the Order does not affect the vast majority of Muslims worldwide, further belying the suggestion of disparate treatment *because of religion.* While the Order disparately impacts Muslims, that correlation is not surprising, given the current historical correlation between Islam and both failed states and sponsors of terrorism.

A famous statistical study showed that birthrates in seventeen countries correlate heavily with those countries' stork populations. Robert Matthews, *Storks Deliver Babies* ($\rho = 0.008$)*,* 22:2 TEACHING STATISTICS: AN INT'L JOURNAL FOR TEACHERS, at 36 (2000). The statistical inference that storks deliver babies clearly "mistakes correlation for causation." *Woodford v. Ngo,* 548 U.S. 81, 94 n.4 (2006); Matthews, *Storks Deliver Babies,* 22:2 TEACHING STATISTICS, at 36-37. The same type of mistake underlies the lower court's reasoning from disparate impacts to intentional discrimination. Mere correlation *with religion* is not discrimination *because of religion. Feeney,* 442 U.S. at 279; *Larson,* 456 U.S. at 246 n.23; *McGowan v. Maryland*, 366 U.S. 420, 564 (1961). On its face, at least, the Order is entirely neutral with respect to religion.

Even religion is not sacrosanct under the Constitution. Thus, while "for temporal purposes, murder is illegal, ... the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation." *McGowan*, 366 U.S. at 442. Sadly, recent history and the record here suggest that significant segments of worldwide Islam support harming Americans. *IRAP*, 857 F.3d at 575 n.5 (Pet. App. 10a n.5). While most Muslims are not murderous jihadis, significant numbers are, and our enemies actively use immigration to gain access. Order, §1(e) (Pet. App. 293a-297a). Under the circumstances, pausing immigration from countries associated with terrorism is not irrational: "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). In any event, aliens abroad have no religious rights here, Section I.B.3, *supra*, so the Court need not decide whether the Order violates religious-freedom rights.

C. Non-record statements – especially ones predating the President's oath of office – do not control here.

Recognizing that no one protested when the prior administration acted against the same countries, *see* Kate M. Manuel, Acting Section Research Manager. Congressional Review Service, *Executive Authority to Exclude Aliens: In Brief*, at 6-10 (2017) (listing prior presidents' exclusions), plaintiffs seek to find discriminatory intent by the current administration officials based on non-record statements, primarily ones predating the defendants' oaths of office. As explained, however, the extra-record statements are simply not relevant here.

As indicated, there is no judicial review for aliens abroad, *see* Sections II.A.1-II.A.2, *supra*, but *IRAP* also violated this Court's precedents for domestic religious claims. With regard to the religious rights of those already within the U.S., the inquiry can be more searching: "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi Babalu*, 508 U.S. at 547. Because no one in this litigation has standing to assert religious rights, *see* Sections I.B.1-I.B.3, *supra*, the Court need not consider this line of inquiry. To the extent that the Court pursues this line of inquiry, the plaintiffs cannot make the selective-enforcement showing that the *Lukumi Babalu* plaintiffs made, see Section II.B.3, *supra*; Sections II.C.2-II.C.3, *infra*, so the plaintiffs cannot prevail.

1. The plaintiffs have not made an *Overton Park* showing for going beyond the administrative record.

Courts typically base judicial review of executive action on the administrative record before the agency when it acted, *Overton Park*, 401 U.S. at 420. Assuming *arguendo* it were otherwise permissible and relevant to go outside the record to review statements during the election campaign, on Twitter, and the like, the plaintiffs would need "a strong showing of bad faith or improper behavior" before expanding review to include materials in addition to the governmental findings that accompanied the Order. *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]"). "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and are "therefore 'usually to be avoided.'" *Arlington Heights*, 429 U.S. at 268 n.18 (*quoting Overton Park*, 401 U.S. at 420). As explained below, the plaintiffs have not produced anything near the "clearest proof" or even made a "strong showing" of anything improper.

2. Statements about prior policy iterations are irrelevant.

The lower courts erred by reaching back into pre-election campaign statements, including original statements that the candidate subsequently revised to accommodate constitutional concerns. The courts' error lies not only in the practical import and equity but also in the institutional competences of the respective branches of government.

As a matter of simple fairness and equity, a court should not hold an officer to initial plans when that officer changes plans based on input from stakeholder groups and affected agencies. Particularly for political outsiders, learning on the job is necessary.

More importantly, however, the lower courts' approach is outside the judicial power. Specifically, "treat[ing an] Act as merely a ruse by Congress to evade constitutional safeguards" "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Subversive Activities Control Bd.*, 367 U.S. at 85. In *Subversive Activities Control Board*, the initial bills would have targeted the Communist

Party by name and effectively outlawed it, but – in response to constitutional questions raised against that approach – Congress amended the bill to target certain activities, *id.*, which the Court upheld without regard to the alleged constitutional defects of the bills as first proposed.

There, like here, when presented with the argument that regulating one way would violate the Constitution, the Government changed the focus of the legislation to achieve a desired end lawfully. The Court did not inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly here, the Court must evaluate what the Government did, once the new administration was fully installed, not what they thought about doing before they took office.

3. **The President's recent tweets in defense of the first order and against "political correctness" are neither relevant nor anti-Muslim.**

As this Court has said of Twitter, "[p]rejudice can come through a whisper or a byte." *Dietz v. Bouldin*, 136 S.Ct. 1885, 1895 (2016). After the Government's petition and applications were filed, the President went online to lament courts as "slow and political," to characterize the Order as a "watered down" and "politically correct version" of the first order, and to identify the need for a "much tougher version." Glenn Thrush, *National Desk: Online Defiance Starts Early at the Oval Office*, N.Y. TIMES, June 7, 2017, at A18.

These tweets are irrelevant because they do not constitute anti-Muslim prejudice and cannot elevate review of the second Order into review of the superseded first order. In effect, the tweets are inadmissible because they are irrelevant.

At the outset, however much the President or the plaintiffs want this Court to evaluate the first order, this Court lacks jurisdiction for an advisory opinion on that topic. Federal courts cannot render advisory opinions because their Article III jurisdiction extends only to cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). If the President wants to do another order, courts will have to wait for that eventuality; whatever was in the first order is now moot.

Similarly, as explained in Sections II.B.3 (no anti-Muslim prejudice) and II.C.2 (prior versions do not impugn amended policies), *supra*, these tweets do not express any unconstitutional or otherwise improper motive. If the tweets portend any future action, courts will have to assess the legality of those actions when that future action occurs, if it occurs at all.

On the question of political correctness, however, the President's tweet did not reflect prejudice against peaceful and lawful Muslims. Instead, the President campaigned on frustration with political correctness, including officials' classifying Islamic terrorist action with euphemisms such as "workplace violence." Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 653 (2013). Calling Islamic terrorism by its name and trying to understand its roots should not offend anyone – Muslim or not – who opposes terrorism.

III. THE NATIONWIDE INJUNCTIONS WOULD BE OVERBROAD, EVEN ASSUMING THAT ANY PLAINTIFF HAD A MERITORIOUS AND JUSTICIABLE CLAIM.

For practical, jurisprudential, and jurisdictional reasons, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Thus, even if this Court finds that some aspect of the injunction should remain in place, the Court nonetheless should narrow the injunction.

A. Overbroad nationwide injunctions deprive this Court to the percolating effect of multiple circuits reaching an issue.

Nationwide injunctions effectively preclude other circuits from ruling on the constitutionality of the enjoined agency action. In addition to conflicting with the principle that federal appellate decisions are binding only within the court's circuit, *see, e.g.*, *U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994), nationwide injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives the Court of the benefit of decisions from several courts of appeals. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to trim the nationwide injunctions.

B. Providing facial relief in as-applied challenges frustrates this Court's precedents on facial and class actions.

Overbroad injunctions can convert an as-applied challenge into a facial challenge or class action, without the procedural safeguards that protect defendants in those other two contexts. Allowing such suits to proceed in that manner would trammel defendants' rights, which is particularly problematic for the public interest when the suit is against the Government.

Where the relief would reach beyond the particular parties' circumstances, the party seeking that relief "must ... satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Indeed, where "claims are better read as facial objections" to a law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Of course, a "facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.*, prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011). Sympathetic individual plaintiffs cannot form the basis for nationwide facial relief, particularly where those individual plaintiffs failed to exhaust the Order's hardship provisions.

Similarly, when plaintiffs with standing purport to represent a class of similarly situated persons or entities, the law requires that the protected class is indeed similarly situated. FED. R. CIV. P. 23(a)(1)-(4) (requiring commonality and typicality, as well as numerosity and adequacy of representation). Thus, this Court has "repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (interior quotations omitted). Thus, the rules also contemplate subclasses, FED. R. CIV. P. 23(c)(5), which can be required:

> Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses....

Amchem Prods. v. Windsor, 521 U.S. 591, 627 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32 (1999). Not every U.S. resident who wishes to interact here with foreign-based aliens can claim the same facts that Hawaii's universities and Dr. Elshikh claim, so not every such resident should benefit from facial relief that a court premised on those unusual facts.

Especially where the Order allowed case-by-case waivers for instances of undue hardship, this Court should not allow hijacking national policy based on atypical, cherry-picked facts.

CONCLUSION

For the foregoing reasons and those argued by the Government, this judgments of the Courts of Appeals should be reversed.

Dated: August 17, 2017 Respectfully submitted,

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
—v.—
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
—v.—
HAWAII, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF EPISCOPAL BISHOPS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae[1] are the Rt. Rev. Gladstone B. Adams III, Bishop Provisional of South Carolina; the Rt. Rev. Laura J. Ahrens, Bishop of Connecticut; the Rt. Rev. Barry Beisner, Bishop of Northern California; the Rt. Rev. Patrick Bell, Bishop of Eastern Oregon; the Rt. Rev. Scott A. Benhase, Bishop of Georgia; the Rt. Rev. Joe Burnett, Bishop of Nebraska, Resigned; the Rt. Rev. Tom Breidenthal, Bishop of Southern Ohio; the Rt. Rev. Bud Cederholm, Suffragan Bishop of Massachusetts, Retired; the Rt. Rev. John Bryson Chane, Assisting Bishop of San Diego; the Rt. Rev. Joe Doss, Bishop of New Jersey, Attorney-at-Law, Retired; the Rt Rev. Ian T. Douglas, Bishop of Connecticut; the Rt. Rev. Thomas C. Ely, Bishop of Vermont; the Rt. Rev. Doug Fisher, Bishop of Eastern Massachusetts; the Rt. Rev. Robert L. Fitzpatrick, Bishop of Hawai'i and the Episcopal Church in Micronesia; the Rt. Rev. J. Michael Garrison, Bishop of Western New York, Resigned; the Rt. Rev. Susan E. Goff, Bishop Suffragan of Virginia; the Rt. Rev. Edwin F. Gulick, Assistant Bishop Of Virginia; the Rt. Rev. Dena Harrison, Suffragan Bishop of Texas; the Rt. Rev. Scott Hayashi,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel, party, or person other than the amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties consented to the filing of this brief.

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Bishop of Utah; the Rt. Rev. Dorsey Henderson, Bishop of Upper South Carolina, Resigned, Assisting in Florida; the Rt. Rev. A. Robert Hirschfeld, Bishop of New Hampshire; the Rt. Rev. Whayne M. Hougland, Jr., Bishop of Western Michigan; the Rt. Rev. Shannon S. Johnston, Bishop of Virginia; the Rt. Rev. David Colin Jones, Bishop Suffragan of Virginia, Retired; the Rt. Rev. Stephen Lane, Bishop of Maine; Rt. Rev. Ed Leidel, Jr., Bishop of Eastern Michigan, Retired; Rt. Rev. Dorsey W. M. McConnell, Bishop of Pittsburgh; the Rt. Rev. Jack M. McKelvey, Bishop of Rochester, Retired; Rt. Rev. Robert O'Neill, Bishop of Colorado; the Rt. Rev. Brian N. Prior, Bishop of the Episcopal Church in Minnesota; the Rt. Rev. David Rice, Bishop of San Joaquin; the Rt. Rev. Gregory H. Rickel, Bishop of Olympia; the Rt. Rev. V. Gene Robinson, Bishop of New Hampshire, Retired; the Rt. Rev. Mark S. Sisk, Bishop of New York, Retired; the Rt. Rev. Cabell Tennis, Bishop of Delaware, Resigned; the Rt. Rev. Brian Thom, Bishop of Idaho; the Rt. Rev. John S. Thornton, Bishop of Idaho, Resigned; and the Rt. Rev. Geralyn Wolfe, Bishop of Rhode Island, Retired, Assisting Long Island (collectively, the "Bishops").

The Episcopal Church is organized into 111 geographic dioceses, which include more than 7,000 congregations. Each Bishop, whose authority in his or her diocese is both sacramental and constitutional within the Episcopal Church, governs the diocese, together with local representative bodies.

Among the central tenets of the Episcopal Church are to welcome and assist strangers, especially those who are poor, sick, and most in need of help, to provide a safe haven for those seeking freedom from oppression, and to uphold the dignity of every human being. To those ends, the Church has an active global missionary program and a refugee resettlement program in the United States, together known as the Episcopal Migration Ministries ("EMM").

Since 1988, EMM and its network of affiliate partners have aided and welcomed more than 50,000 refugees into the United States. In 2016, EMM helped more than 5,700 refugees from 35 countries build new lives, in peace and security, in 30 communities across the United States. EMM collaborates with local partner agencies in 27 Episcopal dioceses and 23 states to welcome those fleeing persecution. Helping these families is one way Episcopalians honor their baptismal covenant with God.

EMM is one of nine organizations contracted with the federal government to resettle refugees. After "extensive vetting . . . , vetting far more thorough and extreme than faced by any other group or individual," EMM formally assures each refugee's sponsorship, cementing the relationship and the organization's commitment to the refugee.[2] Due to the reduced number of refugees to be resettled under Section 6(b) of Executive Order 13,780 (the "Executive Order"), EMM will reduce its 31-member affiliate network by six in the 2018 fiscal year.[3] "The planned closings are a painful but strategically necessary move . . . for the health of the overall network and for the well-being of the refugees."[4]

The Bishops earnestly believe that the Executive Order impedes the ability of Episcopalians to practice their faith and keep their baptismal covenant with God. As leaders in the Episcopal Church, as members of the broader faith community, and as active providers of refugee resettlement services, the Bishops have a deep interest in preserving this country's special status as a safe haven for refugees and in protecting the fundamental principle of religious tolerance embedded in our Constitution. The Bishops urge the Court to affirm the rulings of the courts of appeals.

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[2] The Rev'd Canon E. Mark Stevenson, *A Response to the Administration's Decision on Relationships* (June 30, 2017), https://episcopalmigrationministries.org/statement-episcopal-migration-ministries-2.

[3] Mary Frances Schjonberg, *Trump's immigration policies force reduction of Episcopal Church's refugee resettlement network* (April 4, 2017), http://episcopaldigitalnetwork.com/ens/2017/04/04/trumps-immigration-policies-force-reduction-of-episcopal-churchs-refugee-resettlement-network.

[4] *Id.*

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT

From its earliest inception, America has been a safe haven for victims of religious oppression, in part because religious tolerance is a value enshrined in our Constitution through the Establishment Clause. The Executive Order contradicts those values and undermines the United States' longstanding status as a place of refuge for the world's most vulnerable populations. The Executive Order has slammed the door on people who have suffered some of the greatest atrocities in recent times, and it does this solely based on their religion.

From the beginning of his presidential campaign, President Donald J. Trump has called for a "total and complete shutdown of Muslims entering the United States."[5] One week after he took office, the President made good on his threat by issuing an executive order banning everyone but religious minorities from seven majority-Muslim countries (the "Original Executive Order").[6] In the weeks that followed, the President and his senior advisors confirmed this was his long-promised "Muslim ban."[7]

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[5] Donald J. Trump, *Statement on Preventing Muslim Immigration* (December 7, 2015), www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

[6] *See* Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

When it became clear that the Original Executive Order would not pass constitutional muster, the President and his senior advisors revised its text, removed Iraq from the list, and issued it as a new executive order.[8] Despite the Administration's textual gymnastics, the President stood by his Muslim "travel ban," issuing numerous statements that revealed his true motivation.[9]

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[7] *E.g.*, *Full Transcript: President Donald Trump's News Conference*, CNN, Feb. 16, 2017, http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript; Rebecca Shabad, *Donald Trump says he's expanding his Muslim ban*, CBS News (July 24, 2016), http://www.cbsnews.com/news/donald-trump-says-hes-expanding-muslim-ban; Katie Reilly, *Donald Trump on Proposed Muslim Ban: 'You Know My Plans'*, Time (Dec. 21, 2016), http://time.com/4611229/donald-trump-berlin-attack; Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally'*, The Washington Post (Jan. 29, 2017), http://wpo.st/xzuY2.

[8] *See* Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13210-11 (Mar. 6, 2017).

Appellants argue that statements made before a president assumes office—"before he [takes] the prescribed oath to 'preserve, protect and defend the Constitution'"— "cannot bind elected officials who later conclude that a different course is warranted."[10] This argument is immaterial, however, because President Trump has made numerous, official, post-inaugural statements revealing that the Executive Order's true intent is to accomplish exactly what Candidate Trump said he would do as president. Rather than support the revised order and the "different course" that he had allegedly charted, the President took to Twitter to blame the Department of Justice for "watering down" his "travel ban":

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[9] *See infra* notes 12-14; *see also* Donald J. Trump, @realDonaldTrump, Twitter (June 4, 2017, 4:19 AM EST), https://twitter.com/realdonaldtrump/status/871325606901895168?lang=en ("We must stop being politically correct and get down to the business of security for our people. If we don't get smart it will only get worse[.]"); Donald J. Trump, @realDonaldTrump, Twitter (June 5, 2017, 3:44 AM EST), https://twitter.com/realdonaldtrump/status/871679061847879682?lang=en ("In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!"); Donald J. Trump, @realDonaldTrump, Twitter (June 5, 2017 6:20 AM EST), https://twitter.com/realdonaldtrump/status/871899511525961728?lang=en ("That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!"); Donald J. Trump, @realDonaldTrump, Twitter (June 13, 2017, 3:44 AM EST), https://twitter.com/realdonaldtrump/status/874578159676665857?lang=en ("Well, as predicted, the 9th Circuit did it again - Ruled against the TRAVEL BAN at such a dangerous time in the history of our country. S.C.").

[10] Brief for Petitioners at *73, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 137 S. Ct. 2080 (Aug. 10, 2017).

> People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN![11]
>
> The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.[12]
>
> The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - & seek much tougher version![13]

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[11] Donald J. Trump, @realDonaldTrump, Twitter (June 5, 2017, 3:25 AM EST), https://twitter.com/realdonaldtrump/status/871674214356484096?lang=en.

[12] Donald J. Trump, @realDonaldTrump, Twitter (June 5, 2017, 3:29 AM EST), https://twitter.com/realdonaldtrump/status/871675245043888128?lang=en.

[13] Donald J. Trump, @realDonaldTrump, Twitter (June 5, 2017, 3:37 AM EST), https://twitter.com/realdonaldtrump/status/871677472202477568?lang=en.

Faced with voluminous evidence showing the President's true, discriminatory ambition, Appellants argue that it is not the Court's prerogative to "prob[e] government officials' subjective intentions . . . ."[14] They want this Court "to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the [President's] actions and competent to learn what history has to show."[15]

"But the world is not made brand new every morning" and this Court's "precedents sensibly forbid an observer to turn a blind eye to the context in which this policy arose."[16] The President and his senior advisors have been clear in fundraising e-mails,[17] statements to the press,[18] and social media messaging that the revised Executive Order has the same intent as the original—the implementation of the President's desired "total and complete shutdown of Muslims entering the United States."[19]

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[14] Brief for Petitioners at *64, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 137 S. Ct. 2080.

[15] *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005).

[16] *Id.* at 866.

[17] M. Zapotosky, D. Nakamura, & A. Hauslohner, *Revised Executive Order Bans Travelers from Six Muslim-Majority Countries from Getting New Visas*, The Washington Post (Mar. 6, 2017), www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/ 3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.1f6730369a62.

[18] *Press Briefing by Secretary Sean Spicer, No. 18*, The White House (Mar. 7, 2017), www.whitehouse.gov/the-press-office/2017/03/07/press-briefing-press-secretary-sean-spicer-372017-18.

As found by the Fourth Circuit, the context and history of the Executive Order, including the President's consistent statements before and after his election, show that the primary purpose behind the Executive Order is religious animus.[20] Other amici curiae, including Americans United for Separation of Church and State, Oxfam, and the Interfaith Coalition, have thoughtfully explained how the Executive Order violates the Establishment Clause. The Bishops submit the following historical background and context of the Establishment Clause for the Court's benefit.

III. ARGUMENT

A. The First Amendment Establishment Clause Enshrines America's Longstanding Role as a Safe Haven for Refugees Fleeing Religious Oppression.

The Founders adopted the Establishment Clause in part to enshrine America's role as a safe haven for victims of religious oppression and to guard against precisely the sectarianism that motivates the Executive Order. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches."[21] They came here to avoid "turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."[22] But as life in the Colonies developed, the formerly persecuted became persecutors—often repeating "many of the old world practices and persecutions" they had escaped.[23]

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[19] Trump, *supra* note 5.

[20] *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 597 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080, (June 26, 2017).

> It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.[24]

Virginia's early code of laws imposed fines, whippings, or months in the gallows for failure to attend church twice daily.[25] The early Jews arriving in Maryland from Brazil were denied citizenship, the right to worship, and the right to operate public businesses.[26] In Puritan New England, religious minorities were punished with whippings, ear croppings, and even hangings.[27] "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. . . . It was these feelings which found expression in the First Amendment."[28]

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[21] *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 8 (1947).

[22] *Id.* at 8-9.

[23] *Id.* at 10.

[24] *Engel v. Vitale*, 370 U.S. 421, 427 (1962).

The movement towards the Establishment Clause began in earnest in 1785 with a proposal to renew Virginia's tax levy for the support of the established Church of England.[29] In opposition to the proposal, James Madison wrote *Memorial and Remonstrance*, in which he argued that renewing the levy for support of the Church was "a dangerous abuse of power . . . ."[30] Madison cautioned that renewing the religious tax would be "a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens."[31] He specifically warned that victims of oppression abroad would look elsewhere for refuge if America fell into the trap of establishing a national religion and penalizing those who do not adhere to it:

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[25] PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA 36 (2003).

[26] *Id.* at 43.

[27] *Id.* at 44.

[28] *Everson*, 330 U.S. at 11.

[29] *See id.*

[30] James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

> What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy [sic] in their due extent, may offer a more certain repose from his Troubles.[32]

Madison's warnings proved extremely effective. Not only was the bill defeated, but the Virginia Assembly enacted Thomas Jefferson's "Virginia Bill for Religious Liberty."[33] Madison's work and ideas spread beyond Virginia and several other colonies considered similar legislation at the time.[34] This movement led to the inclusion of the Establishment Clause in the First Amendment.[35] This is the place in our Constitution that preserves the United States' special role as a beacon of hope and a refuge for the oppressed.

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[31] *Id.* at ¶ 9.

[32] *Id.* (emphasis added).

[33] *Everson*, 330 U.S. at 12.

B. The Executive Order Undermines the United States' Role as a Safe Haven for Refugees Fleeing Oppression.

Beyond violating the letter of the Establishment Clause, both Executive Orders have caused the very harms James Madison identified in his *Memorial and Remonstrance*: they have shaken the world's faith in the United States as a home for people suffering religious, ethnic, political, and other strife.

The day after the President signed the Original Executive Order, the United Nations High Commissioner for Refugees issued a statement recognizing that the United States' resettlement program "is one of the most important in the world" and expressing "hope that the U.S. will continue its strong leadership role and long tradition of protecting those who are fleeing conflict and persecution."[36] A few days later, the United Nations Secretary General declared that the United States had lost its standing as a leader in refugee resettlement, but he had "hope that the U.S. [would] be able to re-establish its very solid refugee protection in resettlement . . . ."[37] Lawmakers in Indonesia, home to the world's largest Muslim population, decried the Original Executive Order as an act that will "diminish the U.S. standing [sic] as a beacon for democracy."[38] German Chancellor Angela Merkel likewise remarked that banning travel based on nationality and blocking refugee admissions are "against the core idea of international aid for refugees and international cooperation."[39] The world views the executive orders as a retreat from America's traditional role as the leading safe haven for immigrants and refugees.

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[34] *See Engel*, 370 U.S. at 428-29 (citing, *inter alia*, SANFORD HOADLEY COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 74-115 (1902)).

[35] *See Reynolds v. United States*, 98 U.S. 145, 162-64 (1878).

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[36] *Joint IOM-UNHCR Statement on President Trump's Refugee Order*, U.N. High Comm'r for Refugees (Jan. 28, 2017), www.unhcr.org/en-us/news/press/2017/1/588bc4e34/joint-iom-unhcr-statement-president-trumps-refugee-order.html.

[37] S. Sengupta, *U.N. Leader Says Trump Visa Bans 'Violate Our Basic Principles,'* N.Y. Times (Feb. 1, 2017), www.nytimes.com/2017/02/01/world/trump-immigration-ban-un.html.

[38] T. Salim, *RI Regrets Trump's Muslim Ban*, The Jakarta Post (Jan. 30, 2017), www.thejakartapost.com/news/2017/01/30/ri-regrets-trump-s-muslim-ban.html.

[39] A. Ansari, N. Robertson, & A. Dewan, *World leaders react to Trump's travel ban*, CNN (Jan. 30, 2017), www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction.

This Court has stayed in part the application of injunctions against the Executive Order entered by the Fourth and Ninth Circuits. [40] The Court's stay allows enforcement of the Executive Order with respect to "foreign nationals lacking a bona fide relationship with a person or entity in the United States."[41] The Court explained that exemption from the Executive Order required a "close familial relationship" or a relationship with an entity that is "formal, documented, and formed in the ordinary course."[42] The U.S. State Department quickly issued implementing guidelines to its agencies, defining "close familial relationship" and instructing agencies that "bona fide relationship" does not include a resettlement agency's "formal assurance for a refugee seeking admission."[43]

Plaintiffs in *Hawai'i v. Trump* promptly challenged the government's interpretation of this

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[40] *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 137 S. Ct. 2080 (June 26, 2017) (order granting in part and denying in part motion to stay injunction).

[41] *Id.*

[42] *Id.*

[43] *Information Regarding the U.S. Refugee Admissions Program, Fact Sheet*, Bureau of Population, Refugees, & Migration (June 30, 2017), https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm.

Court's order.[44] The District Court of Hawai'i enjoined the implementing guidelines, concluding, *inter alia*, that "[a]n assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, . . . it is issued in the ordinary course, and historically has been for decades. Bona fide does not get any more bona fide than that."[45] The Ninth Circuit affirmed the district court's ruling and preliminary injunction, "considering the individualized screening process necessary to obtain a formal assurance and the concrete harms faced by a resettlement agency because of that refugee's exclusion."[46]

C. The Executive Order Impedes the Efforts of EMM And Other Religious Organizations to Render Aid to Refugees.

The Executive Order significantly undermines the efforts of religious organizations in the United States, including the Episcopal Church, to render aid to those fleeing war and oppression. For many Americans, this type of refugee-assistance work is an expression of their faith and one of the ways in which they keep their covenant with God.

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[44] *Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 2989048, at *1 (D. Haw. July 13, 2017), *aff'd*, No. 17-16426, 2017 WL 3911055 (9th Cir. Sept. 7, 2017).

[45] *Id.* at *7.

[46] *Hawai'i v. Trump*, No. 17-16426, 2017 WL 3911055, at *10 (9th Cir. Sept. 7, 2017).

Through EMM, the Episcopal Church and its members provide a multitude of services to refugees, including coordinating the arrival of refugees to the United States, housing assistance, job training, providing for basic household needs, advocacy, language tutoring, business training, microenterprise loans, and a savings program to help refugees purchase homes, vehicles, education, or businesses. All of this has been "thrown into chaos" by the executive orders.[47]

As one of nine U.S. organizations working under federal contracts to resettle refugees, EMM will be directly affected by the outcome of these cases. On the day this Court narrowed the injunction, the Director of EMM, The Reverend Canon E. Mark Stevenson, issued a statement. Canon Stevenson reflected on the Court's determination that the "bona fide relationship" limitation "does not burden any American party . . . ."[48] The Canon wrote, "While that may or may not be true from a legal standpoint, it most certainly is not true from where this American, this Christian, sits and reflects. I feel the burden tremendously, as our country says to those who are

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[47] David Paulsen, *Olympia diocese welcomes refugees, sues to keep resettlement efforts alive* (Feb. 10, 2017), http://episcopaldigitalnetwork.com/ens/2017/02/10/olympia-diocese-welcomes-refugees-sues-to-keep-resettlement-efforts-alive.

[48] *See Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 137 S. Ct. 2080, 2088 (Aug. 10, 2017).

'other' that their suffering is less important than is mine."[49]

When the President signed the Original Executive Order, EMM had invested substantial resources in preparing to welcome hundreds of refugee families—including families from Syria, Iraq, and Somalia—into communities across the country. Because of the Church's efforts, these refugee families already had domestic arrangements supporting their arrival in the United States and were approved for travel. These families had their dreams dashed when they had to abruptly cancel their travel plans, and the Church's efforts to aid them have been for naught.

Although the second Executive Order did not bar entry for individuals in transit like the Original Executive Order did, EMM's work (and the work of other similarly situated religious organizations) has been devastated. The chaos surrounding the implementation of each executive order required EMM to expend additional, unanticipated resources. EMM staff worked around-the-clock to address the immediate needs of families in crisis, as their loved ones, so close to finding safety in the United States, became trapped in limbo overseas under threats of war and persecution. Many of EMM's resources devoted to these refugee families over the past months have been wasted.

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[49] *A Statement by The Rev'd Canon E. Mark Stevenson* (June 26, 2017), https://episcopalmigrationministries.org/statement-episcopal-migration-ministries.

By the exclusion of a resettlement agency's formal assurance from the definition of "bona fide relationship," the Executive Order impacts each individual served by EMM. The dramatic reduction in the overall number of refugees allowed into the country under Sections 2(c) and 6(b) will not only rob families of hope and a future, it will also cost some their lives.

The Executive Orders have caused and will continue to cause significant harm to EMM and to the very vulnerable people that EMM serves. These refugees are fleeing persecution in their countries of origin, and because of the President's executive orders, they now face persecution in the safe haven they had been promised in the United States. The Executive Order has debilitated and will continue to debilitate the vital mission of EMM and other established religious organizations like it, and it will deprive Americans of the opportunity to practice their faith through service to others in need.

IV. CONCLUSION

The words inscribed on the base of the Statute of Liberty invite the world to give America its tired, its poor, its huddled masses yearning to breathe free. This idea—that victims of oppression around the world will find refuge on our shores—is enshrined in the Establishment Clause and is given life in part by religious organizations like the Episcopal Church, who actively work to welcome refugees as an expression of their own faith. The Executive Order violates the letter and the spirit of the Establishment Clause. It deprives refugees of an opportunity to live free from oppression, and it deprives Americans of an opportunity to practice their faith through service.

The Bishops urge the Court to affirm the judgments of the Fourth and Ninth Circuit Courts of Appeals.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE
FOURTH AND NINTH CIRCUITS

BRIEF OF AMICI CURIAE EXECUTIVE BRANCH OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are former officials of the United States Department of Justice, the Department of Homeland Security, the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the Department of Health and Human Services who recognize both the importance of executive power and the value of judicial review of official conduct. They submit this brief to make clear that the "presumption of regularity" has never been an obstacle to a court's consideration of evidence showing that government officials have acted with an improper purpose. Amici include the following individuals.[1]

Bo Cooper, former General Counsel of the Immigration and Naturalization Service.

David A. Martin, former General Counsel of the Immigration and Naturalization Service, former Principal Deputy General Counsel of the Department of Homeland Security, and former Acting General Counsel of the Department of Homeland Security.

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[1] In accordance with Rule 37.6, Amici certify that no counsel for any party authored this brief in whole or in part, and no person or entity other than named Amici made a monetary contribution for the preparation and submission of this brief. The parties consented to the filing of this brief.

David W. Ogden, former Deputy Attorney General, and former Assistant Attorney General for the Civil Division.

William B. Schultz, former General Counsel of the Department of Health and Human Services, and former Deputy Assistant Attorney General for the Civil Division.

Howard M. Shapiro, former General Counsel of the Federal Bureau of Investigation.

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Paul Virtue, former General Counsel of the Immigration and Naturalization Service, as well as former Executive Associate Commissioner and former Deputy General Counsel of that agency.

Seth P. Waxman, former Solicitor General of the United States.

Robert N. Weiner, former Associate Deputy Attorney General.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In an effort to shield the Executive from claims of a discriminatory intent in enacting the travel ban, the Government's brief cites the "presumption of regularity" to avoid judicial scrutiny. Gov. Br. 78. The presumption touted by the Government, however, does not insulate the Executive Order from review and does not alter the burden of the plaintiffs to show discriminatory intent.

The presumption of regularity is founded on the commonsense idea that courts should assume that government officials "have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926). The presumption began as a way of filling in minor evidentiary gaps, usually related to procedural or technical formalities. Historically, the same presumption of normality and regularity applied to private parties and corporate officers, as well as to government officials. For example, if a copy of a document with a corporate seal was filed, a court would presume it was an official corporate seal issued by an authorized party unless someone submitted evidence to the contrary. Today, consistent with its historical origins, the presumption serves as a "general working principle" that means courts will "insist on a meaningful evidentiary showing" before entertaining doubts about the integrity of official acts or documents. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

The Government, here, seeks to inflate this modest presumption into a high barrier thwarting meaningful judicial review. The Government argues that the presumption of regularity demands that this Court "resolve[] any uncertainty" in its favor and credit the President's stated rationale "absent the clearest showing to the contrary." Gov. Br. 77-78. But the presumption does not alter the standards of pleading or proof in a suit against the government, nor is it a source of deference or immunity from judicial review. Indeed, as this Court has made clear, the presumption is little barrier to examining whether officials have acted with an improper purpose. The Government's arguments here represent a major departure from both historical and modern applications of the presumption of regularity and should be squarely rejected.

ARGUMENT

I. The Presumption Of Regularity Was Historically A Modest Principle.

The historical foundation for the presumption of regularity does not support the aggressive application the Government advocates for. The most frequently cited case today regarding the presumption is *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 15 (1926). But the Court there—citing cases dating back to 1827—relied on a principle that was quite modest.

The presumption of regularity has humble origins. As with many legal principles, its roots lie with a Latin phrase: *omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium*. *Bank of U.S. v. Dandridge*, 25 U.S. 64, 70 (1827). It means: "All acts are presumed to be rightly done" until proven to the contrary. Herbert Broom, *A Selection of Legal Maxims* 578 (3d ed. 1852).

The presumption's original purpose was to fill minor gaps in proof relating to formalities or procedural technicalities, especially where circumstantial evidence supported the inference the Government proceeded properly. Under the presumption, "where there is general evidence of facts having been legally and regularly done," a party need not prove circumstances which were "*strictly speaking*, essential to the validity of those acts, and by which they were probably accompanied in most instances." *United States v. Ross*, 92 U.S. 281, 285 (1875) (emphasis added). Courts applying this doctrine would, for example, "presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done." *Dandridge*, 25 U.S. at 70. The presumption was not, however, a "substitute for proof of an independent and material fact." *Ross*, 92 U.S at 285.

Schell v. Fauché represents a quintessential presumption of regularity case. 138 U.S 562 (1891). This Court ruled that documents protesting customs duties could be admitted into evidence even though the record did not demonstrate that they were properly served. *Id.* at 564-65. The Court, citing the presumption of regularity, explained that the protests had been subpoenaed from the appropriate government repository, and so it was "not unreasonable to infer that ... the protests [were] served according to the custom of the office." *Id.* at 565.

It is that sort of procedural technicality that the presumption addressed. Notably, the doctrine is not based on any unique or special deference to the Executive Branch. In fact, this Court's first invocations of the doctrine involved judicial proceedings. In 1799, this Court stated that the proceedings of a circuit court "are entitled to ... presumptions in favor of their regularity." *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 (1799). And in that case, the court *refused* to apply the presumption because no mere formality was at issue, but the existence of federal jurisdiction. Specifically, the record was silent regarding the citizenship of one of the parties. *Id.* at 9. Since diversity of citizenship could not be established, the Court ruled that federal jurisdiction did not exist (rather than presuming the lower court had properly found jurisdiction). *Id.* at 10.

A little over a decade later, the Court applied the presumption to the form of a "release" from a stay of an execution of judgment. *Fitzsimmons v. Ogden*, 11 U.S. 2, 11 (1812). The precise date of the release was not in the record. *Id.* So questions arose concerning whether the release was filed before the execution was issued. The Court explained that the gap in proof was not fatal: "[S]ince the execution could not legally issue without a regular release filed in the [c]ourt ... it must be presumed ... in favor of the regularity of the proceedings that the release was in due form, and bore date prior at least to the emanation of the execution." *Id.* (internal punctuation omitted).

The presumption of regularity was not grounded on giving any special deference to *government* actions, much less the Executive branch in particular. "It presume[d] that every man, in his *private* and official character, does his duty, until the contrary is proved." *Dandridge*, 25 U.S. at 69 (emphasis added); *see also* Broom, *A Selection of Legal Maxims* 579 ("The presumption ... applies also to the acts of private individuals."). Over a hundred years ago, in *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Rankin*, this Court applied the doctrine to private entities—in that instance a railroad. 241 U.S. 319, 327 (1916). Citing the presumption of regularity, the Court explained that "[i]t cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law." *Id.*

It was these sorts of cases that this Court relied on in *Chemical Foundation*, 272 U.S. at 14-15—cases that underscore the modesty of the presumption. Take *United States v. Page* for example. 137 U.S. 673 (1891). That case involved a statute that required the record of certain court-martials to be "laid before the president of the United States for his confirmation" before the sentence could be carried out. *Id.* at 678. The Secretary of War declared that he followed those procedures. *Id.* at 680. The Court explained that when "the record discloses that the proceedings have been laid before the president for his orders," the resulting orders "are presumed to be his, and not those of the secretary." *Id.* The Court contrasted that situation with another case, where the record "failed to show the vital fact of the submission of the proceedings to the president." *Id.* In that circumstance, the "presumption could not supply that fact." *Id.* at 682.

Similarly, *United States v. Nix* involved a marshal's petition for reimbursement of his travel expenses. 189 U.S. 199 (1903). Resolving the case required determining the number of miles he had traveled transporting prisoners, deputies, and guards. The marshal had submitted his accounts to the Oklahoma district court, who approved them. *Id.* at 200 n.†. Because the accounts "had been allowed by the district judge, ... the burden of showing any error of fact in his account" fell on the opposing party. *Id.* at 205. The Court explained: "It would be an insupportable burden upon the officers of courts if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item." *Id.* at 206.

The other cases *Chemical Foundation* cites are to the same effect:

- ***The Confiscation Cases***: The Court ruled that an information to seize property stating that the Attorney General had ordered the seizure "by virtue of the [relevant] act of Congress" sufficiently stated that the President had authorized the Attorney General's actions (as required by the statute). 87 U.S. 92, 108 (1873).

- ***Monongahela Bridge Co v. United States***: A company criminally refused to comply with the Secretary of War's order to alter a bridge so as to not obstruct the river it passed over. 216 U.S. 177, 186-87, 191 (1910). Because it was not relevant whether or not the bridge actually caused an obstruction, the Court assumed that the Secretary of War based his decision on the facts presented to him. *Id.* at 194-95.

- ***Dakota Cent. Tel. Co. v. South Dakota***: The Court concluded that arguments relating to the President's motives were not relevant because the alleged motives did not affect his authority to act. 250 U.S. 163, 184 (1919).

- ***Martin v. Mott***: The Court ruled that a government pleading to justify collecting a fine for refusing to report for militia service need only allege that the plaintiff was ordered to serve and did not need to allege that the necessary conditions for requiring military service were met. 25 U.S. 19, 32-33 (1827).

- ***Levinson v. United States***: The Court ruled that the government was bound by its sale of a Navy vessel even though it later realized it had received a higher bid from another potential buyer. 258 U.S. 198 (1922).

Citing these cases concerning the historic presumption of regularity, the Court in *Chemical Foundation* applied it in an unremarkable way. *Chemical Foundation* involved a State Department counselor's orders authorizing the government to seize "enemy-owned" intellectual property and sell it to the Chemical Foundation. 272 U.S. at 4, 6-7. The United States brought suit to set aside those sales alleging that the orders were fraudulently obtained. *Id.* at 4, 14. But there was no evidence of any fraud. *United States v. Chem. Found., Inc.*, 294 F. 300, 332 (D. Del. 1924) ("The charges of deception ... have failed utterly."). Since both lower courts found that the United States had not established any fraud, this Court "accepted" the lower courts' determination. *Chem. Found.*, 272 U.S. at 14. This Court then *went on* to note that it would assume under the presumption of regularity that the counselor "properly discharged" his duties, citing the prior cases applying the presumption. *Id.* at 14-15.

The historical foundation of the presumption of regularity, including *Chemical Foundation*, evidences its modest role. Neither *Chemical Foundation* nor the cases it cites support the rule the Government advocates for here. The cases do not stand for the principle that "any uncertainty" must be resolved in the Government's favor. Gov. Br. 77. Nor do any of those cases involve a law whose purpose is unconstitutionally discriminatory. Rather, the cases simply show that courts would assume procedural formalities have been satisfied, or at most, that courts would not assume misconduct occurred in the absence of any supporting evidence.

II. More Recent Cases Have Applied The Presumption As A Modest Working Principle.

A. The presumption does not alter the standards of pleading or proof.

While *Chemical Foundation* explained that courts should "presume that [government agents] have properly discharged their official duties" unless there is "*clear evidence* to the contrary," 272 U.S. at 14-15 (emphasis added), the presumption of regularity has never changed the standards of pleading or proof that apply in suits against government officials alleging an unconstitutional motive.

As for the standard of proof of what a plaintiff must show to establish a case at summary judgment and at trial, "where Congress has spoken, [this Court has] deferred to 'the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts,' absent countervailing constitutional concerns." *Steadman v. S.E.C.*, 450 U.S. 91, 95 (1981) (quoting *Vance v. Terrazas*, 444 U.S. 252, 265 (1980)). Although courts are "at liberty to prescribe the standard" when Congress is silent, *id.*, the general rule is that "in a civil action ... a preponderance of the evidence will establish the case," *S.E.C. v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.").

Scarcely attempting to square its position with that settled law, the Government here claims that the presumption requires courts to "resolve[] any uncertainty" in its favor and credit the President's stated rationale "absent the clearest showing to the contrary." Gov. Br. 77-78. But as this Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the preponderance of the evidence—not any "heightened standard"—is the appropriate burden of proof in a suit against government officials "based on a constitutional claim that requires proof of improper motive." *Id.* at 577. "[A]lthough evidence of improper motive ... may be an essential component of the plaintiff's affirmative case," this Court saw "no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." *Id.* at 589.

In so ruling in *Crawford-El*, this Court rejected the very argument advanced by the Government here: that the presumption of regularity supports imposition of a heightened standard of proof. In *Crawford-*

El, the Government argued that to succeed in a motive-based claim against an official asserting the right to qualified immunity, the presumption of regularity required proof of improper motive by clear and convincing evidence. *See* Br. of the United States as Amicus Curiae Supporting Respondent, No. 96-827, 1997 WL 606738, at *21-22 (U.S. Oct. 1, 1997). This Court rejected that argument and instead unambiguously held that there was no heightened burden of proof. As *Crawford-El* makes plain, the presumption's "clear evidence" requirement, *Chemical Foundation*, 272 U.S. at 14, is wholly distinct from the "clear and convincing evidence" standard—or any other "heightened standard" of proof, *Crawford-El*, 523 U.S. at 594-95.[2]

Nor does the presumption of regularity alter the standard of pleading in a suit against government officials alleging an unconstitutional motive. This Court has repeatedly declined to impose heightened pleading standards beyond those set out in the Federal Rules of Civil Procedure. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007) ("Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits."); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) ("Rule 9(b) ... provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts.").

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[2] On this point, there has been some confusion in the lower courts. *See, e.g.*, *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 852 F.3d 268, 285 (3d Cir. 2017) (describing the presumption as a standard of proof); *Latif v. Obama*, 677 F.3d 1175, 1185 n.5 (D.C. Cir. 2012) (noting that courts applying the presumption "have required litigants to meet" a range of "standards" "[d]epending on the circumstances"). Although the Court has on occasions used the term "clear evidence" to mean "clear and convincing evidence," *Oriel v. Russell*, 278 U.S. 358, 362-63 (1929), it has never suggested that the presumption of regularity triggers a heightened standard of proof. This case is an opportunity to clarify any ambiguity.

Notably, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), where the plaintiff accused officials "at the highest level of the federal law enforcement hierarchy" of "arrest[ing] and detain[ing] thousands of Arab Muslim men" and subjecting them to "harsh conditions of confinement" "*solely on account of [their] religion, race, and/or national origin*," *id.* at 668-69 (emphasis added), this Court employed the same "plausibility" pleading standard that applies in general civil litigation, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). If the presumption did any work in *Iqbal*, it was in the background, helping to inform what the Court deemed "plausible" under the factual circumstances presented. As the majority explained, the plaintiff's "conclusory" complaint failed to plausibly allege that the Attorney General and Director of the FBI had "purposefully" targeted him on the basis of his protected characteristics, given the more "obvious alternative explanation" that he was swept up by "a legitimate policy" aimed at individuals with a suspected link to the September 11 attacks. *Id.* at 680-82. In other words, the Court presumed that the defendants had "properly discharged their official duties," *Chemical Foundation*, 272 U.S. at 14-15, refusing to impute an improper motive to their actions on the basis of conclusory allegations.

B. The presumption is a working principle.

Elaborating on the "clear evidence" formulation set out in *Chemical Foundation*, more recent decisions of this Court cast the presumption as "a general working principle"—far from the source of special deference, elevated pleading standard, or heightened burden of proof sought by the Government. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (citing *Chem. Found.*, 272 U.S. at 14-15). In operation, the presumption has meant only that this Court will "insist on a meaningful evidentiary showing" before entertaining doubts about the integrity of official acts. *Id.* at 175. Thus, "a totally unsupported suggestion" that government agents acted improperly will fail to "impugn the integrity" of government reports. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991). Likewise, "in the absence of evidence to the contrary" this Court has refused to attribute a delay in agency action to official misconduct. *I.N.S. v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam).[3]

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[3] This Court has also frequently noted that the presumption of regularity set out in *Chemical Foundation* extends to "prosecutorial decisions" such that "'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Chem. Found.*, 272 U.S. at 14-15). The presumption should not, however, be confused with the requirements of specific claims against prosecutors, such as selective prosecution or retaliatory prosecution. *See id.* at 458 (holding that for claims of selective prosecution based on race, a defendant must "show that the Government declined to prosecute similarly situated suspects of other races"); *Hartman v. Moore*, 547 U.S. 250, 252 (2006) (holding that for claims "against criminal investigators for inducing prosecution in retaliation for

Lower courts have applied the presumption in a similarly limited manner. Because "[a]gency decisions are entitled to a presumption of regularity," the Eleventh Circuit has explained, it will decline to "ascribe some improper motive" to agency action "[a]bsent evidence in the record." *Nat'l Parks Conservation Assoc. v. U.S. Dep't of Interior*, 835 F.3d 1377, 1385-86 (11th Cir. 2016). So too, where challengers to an executive order of the President failed to "suggest[] any actual irregularity in the President's factfinding process or activity" the D.C. Circuit refused to entertain "an unwarranted assumption that the President was indifferent to the purposes and requirements of" his authority, "or acted deliberately in contravention of them." *Am. Fed. of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723, 728 (D.C. Cir. 1989); *see Latif v. Obama*, 677 F.3d 1175, 1186-87 (D.C. Cir. 2012) ("minor transcription errors" fail to "rebut[] the presumption of regularity" accorded an intelligence document).

C. The presumption is no obstacle to examining motive.

Though courts must "insist on a meaningful evidentiary showing" before entertaining doubts about the integrity of official acts, *Favish*, 541 U.S. at 175, "th[e] presumption is not to shield [government] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

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speech" plaintiffs must show an "absence of probable cause to support the underlying criminal charge").

402, 415 (1971). Particularly relevant here, the presumption is little barrier to examining whether government has acted with an improper purpose.

McCreary County v. ACLU, 545 U.S. 844 (2005), is instructive. In that case, civil liberties organizations challenged two courthouse displays of the Ten Commandments as violating the Establishment Clause. Reviewing the purpose behind the displays as an "objective observer," mindful of the "text, legislative history, and implementation" of the "official act," *id.* at 862, (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)), this Court determined that the "context in which [the] policy arose" revealed an unmistakable sectarian motivation, *id.* at 866 (quoting *Santa Fe*, 530 U.S. at 315). Although the dissent argued that looking at this history flouted "the presumption of regularity that always accompanies our review of official action," *id.* at 912, the majority took another view: that searching inquiry into "governmental purpose" is a "staple" of the law, and "a key element of a good deal of constitutional doctrine," *id.* at 861. And where this Court did afford deference to the "legislature's stated reasons," it was the *Lemon* test—not the presumption of regularity—that it cited as the source of deference. *Id.* at 864.

As *McCreary* makes clear, courts may begin from the premise that government agents have acted properly, yet that has never prevented them from "look[ing] behind the presumption to the actual facts." *See Bismullah v. Gates*, 501 F.3d 178, 186 (D.C. Cir. 2007), *vacated on other grounds*, 554 U.S. 913 (2008). If the contrary were true, as the Government seems to suggest, then even a Jim Crow law designed specifically to disenfranchise Black voters, could escape constitutional scrutiny so long as it were neutral on its face. On this theory, courts would presume grandfather clauses, literacy tests, and requirements to count jelly beans were "regular." But this Court has long rejected the notion that the "discriminatory racial purpose" necessary to show a violation of the Equal Protection Clause "must be express or appear on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241 (1976).

Instead, this Court's cases describe "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" to determine whether government acted with "invidious discriminatory purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (detailing "[t]he impact of the official action," the "historical background" and "specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," "statements" by officials, and government records as potential evidence of intent). As this Court recently put it, "all of the circumstances that bear upon the issue of racial animosity must be consulted" when discriminatory purpose is in question, and courts should not "blind [them]selves" to probative evidence of intent. *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016). The same is true of impermissible purposes under the Establishment Clause. *McCreary*, 545 U.S. 844.

Nor has the presumption prevented courts from considering a wide variety of evidence to determine whether it has been rebutted, including:

- Statements or admissions by the relevant officials, *see Hartman v. Moore*, 547 U.S. 250, 264 (2006);

- Sworn affidavits from witnesses, *see Kelly v. United States*, 826 F.2d 1049, 1053 (Fed. Cir. 1987);

- A pattern of conduct difficult to reconcile with legitimate purposes, *McDonough v. Anoka County*, 799 F.3d 931, 947-48 (8th Cir. 2015);

- Related acts of official corruption, *see Bracy v. Gramley*, 520 U.S. 899, 909 (1997);

- Contrary findings in government reports, *McDonough*, 799 F.3d at 948;

- And actions that "demonstrated undue bias towards particular private interests," *Nat. Res. Def. Council, Inc. v. S.E.C.*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979).

Several of these cases involved evidence analogous to that relied on by the Fourth Circuit. For example, the President's campaign statements are similar to those considered in *McCreary* and *Hartman*. Likewise, as in *McDonough*, the context surrounding the January Order reveals a pattern of conduct inconsistent with the Government's stated rationales.

D. The presumption is distinct from sources of deference and immunity.

This Court should reject the Government's effort to conflate the presumption, which is a working principle that applies in all cases and to all government conduct, with sources of deference and immunity.

The presumption is not a principle of deference to government defendants. As discussed, in its original form, the presumption clearly applied to private persons and corporate officers, as well as government officials. *See Dandridge*, 25 U.S. at 69; *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin*, 241 U.S. at 327. Today, it is simply a baseline presumption of normality accorded all government conduct, absent evidence to the contrary. It is not a special defense for government officials. Indeed, the presumption has in some contexts been invoked against government parties. *See Riggs Nat'l Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 295 F.3d 16 (D.C. Cir. 2002) (a private plaintiff allowed to invoke the presumption in regard to the accuracy of certain tax records).

The Government, for its part, treats the presumption as a source of deference that is "magnified" and "carries the utmost force with respect to the President." Gov. Br. 78. But it cites no authority for applying the presumption differently where the President is concerned. Rather, "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Martin*, 25 U.S. at 33. Accordingly, this Court has applied the presumption without variation to state judges, *Bracy*, 520 U.S. at 909, postal inspectors, *Hartman*, 547 U.S. at 263, and cabinet secretaries alike, *Overton Park*, 401 U.S. at 415. The D.C. Circuit, for its part, has applied the presumption in equal measure to an executive order of the President, *Am. Fed. of Gov't Emps.*, 870 F.2d at 728, and to Brazilian tax receipts, *Riggs Nat'l Corp.*, 295 F.3d at 20-21. Holding that the presumption should operate differently depending on the government official would introduce a new and unworkable complexity into that doctrine.

It would also needlessly blend the presumption of regularity with other rules that serve to heighten deference and grant immunity when appropriate. As this Court has recognized, "[t]he President's constitutional responsibilities and status ... counsel[] judicial deference and restraint." *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). One product of that recognition is the President's absolute immunity from damages liability based on official acts. *Id.* Another is the "narrow standard of review [that governs] decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 82 (1976). The Government's effort to conflate the presumption of regularity with the deference afforded to the President in the fields of immigration and national security is a transparent attempt to obtain more latitude than those carefully calibrated doctrines would otherwise afford. Whatever deference is appropriate in this case, its source is not the presumption of regularity.

CONCLUSION

The Court should reject the Government's attempts to expand the presumption of regularity beyond its historical underpinnings and modern application. The Court should apply the presumption as a modest working principle, and proceed to consider any evidence reasonably bearing on the President's decision to implement the travel ban.

Respectfully submitted,

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DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
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On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae are former national security, foreign policy, intelligence, and other public officials who have worked on security matters at the most senior levels of the United States government.[2]

Amici have held the highest security clearances, and collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. A number of amici have worked in senior leadership positions in the administrations of Presidents from both major political parties. Many were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the original January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("January Order"), and one was current as recently as the beginning of March 2017, shortly before the issuance of the identically titled March 6, 2017 Executive Order ("Order") under review here.

Amici have devoted their careers across multiple decades to protecting the security of the United States. They write to provide their views regarding the substantial national security and foreign policy issues raised by the Order under dispute in these proceedings.

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[1] No counsel for a party to this case authored this brief in whole or in part, and no counsel for a party contributed monetarily to the preparation or submission of any portion of this brief. Amici received consent from Respondents to file this brief. Petitioners provided blanket consent to file *amicus curiae* briefs.

[2] A complete list of signatories can be found in the Appendix.

SUMMARY OF ARGUMENT

Amici agree that to keep our country safe from terrorist threats, the U.S. Government must gather all credible evidence about growing threat streams—including through the best available intelligence—to thwart those threats before they ripen. Through the years, amici have worked individually and collectively to help develop national security-based immigration restrictions that have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency review. The Executive Orders at issue in this case do not rest on such carefully tailored grounds, but rather, (1) are blanket entry bans based on national origin, (2) that are not supported by any intelligence that Petitioners have cited or of which amici are aware, and (3) did not emerge from the sort of careful interagency legal and policy review that would compel judicial deference.

Petitioners insist that amici are trying to second-guess the "national-security judgment" of the President. Pet. Br. at 48-49. In fact, amici—who include senior officials from Democratic and Republican administrations, and several who served in both—well understand that national security decisions will differ from administration to administration, and evolve with changing circumstances. On some issues, amici disagree among themselves regarding the best approach to protecting the national security and immigration policy of the United States. But amici join together here, not to second-guess the President's national security judgment, but to underscore the many ways in which the Order under review does not appear to reflect sound national security judgment at all.

First, the Order radically departs from the consistent approach to national security of multiple administrations, which for good reason have adopted individualized approaches based on cognizable intelligence rather than blanket, national origin-based bans. Overwhelming evidence demonstrates that the Order's overbroad bans on travel and refugees will not only fail to advance our national security or foreign policy, but will seriously damage those interests. *Second*, the January Order was not vetted through national security agencies, and took the President's own national security officials by surprise. *Third*, nearly eight months later, Petitioners offer no meaningful evidentiary support for the claimed national security imperative underlying the Order. *Fourth*, Petitioners' subsequent actions have shown that they never took their own claimed national security rationale seriously. Although the Order imposes a 90-day "pause" in travel from the listed countries—allegedly so that Petitioners may conduct an interagency review of vetting procedures—once the Order was in place, Petitioners failed to conduct that review, making clear that the "pause" was just another disguised travel ban, unconnected to the review of vetting procedures claimed as its *raison d'être*. Finally, the President's and his advisors' well-publicized statements repeatedly calling for a "Muslim ban" undercut Petitioners' claim that any considered national security judgment really underlies the Order.

In sum, all available evidence suggests that the Order was not based on national security judgment at all, but rather, on a deliberate political decision to discriminate against a religious minority. In *Winter* v. *Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008), this Court "[gave] 'great deference *to the professional judgment* of military authorities concerning the relative importance of a particular military interest.'" (quoting *Goldman* v. *Weinberger,* 475 U.S. 503, 507 (1986)) (emphasis added)). While the Order at issue here may be *about* national security, Petitioners have provided no evidence that it actually involves the kind of considered national security *judgment*—based on process, evidence, findings, and careful interagency deliberation conducted by experienced national security professionals—that would warrant judicial deference.

This Court should not allow Petitioners to shield this Order from meaningful judicial review by cloaking discrimination in a thin veil of "national security." The record establishes that our nation's security was hardly deliberated, let alone through the appropriate channels, and was never this Order's true aim.

ARGUMENT

I. The Order departs sharply from historical precedent and would cause serious national security and foreign policy harm.

Amici are aware of no national security or foreign policy interest that would justify the Order at issue in this case. While amici include officials who were current on active intelligence concerning all credible terrorist threat streams directed against the United States as recently as March 2017, they know of no specific threat that justified either the unprecedented January Order—which suspended both travel from a number of listed countries ("the country ban") and refugee admissions ("the refugee ban")

—or the similar bans in the slightly revised March Order.

In fact, the Order (1) fails to advance the national security or foreign policy interests of the United States, (2) will harm those interests, and (3) is an unprecedented step that cannot be defended by reference to U.S. history.

A. The Order does not advance the national security or foreign policy interests of the United States.

In amici's professional judgment, the country and refugee bans bear no rational relation to the President's stated aim of protecting the nation from foreign terrorism.

1. The Country Ban. The current Order targets six countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last forty years.[3] Although Petitioners initially invoked the September 11, 2001 attacks as a rationale for the ban,[4] none of the September 11 hijackers were in fact citizens of those six listed countries.[5] The overwhelming majority of individuals who have been charged with—or who died in the course of committing—terrorism-related crimes inside the United

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[3] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, CATO Institute: CATO at Liberty (Jan. 25, 2017) [hereinafter Nowrasteh Jan. 2017].

[4] Exec. Order No. 13,769, 82 Fed. Reg. 8977, §1 (Feb. 1, 2017) [hereinafter January Order].

[5] Peter Bergen et al., *Terrorism in America After 9/11*, New America Foundation, http://www.newamerica.org/in-depth/terrorism-in-america/ (accessed Sept. 16, 2017).

States since September 11 have been U.S. citizens or legal permanent residents.[6]

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[6] See *ibid.*; Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, George Washington University Program on Extremism 7 (Dec. 2015); Nora Ellingsen, *It's Not Foreigners Who Are Plotting Here: What the Data Really Show*, Lawfare (Feb. 7, 2017); see also Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016) [hereinafter Nowrasteh Sept. 2016]; Felicia Schwartz & Ben Kesling, *Countries Under U.S. Entry Ban Aren't Main Sources of Terror Attacks*, Wall St. J. (Jan. 29, 2017). "Of 161 people charged with jihadist terrorism related crimes or who died before being charged, 11 were identified as being from" the countries listed in the Order, but "none of the 11 were involved in any major U.S. plot resulting in the deaths of Americans, including the attacks of Sept. 11, 2001." Schwartz & Kesling, *supra*. The March Order asserts that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States," and a letter from then-Secretary of Homeland Security Kelly and Attorney General Sessions asserts that since September 11, 2001, "a substantial majority of those convicted in U.S. courts for international terrorism-related activities were foreign-born." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, §1(h) (Mar. 9, 2017) [hereinafter March Order]; Letter from Jeffrey B. Sessions, Attorney Gen., & John Francis Kelly, Sec'y of Homeland Sec., to Donald J. Trump, President (Mar. 6, 2017) [hereinafter March 6 Letter]. These documents cite no support for these assertions, and appear to be based upon a data set that has been widely criticized, *inter alia*, for its overly broad definition of offenses. See Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here"*, Lawfare (Apr. 11, 2017); Alex Nowrasteh, *42 Percent of "Terrorism-Related" Convictions Aren't for Terrorism*, Cato Institute: Cato at Liberty (Mar. 6, 2017); Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2007); Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, Just Security (Mar. 4, 2017).

Against this history, Petitioners offer no proof that the threat from the listed countries has increased recently so as to warrant the country-based ban in the Orders. In the January Order, Petitioners offered no such information at all. In the March Order, Petitioners added only general excerpts from documents such as the 2015 Department of State Country Reports on Terrorism, describing how these nations are home to violent extremist groups, and do not cooperate in U.S. counterterrorism efforts.[7] But a closer reading of those Country Reports—which several amici reviewed before publication—only confirms the gross imprecision of the Order's country bans. In fact, those Reports show that the majority of the terrorist attacks occurring in 2015 took place in five countries, *none of which are subject to the travel ban.*[8]

The only other claimed evidence cited in the March Order—two anecdotal cases in which refugees were later sentenced for terrorism-related crimes—provide no support at all for the overbroad ban.[9] In one instance, the terrorist activities were undertaken *before* the individual came to the United States from a country that is no longer listed in the Order.[10] Refugee procedures had already been fully reviewed and revised to address the concerns raised by this instance *before* the Order was issued.[11] Nor would a country-based suspension of travel to "improve the vetting process" have affected the entry of the other named individual, who never executed his plans, and was in any event admitted as a baby and radicalized in the United States.

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[7] March Order, *supra* note 6, at §1(e).

[8] Nat'l Consortium for the Study of Terrorism and Responses to Terrorism, *Annex of Statistical Information: Country Reports on Terrorism 2015* (June 2016) [hereinafter *Country Reports* 2015] (identifying Iraq, Afghanistan, Pakistan, India, and Nigeria).

[9] March Order, *supra* note 6, at §1(h).

[10] Office of Public Affairs, *Former Iraqi Terrorists Living in Kentucky Sentenced for Terrorist Activities*, Dep't of Justice, (Jan. 29, 2013).

Finally, the March Order claims that Petitioners must suspend travel from the six listed countries in order to review vetting procedures in all countries around the world. The Order asserts that a pause in travel is needed "[t]o temporarily reduce investigative burdens on relevant agencies during the review period" and "to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals."[12] But no actual evidence is offered for these assertions, and no explanation is provided for why a suspension of travel from six countries is needed to facilitate a vetting review of every country in the world. In fact, the United States has undertaken periodic reviews of vetting procedures throughout its history without claiming the need arbitrarily to block travel by some 180 million people to do so. And in recent weeks, Petitioners moved forward with their vetting-procedure review without an accompanying total suspension of travel.[13] Nearly eight months after the supposed emergency conditions necessitating issuance of the initial Order, Petitioners still cannot point to any genuine security threat, or any claimed flaw in our existing security screening of travelers, that suddenly demands imposition of the Orders' overbroad bans.

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[11] *Ten Years After 9/11: Preventing Terrorist Travel: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. 522 (2011) (written statements of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, & Janice L. Jacobs, Assistant Secretary, Bureau of Consular Affairs, Department of State); Andorra Bruno, Cong. Research Serv., R43725, Iraqi and Afghan Special Immigrant Visa Programs, 14 (Feb. 26, 2016).

[12] March Order, *supra* note 6, at §2(c).

In fact, since the September 11, 2001 attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law enforcement and intelligence communities. Over the years, amici have worked individually and collectively to develop that system. In amici's experience, the current individualized vetting system is applied to travelers not once, but multiple times, and is continually re-evaluated to ensure its effectiveness. Successive administrations have strengthened the vetting process through robust information-sharing and data integration. This approach allows the U.S. Government to identify potential terrorists without resorting to blanket bans.[14]

Throughout this protracted litigation, Petitioners have offered no persuasive national security justification for abruptly moving to a country-based travel ban, particularly when the United States already has in place a tested, proven system of rigorous individualized vetting. Far from providing that justification, the information that has surfaced from within the U.S. Government has only undermined its national security claim. Since the initial Order issued this past January, a document generated by the Department of Homeland Security, prepared in response to a request from the new Administration, only confirmed amici's conclusion that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."[15]

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[13] U.S. Dep't of State, *Demarche Request: E.O. 13780 – Improving Information Sharing with Foreign Governments* (July 12, 2017),
http://live.reuters.com/Event/Live_US_Politics/1012197528.

[14] *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. (2016) (written statements of David T. Donahue, Principal Deputy Assistant for Consular Affairs, Department of State, & Sarah R. Saldaña, Director, U.S. Immigration and Customs Enforcement).

2. The Refugee Ban. For similar reasons, the March 6 Order's 120-day ban on refugee admissions serves no legitimate national security or foreign policy purpose. Amici include a number of officials who have held for extended periods of time the most senior responsibility within the U.S. Government for overseeing the refugee resettlement process. Amici know of no factual basis for Petitioners' claim that refugees pose a particular security threat to the

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[15] U.S. Dep't of Homeland Sec., *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* 1 [hereinafter *Citizenship Likely an Unreliable Indicator*], http://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf. Although the lower courts largely blocked a formal country ban from taking effect, the State Department still sharply reduced the number of non-immigrant visas issued to nationals of those six listed countries. See U.S. Dep't of State, Bureau of Consular Affairs, *Monthly Nonimmigrant Visa Issuances*, http://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas/monthly-nonimmigrant-visa-issuances.html (showing 45% drop in issuance of such visas compared to the same period one year earlier); see also Yeganeh Torbati, *U.S. Visas Issued to Citizens of Trump Travel Ban Nations Continue To Decline*, Reuters (May 25, 2017).

United States that would justify the Order's categorical bans. To the contrary, the Government's position entirely misunderstands the realities of—and the national security protections provided by—the existing vetting process.

Refugees already receive the most thorough vetting of any travelers to the United States.[16] Refugee candidates are vetted repeatedly throughout the resettlement process, as "pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light."[17] By the time refugees referred by the United Nations High Commissioner for Refugees ("UNHCR") are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and the U.S. intelligence community.[18]

The refugee vetting process is also reviewed and enhanced on an ongoing basis in response to particular threats.[19] For Syrian applicants, the Department of Homeland Security in 2015 described a layer of enhanced review that involves collaboration between the U.S. Citizenship and Immigration Services' Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews.[20]

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[16] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs*.

[17] Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015), http://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states.

[18] U.S. Dep't of State, *The Refugee Processing and Screening System*, http://www.state.gov/documents/organization/266671.pdf.

[19] U.S. Citizenship and Immigration Services, *Fact Sheet: Refugee Security Screening* (Dec. 3, 2015), http://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20

Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States.[21] Fewer than one percent of all refugees determined by the UNHCR to be eligible for resettlement were settled in any single country in 2015.[22] Because refugees do not decide where they will be resettled, the odds that any terrorist posing as a refugee will be resettled in the United States are vanishingly small.

During the four decades from 1975 to the end of 2015, over three million refugees have been admitted to the United States. Despite this vast number, only three refugees have killed people in terrorist attacks on U.S. soil during this period. All three were refu-

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Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[20] U.S. Dep't of State, *supra* note 18; Andorra Bruno, Cong. Research Serv., R44277, Syrian Refugee Admissions and Resettlement in the United States: In Brief 4-5 (2016).

[21] U.S. Dep't of State, *U.S. Refugee Resettlement Processing for Iraqi and Syrian Beneficiaries of an Approved I-130 Petition* (Mar. 11, 2016).

[22] U.N. High Commissioner for Refugees, *Resettlement*, http://www.unhcr.org/en-us/resettlement.html.

gees from Cuba—a country not listed in the Order—who were admitted to the United States and carried out their crimes *before* the creation of the modern refugee vetting system in 1980.[23] According to a recent study, over that same period, only 20 refugees have been convicted of *any* terrorism-related crimes on U.S. soil.[24] Between October 1, 2011 and December 31, 2016, more than 18,000 Syrian refugees were resettled in the United States; amici know of none who has been detained due to an alleged connection with terror.[25]

Petitioners allege no specific information about any vetting step omitted by these current procedures that would demand a generalized suspension of the refugee program.[26] At bottom, the U.S. refugee resettlement program is a humanitarian assistance program that was not set up to benefit relatives of American citizens or residents, nor to serve the employment or educational needs of American companies or institutions. It was instead established to further the noble and historical American tradition of aiding people fleeing persecution. Of course, this includes people with relatives and other prior connections to the United States. But it also includes people who, before having their case considered, had no relationship at all with the United States, but after full vetting under rigorous, individualized modern procedures, have been found to pose no national security threat.

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[23] Nowrasteh Sept. 2016, *supra* note 6, at 13.

[24] *Ibid.*; see also *ibid.* ("[T]he chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 *billion* per year * * *." (emphasis in original)).

[25] Nowrasteh Sept. 2016, *supra* note 6, at 13.

[26] Nor have Petitioners offered any national security reason why a "*bona fide* relationship" requirement should be superimposed on existing refugee vetting procedures to block entry even of those refugees with formal assurances from a U.S.-based resettlement agency. In reality, *all* refugees in the U.S. Refugee Admissions Program develop close *bona fide* relationships with U.S.-based entities by virtue of the refugee process, and in some cases well before a formal assurance of admittance is provided. The decision to admit individual refugees, once screened, depends on the U.S. Government's assessment that an agency in the United States is prepared to handle the particularized and often unique cultural, medical, and familial needs of individual refugees. By the time refugees have made their way through this intensive vetting process of matching individuals to resources, and have been formally admitted, they have necessarily acquired the kind of formal and documented "*bona fide* relationship" with the United States called for by this Court's June

B. The Order would do serious damage to the national security and foreign policy interests of the United States.

The Order not only fails to advance the national security or foreign policy interests of the United States but would cause serious and multiple harms to those interests.

First, the Order would harm interpreters and others who have assisted our troops at great risk to their own lives. While Iraq has been removed from the list of banned countries, the Order would halt the entire U.S. Refugee Assistance Program for 120 days for all countries. This pause would affect thousands of individuals who, because they assisted the United States overseas, are waiting for admission under the

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26 *per curiam* order. See generally Brief of Amici Curiae Former National Security Officials in Opposition to the Motion for Clarification at 6-9, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 19, 2017), 2017 WL 3045234.

already backlogged "Priority 2" program.[27] By discouraging future assistance and cooperation from these and other affected military allies and partners, the Order would jeopardize the safety and effectiveness of our troops.

Second, the Order would disrupt key counterterrorism, foreign policy, and national security partnerships, in particular with countries in the Middle East. These partnerships are critical to our country's efforts to address the threat posed by terrorist groups such as the "Islamic State" ("IS"). The Order would also endanger U.S. intelligence sources in the field. For up-to-date information, our intelligence officers often rely on human sources in some of the countries listed. The Order breaches trust with those very sources, who have put themselves at great risk to keep Americans safe—and whom our officers had promised to protect.[28] Finally, by suspending visas, this Order halts the collection of vital intelligence that occurs during visa screening processes, information that can be used to recruit agents and identify regional trends of instability.

Third, the Order's disparate impact on Muslim travelers feeds IS's propaganda narrative and sends the wrong message to the Muslim community at home and abroad—that the U.S. Government is at war with Islam. The day after President Trump signed the January 27 Order, jihadist groups began citing its contents in recruiting messages online.[29] Likewise, domestic law enforcement relies heavily on partnerships with American Muslim communities to fight homegrown terrorism.[30] By alienating Muslim-American communities in the United States, the Order will harm our efforts to enlist their assistance in identifying radicalized individuals who might launch attacks such as those in San Bernardino and Orlando.

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[27] See U.S. Dep't of State et al., Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016, at 57 (2016); Urban Justice Ctr., Int'l Refugee Assistance Project, IRAP Stands with Iraqi Allies of the United States Affected by Executive Order (Feb. 1, 2017).

[28] Michael V. Hayden, Opinion, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash. Post (Feb. 5, 2017).

Fourth, the Order has already had a devastating humanitarian impact. The travel ban has disrupted the travel of men, women, and children who have been victimized by actual terrorists.[31] Countless other travelers now face deep uncertainty about whether they will be able to travel to or from the United States for reasons including medical treatment, study or scholarly exchange, funerals, or other pressing family reasons. While the Order allows the Secretaries of State and Homeland Security to admit travelers from targeted countries on a case-by-case basis, in amici's experience administering that process, it would impose unrealistic obligations on these overburdened agencies to apply such procedures to each and every affected individual with urgent and compelling needs to travel.

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[29] See, *e.g.*, Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, Wash. Post (Jan. 29, 2017).

[30] See, *e.g.*, Kristina Cooke & Joseph Ax, *U.S. Officials Say American Muslims Do Report Extremist Threats*, Reuters (June 16, 2016).

[31] See, *e.g.*, Cora Currier, *U.S. Embassy Memos Offer a Glimpse into the "Devastated" Lives of Refugees Rejected by the Travel Ban*, The Intercept (Sept. 15, 2017).

Finally, the Order would affect many foreign travelers, who annually inject hundreds of billions of dollars into the U.S. economy, supporting well over a million U.S. jobs.[32] The travel ban also could be expected to have a negative economic impact on strategic economic sectors including defense, technology, and medicine. About a third of U.S. innovators were born outside the United States, and their scientific and technological innovations have contributed to making our nation and the world safe.[33] The unwarranted harm caused by the ban to the economic dynamism of our country would carry long-term negative and serious consequences for our national security.

C. The Order is of unprecedented scope.

In their long collective experience, amici know of no case where a President has invoked authority under the Immigration and Nationality Act to suspend admission of such a sweeping class of people. Even after the September 11 attacks, the U.S. Government did not invoke the provisions of law cited by Petitioners to broadly bar entrants based on nationality, national origin, or religious affiliation. To the contrary, across the decades, executive orders under the

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[32] U.S. Dep't of Commerce, *Department of Commerce Releases October Travel and Tourism Expenditures* (Dec. 15, 2016), http://trade.gov/press/press-releases/2016/department-of-commerce-releases-october-travel-tourism-expenditures-121516.asp.

[33] Adams Nager et al., *The Demographics of Innovation in the United States*, Information Technology & Innovation Foundation 29 (Feb. 2016), http://www2.itif.org/2016-demographics-of-innovation.pdf; Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*, Cyberscoop (Jan. 30, 2017).

Immigration and Nationality Act usually have targeted specific government officials,[34] undocumented immigrants,[35] or other individuals whose personalized screenings indicated that *as individuals*, they posed a national security risk.[36] No example in the modern era approaches the breadth of this Order, which, with one stroke of the pen, bans more than 180 million people in six separate countries from traveling to the United States based solely on their national origin.

Petitioners point to three inapposite examples in modern history. One involved actions in 1981 to stop *undocumented aliens* from Haiti "coming by sea to the United States without necessary documentation," hardly precedent for the sweeping ban on lawful travel imposed in this case.[37] The other two examples, Cuba in 1986[38] and Iran in 1979[39], imposed bans on travel, with exceptions, as part of an escalation against a foreign government during a diplomatic impasse between our countries, to exert pressure on the opposing government, not the individual travelers involved.[40] No President has ever used such a sweeping ban to target legal travelers in order to minimize a claimed security threat by the travelers themselves.

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[34] See, *e.g.*, Proclamation No. 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

[35] See, *e.g.*, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

[36] See, *e.g.*, Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016); Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

[37] Exec. Order 12,807, *supra* note 35.

[38] Proclamation No. 5,517, 51 Fed. Reg. 30,470 (Aug. 26, 1986).

[39] Exec. Order 12,172, 44 Fed. Reg. 67,947 (Nov. 26, 1979).

Nor can the Order be defended as a mere continuation of more recent U.S. counterterrorism policy. Because threat streams constantly evolve, amici sought continually to improve vetting when serving as national security officials. That effort included reviews in 2011 and 2015-16, when the U.S. Government acted in response to particular threats identified by intelligence sources. In 2011, after receiving suspicious information regarding two Iraqi nationals who had entered the United States as refugees, the U.S. Government undertook an extensive interagency review of the Iraqi refugee vetting system.[41] During the pendency of the review, the flow of refugees from Iraq slowed but did not stop,[42] and upon completion of the review, the U.S. Government implemented new, stronger security procedures in areas of identified vulnerability.[43]

Likewise, in late 2015 and early 2016, in response to the emerging threat posed by IS, the U.S.

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[40] See, *e.g.*, Charles Babcock, *Carter's Visa Crackdown Won't Hurt Immediately*, N.Y. Times (Apr. 9, 1980); Gerald M. Boyd, *Reagan Acts to Tighten Trade Embargo of Cuba*, N.Y. Times (Aug. 23, 1986).

[41] Jon Finer, *Sorry, Mr. President: The Obama Administration Did Nothing Similar to Your Immigration Ban*, Foreign Policy (Jan. 30, 2017).

[42] U.S. Dep't of State, Bureau of Population, Refugees, and Migration, *Refugee Arrivals*, Interactive Reporting (2011), http://ireports.wrapsnet.org/; Finer, *supra* note 41.

[43] *Ten Years After 9/11*, *supra* note 11; Bruno, *supra* note 11.

Government took several steps to strengthen the Visa Waiver Program, which allows citizens from thirty-eight approved countries to travel to the United States without first obtaining a visa. President Obama introduced a series of new measures to enhance security screenings and traveler risk assessments in the program and to bolster our relationship with partner countries.[44] Around the same time, President Obama signed into law a statute that removed from the Visa Waiver Program those nationals of existing Visa Waiver Program countries who: (1) had been present in Iraq, Syria, Iran, or Sudan after March 1, 2011, or (2) were dual nationals of one of those four countries.[45] Several months later, the Secretary of Homeland Security—acting under the new statute and in consultation with the Director of National Intelligence and the Secretary of State—expanded the list to include persons who had traveled to Yemen, Libya, and Somalia.[46]

Contrary to Petitioners' claims, these prior reforms provide no justification for a blanket, group-based ban on the entry of nationals from these six countries. The security enhancements introduced into the refugee system simply enabled *more searching,*

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[44] U.S. Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016); White House, *Fact Sheet: Visa Waiver Program Enhancements* (Nov. 30, 2015).

[45] 8 U.S.C. § 1187; U.S. Dep't of State, *Visa Waiver Program*, http://travel.state.gov/content/visas/en/visit/visa-waiver-program.html.

[46] The exemptions for Yemen, Libya, and Somalia only applied to those who had traveled to or been present in one of those countries, not dual nationals. U.S. Dep't of Homeland Sec., *supra* note 44.

individualized vetting of travelers, the opposite of the categorical ban in this Order. Similarly, the reforms to the Visa Waiver Program did not automatically bar anyone—including nationals of any country—from travel to the United States. Instead, the affected individuals no longer could *automatically enter*; they were simply required to obtain *individually-vetted visas* before entering the United States, in the same way as nationals of the more than 150 other nations that are not currently part of the Visa Waiver Programs.

II. The Order was not vetted through national security agencies, and even took the President's own national security officials by surprise.

The aberrant process that produced the Executive Orders provides further evidence that this Order rested on no identifiable national security purpose. This Court has stated that "[d]epartures from the normal procedural sequence * * * might afford evidence that improper purposes are playing a role" in government action.[47] Likewise, this Court has ruled that evidence of an improper motivation in an initial policy cannot be cured by a later-in-time substitute that simply carries forward the essence of the original.[48]

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[47] *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

[48] See *McCreary County* v. *ACLU of Kentucky,* 545 U.S. 844, 866 (2005) (finding continued religious discrimination because the argument that "purpose in a case like this one should be inferred * * * only from the latest news about the last in a series of governmental actions * * * just bucks common sense"); *United States* v. *Fordice*, 505 U.S. 717, 730 (1992) (invalidating Mis-

In this case, the process that produced the original January Order departed dramatically from the traditional national security policy-making process, with little to no consultation or scrutiny across the Departments of State, Justice, Homeland Security, or the Intelligence Community. While further consideration undoubtedly went into the March Order, that order so closely tracks the old ban that its lingering underlying intent cannot be disregarded.

In every recent administration, Presidents considering an important change to immigration policy have followed an interagency review process, in which many amici have participated. That process allows experienced national security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential risks are effectively identified and mitigated. Before recommendations are submitted to the President, the National Security Council oversees a legal and policy process that typically includes: a review by the career professionals in those institutions of the U.S. Government charged with implementing an order; a review by the career lawyers in those institutions to ensure legality and consistency in interpretation; and a policy review among senior leadership across all relevant agencies, including Deputies and Principals at the cabinet level.[49]

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sissippi's re-classification of its state colleges and universities because "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable").

[49] This is true whether or not the executive orders were issued at the start of a new presidency. See, *e.g.*, Henry B. Hogue, Cong. Research Serv., RS22979, Presidential Transition Act:

This sustained practice of interagency deliberation has been followed even—and especially—in times of national emergency to set temporary exclusions or establish criteria for admission to the United States. For example, in the immediate aftermath of the September 11, 2001 attacks, the Bush Administration considered whether the President should invoke 8 U.S.C. § 1182(f)—the very same provision that Petitioners cite here—to bar certain immigrants or take other actions to secure the border.[50] Officials engaged in consultations across the national security agencies to arrive at a decision. The reexamination of the Iraqi refugee vetting system in 2011[51] and the security reforms to the Visa Waiver Program in 2015-16[52] involved similar interagency consultation.

The process that produced the January Order deviated sharply from this standard practice. Collectively, amici are aware of no intragovernmental process that was underway before January 20, 2017 to change current immigration vetting procedures. Ac-

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Provisions and Funding (2016); William Glaberson & Helene Cooper, *Obama's Plan to Close Prison at Guantanamo May Take One Year*, N.Y. Times (Jan. 12, 2009).

[50] See, *e.g.*, Thomas R. Eldridge et al., *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* 151-154 (2004); Edward Alden, *The Closing of the American Border* 104-106 (2008). That same statute—8 U.S.C. § 1182(f)—authorizes the President to act only if he "finds" the entry of the individuals "would be detrimental to the interests of the United States." But the Order in this case makes no such finding with respect to the entry of "*any* of the approximately 180 million individuals subject to the ban." *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 609 (4th Cir. 2017) (Keenan, J., concurring) (emphasis added).

[51] See *supra* notes 41-43 and accompanying text.

[52] See *supra* notes 44-46 and accompanying text.

cording to extensive reporting, Petitioners followed no such interagency review in producing the January 27 Order. Nor, apparently, did the White House consult officials from *any* of the seven agencies tasked with enforcing immigration laws, much less the congressional committees and subcommittees that oversee them. To the contrary, that Order evidently received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security, or the intelligence community.[53]

According to reports, the January Order took the President's own senior-most national security officials by surprise. The then-Secretary of Homeland Security reportedly received his first full briefing on the Order just as the President was signing it.[54] The Secretary of Defense was neither consulted during the drafting of the Order nor given an opportunity to provide input.[55] Most State Department officials first heard of the Order through the media, and within hours a dissent channel cable objecting to it had been signed by over 1,000 career officials.[56]

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[53] Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017); Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017); Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017).

[54] Shear & Nixon, *supra* note 53 ("As President Trump signed a sweeping executive order on Friday, shutting the borders to refugees and others from seven largely Muslim countries, the secretary of homeland security was on a White House conference call getting his first full briefing on the global shift in policy."). Customs and border officials reported that their superiors could not provide clear guidance about the new policy. *Ibid.*; see also Allen & O'Brien, *supra* note 53 (quoting CBP chief of passenger operations at John F. Kennedy International Airport declaring, "[w]e are as much in the dark as everybody else.").

As telling, the January Order was apparently issued without even the ordinary interagency *legal* process for review of Executive Orders. In recent history, administrations of both political parties have followed a protocol of submitting proposed Executive Orders to the Attorney General, the Justice Department's Office of Legal Counsel ("OLC") and all other agency legal offices involved with enforcing the law.[57] Legal review by multiple agencies helps to identify potentially unforeseen legal implications of an order, determines the lawfulness of the proposed action, and analyzes whether the proposed language has established legal meaning that can be interpreted consistently with other laws and regulations. Here, the White House reportedly never asked the Department of Homeland Security for legal review in advance of the Order being promulgated, so "[t]he Department * * * was left making a legal analysis on the order *after* [President] Trump signed it."[58]

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[55] Shear & Nixon, *supra* note 53 (Secretary of Defense "Mattis, according to administration officials familiar with the deliberations, was not consulted by the White House during the preparation of the order and was not given an opportunity to provide input while the order was being drafted.").

[56] Allen & O'Brien, *supra* note 53; Jeffrey Gettleman, *State Dep't Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. Times (Jan. 31, 2017).

[57] See Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (Jun. 19, 1962).

[58] Shear & Nixon, *supra* note 53; Perez et al., *supra* note 53 (emphasis added).

Although the White House apparently brought more agencies into the fold in the days leading up to the March Order, whatever process took place after January 27, 2017 plainly was meant to preserve the same structure, substance, and purpose of the original flawed Order. Indeed, White House political advisor Stephen Miller publicly admitted that the March 6 Order would reflect "mostly minor technical differences," and achieve "the same basic policy outcome for the country," statements that were echoed by other senior officials.[59]

Many months later, Petitioners remain unable to offer any evidence that the country-based approach that is maintained in the executive orders emerged from the considered professional judgment of national security experts from across multiple affected agencies. In fact, internal government documents show just the opposite. When DHS officials were asked by the new administration to identify the terrorist threat from the countries listed in the January Order, their written answer concluded—directly contrary to the assumptions underlying the Orders—that citizenship in fact is likely an unreliable indicator of terrorist threat, and that few of the listed countries are in fact home to terrorist groups that threaten the United States.[60]

As Justice Thomas explained in *United States* v. *Fordice*, "if a policy remains in force, without adequate justification and despite tainted roots * * *, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent."[61] The manifestly hasty and defective process here supports the lower courts' conclusion that the Order here grew out of unlawful discriminatory intent, not actual national security need.

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[59] Matthew Nussbaum et al., *White House Creates Confusion About Future of Trump's Travel Ban*, Politico (Feb. 21, 2017) (recounting similar statements by President Trump, Press Secretary Sean Spicer, and White House spokesman Michael Short).

[60] *Citizenship Likely an Unreliable Indicator*, *supra* note 15.

III. Petitioners have consistently failed to provide evidence of a national security or foreign policy rationale for the Order.

At no point during these proceedings have Petitioners offered concrete evidence of a credible national security threat that would be effectively neutralized by the directives of the Order. This total absence of material evidence—combined with multiple statements by Petitioners suggesting an altogether different purpose[62]—suggests that the decision was not motivated by national security at all.

The January Order offered no evidence of a national security imperative for a ban on refugees or travel from the listed countries. That Order offered only vague allusions to the need to "protect the American people from terrorist attacks by foreign nationals" and that "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes," without tying these assertions to any of the seven listed countries.[63] In court proceedings,

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[61] *Fordice*, 505 U.S. at 747 (Thomas, J., concurring).

[62] See, *e.g.*, Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, Wash. Post (Dec. 7, 2015); Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says – And Ordered a Commission To Do It 'Legally'*, Wash. Post (Jan. 29, 2017).

[63] January Order, supra note 4.

Petitioners, sought to defend the January Order mostly by quoting language from the face of the Order, repeating that the Court should defer to President's national security prerogative.[64]

Shifting course, the revised Order added language describing each of the listed countries as a haven of terrorism and claiming that their nationals "present heightened risks to the security of the United States."[65] But this new language appeared to be drawn principally from the 2015 Department of State Country Reports on Terrorism and other public reports discussing the security conditions in the six countries in broad terms. In court, Petitioners relied on similarly vague assertions about the "danger" posed by travelers from these countries.[66] Petitioners added a newly written, two-page letter from the Secretary of Defense and the Secretary of Homeland Security that discussed the risks of terrorism in general terms, but without any specific reference to the six listed countries.[67] Petitioners have never offered any careful analysis of the threat to the United States from the listed countries or of the alleged harm that would occur in the absence of such a ban. The only governmental analyses that did emerge—along with numerous non-governmental reports—showed no heightened risk from these countries.[68]

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[64] Brief for Respondents at 12-18, Darweesh v. Trump, No. 1:17-cv-00480 (E.D.N.Y., Feb. 10, 2017).

[65] March Order, supra note 6.

[66] See Def. Memorandum at 36, *Int'l Refugee Assistance Project v. Trump*, 241 F.Supp.3d 539 (D. Md. 2017) (No. 8:17-cv-00361-TDC) ("The President * * * determined that, while the review of screening and vetting procedures is ongoing, the 'risk of erroneously permitting entry' of an individual who intends to commit terrorist acts 'is unacceptably high.'" (quotation omitted); Def. Memorandum at 49-51, *Hawai'i v. Trump*, 241 F.Supp.3d 1119 (D. Haw. 2017) (CV. NO. 17–00050 DKW–KSC) (emphasizing "the ability of would-be terrorists to infiltrate the country" and defending the order as "a preventive measure" in order "to prevent imminent harms") (citations omitted)).

[67] That letter claimed that a substantial majority of those convicted in U.S. courts for international terrorism-related activi-

Before this Court, Petitioners have again shifted emphasis, downplaying the terrorist risk posed by the individuals from the listed nations, and focusing instead on their nations' alleged failure to engage in

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ties were foreign-born, while offering no citation or support for this assertion, which appears based on highly questionable evidence, see *supra* note 7 and accompanying text, that is entirely unconnected to the listed countries actually at issue in the ban. Nothing in the letter expressly identified any of the six countries singled out in the Order's generalized travel ban, or provided any concrete evidence or data on the risk from those countries in particular. The letter similarly argued that "based on DHS data and the experience of its operators, nationals from these countries are more likely to overstay their visas and are harder to remove to their home countries," and "there is a greater risk that the United States will not have access to necessary records," but includes no data, citations or supporting evidence for these assertions. March 6 Letter, *supra* note 6. It remains unclear whether these statements were alluding to the six listed countries in the Order, or instead *all* countries that, in the words of the letter, are deemed "state sponsors of terrorism [or] have active conflict zones in which the central government has lost control of territory to terrorists." *Ibid.*; *see* Country Reports 2015, *supra* note 8, ch. 5 (listing more than a dozen countries or regions as "terrorist safe havens," defined as "ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize * * * in relative security because of inadequate governance capacity, political will, or both.")

[68] *See Citizenship Likely an Unreliable Indicator*, *supra* note 15; *supra* note 6 and accompanying text.

the sharing of national security information.[69] While Petitioners' asserted national security basis for the ban has shifted over time, they have consistently failed to muster any real evidence of national security risk that would justify the sweeping bans in the Order. Petitioners' new "information-sharing argument" derives almost entirely from unsupported assertions in the text of the Order.[70] They offer this Court no sworn declarations from any national security officials, no careful analyses of national security risk, and no statements from or about foreign governments documenting their unwillingness to cooperate.

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[69] See, *e.g.*, Pet. Br. at 44 ("Section 2 is designed to assess what information is needed from foreign governments, whether they are furnishing it, and what further steps are needed"); *id.* at 47 ("The President did not determine that all nationals of the six countries are likely terrorists. Rather, given his assessment of future threats and risk tolerance, he determined that certain foreign governments—especially those that sponsor or shelter terrorism—may not be able and willing to provide sufficiently complete and reliable information * * *.").

[70] See Pet. Br. at 44-47. Although Petitioners claim—pointing only to the text of the Order itself—that Iraq was removed from the March Order because it undertook steps to supply travel information, *id.* at 9, 45, 65, extensive reporting indicates otherwise, see, *e.g.*, Stephen Dinan, *Trump's First Victory in Deportation Feud is Iraq*, The Wash. Times (Mar. 7, 2017) ("Iraq earned its way out of President Trump's 'extreme vetting' doghouse in large part because it agreed to play ball on another of the president's big goals: getting countries to take back their illegal immigrant criminals."); Jack Moore, *Iraq to be Removed From Trump's New Travel Ban List: Official*, Newsweek (Mar. 2, 2017) (Cabinet officials "lobbied Trump and his team to remove Iraq from the ban" due to ongoing U.S. military and civilian operations in the country).

IV. Petitioners have failed to take their own claimed national security arguments for the Order seriously.

Perhaps the most telling evidence undermining Petitioners' national security claim is that they themselves did not consider it either serious or urgent. When their initial Order suspended travel from the listed countries for 90 days, it cited the need to establish a period to review existing screening and vetting protocols.[71] Under the Order, within the first 30 days, the named officials were to complete the review, report to the President, then start making the necessary requests to foreign governments to begin providing requested information. But during the 47 days between the January Order taking effect, and the review process being blocked by the U.S. District Court for the District of Hawaii, Petitioners admittedly managed only to do "some work" on the very first stage of the "review-report-request" process described above.[72] While evincing no apparent urgency to implement the various procedural steps called for by their own Executive Order, Petitioners now claim the suspension is essential to protect national security.

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[71] Specifically, Section 3 of the initial Order: (i) instructed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "*immediately conduct* a review" to identify what additional information would be needed from any country to ensure that an application by a national of those countries for a visa or other benefit is not a security or public safety threat, January Order, *supra* note 4, at §3(a) (emphasis added); (ii) instructed the Secretary of Homeland Security to submit to the President and the Secretary of State "a report on the results of the review * * * *within 30 days of the date of the Order*," *id.* at §3(b) (emphasis added); (iii) ordered the Secretary of State, "*immediately upon receipt of the report*," to request that all foreign governments that do not supply the necessary information begin providing it within 60 days of notification, *id.* at §3(d) (emphasis added); and (iv) instructed the Secretary of Homeland Security, after the 60-day period expires and in consultation with the Secretary of State, to submit to the President a list of countries that do not provide the requested information for inclusion in a subsequent Presidential proclamation that would prohibit the entry of foreign nationals until compliance is achieved, *id.* at §3(e) (emphasis added).

Although the Order currently ties the travel ban to a time-bound review of selected countries, Petitioners plainly anticipate that today's ban could turn into something far more expansive and permanent.[73] They would surely look to any opinion this Court may issue in the current posture to defend such a broader move. Yet Petitioners have offered no concrete national security evidence to support the ban they have currently offered, much less a broader indefinite ban on travel by a potentially much larger number of people, from a greater number of countries.

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[72] Oral Argument at 8:02, *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351) (en banc).

[73] The January Order envisioned that after the review, the President would issue a "proclamation that would prohibit the entry of foreign nationals * * * from countries that do not provide the information requested." January Order, *supra* note 4, at § 3(e). The March Order said the proclamation "would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested." March Order, *supra* note 6, at § 2(e). Both Orders also provided that officials "may submit to the President the names of any additional countries recommended for similar treatment" at any point. January Order, *supra* note 4, at § 3(f); March Order, *supra* note 6, at § 2(f). See also Donald J. Trump (@realDonaldTrump), Twitter (September 15, 2017, post uploaded at 3:54 a.m.) ("The travel ban into the United States should be far larger, tougher and more specific * * *."); ABC News, *National Security Adviser McMaster says White House 'looking at" new travel ban*, Sept. 17, 2017, http://abcnews.go.com/ThisWeek/video/white-house-national-security-adviser-latest-north-korea-49907174.

* * *

Petitioners now ask this Court to afford the President's judgment in this case "the utmost deference." Pet. Br. at 49. Yet Petitioners have offered this Court no good reason to defer to a decision that was not based on considered national security judgment, process, or evidence. This Court has expressed its willingness to defer to the "considered professional judgment" of "appropriate military officials." *Goldman* v. *Weinberger*, 475 U.S. 503, 508-09 (1986). But this record reveals no evidence that considered professional judgment was ever exercised by the appropriate national security officials, who were both excluded from consideration of the Order, and did not pursue the review that was its supposed rationale.

Ours is a nation of immigrants, committed to the faith that we are all equal under the law, and rejecting discrimination, whether based on race, religion, sex, or national origin. As government officials, amici sought diligently to protect our country, while maintaining an immigration system that is as free as possible from prejudice, that applies no religious tests, and that measures individuals by their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the Nation and Constitution that we each took oaths to protect. Rebranding a proposal first advertised as a "Muslim Ban" as "Protecting the Nation from Foreign Terrorist Entry into the United States" does not disguise the Order's discriminatory intent, or make it necessary, effective, or faithful to America's Constitution, laws, or values.

CONCLUSION

For the foregoing reasons, this Court should affirm the opinions of the Fourth and Ninth Circuits.

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Counsel for Amici Curiae

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. General (ret.) John R. Allen, USMC, served as Special Presidential Envoy for the Global Coalition to Counter ISIL from 2014 to 2015. Previously, he served as Commander of the International Security Assistance Force and U.S. Forces Afghanistan.

3. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

4. John B. Bellinger III served as the Legal Adviser for the U.S. Department of State from 2005 to 2009. He previously served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005.

5. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

6. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He previously served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

7. John O. Brennan served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

8. R. Nicholas Burns served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

9. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

10. James Clapper served as U.S. Director of National Intelligence from 2010 to January 20, 2017.

11. David S. Cohen served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as

Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

12. Eliot A. Cohen served as Counselor of the U.S. Department of State from 2007 to 2009.

13. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

14. Ryan Crocker served as U.S. Ambassador to Afghanistan from 2011 to 2012, as U.S. Ambassador to Iraq from 2007 to 2009, as U.S. Ambassador to Pakistan from 2004 to 2007, as U.S. Ambassador to Syria from 1998 to 2001, as U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

15. Thomas Donilon served as U.S. National Security Advisor from 2010 to 2013.

16. Jen Easterly served as Special Assistant to the President and Senior Director for Counterterrorism from October 2013 to December 2016.

17. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

18. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to January 20, 2017.

19. Michèle Flournoy served as Under Secretary of Defense for Policy from 2009 to 2013.

20. Robert S. Ford served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

21. Josh Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

22. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

23. Phil Gordon served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

24. Chuck Hagel served as Secretary of Defense from 2013 to 2015, and previously served as

Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.

25. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

26. Luke Hartig served as Senior Director for Counterterrorism at the National Security Council from 2014 to 2016.

27. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

28. Heather A. Higginbottom served as Deputy Secretary of State for Management and Resources from 2013 to 2017.

29. Christopher R. Hill served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

30. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

31. Prem Kumar served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

32. Richard Lugar served as U.S. Senator for Indiana from 1977 to 2013, and as Chairman of the Senate Committee on Foreign Relations from 1985 to 1987 and 2003 to 2007, and as ranking member of the Senate Committee on Foreign Relations from 2007 to 2013.

33. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

34. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

35. Cameron P. Munter served as U.S. Ambassador to Pakistan from 2009 to 2012 and to Serbia from 2007 to 2009.

36. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

37. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

38. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

39. Jeffrey Prescott served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

40. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights on the National Security Council.

41. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor from 2013 to January 20, 2017.

42. Anne C. Richard served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

43. Kori Schake served as the Deputy Director for Policy Planning at the U.S. Department of State from December 2007 to May 2008. Previously, she was the director for Defense Strategy and Requirements on the National Security Council in President George W. Bush's first term.

44. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

45. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

46. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

47. Jeffrey H. Smith served as General Counsel of the Central Intelligence Agency from 1995 to 1996. Previously, he served as General Counsel of the Senate Armed Services Committee.

48. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

49. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

50. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population,

Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.

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Nos. 16-1436 and 16-1540

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
STATE OF HAWAII, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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MOTION OF FOUNDATION FOR MORAL LAW FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

The Foundation for Moral Law respectfully moves for leave of Court to file the accompanying amicus brief under Supreme Court Rule 37.3(b). Counsel for the petitioner has filed a blanket consent. The Foundation has been unable to obtain consent from all the respondents.

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible. Those principles are reflected in the Establishment Clause, at issue in this case. In conformity with its mission to further a Biblical understanding of law, the Foundation desires for the Court to have an understanding of Biblical principles about immigration. In furtherance of its mission of strictly interpreting the Constitution, the Foundation also wishes to explain why the nationwide injunctions issued in these cases fail to conform with the limits of judicial power defined in Article III of the Constitution.

For these reasons, The Foundation for Moral Law requests that the Court grant leave to file its amicus brief.

August 17, 2017

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John Locke, *Second Treatise of Government* (1689) (quoting King James I), *reprinted in Classics of Political and Moral Philosophy* (Steven M. Cahn ed., 2002) 12

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Quran in English (Talal Itani, trans.), http://www.clearquran.com 7

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible. Those principles are reflected in the Establishment Clause, at issue in this case. In conformity with its mission to further a Biblical understanding of law, the Foundation desires for the Court to have an understanding of Biblical principles about immigration. In furtherance of its mission of strictly interpreting the Constitution, the Foundation also wishes to explain why the nationwide injunctions issued in these cases fail to conform with the limits of judicial power defined in Article III of the Constitution.

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[1] Counsel for the petitioner has filed a blanket consent. The Foundation has been unable to obtain consent from all the respondents. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

- The Establishment Clause applies less stringently in foreign affairs, and the travel ban has a secular national-security purpose.
- The travel ban is compatible with the teaching of the Bible on immigration.
- The universal injunctions issued in these cases violate Article III of the Constitution.

ARGUMENT

I. The travel ban does not violate the Establishment Clause.

A. The Establishment Clause has a narrower application to foreign affairs than to domestic matters.

The United States correctly asserts that this Court has uniformly held that when the Executive exercises the power to exclude aliens "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion." *Kleindienst v. Mandel,* 408 U.S. 753, 770 (1972).

The early history of this country supports the conclusion that establishment concerns are more attenuated in regard to foreign affairs.

One of the most ardent advocates of separation of church and state, Thomas Jefferson, said in his Second Inaugural Address,

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercise suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[2]

Justice Joseph Story stated that "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State Constitutions."[3]

From these and other statements of the Framers, Professor Robert L. Cord concludes:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed

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[2] Thomas Jefferson, *Second Inaugural Address* (1805), http://avalon.law.yale.edu/19th_century/jefinau2.asp.

[3] Joseph Story, *Commentaries on the Constitution* § 1879 (1833).

> in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.[4]

This third purpose of the First Amendment—preventing federal interference with the States in their dealing with religion— clearly does not apply to the Federal Government in its dealings in foreign affairs such as immigration. Consequently, the Confederation Congress and early Presidents such as Jefferson interacted with religion in foreign affairs in ways that they would not have done in domestic matters.

For example:

- The Preamble to the Northwest Ordinance of 1787 states: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Because the Northwest Ordinance applied to territories that were not yet states, it was not seen as conflicting with the later-adopted First Amendment.

- Another Act of Congress in 1787 reserved special lands "for the sole use of Christian Indians" and reserved lands for the Moravian Brethren "for civilizing the Indians and promoting Christianity."[5] This act was renewed in 1796 as "An Act regulating the grants of land appropriated for Military services and for the Society of the United Brethren for propagating the Gospel among the Heathen."[6]

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[4] Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 15 (Baker Book House 1988) (1982).

[5] *Id.* at 41.

- In 1803 Congress ratified a treaty proposed by the Jefferson Administration with the Kaskaskia Indians that provided, among other things, for a federal stipend of $100 annually for seven years for the support of a Catholic priest to minister to the Kaskaskia Indians. Similar treaties were made with the Wyandotte Indians in 1806 and with the Cherokees in 1807.[7]

These and other examples indicate that Jefferson and other early Presidents did not understand the Establishment Clause to restrict them in foreign affairs to the same extent that it restricted them in domestic matters.

B. By failing to give proper weight to the national-security purpose of the travel ban, the Fourth Circuit misapplied the "secular purpose" prong of *Lemon*.

In light of the historical analysis above, it is doubtful whether the *Lemon* test, *Lemon v. Kurtzman,* 403 U.S. 602 (1971), or the "endorsement test," *Lynch v. Donnelly,* 465 U.S. 668 (1984), provides an appropriate framework for analysis of this case. A more fitting framework is the "historical precedent" test of *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court held that uninterrupted practices which predate the First Amendment, such as legislative chaplains, are sanctioned and approved by the First Amendment.

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[6] *Id.*

[7] *Id.* at 38-39.

However, even if the *Lemon* test is appropriate in this case, the Fourth Circuit misapplied the secular purpose prong.

The first prong of the *Lemon* test asks whether there is a secular purpose. It does not require that the secular purpose be the only purpose nor does it even require that the secular purpose be the main purpose. It requires only that there be a secular purpose that is legitimate and not a sham.

The purpose of the travel ban—protecting America from terrorism—is as clear a secular purpose as anyone could possibly imagine. Candidate Trump's motives in advocating a travel ban—whether to gain votes or any other purpose—are irrelevant.

Although determining subjective intent is a perilous enterprise, *see, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia J. dissenting) (explaining the impossibility of accurately discerning the motives that underlie passage of legislation in a multi-member body), the existence of any secular purpose is sufficient to satisfy *Lemon*. The national-security purpose that is evident on the face of the executive order, far from being pretextual, has sound evidentiary support that dispels the allegation that the purpose of the order was to "disapprove of religion." *Lynch v. Donnelly*, 465 U.S. 668, 690 (O'Connor, J., concurring).

Nowhere can the Fourth Circuit bring itself to deny that there is a genuine concern about terrorism in the United States and worldwide, that the six nations under the travel ban have been the origin of many terrorists, that abundant evidence exists that these six nations have fomented and supported terrorism, or that these six nations have been unable to "vet" those who would emigrate to determine which of them might have criminal backgrounds or tendencies toward terrorism. Nor can the Fourth Circuit deny that combating terrorism is a legitimate secular purpose. Each of these individually, and all of them combined, certainly constitute a secular purpose for the travel ban.

But the Fourth Circuit ignored these legitimate concerns and secular purposes and focused instead upon statements by Donald Trump, most of them before he was elected or inaugurated, that supposedly indicate a religious purpose or motive for the travel ban.

The Fourth Circuit did not consider the extent to which terrorist attacks in the United States and worldwide are conducted by Muslims, or the extent to which Muslim terrorists are motivated by their understanding of Islam to commit terrorist acts.[8] The

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[8] Passages in the Koran which some have interpreted to call for *jihad* include 2:190-93, 216, 217, 246; 4:74-78, 91, 104; 9:5, 29, 36, 41, 84, 123; and 47:4-6. *See Quran in English* (Talal Itani, trans.), http://www.clearquran.com. For evidence of the

Fourth Circuit did not consider the question whether, if in fact a religious group is promoting terrorism, there is a secular purpose in identifying the source of that terrorist ideology, even if Candidate Trump did not identify that source with the precision he might have used later in the campaign or during his Presidency. Instead, the Fourth Circuit took out of context a few statements made by Candidate Trump, imputed them to President Trump and all those in his Administration who had a role in developing and implementing the travel ban.

The Fourth Circuit effectively accused President Trump of duplicity by first identifying the problem as Muslim terrorism and then limiting the travel ban to specific countries. The opinion cites former New York City Mayor Rudolph Giuliani as claiming Trump told him to "Put a commission together. Show me the right way to do it legally." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 577 (4th Cir. 2017). The most sensible interpretation is that Mr. Trump, who is not a lawyer, sincerely wanted to find a way to stop radical terrorism in a way that does not violate the Constitution. But the Fourth Circuit misconstrued this to mean that the President was trying to evade the Constitution rather than comply with it.

The Fourth Circuit also overlooked the reality that the six nations directly affected by the travel ban—Iran, Libya, Somalia, Sudan, Syria, and

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violent side of Islam, *see* David Benjamin and Steven Simon, *The Age of Sacred Terror: Radical Islam's War Against America* (2005); Efraim Karsh, *Islamic Imperialism: A History* (2006).

Yemen — have a combined population of about 166 million people.[9] Since the global Muslim population is about 1.6 billion,[10] then only 10.4% of the world's Muslims are affected by the travel ban. Moreover, those six countries range from Sudan which is 71.4% Muslim to Iran which is 99.7% Muslim.[11] Christians, Jews, and persons of other religions who live in those countries are also affected by the ban.

Furthermore, other nations with significant Muslim populations (some with higher percentages than those nations included in the ban) are not included in the ban because they do not export terrorism or are able to "vet" their potential emigrants. Those include Afghanistan (99.8% Muslim), Algeria (98.2%), Azerbaijan (98.4%), Bahrain (81.2%), Bangladesh (90.4%), Comoros (98.3%), Djibouti (97%), Egypt (94.7%), Gambia (95.3%), Guinea (84.2%), Indonesia (88.1%, and the largest Muslim population of any nation in the world), Iraq (98.9%), Jordan (98.8%), Kosovo (91.7%), Kuwait (86.4%), Kyrgyzstan (88.8%), Maldives (98.4%), Mali (92.4%), Mauritania (99.2%), Mayotte (98.8%), Morocco (99.9%), Niger (98.3%), Oman (87.7%), Pakistan (96.4%), Palestinian Territories (97.5%), Qatar (77.5%), Saudi Arabia (97.1%), Senegal (95.9%), Tajikistan (99%), Tunisia (99.8%), Turkey (98.6%), Turkmenistan (93.3%), United Arab

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[9] These population figures are for 2010. Pew Research Center, *Table: Muslim Population by Country* (Jan. 27, 2011), https://goo.gl/a76kVk.

[10] Pew Research Center, *Muslim-Majority Countries* (Jan. 27, 2011), https://goo.gl/cRwzpt.

[11] *Muslim Population by Country*, *supra* n.9.

Emirates (76%), Uzbekistan (96.5%), and Western Sahara (99.6).[12]

It is difficult to understand how a travel ban that applies to only six nations that are known to export terrorism and cannot or will not "vet" prospective emigrants, that also applies to non-Muslims living in those six countries, that applies to only 10.4% of the world's Muslims, and that does not apply to at least 35 majority-Muslim nations, is aimed at religion, is motivated by religious "animus," and has no secular purpose.

Furthermore, the travel ban has been further tailored so that it does not restrict people who already have visas, and is in effect for only 90 days for the six nations and 120 days for all refugees.

The United States has definitely satisfied the "secular purpose" prong of the *Lemon* test. Keeping the American people safe from terrorism is as clear and important a secular purpose as one can imagine.[13]

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[12] *Id.*

[13] Because the Fourth Circuit did not reach the second and third prongs of the *Lemon* test, the Foundation also does not address them.

II. The teaching of the Bible is compatible with limiting the immigration of foreign nationals who may be seeking entry into a country to harm its people.

A number of religious organizations, including those with an emphasis on refugee resettlement, filed an amicus brief earlier in this case suggesting that Biblical principles required them to support the respondents. *See* Case Nos. 16A1190 & 16A1191, *Brief for Interfaith Group of Religious and Interreligious Organizations as Amici Curiae Supporting Respondents' Oppositions to the Stay Applications* (June 12, 2017). Similarly, other religious organizations suggested last year in *United States v. Texas,* 136 S. Ct. 2271 (2016) that their Christian principles required them to support President Obama's executive order granting amnesty to millions of illegal immigrants. Case No. 15-674, *Amicus Curiae Brief of Faith-Based Organizations In Support of the United States and Reversal,* at 10 (quoting *Leviticus* 19:33-34).

As a Christian organization, the Foundation would like to provide a fuller perspective on what the Bible says about immigrants.

At the inception of America as a nation, the *Declaration of Independence* (1776) invoked "the laws of nature and of nature's God" as justification for separation from Britain. *Id.*, para. 1.[14] Blackstone explained that the "law of nature" is "the will of [man's] Maker[.]" 1 William Blackstone, *Commentaries on the Laws of England* *39. Although God made the law of nature accessible through human reason, He also delivered that law through "an immediate and direct revelation." *Id.* at *42.

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[14] The United States Code recognizes the Declaration of Independence as part of this nation's "organic laws." *Black's Law Dictionary* defines "organic law" as "[t]he body of laws (as

> The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. ...
>
> Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.

Id. The Declaration's invocation of divine law makes Biblical analysis peculiarly relevant to American law.

A. God ordained governments to protect people from evildoers.

As John Locke recognized, mankind has the authority to establish earthly governments "according to that pact[] which God made with Noah after the deluge." John Locke, *Second Treatise of Government* § 200 (1689) (quoting King James I), *reprinted in Classics of Political and Moral Philosophy* 496 (Steven M. Cahn ed., 2002) *See also* John Eidsmoe, *Christianity and the Constitution* 61

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in a constitution) that define and establish a government." *Black's Law Dictionary* 1274 (10th ed. 2014).

n.20 (2008) (citing other parts of Locke's writings that reflect this proposition).

Government is a mechanism to create and enforce laws. Thus, a prime function of government is to punish lawbreakers. The first indication in Scripture of authorization for government by earthly rulers appears among the commands that God gave to Noah after the flood: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6.[15] Agreeing with Locke, theologian Wayne Grudem argues that this passage is the "first indication of God's establishment of civil government in human society," reasoning that this mandate gave man the authority to execute the greatest punishment for the greatest crime as well as lesser punishments for lesser crimes. Wayne Grudem, *Politics According to the Bible* 77 (2010).[16]

Thus, the first command in the Bible of a governmental nature provided for the punishment of those who hurt innocent people. The New Testament likewise affirms that civil government exists to protect the innocent and punish those who do evil. *See Romans* 13:3-4 (stating that the ruler "is the minister of God, a revenger to execute wrath upon him that doeth evil"); *I Peter* 2:13-14 (noting that rulers "are sent by him for the punishment of evildoers, and for the praise of them that do well").

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[15] All Scripture quoted herein is from the King James Version unless otherwise noted.

[16] The first mention of formal government appears one chapter later in *Genesis* 10:10 (speaking of the beginning of the "kingdom" of Nimrod), a further indication that *Genesis* 9:6 was the first mandate for civil government. God gave governmental authority to mankind in general, but it appears that mankind quickly vested this power in civil governments in order to avoid anarchy.

Those two passages were cited more than any other Bible passages during America's founding era. Donald Lutz, *The Origins of American Constitutionalism* 140 (1988). Indeed, the Bible was the most cited source during America's founding period. *Id.* at 141. *Accord* Eidsmoe, *supra*, at 52; David Barton, *Original Intent: the Courts, the Constitution, and Religion* 232 (2008). Thus, the view that the primary purpose of government is to protect the innocent and punish the evildoer is not only fundamentally Biblical but also fundamentally American.

B. Although the Bible forbids oppression of foreigners, it does not require a country to have open borders.

The Bible teaches that God "hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, *and the bounds of their habitation.*" *Acts* 17:26 (emphasis added). Contrary to the liberal notion of borderless nations, the Bible teaches not only that nations are authorized to establish borders, but also that those borders have been established by God. Returning to *Genesis*, we see that the same God who ordered humanity to fill the earth (impliedly giving mankind the right to travel) also scattered mankind over the face of the earth so that they formed separate nations. *See Genesis* 9:1 (ordering mankind to "be fruitful and multiply" and "fill the earth"); 10:32 (noting that "the nations [were] divided in the earth after the flood"). Because God established both nation-states and their boundaries, it is reasonable to infer that a nation's government may exclude aliens for good cause if it is in the best interests of the nation. *See* Grudem, *supra*, at 472 (arguing, at the end of a Biblical analysis of immigration, that it is appropriate "to *exclude* those with a criminal record, those who have communicable diseases, or those who otherwise give indication that their overall contribution would likely be negative rather than positive in terms of advancing the well-being of the nation.") .

It is certainly true that God commanded the Israelites to be kind to the strangers among them. *See, e.g.*, *Exodus* 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt."); *Leviticus* 19:33-34 ("And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the LORD your God."). However, the Bible uses different Hebrew words when talking about different groups of aliens. The word used in *Exodus* 22:21 and *Leviticus* 19:33-34 for "stranger" is "*ger*," which refers to "'a person who entered Israel and followed legal procedures to obtain recognized standing as a resident alien.'" Grudem, *supra*, at 470-71 (quoting James Hoffmeier, *The Immigration Crisis: Immigrants, Aliens, and the Bible* 52 (2009)). *See also* 1 Rousas John Rushdoony, *The Institutes of Biblical Law* 530 (1973) (describing the "strangers" in these verses as "permanent residents of the community"). Other Hebrew words were used to designate foreigners who were not necessarily entitled to the same privileges. *See* Grudem, *supra*, at 471. Thus, as long as all foreigners are "dealt with in a humane manner," it is both "legally and morally acceptable" to exclude non-resident aliens for good cause. *Id.*

The Old Testament has multiple examples of immigration restrictions. Perhaps the best example is found in *Deuteronomy* 23:3-4, which reads:

> An Ammonite or Moabite shall not enter into the congregation of the LORD; even to their tenth generation shall they not enter into the congregation of the LORD for ever:
>
> Because they met you not with bread and with water in the way, when ye came forth out of Egypt; and because they hired against thee Balaam the son of Beor of Pethor of Mesopotamia, to curse thee.

The Ammonites and Moabites were hostile towards Israel from the moment that Israel tried to enter the Promised Land; therefore God refused to allow them to even *enter* His assembly. *See Exodus* 17:14-16 (declaring a permanent state of war with the Amalekites because they attacked the Israelites on their way from Egypt to the Promised Land). Even foreigners from nations that God favored still had to wait before they could join the congregation. *Deuteronomy* 23:7-8 (providing that Egyptians and Edomites could join the congregation "in their third generation"). In addition, when the Israelites returned from the exile in Babylon, they forbade both Samaritans and Israelites who had intermarried with surrounding the peoples (in violation of God's command) from helping rebuild the Temple. See *Ezra* 4:1-3. *See also Ezra* 9-10. Thus, the Bible not only permitted but required excluding foreigners for national security or religious reasons under certain circumstances.

C. The President's Executive Order is compatible with Biblical teaching.

In the executive order at issue in this case, the President of the United States found that "conditions in six [countries] demonstrate why their nationals continue to present heightened risks to the security of the United States[.]" Exec. Order No. 13780, 82 Fed. Reg. 13209, 13210 (Mar. 6, 2017). Finding that the risk of "erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high," the President imposed a temporary ban on the entry of these nationals for 90 days while our screening procedures were evaluated. *Id.* at 13211. Congress granted the President this authority under 8 U.S.C. §§ 1182(f) and 1185(a).

As demonstrated above, the first duty of government is to punish the wicked and protect the innocent. *Genesis* 9:5-6; *Romans* 13:1-7; *I Peter* 2:14-15. The main responsibility of any civil government is to protect its own people. By entering the aforementioned executive order, the President *complied* with the obligations of Scripture; he did not violate them, as liberal religious groups would have this Court believe. In addition, this case is very much like *Deuteronomy* 23:3-4, where God imposed a severe immigration restriction against nationals from Moab and Ammon because of their people's hostility towards Israel. Of course, not every person from Moab or Ammon was hostile towards Israel, just as every person from these six countries is not hostile towards the United States. *See Ruth* 1:16 (Ruth the Moabite pledging to make Israel's God her God); *II Samuel* 10:2 (noting that Ammonite King Nahash "shewed kindness" to Israelite King David). But the friendliness of some Ammonites and Moabites towards Israel did not negate God's command, which was based on those nations' overall hostility towards Israel. In the same way, the Bible does not prohibit the President from implementing a temporary travel ban as to six designated nations.[17]

Both the general Biblical principles about the role of government and the specific history of excluding nationals from hostile countries demonstrate that there is nothing unbiblical about the President's executive order.

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[17] The executive order also allows for waivers on a case-by-case basis. 82 Fed. Reg. 13214-15.

III. The universal injunctions issued in these cases violate Article III of the Constitution.

A. Neither case is a class action.

Neither of the cases on appeal is a class action. In *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) ("*IRAP*"), the court stated: "This action was brought by *six individuals*, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, *and three organizations* that serve or represent Muslim clients or members." *Id.* at 577 (emphasis added). After finding that plaintiff Doe #1 had standing to litigate his Establishment Clause claim, the Fourth Circuit did not bother to determine the standing of the other plaintiffs. "[B]ecause we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim." *Id.* at 586. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2 (2006) (stating that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"). Thus, the Fourth Circuit affirmed a national injunction for the benefit of every person in the United States who might be affected by the President's executive order on the basis of a finding that a single individual had standing to bring the case.[18]

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[18] And even that standing is now in question. *See Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 and 16-1540 (June

In *State of Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) ("*Hawaii*"), the Court of Appeals held that both of the plaintiffs, the State of Hawaii and Dr. Ismail Elshikh, had standing. The Ninth Circuit, like the Fourth Circuit, did not limit its relief to redressing the grievances of the parties before it but instead issued an injunction for the benefit of anyone in the United States who might be affected by the executive order at issue in the case.

Neither court of appeals provided a detailed explanation of its decision to grant relief for the benefit of unknown persons who were not before the court. The Fourth Circuit's justification of the nationwide scope of relief covered only 1 1/2 pages in a 79-page opinion. *IRAP*, 857 F.3d at 604-05. The Ninth Circuit similarly devoted a mere 2 pages out of 81 to the scope of relief. *Hawaii*, 859 F.3d at 787-88. Yet the impact of those orders on national immigration policy depended as much on the scope of the remedies as it did on the holdings on the merits. Had the two courts of appeals limited their relief to the plaintiffs before them, as the contours of judicial power require in the absence of a class action, this case would probably not be before the Court. But the sweeping scope of the relief imposed necessitated immediate review.

26, 2017), slip opinion, at 7 n.* (noting that counsel for Doe had informed the Court that Doe's wife had recently received a visa).

B. A court has no power to issue a decree for the benefit of a nonparty.

Laws by their nature apply to everyone but the judgments of courts apply only to the parties in the action.[19] "Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them." *Additive Controls & Measurement Sys. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996). Thus, in the absence of a plaintiff who is suffering an actual or imminent injury traceable to the actions of a defendant and that is redressable by a judicial decree, a court has no authority to act. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A judgment binds the defendant for the benefit of the plaintiff but extends no further.

The necessity for standing separates judicial from executive or legislative power. "[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. 560. Nonparties by definition have no standing to participate in a case.

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[19] Judgments also bind those "in privity" with a defendant. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *See* Rule 65(d)(2), Fed. R. Civ. P.

Persons not parties to a case can argue the persuasiveness of the ruling for adoption as a precedent in cases to which they are a party but cannot themselves enforce that judgment by contempt proceedings against the defendant in the original case. If a party who is found to lack standing is not entitled to have its legal rights adjudicated by a court, neither may a nonparty who never sought standing at all enjoy the benefit of a judgment to which it was not a party.

C. The lower courts' practice of issuing universal injunctions violates the limits on judicial power stated in Article III.

"The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. What is the nature of that "judicial power"? "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority[.]" *Id.* § 2, cl. 1. The Constitution lists additional "cases" to which the judicial power extends and also certain "controversies." *Id.* Hence arises the familiar phrase "cases and controversies" as a constitutional limitation on the exercise of federal judicial power.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts

> cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (quoting *Liverpool S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). A court may constitutionally decide only "the legal rights of litigants." It has no authority to determine the legal rights of nonlitigants. A nationwide injunction that purports to control the actions of a defendant not merely against the plaintiff but against anyone in the world is flatly unconstitutional.

Federal courts have no general mandate to repeal laws or nullify executive actions that they find repugnant to the Constitution. The only power they possess is to enforce judgments upon the parties before the Court and no one else.

> [T]he philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor ... has no place in our constitutional scheme.

Valley Forge, 454 U.S. at 489. As envisioned by the Constitution, "[t]he Judiciary would be, 'from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution' ... *because the binding effect of its acts was limited to particular cases and controversies*." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995) (emphasis added) (quoting *The Federalist No. 78* (Alexander Hamilton), at 522).

D. The meager reasoning offered by the courts of appeals in justification of their universal injunctions is unpersuasive.

Because a judgment of a court against a defendant does not operate for the benefit of a nonparty, the blithe assumption of the courts of appeals in these cases that their judgments bound the defendant against the world as opposed to the parties in the case is completely unconstitutional. The policy arguments they proffered to justify the universal application of their judgments merely underscore the unconstitutionality of their actions. The Fourth Circuit claimed that its universal injunction was necessary because "[p]laintiffs are dispersed throughout the United States." *IRAP*, 857 F.3d at 605. How does that rationale justify extending the injunction to *non*plaintiffs?

The Fourth Circuit, as did the Ninth Circuit, claimed that the requirement for "uniformity" in immigration law necessitated a universal injunction. *See id.*; *Hawaii*, 859 F.3d at 787. That policy rationale, however, does not negate the Article III requirement that a judgment only binds the parties to a case. Furthermore, lack of uniformity in the application of laws is resolved through appellate processes, not through district court ukases. See Sup. Ct. R. 10 (listing a conflict between courts as a reason for granting a petition for a writ of certiorari).[20]

The Ninth Circuit quoted the Fourth Circuit for the proposition that not extending the injunction to nonparties would allow the statutory or constitutional violations, as the case may be, to endure in all applications. *Hawaii*, 859 F.3d at 787. True enough. But the remedy is not for the district court to exercise power not bestowed by the Constitution. Other affected persons may file suit for their own benefit and argue that the reasoning in a similar case in another district court should be adopted in their own case. They may not, however, receive the judicial gift of a judgment without an adjudication.[21] Such actions are illegal, protestations of lower courts to the contrary notwithstanding. *See, e.g., Bresgal v. Brock*, 843 F. 2d 1163, 1169 (9th Cir.

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[20] A related incongruity in the issuance of nationwide injunctions for the benefit of nonparties is that the practice "conflicts with the principle that a federal court of appeals's decision is only binding within its circuit." *Virginia Soc. for Human Life v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001). One circuit is not at liberty to impose its view of the law on all the other circuits. *Id.* at 394. Disagreement between circuits provides the Supreme Court with a salutary vetting of the law. "We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[21] District court opinions are not binding precedent in any other court and, indeed, not even in the district court itself. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011).

1987) (stating that "[t]here is no general requirement that an injunction affect only the parties in the suit").

E. Collateral damage: the nullification of Rule 23, Fed. R. Civ. P.

The loose use of the universal injunction remedy in the absence of a class action has become so prevalent as to have found its way into the leading treatise on federal practice as early as 1972. *See Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (identifying the "settled rule" that "[w]hether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack") (quoting 7 Wright & Miller, *Federal Practice and Procedure*, § 1771, at 663-664 (1972)). Nonetheless, the fact remains: "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

The practice of issuing injunctions for the benefit of nonparties without drawing those persons into the case through the class-action mechanism of Rule 23, Fed. R. Civ. P., may be the most widespread systematic violation of the Constitution by the lower federal courts today. That practice makes Rule 23, adopted in 1966, a mere cosmetic formality that courts may use or not use as they desire, but which does not affect the scope of their powers. In a typical statement the *Sandford* court said: "Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary ...." 573 F.2d at 178 (footnote omitted). *But cf. Gregory v. Litton Systems, Inc.*, 472 F. 2d 631, 633 n.4 (9th Cir. 1972) ("[W]e can not hold ... that Rule 23 is a meaningless formality which this court should disregard."). The widespread failure to heed Rule 23 in ideologically charged cases such as those before the Court is a further reason to rein in the undisciplined use of equitable power by the lower courts. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, at 15 n.67, 131 Harv. L. Rev. (forthcoming 2017)[22] (stating that "Rule 23(b)(2) makes a class-wide injunctive remedy available if certain conditions are met; by implication, this remedy is available only if those conditions are met").[23]

F. The practice of deliberately selecting venues perceived as amenable to the issuance of universal injunctions undermines the reputation of the federal judiciary for fair and neutral adjudication.

The practice of issuing universal rather than party-specific injunctions has proliferated in recent years as a way of nullifying presidential actions.

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[22] *Available at* https://goo.gl/v1WqFw.

[23] Even in the context of class actions, the Supreme Court has urged courts to exercise caution in granting national injunctions. *See Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979). *See generally* Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615 (2017).

Alert lawyers identify jurisdictions, conservative or liberal as the case may be, that are attuned to their cause and file for a national injunction that, if successful, preempts every other court except the supervising appellate court from ruling differently. To complete the coup, district judges are selected in circuits that are likely to provide favorable review. Thus, under President George W. Bush environmentalists filed for national injunctions in the Ninth Circuit. Under President Obama, opponents of his more grandiose executive actions sought nationwide relief in Texas courts in the Fifth Circuit. Now that a Republican president is again in the White House, liberals have sought to stymie his executive actions by filing for universal injunctions in the Ninth Circuit (Washington and Hawaii) and in the newly liberal Fourth Circuit.[24] The embarrassing spectacle of agenda-driven lawyers successfully filing for national decrees before handpicked judges in carefully selected venues may eventually bring the federal judiciary into disrepute. This Court has an obligation to end that practice and to compel the judges of the lower federal courts to respect the constitutional limits on judicial power.

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[24] For a survey of the relevant cases, *see* Bray, *Multiple Chancellors*, at 8-10; Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, at 3-4, 92 N.Y.U. L. Rev. (forthcoming 2017), *available at* https://goo.gl/MTTHaU.

G. This case offers the Court the opportunity for a long overdue course correction in the use of equitable power by the lower courts.

The Supreme Court has had two recent opportunities to rein in the improper practice of issuing injunctions for the benefit of nonparties. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (resolving case on grounds of standing and therefore not reaching "the question whether, if respondents prevailed, a nationwide injunction would be appropriate"); *United States v. Texas*, 136 S. Ct. 2271 (2016) (affirming Fifth Circuit decision upholding a nationwide injunction "by an equally divided Court" with no written opinions). This case presents another opportunity to curtail the misuse of equitable judicial power by the lower federal courts and to call a halt to the unconstitutional practices described above. Should respondents prevail in any degree on justiciability, mootness, and the merits, the opportunity will be ripe for this Court to address the propriety of the remedies ordered below. In that event, this Court will have an opportunity to remind the lower courts that an injunction constrains the defendant's conduct against the plaintiff and no one else.[25]

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[25] Ample and recent scholarship now exists plumbing this issue in depth and surfacing multiple problems with the current practices in the lower courts. In addition to Berger and Bray, *supra*, *see also* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J.L. & Pub. Pol'y 487 (2016).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

HAWAI'I, ET AL., *Respondents*.

On Writ of Certiorari to the United States
Courts of Appeals for the Fourth and Ninth Circuits

BRIEF FOR THE FOUNDATION FOR THE CHILDREN OF IRAN AND IRANIAN ALLIANCES ACROSS BORDERS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus **The Foundation for the Children of Iran (FCI)** is a 501(c)(3) organization that helps arrange healthcare services, including life-saving treatments, for Iranian children and children of Iranian origin. Based in Bloomington, Minnesota, FCI relies on a global network of volunteers to serve the needs of as many children as possible, regardless of race, creed, religious belief, or political affiliation. Essential to FCI's mission is the ability of children residing in Iran and their parents to travel to the United States on non-immigrant visas over the course of several years to obtain the critical medical treatment that they need.

Amicus **Iranian Alliances Across Borders (IAAB)** is a 501(c)(3) organization based in New York City that seeks to strengthen America's Iranian diaspora community through leadership and educational programming that encourages collaboration and solidarity across borders and multiple communities. IAAB includes over a thousand members of Iranian descent or nationality and works by empowering members of the Iranian diaspora community to deepen connections with their new communities while continuing to maintain their roots. These activities rely in large part on the ability of IAAB members to travel between the United States and Iran, including on non-immigrant student visas.

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[1] No parties' counsel authored this brief in whole or in part, no party or its counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici* or their counsel contributed money that was so intended. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

The Executive Order at the heart of this case, Executive Order No. 13,780 ("Executive Order" or "Order"), which supersedes a prior version of the same policy, Executive Order No. 13,769 ("the Prior Order"), poses a grave threat to *amici* and their respective missions. Among other things, with certain limited exceptions for government officials, the Order bars any Iranian national (as well as nationals of Libya, Somalia, Sudan, Syria and Yemen, with whom *amici* stand in solidarity)[2] from entering the United States for a period of at least 90 days. *See* Executive Order, § 2(c). Those affected by the Order include Iranian nationals who have previously been allowed to enter the United States on student, work or visitor visas, and who will need to renew or reapply for those visas when their current entry authorizations expire. Many of *amici*'s members and other constituents, as well as their relatives and friends, have found their ability to travel severely curtailed as a result. For some, the consequences of the Order's restrictions could be severe: for the children served by *amicus* FCI, for example, their ability to travel to the United States for life-saving medical care is a matter of life-or-death.

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[2] The Prior Order also banned the entry of Iraqi nationals. The current Order does not categorically ban the entry of such persons, but subjects them to "additional scrutiny" when they apply for visas, admission, or other immigration benefits, "including, as appropriate, consultation with a designee of the Secretary of Defense." Executive Order, §§ 1(g), 4.

Given both the vital importance of the legal questions presented to their members and other constituents, *amici* have a strong interest in supporting the Respondents and are well-positioned to explain why affirming the rulings of the Fourth and Ninth Circuits is the correct decision. To that end, *amici* have included in this brief not only legal arguments, but also personal stories of Iranians concerning the extensive screening procedures to which they already were subjected before entering the United States, and the harm that these individuals suffered and continue to suffer under the Order.[3]

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[3] For the safety of these individuals and their families, the italicized names used in this brief are pseudonyms. Given the heightened tension surrounding these issues, as well as the reported threats made against individuals associated with these proceedings, *e.g.*, federal judges connected to litigation challenging the current Order and the Prior Order, these individuals are understandably fearful about revealing their identities. *See* Lynn Kawano, *Hawaii Judge Who Blocked Travel Ban Gets Protection Detail*, Hawaii News Now (Mar. 24, 2017), http://www.hawaiinewsnow.com/story/34977777/hawaii-judge-who-blocked-travel-ban-gets-protection-detail-following-threats (last visited Sept. 15, 2017); Evan Perez, *et al.*, *Threats Against Judges in Immigration Ban Cases Leads to Increased Security*, CNN (Feb. 9, 2017), http://www.cnn.com/2017/02/09/politics/judges-threatened-immigration-order (last visited Sept. 15, 2017). These individuals also fear retaliation by Iran's government and its supporters should they be identified publicly as beneficiaries of American charities and organizations such as *amici*.

BACKGROUND

On January 27, 2017, President Trump issued the Prior Order which, *inter alia*, suspended the entry of, and the issuance of visas to, nationals from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. While purportedly justified by the need to protect Americans, the Prior Order instituted a 90-day ban on the "immigrant and nonimmigrant entry into the United States of aliens from" the seven countries while the Departments of State and Homeland Security as well as U.S. intelligence officials would undertake a "review" of the United States' current visa-application and issuance process. Prior Order, § 3(a)-(c). The Prior Order's enforcement was enjoined by several federal district courts almost as soon as it was issued, as a result of legal challenges brought by various plaintiffs across the country. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. Feb. 13, 2017).

On March 6, 2017, in response to these injunctions, Petitioners issued the current, superseding Order now at issue. The current Order's stated purpose is substantially the same as the Prior Order's: "to protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." Executive Order, § 1(a). And the current Order seeks to achieve that end via means nearly identical to those employed by the Prior Order, *i.e.*, by instituting a 90-day, categorical ban on the entry of foreign nationals from certain designated countries, and suspending the United States' participation in refugee resettlement, purportedly while the federal government undertakes a review of the "screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program." *Id.* §§ 1(a), 2, 6. The current Order singles out for exclusion nationals from the same seven countries as the Prior Order, the only exception being that Iraqi nationals are now subject to special review by the Department of Defense, rather than a categorical entry bar. *Id.* § 4. The categorical bar for nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen remains unchanged. *Id.* § 2(c).

The current Order retreats from the Prior Order in a few respects. For example, the current Order, unlike the Prior Order, expressly does not apply to lawful permanent residents, or to foreign nationals who were authorized to enter the United States when the Prior Order was issued, or to foreign nationals who have valid visas on the effective date of the current Order. *Id.* § 3(a)-(b). The exemptions for those who previously received visas, however, are cold comfort to those who, like many of the individuals whose personal stories are reported below, will need to leave the United States only to return later, *e.g.*, for subsequent surgical treatments. Such persons would be denied entry under the Order when they later seek to reapply for or renew their visas (absent a waiver from the Secretaries of State and Homeland Security, *id.* § 3(c)).

As the following personal stories that have been relayed to *amici* demonstrate, nationals from the countries subject to the Order, including children seeking medical attention and students from Iran, already must undergo an extensive and lengthy vetting process to obtain visas to enter the United States. *See, e.g.*, *Hawai'i v. Trump*, 859 F.3d 741, 756 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017) (citing FCI and IAAB's brief "describing how an Iranian visa holder was turned away while en route to the United States because of the confusion regarding the contours of [the Prior Order's] scope"); *id.* at 784 ("[FCI and IAAB] ... have identified specific harms .... explain[ing] that [the Order] would ... curtail children's ability to travel to the United States to obtain life-saving medical care"). The Order nevertheless bars those who have cleared that existing screening process from entry, and has thereby caused tremendous stress and terrible disruption to these individuals and their families.

The Fourth and Ninth Circuits upheld preliminary injunctions against the Order. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017); *Hawai'i*, 859 F.3d 741. Specifically, the Fourth Circuit held that "the reasonable observer would likely conclude that [the Order's] primary purpose is to exclude persons from the United States on the basis of their religious beliefs," and thus the Order violates the Establishment Clause. *Int'l Refugee Assistance Project*, 857 F.3d at 601, 580-81. The Fourth Circuit declined to reach the parties' statutory arguments. The Ninth Circuit held that the Order exceeded the scope of the authority delegated to the President by Congress, and declined to reach the Establishment Clause question. *Hawai'i*, 859 F.3d at 755, 761. Amici offer the following personal stories and the arguments that follow in support of affirming the decisions of the Fourth and Ninth Circuits.

I. *Azar* and *Ahmad*

Azar and her husband live in Iran with their teenage daughter and eight-year-old son, *Ahmad*.[4] *Ahmad* suffers from a univentricular heart. *Azar* and *Ahmad* first came to the United States on B-2 visitor visas when *Ahmad* was three-years-old because *Ahmad* required a surgery known as the Fontan procedure, not available in Iran.

Obtaining those visitor visas was a difficult process. First, only *Azar* and *Ahmad* could receive visas, separating the family while *Azar* and *Ahmad* traveled to the United States. In FCI's experience, the United States will grant only one parent (typically the mother) a visa to enter the United States out of fear that, if both parents were granted visas, they would not return to Iran. Therefore, as with all of FCI's beneficiaries, FCI recommended that only the mother and child seek visitor visas.

Second, *Azar* and *Ahmad* were both required to travel to the American embassy in Dubai for an interview because the United States does not maintain an embassy or consulate in Iran. In addition to the documents described *infra* at 17-19,

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[4] As described *supra* note 3, the identities of Iranian nationals have been anonymized using pseudonyms.

Azar also brought, *inter alia*, documentation regarding FCI's financial support of *Azar* and *Ahmad*, which included a place to stay while in the United States, and medical documentation detailing *Ahmad*'s medical condition and the lack of treatment options in Iran. *Azar* was required to return to the embassy four times with additional documentation before she and *Ahmad* were finally issued visas. *Azar* stayed in Dubai for over a month in an effort to obtain a visa for travel to the United States to seek life-saving medical treatment for her sick child.

Ahmad's first surgery in the United States was a success, but it was only the first of a planned series of procedures, as is typical with the Fontan procedure. *Ahmad* required significant post-operative recovery time. *Azar* and *Ahmad* stayed in the United States for four months and then returned to Iran. Four years later, when *Ahmad* was seven-years-old, he was scheduled for his next surgery. Again, *Azar* was required to travel with *Ahmad* to Dubai for an interview. This time, a woman working at the embassy told *Azar* that, because *Azar* was not a resident of Dubai, she could not obtain a visa from the embassy in Dubai. After much uncertainty and anguish, this misunderstanding was resolved and *Azar* was able to obtain visas for herself and *Ahmad*. *Azar* and *Ahmad* traveled again to the United States, where they stayed for three months after *Ahmad*'s surgery.

Ahmad is now eight-years-old. *Azar* and *Ahmad* traveled to the United States a third time in November 2016 for another surgery. *Ahmad* is still in recovery from that surgery.

II. *Banu* and *Basir*

Banu, her husband, daughter and son *Basir* live in Iran. *Basir* was born in late 1998 with a congenital heart defect that resulted in a lack of oxygen in his blood. *Banu* and her husband consulted the best Iranian doctors, but none in Iran could help *Basir* with his life-threatening condition. Their only hope for *Basir*'s survival was in the United States. *Banu* contacted FCI, which assisted *Banu* with the visa-application process.

Banu, her husband and *Basir* traveled to the U.S. Embassy in Turkey for *Banu* and *Basir*'s interviews when *Basir* was still an infant. *Basir* was extremely sick and required constant oxygen and medication during the interview process.

Banu and *Basir* were issued visas and traveled to the United States for *Basir*'s surgery. At 44-days-old, *Basir* was so sick that he was greeted by an ambulance at the airport gate and immediately transported to a hospital. *Basir*'s surgery was successful but his recovery was lengthy. *Banu*'s visa was valid for only three months, and therefore she needed to return to Iran. FCI was able to assist *Banu*'s husband with obtaining a visa so that he could be with *Basir* during the remainder of *Basir*'s recovery.

Basir returned to the United States in 2012 for an additional surgery and recovered well. Today, *Basir* is a student at the best university in Iran. He enjoys playing soccer and is a chess champion. After his 2012 surgery, however, doctors anticipated that he would need additional surgery in another five to ten years—between 2017 and 2022—and *Basir* is now within that window. He is under the care of doctors in Iran, who consult with U.S. physicians as needed. Although *Basir*'s condition is currently stable, it is difficult to predict when in the next five years he will need his additional surgery. FCI, *Banu* and *Basir* are concerned that the Order could prevent *Basir* from receiving further life-saving surgery should an urgent need arise.

III. Dr. David Overman

Dr. David Overman is Chief of the Division of Cardiovascular Surgery at Children's Hospitals and Clinics of Minnesota and a staff surgeon. His clinical interests include the surgical management of congenital heart disease. He has specific expertise with hypoplastic left heart syndrome and complex neonatal repairs, as well as aortic root disease and the Ross Procedure.

Dr. Overman is Medical Director of Children's HeartLink, a non-governmental organization that builds partnerships between pediatric cardiac programs in the developing world and in North America and Europe. Dr. Overman began working with FCI in early 1999 when he operated on *Basir*. Since then, Dr. Overman has operated on approximately 15 Iranian children brought to the United States by FCI. Some of these children, like *Basir*, require close monitoring and multiple surgeries.

Dr. Overman's role with FCI involves evaluating the medical records of potential beneficiaries to determine whether they may be good candidates for treatment in the United States, performing surgery on these beneficiaries if they do come to the United States, and working remotely with doctors in Iran to monitor their conditions. Dr. Overman is concerned that the Order will interfere with his ability to offer necessary life-saving medical treatment to his patients.

IV. *Dalir*

Dalir is a Ph.D. chemistry student in the Midwestern United States. As with all student visa applicants, *Dalir* was first required to obtain acceptance at an American university. He was accepted in 2015 and immediately applied for an F-1 (student) visa for himself and an F-2 (dependent) visa for his wife. After submitting the necessary applications, photographs and fees, he made an appointment for them to travel to Dubai to be interviewed at the U.S. embassy. At his interview, he presented, *inter alia*, his research plan, statement of purpose, certificate of marriage and bank statements. He and his wife were fingerprinted. Two months later, they received their visas. *Dalir* was pleasantly surprised that they received multiple-entry visas; in *Dalir*'s experience, most Iranian students receive only single-entry visas, which are valid for five years. Because their visas are multiple-entry visas, however, they are valid for only two years.

Dalir and his wife arrived in the United States for the fall semester 2015. By the end of 2016, they had not been to Iran for over one year and missed their families. They decided to return to Iran for the winter holidays. *Dalir* could stay only two weeks due to his academic demands. His wife, not being a student, could stay longer and planned to return to the United States in February. After hearing rumors of a forthcoming travel ban, however, *Dalir* immediately called his wife and rescheduled her return. His wife was in the air, attempting to reunite with her husband, when President Trump signed the Prior Order.

His wife's itinerary took her from Iran to Chicago via Frankfurt. She landed in Frankfurt shortly after the Prior Order was signed. Two hours into her layover, the airline informed her that she would not be allowed to board her flight to Chicago due to the Prior Order and put her on a plane back to Iran.

The next week was extremely difficult for *Dalir* and his wife. Both feared that they would not be able to see one another again unless *Dalir* quit his Ph.D. program. *Dalir*'s worry that he would not be reunited with his wife prevented him from concentrating on his studies. For six days, he desperately followed the news. He was aware of the TRO issued by a federal district court in Boston, but also knew that airlines were not allowing Iranian visa holders to board planes bound for the United States. When *Dalir* learned that Lufthansa was allowing Iranian visa holders to board planes bound for Boston, he immediately called his wife. *Dalir* had told her to pack her bags and be prepared to leave. It was 2 a.m. in Iran, but he convinced his wife to get to the airport for a 7 am flight. *Dalir* booked her ticket and she immediately left for the Tehran airport. Simultaneously, *Dalir* began a seventeen-hour car ride to Boston.

Dalir arrived in Boston just as his wife's flight was landing. As he waited at the international arrivals area, *Dalir* grew concerned when he did not see his wife for several hours, despite seeing other passengers exit customs. She emerged three hours after landing, following secondary screening.

Dalir and his wife got back into the car and drove another seventeen hours home. The travel ban had significant impacts on *Dalir*'s studies—*e.g.*, he delayed one of his seminars that was scheduled to take place during the six days when he was trying to bring his wife back into the United States. Although *Dalir* and his wife may lawfully remain in the United States until *Dalir* completes his Ph.D. program, they fear that they will be unable to obtain additional visas when their current visas expire, leaving them potentially unable to visit their families for three years.

SUMMARY OF ARGUMENT

This Court should affirm the decisions of the Fourth and Ninth Circuits. For the reasons provided by Respondents (IRAP Resps. 31-42; Hawai'i Resps. 47-60), the Court should apply a more searching standard of review to this case than mere rational basis review. If, however, the Court applies only rational basis review, it still should hold that the Order violates the Equal Protection Clause because it impermissibly distinguishes on the basis of nationality, which even in the immigration context requires at least a rational basis. The lack of any rational impetus for the Order not only renders it unconstitutional under the Equal Protection and Due Process Clauses, but also lends support to Respondents' Establishment Clause challenge, *Int'l Refugee Assistance Project*, 857 F.3d at 580-81, 601 (finding that the Order violates the Establishment Clause). The United States' existing visa-application process and other screening procedures are already aimed specifically at the problems that the Order purportedly seeks to solve—preventing terrorism inside the United States. As illustrated by the compelling stories above from the *amici*'s members and other constituents, these visa-application procedures are stringent, even for a newborn baby seeking a visa to the United States for life-or-death surgery. The irrationality of the travel ban is confirmed by the list of countries singled out by the Order, which is both under-inclusive and over-inclusive in relation to the national origins of the perpetrators of recent terrorist attacks that allegedly provide the justification for the travel ban.

There are statutory flaws with the travel ban as well, as the Ninth Circuit held below. *Hawai'i*, 859 F.3d at 769-74, 776-82 (holding that the Order exceeds the scope of the President's authority as delegated by Congress). Although the Order relies on 8 U.S.C. § 1182(f) for its authority to exclude *all* nationals of six countries, a holistic reading of that statute refutes that claim. That provision states that the President may "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants," but does not define "classes of aliens." Another part of the same section defines multiple "classes of aliens"—but none by reference to immutable characteristics such as nationality. 8 U.S.C. § 1182(a). Reading the statute as a whole, 8 U.S.C. § 1182(f) does not permit the President to bar entire nationalities without some individualized consideration of applicants for admission. Because the Order exceeds the proper scope of the President's statutory authority, it cannot stand.

ARGUMENT

I. The Executive Order's Travel Ban Is Irrational.

A. Existing Screening Procedures for Persons from the Six Restricted Countries to Enter the United States Are Robust and Thorough.

Even acknowledging that the political branches of the federal government have comparatively "broad power over naturalization and immigration," *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976), any distinction that the federal government may wish to draw between noncitizens based on national origin still must satisfy at least "rational basis" review. *See, e.g.*, *Ruiz-Diaz v. United States*, 703 F.3d 483, 486-87 (9th Cir. 2012). Because the Order's travel ban operates selectively with respect to only certain foreign nationals, depending on their national origin, it must be supported by at least some "assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The rational basis standard is far from a meaningless rubber stamp on the actions of the political branches. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (striking down a Colorado law that lacked a "rational relationship to a legitimate governmental purpose"); *Jimenez v. Weinberger*, 417 U.S. 628, 636-37 (1974) (striking down provision of the Social Security Act as not rationally connected to provision's asserted purpose); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-36 (1973) (striking down as irrational statute withholding food stamps to households with unrelated members).

Any supposed rational basis for the categorical ban of travel for individuals from the targeted countries is dispelled by the fact that the United States government currently employs stringent standards regarding the admission of most nonimmigrants into the United States. When foreign nationals wish to enter the United States, they first must obtain visas unless they are from one of only 38 visa-waiver countries where a visa is not required for stays of 90 days or less for tourism or business reasons (and even then, only if they are not also a national of Iraq, Iran, Syria or Sudan). U.S. Dep't of State, *Visa Waiver Program*, http://travel.state.gov/content/visas/en/visit/visa-waiver-program.html (last visited Sept. 15, 2017). The process for obtaining a nonimmigrant visa to the United States is lengthy, expensive and difficult—particularly for Iranians. Over 45 percent of Iranian B-visa seekers were denied visas in Fiscal Year

2016.[5] *See* U.S. Dep't of State, *Adjusted Refusal Rate—B-Visas Only By Nationality Fiscal Year 2016*, http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/RefusalRates/FY16.pdf (last visited Sept. 15, 2017).

Applicants for nonimmigrant visas must complete an application, submit photographs, pay an application fee and schedule an interview at a U.S. embassy or consulate. U.S. Dep't of State, *Student Visa*, http://travel.state.gov/content/visas/en/study-exchange/student.html (last visited Sept. 15, 2017) (applicable to F-1 and F-2 visa applicants); U.S. Dep't of State, *Visitor Visa*, http://travel.state.gov/content/visas/en/visit/visitor.html (last visited Sept. 15, 2017) (applicable to B-2 visa applicants, including those seeking medical treatment). The application form itself is lengthy, asking for information such as a list of all of the countries the applicant has entered in the last ten years and all professional, social and charitable organizations to which the applicant has belonged or contributed, or with which the applicant has worked. Applicants seeking visas for medical reasons additionally must submit an invitation letter from the hospital and doctors providing treatment, medical documentation describing the illness (translated) and a letter from a doctor stating the reasons why the planned treatment cannot or should not be performed in Iran or a neighboring country such as Turkey. Many FCI beneficiaries also require affidavits of support from sponsors if the beneficiaries cannot afford to travel with their own funds, lest the consular official determine their personal financial situation to be insufficient. *See* 22 C.F.R. § 41.31(a)(3). Because the United States does not maintain an embassy or consulate in Iran, Iranian nationals seeking visas to enter the United States must travel to a third country for their interviews. Travel to that third country (for example, the United Arab Emirates), also requires a visa. Applicants must bring significant documentation with them to their visa interviews, including six months of bank statements (translated and officially stamped). Applicants are also fingerprinted during their interviews.

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[5] In FCI's experience, the Department of State denies many Iranian visa seekers' applications for incomplete applications or supporting documentation. *See* 8 U.S.C. § 1201(g).

The Order's travel ban fails to satisfy even the most deferential rational basis standard. As alluded to by the personal experiences recounted above, the United States' preexisting visa-application process and other screening procedures that have been in place for quite some time are all "aimed specifically at the problems" that the Order's travel ban purportedly seeks to solve. *Moreno*, 413 U.S. at 536. Indeed, the Order acknowledges that these procedures were already tightened significantly in response to the September 11 attacks. *See* Executive Order, § 1. "The existence of these provisions necessarily casts considerable doubt upon the proposition that the [travel ban] could rationally have been intended to prevent those very same [harms]." *Moreno*, 413 U.S. at 536-37. Put simply, the U.S. government has already addressed its purported concerns set forth in the Order by adopting and maintaining comprehensive and stringent visa requirements for individuals in the targeted countries.

A law that, like the Order, lacks any rational connection to its asserted aims is more likely to have been motivated by a constitutionally improper purpose, such as "a bare ... desire to harm a politically unpopular group." *Id.* at 534; *accord Romer*, 517 U.S. at 634-35 (laws that impose "disadvantage[s] ... born of animosity toward the class of persons affected" lack a constitutionally legitimate purpose). An absolute ban for 90 days has no rational basis. The evidence is that the existing procedures are working insofar as adult nationals from these countries have not traveled to the United States and participated in terrorist attacks in the past two decades. *See infra.* In the absence of identified problems with the existing screening process for persons from these countries, the Court should affirm the Fourth and Ninth Circuit's rulings.

B. The List of Countries Singled Out by the Executive Order's Travel Ban Lacks a Rational Connection to the Asserted Reasons for the Ban.

The manner in which the Order's travel ban operates also belies its lack of a rational basis. The Order's stated justification for barring the entry of *all* foreign nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen is the concern that any national from those countries might commit terrorist acts in the United States, perhaps at the behest of terrorist organizations, and the Order points to "hundreds of [unspecified] persons born abroad [that] have been convicted of terrorism-related crimes in the United States" since 2001 as support. Executive Order, § 1(h). The problem, however, is that those "persons born abroad" and the history of domestic terrorist incidents in the United States since 2001 lend no support to the Order's selective and discriminatory ban. Indeed, the list of countries whose nationals the Order has singled out bears little or no correlation to the places from which those who have attempted or committed terrorist attacks within the United States have hailed over the last 16 years.[6] Furthermore, as described below, the Order and its call for extreme vetting would not have actually prevented any of these attacks, because the handful of nationals from the targeted countries who were involved in terrorist activities had come to the country as children, and all were either naturalized citizens or lawful permanent residents ("LPRs").

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[6] Petitioners have argued that Congress and the prior administration identified these six countries as ones presenting "terrorism-related concerns," and that the Order merely adopts that prior determination and enhances the security measures with regard to those countries. But neither Congress nor the prior administration banned nationals from those countries from entering the United States for any period of time, as the Order does. Indeed, a Department of Homeland Security assessment found that "'country of citizenship is unlikely to be a reliable indicator of potential terrorist activity' and that 'few of the impacted countries have terrorist groups that threaten the West.'" *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 561-62 (D. Md.), *aff'd in part, vacated in part by* 857 F.3d 554 (4th Cir. 2017) (discussing report *available at* https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf); *accord Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1127 (D. Haw. 2017) (same).

The ban is both selective in whom it targets—only foreign nationals from the six referenced countries—but at the same time sweeping in the burdens it imposes, prohibiting *any* alien from those countries from entering the United States, even minors, and regardless of the grounds on which that entry is sought: for work, for study, for resettlement as a refugee fleeing an active war zone, for medical treatment that is unavailable in their home countries, or for short-term visits with family members residing in the United States. *See Hawai'i*, 859 F.3d at 771-74. Viewing the Order's travel ban in light of the Order's stated reasons for it, the ban's arbitrary harshness presents a second, independent reason why it lacks a rational basis, and confirms that its restrictions can only have been intended to harm an unpopular class of persons, rather than to serve any legitimate security-related aim.

To begin, the Order is *over*-inclusive. *Romer*, 517 U.S. at 632 (laws fail rational basis review where their "sheer breadth is so discontinuous with the reasons offered for it that [they] seem[] inexplicable by anything but animus toward the class [they] affect[]"). There have been only a handful of persons who originally hail from some of the countries the Order singles out who have carried out or attempted to carry out terrorist plots since 9/11—and these acts did not result in fatalities. These include one car-ramming attack carried out in 2006 by an Iranian-

American in Chapel Hill, North Carolina;[7] an unsuccessful plot by a Somali-American who planned to bomb a Christmas tree lighting in Portland, Oregon in 2010;[8] an attack involving multiple stabbings by a Somali-American at a shopping mall in St. Cloud, Minnesota in 2016;[9] and another car-ramming attack carried out by a Somali-American LPR at Ohio State University in 2016.[10]

To put these four individuals in broader perspective, there are approximately 500,000 persons of Iranian ancestry and 130,000 persons of Somali ancestry living in the United States, according to 2011 American Community Survey data.[11] These incidents also offer no reason whatsoever for the inclusion of the other four countries in the Order's travel ban. Moreover, even with respect to these four incidents, there is no credible basis for believing that the Order's travel ban, sweeping as it is, would have done anything to prevent them. Three of the four incidents—the 2006 car-ramming attack, the 2010 bomb plot, and the 2016 stabbings at a shopping mall—involved naturalized U.S. citizens who immigrated to the United States as young children and lived here for many years before engaging in terrorism.[12] The individual at the center of the other incident also came to the United States as a child—at age 16—and did not carry out his attack until years after arriving.[13] The idea that it is rational to ban toddlers from entering the country out of a speculative fear that they might someday grow up to be terrorists is implausible, and offends our most basic principles. *Cf. Miller v. Alabama*, 567 U.S. 460, 470-73 (2012) (recognizing that fundamental differences between juveniles and adults that makes it difficult to predict with confidence how children will behave as they mature). Nor could any "enhanced screening" plausibly determine which young children will grow up to be terrorists.

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[7] Jessica Rocha, *et al.*, *Suspect Says He Meant to Kill*, CHARLOTTE NEWS & OBSERVER (Mar. 8, 2006), https://web.archive.org/web/20080502132128/http://www.newsobserver.com/102/story/415421.html (last visited Sept. 15, 2017).

[8] *US 'Foils Oregon Bomb Plot'*, ALJAZEERA (Nov. 27, 2010), http://www.aljazeera.com/news/americas/2010/11/2010112764714953451.html (last visited Sept. 15, 2017).

[9] *FBI Investigates Stabbing That Injured 9 at Minnesota Mall as Possible Act of Terrorism*, CHI. TRIB. (Sept. 18, 2016), http://www.chicagotribune.com/news/nationworld/ct-minnesota-mall-stabbing-20160918-story.html (last visited Sept. 15, 2017).

[10] *Islamic State Group Claims Ohio State University Rampage*, BBC (Nov. 30, 2016), http://www.bbc.com/news/world-us-canada-38151669 (last visited Sept. 15, 2017).

[11] *See* U.S. Census Bureau, *2011 American Community Survey 1-Year Estimates: Total Ancestry Reported* (Dec. 22, 2012), *available at* http://ia601608.us.archive.org/26/items/2011AmericanCommunitySurveyAncestry/2011Acs.pdf (visited Sept. 15, 2017).

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[12] *See* Rocha, *supra* note 7 (reporting that 22-year-old perpetrator was born in Iran but "grew up in the Charlotte area, attending public school for 13 years until he graduated from South Mecklenburg High School in 2001," five years before attack); Colin Miner, *et al.*, *F.B.I. Says Oregon Suspect Planned 'Grand' Attack*, N.Y. TIMES (Nov. 27, 2010), http://www.nytimes.com/2010/11/28/us/28portland.html (last visited Sept. 15, 2017) (reporting that 19-year-old plotter attended middle school and high school in Oregon); Mark Greenblatt & Angela M. Hill, *Expert: Refugee Ban Would Not Have Saved Lives*, SCRIPPS (n.d.), http://www.scripps.com/expert-refugee-ban-would-not-have-saved-lives (reporting that 20-year old perpetrator was "a refugee who came to the United States at two months old and became a U.S. Citizen in 2008").

[13] *See Islamic State Group Claims Ohio State University Rampage*, *supra* note 10 (reporting that 18-year-old perpetrator arrived in the United States two years before the incident, after living for seven years in a refugee camp in Pakistan).

The Order is also *under*inclusive—another sign of irrationality that often bespeaks constitutionally impermissible animus toward those few the law actually targets. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (rejecting need to regulate population density of group homes for mentally disabled residents as a justification for a zoning ordinance requiring special permits for such facilities because other types of facilities presenting identical concerns were not subject to similar requirements). There have been twelve persons who have succeeded in carrying out fatal terrorist attacks inside the United States since the September 11, 2001 attacks; not a single one of these attacks was committed by anyone from the six countries identified in the Order.[14] Three of them were of Pakistani heritage.[15] Three more were African Americans who were born here.[16] Another was Egyptian.[17] Two were of Chechen ancestry, born in former Soviet republics, and came to the United States from Russia as children.[18] And one each came from families that originally hailed from Kuwait,

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[14] *See* Peter Bergen, *et al.*, *In Depth: Terrorism in America After 9/11, Part II: Who are the Terrorists?* NEW AMERICA https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/ (last visited Sept. 15, 2017).

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[15] *See San Bernardino Shooting: Who Were the Attackers?*, BBC (Dec. 11, 2015), http://www.bbc.com/news/world-us-canada-35004024 (visited Sept. 15, 2017); Jennifer Sullivan, *Seattle Jewish Center Shooter Gets Life Sentence*, L.A. TIMES (Jan. 15, 2010), http://articles.latimes.com/2010/jan/15/nation/la-na-seattle-jewish-center15-2010jan15 (last visited Sept. 15, 2017).

[16] *See* Sergio Peçanha & K.K. Rebecca Lai, *The Origins of Jihadist-Inspired Attackers in the U.S.*, N.Y. TIMES (Dec. 8, 2015), http://www.nytimes.com/interactive/2015/11/25/us/us-muslim-extremists-terrorist-attacks.html?_r=0 (last visited Sept. 15, 2017) (Ali Muhammad Brown, Alton Nolen and Abulhakim Mujahid Muhammad).

[17] *See Los Angeles Airport Shooting Kills 3*, CNN (July 5, 2002), http://edition.cnn.com/2002/US/07/04/la.airport.shooting/ (last visited Sept. 15, 2017).

[18] *See* Nina Burleigh, *The Brothers Who Became the Boston Marathon Bombers*, NEWSWEEK (Apr. 6, 2015), http://www.newsweek.com/brothers-who-became-boston-marathon-bombers-319822 (last visited Sept. 15, 2017).

Afghanistan and the Palestinian Territories.[19] Indeed, even the primary example that the Prior Order cited in support of the travel ban—the September 11 attacks, *see* Prior Order, § 1—had no relation to any of the countries on which the ban is focused. The "19 foreign nationals who went on to murder nearly 3,000 Americans," *id.*, came to the United States from Saudi Arabia, Egypt, Lebanon and the United Arab Emirates.[20]

In sum, even under rational basis review, the record of terrorist attacks committed or attempted in the United States since the September 11 attacks offers no basis for singling out the six countries identified in the Order for travel restrictions.[21] Most of the countries from which foreign terrorist attacks against the United States have originated are not even included on the list; most of the countries that are on the list are ones from which no terrorist threat has come at all in the period following the September 11 attacks. Even acknowledging that a handful of recent attackers or would-be attackers were from these countries, there is no basis to say that any purported "enhanced screening" would have prevented those incidents or others like them because those individuals came here as children. Based on both its under-inclusiveness and over-inclusiveness, the Order's travel ban "appears to ... rest on an irrational prejudice against" nationals from the six countries singled out for adverse treatment, which is not a legitimate government interest supplying the requisite rational basis. *Cleburne*, 473 U.S. at 450.

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[19] *See Orlando Gay Nightclub Shooting: Who Was Omar Mateen?*, BBC (June 14, 2016), http://www.bbc.com/news/world-us-canada-36513468 (last visited Sept. 15, 2017); Catherine E. Shoichet & Gary Tuchman, *Chattanooga Shooting: 4 Marines Killed, A Dead Suspect and Questions of Motive*, CNN (July 17, 2015), http://edition.cnn.com/2015/07/16/us/tennessee-naval-reserve-shooting (last visited Sept. 15, 2017); James Dao, *Suspect Was 'Mortified' About Deployment*, N.Y. TIMES (Nov. 5, 2009), http://www.nytimes.com/2009/11/06/us/06suspect.html (last visited Sept. 15, 2017).

[20] *September 11th Hijackers Fast Facts*, CNN (Aug. 28, 2017), http://cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts (last visited Sept. 15, 2017).

[21] The Order also cites a case from January 2013 that involved "two Iraqi nationals admitted to the United States as refugees in 2009 [who] were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." Executive Order, § 1(h). Iraqi nationals are not subject to categorical restrictions under the current Order, and thus this example cannot justify the Order actually before this Court.

Additionally, the Order fails to mention that the incident did not involve any planned attack on U.S. soil, but rather the provision of material support for such attacks *in Iraq*, and so has little if any connection to the Order's asserted purpose of "protect[ing] the Nation from terrorist activities by foreign nationals admitted to the United States." *See Alex Nowrasteh, Trump Justifies Executive Order by Citing Terrorists Who Were Not Planning a Domestic Attack*, CATO INSTITUTE (Mar. 6, 2017), https://www.cato.org/blog/trump-justified-executive-order-citing-terrorists-who-were-not-planning-domestic-attack (last visited Sept. 15, 2017).

III. The President's Statutory Authority Under Section 1182(f) Does Not Justify the Executive Order.

The Ninth Circuit's decision examined the Petitioners' principal statutory basis for the Order's travel ban—8 U.S.C. § 1182(f)—and correctly rejected their reading, which would give the President unbounded authority to discriminate on the basis of nationality in determining admission to the United States. *Hawai'i*, 859 F.3d at 769-74. The Ninth Circuit recognized that § 1182(f) is framed in broad language, authorizing the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" when he finds that "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." *Id.* at 770; 8 U.S.C. § 1182(f). However, the President's "authority is not unlimited." *Hawai'i*, 859 F.3d at 770. The Ninth Circuit held that the Order did not present a sufficient finding that entry of the excluded classes would be detrimental to the interests of the United States, as required by § 1182(f). *Id.* That determination was correct and provides a sufficient basis to affirm. Additionally, *amici* seek to shed light on an additional way that the Order exceeds the President's authority: § 1182(f) does not provide the President authority to define a "class" in terms of nationality or any similar immutable characteristic. The phrase "class of aliens" in § 1182(f) is not defined; for the reasons to follow, the phrase "class of aliens" in § 1182(f) should not be interpreted to include "nationality" as a type of class.

The phrase "class of aliens" in § 1182(f) should be read in light of the same phrase as used elsewhere in the statute, specifically § 1182(a). *See Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). Section 1182(a) defines several specific "classes of aliens ineligible for visas or admission," who are categorically "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a). None of the "classes of aliens" set forth in § 1182(a) are defined in terms of immutable characteristics, such as nationality; rather, the categories are typically defined by reference to the alien's individual conduct, and in some cases by mutable characteristics (*e.g.*, infection with a communicable disease). *See, e.g., id.* § 1182(a)(1) (health-related grounds), (a)(2) (certain criminal activities or convictions), (a)(1) (communicable diseases), (a)(3) (terrorism, membership in totalitarian parties and related activities), (a)(6) & (9) (prior violations of U.S. immigration laws), (a)(7) (failure to present required documentation). The absence of any "classes" of aliens defined by immutable characteristics in § 1182(a) provides reason to believe that "any class of aliens" in § 1182(f) similarly excludes immutable characteristics such as nationality.

Put another way, the meaning of the phrase "any *class* of aliens" as used in § 1182(f) (emphasis added) should be determined in light of the "company it keeps" under "familiar" statutory-interpretation principles. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). And here, the "company" that § 1182(f) keeps—the enumeration of specific "classes of aliens" identified in § 1182(a)—suggests that it was only meant to provide the President with the authority to temporarily exclude additional "classes of aliens" defined by their individual conduct or mutable characteristics, not their immutable characteristics such as nationality. 8 U.S.C. § 1182(f). Nowhere in Section 1182 is there any evidence that would support reading "class" to include an entire nationality.

This conclusion is also supported by the legislative history of the 1952 Immigration and Nationality Act ("INA"), which shows that overturning decades of racial and national-origin discrimination was of principal importance to Congress. *See, e.g.*, H.R. Rep. No. 82-1365, at 28 (1952) (listing as the first of the 1952 INA's "basic and significant changes ... [e]liminat[ing] race as a bar to immigration and naturalization"). For example, the Senate Committee on the Judiciary discussed the history of immigration policy in the United States and recommended that Congress adopt a policy that prohibited race-based immigration exclusions. S. Rep. No. 81-1515, at 368-373 (1950). The Committee often used the terms "racial" and "national" interchangeably in its review of historical policies. *Id.* In the section titled "Racial Exclusions," the Committee described those barred by the 1940 Nationality Act as "*racially* ineligible for naturalization and therefore ... excluded from admission." *Id.* at 369 (emphasis added). The 1940 Nationality Act had excluded "Burmese, Japanese, Koreans, Malayans" as undesirable "races" of people, despite the fact that those groups are nationalities. *Id.* The exclusion of those nationalities was overturned by the 1952 INA.

The exclusion of certain nationalities from admission was not unique to the 1940 Nationality Act, but rather began with the exclusion of Chinese laborers in 1882, and was later expanded in the 1917 and 1924 Immigration Acts. *Id.* In all of these acts, the term "race" was used to bar the admission of certain nationalities. For example, the 1882 Chinese Exclusion Act as well as 1917 Act, "excluded certain Asiatics on the basis of *geographical distribution*," which covered "some of the groups considered racially undesirable." *Id.* (emphasis added). Both acts exemplify race-based exclusions that are better classified as national-origin based exclusions.

In particular, the 1917 Immigration Act created what became known as the "barred zone." *Id.* at 54. The barred zone was defined by longitude and latitudinal demarcations but included India, Burma, Siam (now Thailand), the Malay States, parts of Russia, parts of Saudi Arabia, parts of Afghanistan, most of the Polynesian Islands, and all of the East India Islands. *Id.* The barred zone was described in a 1916 Senate Committee on Immigration report as a bill "to reach that large number of aliens, not 'free white persons' or persons of 'African nativity' or 'African decent' ... not covered by the Chinese exclusion treaty and laws and the Japanese passport agreement and treaty." S. Rep.

No. 64-352, at 4 (1916). Moreover, the Committee recognized in 1950 that "[t]he purpose of the 'barred zone' provision was primarily to exclude Hindus and make exclusion of Asiatics more complete." S. Rep. No. 81-1515, at 54 (1950). Thus, the Committee recognized that geographical and nationality-based exclusions could embody the underlying purpose of excluding certain religions and races. The 1952 INA was thus principally intended to reverse this history of religious and racial discrimination under the guise of nationality-based discrimination. *See* H.R. Rep. No. 82-1365, at 28 (1952) (listing as the first of the 1952 INA's "basic and significant changes ... [e]liminat[ing] race as a bar to immigration and naturalization").

The Order's categorical prohibition on all foreign nationals (other than certain government officials) from certain countries holding valid U.S. visas entering the United States is unprecedented in the history of the clause, and directly undermines what Congress attempted to accomplish with the 1952 INA. Notwithstanding numerous wars, hot and cold, during § 1182(f)'s more than 60-year history, during which § 1182(f) was invoked dozens of times, no other President has purported to bar all aliens of a given nationality holding visas from entering the United States whether as immigrants or nonimmigrants.[22] Instead, suspensions pursuant to § 1182(f) have generally proceeded on the basis of only demonstrated conduct by specific aliens (*e.g.*, committing human rights abuses, supporting terrorism, or participating in anti-democratic coups). *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* (Cong. Res. Serv. Jan. 23, 2017), at 1-2 & 6-10 (Table 1). That "contemporaneous and consistent" executive practice suggests that "any class of aliens" means something less than a whole nationality, and that understanding "is entitled to great weight" in construing the statute. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *accord* Norman Singer & Shambie Singer, 2B Sutherland Statutes and Statutory Construction § 49:3 (7th ed. 2016); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").[23]

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[22] An August 26, 1986 proclamation limited the entry of Cuban immigrants, but included broad categorical exceptions for Cuban nationals applying for admission as immediate relatives, "special immigrants"—which includes numerous categories of immigrants including lawful permanent residents returning from abroad—and "preference immigrants," including those with family-sponsored and employment-based immigrant visas. *See* Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986).

Petitioners argue that prior presidents have used § 1182(f) to prevent entry of certain nationals. *See* Pet. 43-44. However, none of these presidential actions sought to ban entire nationalities without broad, categorical exceptions. For example, Executive Orders 12,324 and 12,807, addressed in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), did not exclude Haitian nationals—rather, they directed the Coast Guard to interdict migrants from arriving *by sea* because of the large numbers of migrants arriving by sea into the southeastern United States at that time. In stark contrast to the absolute ban presented here, Haitian nationals seeking to visit or immigrate to the United States through other lawful means were not barred. For similar reasons, the other presidential actions cited by Petitioners fail to support the claim that § 1182(f) grants the president sweeping authority to exclude entire nationalities based on that immutable characteristic alone. Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011) (excluding "aliens who are subject to United Nations Security Council travel bans"); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009) (suspending entry of senior foreign government officials responsible for failing to combat human trafficking); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996) (restricting entry of certain officials of the Sudanese government and military); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992) (see Executive Order 12,807 discussed above); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988) (excluding certain officials of the Nicaraguan government); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988) (suspending "entry into the United States as immigrants and nonimmigrants of Panamanian nationals (and their immediate families), who formulate or implement the policies of Manuel Antonio Noriega and Manuel Solis Palma and who are designated by the Secretary of State"); Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (limiting the entry of Cuban immigrants but providing for broad categorical exceptions, *see supra* note 22).

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[23] Even when the President restricts travel from certain countries in response to, *e.g.*, health emergencies, as President Obama did in response to the 2014 Ebola outbreak, the President does so with at least the INA's partial blessing, which grants him authority to exclude aliens on health-related grounds. 8 U.S.C. § 1182(a). However, as the Fourth Circuit held, the current Order is not truly rooted in such legitimate concerns—rather, it is the result of anti-Muslim animus. *Int'l Refugee Assistance Project*, 857 F.3d at 594-97.

In summary, Congress plainly did not intend to give the President *carte blanche* to prevent entire nationalities of aliens from entering the country. Section 1182(f)'s grant of authority should be construed so as not to create unnecessary tension with the rest of the INA, and thus construed, the Order's travel ban should be invalidated as an action that lies beyond the President's authority. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

CONCLUSION

This Court should affirm the decisions of the Fourth and Ninth Circuits.

Respectfully submitted.

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◆

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

◆

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAI'I, ET AL.,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Fourth Circuit And Ninth Circuit

◆

BRIEF OF FREEDOM FROM RELIGION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF THE *AMICUS CURIAE*

The Freedom From Religion Foundation[1] ("FFRF"), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers, representing over 29,000 atheists, agnostics, and other freethinking American citizens. FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's dual purposes are to educate the public on matters relating to nontheism, and to protect the constitutional principle of separation between state and church.

FFRF's interest in this case arises from its position that the Executive Order, "Protecting the Nation from Foreign Terrorist Entry into the United States" issued January 27, 2017, and then reissued on March 6, 2017, violates the Establishment Clause of the First Amendment, which FFRF works to protect and defend. The Executive Order, which targets Muslims, constitutes a religious test for citizenship and for entry into our country. It would create precedent that could be used to target not only non-Christian religious minorities, but the significant non-Christian minority today that identifies as non-religious. The ability of people of any religion and no religion to travel, to gather and to communicate freely in the United States is necessary for the open dissemination of ideas, free speech, free inquiry, free association, and freedom of conscience.

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[1] This brief has not been authored, in whole or in part, by counsel for either party. No contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. Consent to this brief has been given by all parties.

◆

SUMMARY OF ARGUMENT

Never in the history of the United States have our immigration policies and procedures been used to deny opportunity to religious groups and to favor a particular religion. Executive Order 13780 sullies that history with a ban on travel targeting six majority-Muslim countries and motivated by the religious makeup of those countries. No secular purpose justifies the Order. Its true purpose and primary effect are inherently religious. It advances Christianity, gives preference to Christians, and discriminates against a religious minority in violation of the Establishment Clause.

The only references to a relationship between state and church in our Constitution are exclusionary, namely the First Amendment's Establishment Clause and Article VI, which explicitly forbids religious tests for office or public trust. Yet, the Trump Administration seeks to codify such a test for immigrants seeking entry at our borders. This discriminatory policy betrays core American values and violates fundamental rights guaranteed by the Establishment Clause of the First Amendment to our members and to others who are free from religion.

It contravenes U.S. immigration laws and policies, establishing a base constituency's religion as politically and legally preferable and codifying religious discrimination against vulnerable, unpopular religious minorities. The Trump Administration has engaged in a campaign of religious discrimination and favoritism that will not stop until the Court unequivocally strikes down its religious purpose as unconstitutional.

◆

ARGUMENT

I. THE EXECUTIVE ORDER VIOLATES THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE BECAUSE THE PURPOSE AND EFFECT IS TO ADVANCE CHRISTIANITY AND TO DISCRIMINATE AGAINST A RELIGIOUS MINORITY.

Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," ("the Executive Order" or "the Order") violates the Establishment Clause of the First Amendment, which prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. In the first case incorporating the Establishment Clause, this Court wrote that "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . ." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Executive Order violates these basic principles of Establishment Clause jurisprudence.

The *Lemon* test is used to determine whether a challenged government action, like a statute or executive order, is permissible under the Establishment Clause. Under the three-part test, (1) the action must have a secular purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The Executive Order fails the first and second prongs of the test and should be struck down as unconstitutional.

A. The Order's purpose is to give preference to Christianity and to discriminate against the Muslim faith.

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984). "[It] requires that a government activity have a secular purpose." *Id.* Lack of a legitimate secular purpose is sufficient to render government action unconstitutional.

No secular purpose justifies the Executive Order. "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). The government discredits its avowed secular purpose when the law enacted does nothing to meaningfully advance that purpose. *See Stone v. Graham*, 449 U.S. 39 (1980) (rejecting an avowed educational purpose where the Court found no meaningful educational benefit to a mandate on posting the Ten Commandments in schools, and emphasizing that if it had any effect at all, that effect was religious in nature).

1. The Executive Order's avowed purpose is a "sham."

"The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91. Government action violates the Establishment Clause when secular purposes played a role in the action but were overshadowed by a primary religious purpose, such as in *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 846 (2005). In McCreary, the Court credited some secular purposes advanced by the government but ultimately found its Ten Commandments display unconstitutional because of its core religious purpose. *Id.* The Court noted that

"*Lemon* requires the secular purpose to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 846.

The Petitioners argue that the Executive Order's purpose is to bolster national security but the facts and circumstances belie this assertion. The Order's purpose undermines U.S. national security interests and the order conflicts with the Immigration and Nationality Act. Its true purpose is to give preference to Christianity and to discriminate against a religious minority.

a. The Order actively undermines U.S. national security interests, rather than advancing them.

While the Executive Order's stated purpose is to bolster national security, expert opinion and judicial scrutiny of the Order demonstrate that it affords no meaningful benefits within the ambit of national security. Both the Fourth Circuit and the Ninth Circuit asked the Executive Branch to present a finding that U.S. interests justify this dramatic, far-reaching change in immigration. At every level, the Executive Branch failed to provide one. The Department of Justice insisted that the President, by virtue of making the decision, justified the need. The Immigration and Nationality Act, however, requires a *finding* from the President, reviewable by the courts, that entry would be detrimental to U.S. interests. 8 U.S.C. § 1182(f). The Executive Order merely "*proclaim[s]* that entry . . .

would be detrimental to the interests of the United States," First Order, *supra*, at Sec. 2(c) and Sec. 6(b) (emphasis added). No branch of government rules by plenary dictate; the courts have authority to review "cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." *Marbury v. Madison*, 5 U.S. 137, 173 (1803).

The President provides no support for a finding that the entry of all nationals from six designated countries, all refugees, or refugees in excess of 50,000 would be harmful to the national interest or that the exclusion of these persons would benefit national security. The Department of Justice has failed to support any such finding in subsequent litigation, as well. Instead, it offers only the circular assertion that the President enacting the ban is itself sufficient evidence for the finding.

The President issued this Executive Order after multiple federal courts struck down the First Order. *Aziz v. Trump*, No. 117CV116LMBTCB, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, No. 17-35105, 2017 WL 2468700 (9th Cir. Mar. 17, 2017). In the *Joint Declaration by Former National Security, Foreign Policy, and Intelligence Officials Opposing Executive Order*, a group of top senior U.S. diplomats and national security officials declared the first executive order "ultimately undermines the national security of the United

States, rather than making us safer." *See Joint Declaration*, (Feb. 6, 2017), at 2. This conclusion was based on the determination that the Order "disrupts thousands of lives, including . . . refugees and visa holders," and it could "endanger[] U.S. troops in the field and disrupt[] counterterrorism and national security partnerships," as well as "aid ISIL's propaganda effort and serve its recruitment message by feeding into the narrative that the United States is at war with Islam." *Id.* The current iteration of the order does nothing to address these fatal concerns. Each risk to national security articulated in the declaration is still present in the Order. *See generally Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

The Order is not tailored to address the President's supposed purpose. Less than a quarter of Muslim Americans involved in violent extremism of any kind have family ties to the six countries designated in the Order.[2] The Order excludes Saudi Arabia and Egypt, both of which are countries of origin for leaders of several militant jihadist groups but also countries in which President Trump has personal financial interests.[3] The Order also cites terrorist acts perpetrated by immigrants generally, but it provides thin data for terrorist acts specifically perpetrated by asylum seekers. In fact, very few asylum seekers admitted to the U.S.

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[2] Charles Kurzman, *Muslim-American Involvement with Violent Extremism*, 2016.

[3] Michael Keller, *Tracking Trump's Web of Conflicts*, Bloomberg Politics (May 18, 2017) *at* https://www.bloomberg.com/graphics/tracking-trumps-web-of-conflicts/.

have ever committed violent acts of terror. Only four asylum seekers, or 0.0006 percent of the 700,522 admitted from 1975 through 2015, later committed acts of terror.[4]

b. The Order directly conflicts with the Immigration and Nationality Act from which it derives its authority

The President's actions are fundamentally at odds with U.S. immigration law and policy. The Order contravenes immigration law in order to establish religion and promote religious discrimination within the U.S. Refugee Program. Current U.S. immigration law permits persons of various categories fleeing persecution to seek protection in the United States. *See* Immigration and Nationality Act of 1952 ("INA"), § 207a (normal flow of refugees); INA § 207b (regarding the emergency flow of refugees); INA § 208 (asylum seekers); (person seeking withholding or removal under INA § 241b(3) whose life or freedom would be threatened); (persons seeking protection under Convention Against Torture, 8 C.F.R. § 208.16-.18, 1208.16-.18) and parolees under INA § 212(d)(5). To qualify for any of these categories, a refugee must demonstrate a well-founded fear of persecution.

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[4] Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sep. 13, 2016), *at* https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis.

Immigration law generally defines persecution as "a threat to the life or freedom of, or infliction of suffering or harm upon, those who differ in a way regarded as offensive." *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *Stanojkova v. Holder*, 645 F.3d 943, 947-49 (7th Cir. 2011) (offering a definition of persecution distinguished from harassment). *See also Li v. Attorney General of the U.S.*, 400 F.3d 157, 164-68 (3d Cir. 2005) (discussing legislative history of persecution). Currently, courts have ruled that the severity of each incident should be considered as well as the cumulative effects of the events. *See Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010). *See also Chand v. I.N.S.*, 222 F.3d 1006 (9th Cir. 2000) (the cumulative harm to an applicant has suffered is considered in asylum claims); *Korablina v. I.N.S.*, 158 F.3d 1038 (9th Cir. 1998) (stating that a single isolated incident may not "rise to the level of persecution, [but] the cumulative effect of several incidents may constitute persecution).

The First Order required a person seeking admission to the U.S. on the basis of persecution to have a particular religion in order to receive priority within the U.S. Refugee Program. Section 5(b) directed federal agencies to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *See* Exec. Order No. 13769, Sec. 5(b). The order directed federal agencies that they "may continue to process . . . refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *See id.* Sec. 5(f). The current Order suspends refugee admittance completely, but Sec. 6(c) gives discretion to admit asylum-seekers on a case-by-case basis. *See* Executive Order Sec. 6(c). The Order's history suggests a high likelihood that discretion is intended to be abused to discriminate on religious grounds.

Rather than following the established precedent of considering the cumulative effects and circumstances of persecution, the Executive Order contravenes the use of U.S. immigration laws and policies to establish religion and promote religious discrimination. The Executive Order permits administrative preference to those who are religious, in particular those who are Christian and discriminates against Muslims. This sweeping change in standards will have negative impacts on how refugees, asylees, and others seeking protection from persecution will be determined eligible.

The effects of the Order are fundamentally at odds with its avowed purpose and contradictory to the interests of immigration law and policy, thus leaving the Order without any legitimate secular purpose. Having no legitimate secular purpose, the Order fails the first prong of the *Lemon* test, which is sufficient to hold it unconstitutional.

2. The stated presidential purpose is clear, unambiguous and oft repeated.

Consistent public statements by the Trump Administration coloring the Order as a "Muslim ban" suggest an underlying religious purpose. Here, the Court should credit the President's myriad statements that the Executive Order is, in fact, meant to give preference to Christianity and codify religious discrimination.

"Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary Cty.*, 545 U.S. at 846 (quoting *Santa Fe*, 530 U.S. at 315). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). *See, e.g.*, (*Larson*, 456 U.S. at 254-55 (holding that a facially neutral statute violated the Establishment Clause considering legislative history demonstrating an intent to regulate only minority religions); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decision makers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose with regards to Equal Protection).

The President of the United States, the Executive Order's sole legislator, has consistently characterized the Order as religiously motivated, starting before he took office and continuing into the present. Prior to his election, Donald Trump campaigned on the promise that he would ban Muslims from entering the United States. On December 7, 2015, candidate Trump issued a press release calling for "a total and complete shutdown of Muslims entering the United States."[5] The press release was deleted from the Trump campaign's website in May.[6] In defending his decision the next day on ABC's "Good Morning America," candidate Trump compared the Muslim ban to former President Franklin Roosevelt's decision to intern Japanese Americans during World War II, and stated, "[t]his is a president highly respected by all, [Roosevelt] did the same thing."[7]

On June 13, 2016, candidate Trump reiterated in a public address his promise to ban all Muslims entering this country, and that the ban "will be lifted when we as a nation are in a position to properly and perfectly screen those people coming into our country."[8] Asked during a July 24, 2016 interview whether he was "backing off on his Muslim ban[]," candidate Trump admitted the alleged purpose was a sham and that the genuine purpose was religious:

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[5] Mallory Shelbourne, Trump Call for Muslim Ban Deleted from Site After Reporter's Question, The Hill (May 8, 2017), *available at* http://thehill.com/homenews/administration/332404-trump-call-for-muslim-ban-deleted-from-campaign-site-after-reporters.

[6] *Id.*

[7] Good Morning America, interview with George Stephanopoulos, ABC News (Dec. 8, 2016), http://abcnews.go.com/Politics/donald-trump-stands-barring-muslims-criticism/story?id=35640361.

> I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim.[9]

He continued, "Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently."[10]

In a foreign policy speech delivered on August 15, 2016, candidate Trump noted that the United States could not "adequate[ly] screen[]" immigrants because the U.S. admits "about 100,000 permanent immigrants from the Middle East every year." Trump proposed creating an ideological screening test for immigration applicants, which would "screen out any who have hostile attitudes towards our country or its principles – or who believe that Sharia law should supplant American law." During the campaign speech, he referred to his proposal as "extreme, extreme vetting."[11]

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[8] Donald Trump, "Speech on the Orlando Shooting" (speech, Manchester, NH, Jun. 13, 2016), Time, http://time.com/4367120/orlando-shooting-donald-trump-transcript/.

[9] Meet the Press, NBC News (Jul. 24, 2016), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706.

[10] *Id.*

In his first television interview as President, he again referred to his plan for "extreme vetting."[12] On January 27, 2017, one week after being sworn in, President Trump signed an executive order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." The Executive Order directed a series of sweeping changes to the way non-citizens, including legal permanent residents, may seek and obtain entry into the United States. Section 3(c) of the Executive Order proclaimed that entry of immigrants and nonimmigrants from countries referred to in section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1187(a)(12), i.e., Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, "would be detrimental to the interests of the United States." The Executive Order would have "suspend[ed] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order." Sections 5(a)-(b) of the Executive Order would have suspended the U.S. Refugee Admissions Program in its entirety for 120 days and then, upon its resumption, would have directed the Secretary of State to prioritize refugees who claim religious-based persecution, "provided that the religion of the individual is a minority religion in the individual's country of nationality." Section 5(c) of the Executive Order proclaimed that entry of Syrian refugees is "detrimental to the interests of the United States" and suspends their entry indefinitely. After January 27, 2017 hundreds of people, both nonimmigrants and immigrants, were refused entry into the United States. Some had their permanent resident status declared abandoned and some had their visa revoked.

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[11] Donald Trump, "Speech on Fighting Terrorism" (speech, Youngstown, OH, Aug. 15, 2016), http://www.politico.com/story/2016/08/donald-trump-terrorism-speech-227025.

[12] World News Tonight, interview with David Muir, ABC News (Jan. 26, 2017), http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602.

In a January 27, 2017 interview with the Christian Broadcasting Network, President Trump confirmed his intent to prioritize Christians in the Middle East for admission as refugees.[13] President Trump stated during the interview:

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair – everybody was persecuted, in all fairness – but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.[14]

During a signing ceremony for the Executive Order on January 27, 2017, President Trump stated that the purpose of the Executive Order was to "establish[]

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[13] The Brody File, Interview with David Brody, Christian Broadcast Network (Jan. 27, 2017), *available at* http://www1.cbn.com/cbnnews/politics/2017/january/president-trump-to-sit-down-with-news-for-exclusive-interview-friday.

[14] *Id.*

new vetting measures to keep radical Islamic terrorists out of the United States of America." He continued, "We don't want them here."

After issuing the second Order, President Trump publicly acknowledged the difference between avowing a purpose to avoid litigation and a genuine underlying purpose, saying "[p]eople, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[15] In fact, he described the second Order as a "watered down version of the first order."[16]

The President has never recanted past rhetoric condemning Islam and calling his attempts at changing immigration policy a "Muslim ban," and he has never disavowed such a purpose for the second Order. Clear and consistent statements by the President show the Order was motivated by a desire to give preference to a religion and to discriminate against unpopular religious minorities. This impermissible intent fails the *Lemon* test as an unconstitutional endorsement and advancement of religion.

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[15] Donald Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 A.M.), https://twitter.com/realDonaldTrump/status/871674214356484096 ("People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!")

[16] Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017).

B. The Order's primary effect is government preference for Christians and discrimination against Muslims.

Even if the Court were to find a legitimate secular purpose, the Order fails under the second prong of the *Lemon* test. Under this prong, the government can neither advance, nor inhibit religion. This prong has also been known as the "endorsement test." Justice O'Connor noted in her concurrence to *Lynch v. Donnelly* that the question under this prong is "whether the government intended to convey a message of endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. at 670-72 (O'Connor, J., concurring). In subsequent decisions, this Court clarified that the government cannot "advance" religion, which means it cannot endorse, prefer, promote or favor religion. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) ("Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion . . . Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S., at 687 (O'Connor, J., concurring).").

The Justice Department argues Section 2(c) of the Order is facially neutral with respect to religion and does not operate on the basis of religion. However, the primary effect of the Order cannot be ignored. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[17] Each of the designated countries excluded in the Order – Iran, Libya, Somalia, Sudan, Syria, and Yemen – are predominantly Muslim. The President's initial attempt to "prioritize refugee claims . . . provided that the religion of the individual is a minority religion in the individual's country of nationality" created an exception for Christians. Indeed President Trump wanted to "help them" and he made good on those promises. Federal courts correctly and unanimously condemned this provision. *See*, *e.g.*, *Int'l Refugee Assistance Project*, 857 F.3d, *as amended* (May 31, 2017); *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir.), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, No. 17-35105, 2017 WL 2468700 (9th Cir. Mar. 17, 2017); *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *3 (D. Haw. Mar. 15, 2017). The Order creates a preference for Christians, thus unconstitutionally advancing or favoring the Christian religion.

The Order also has the effect of disfavoring Islam. Nearly half of all refugees admitted to the United States in 2016 were Muslim.[18] Refugees comprise less than 10% of all immigrants to the U.S. each year, and only about one-in-ten of the other 90% of those immigrants is Muslim.[19] The provisions of the Order banning travel from six designated countries and suspending the refugee program both disproportionately affect Muslims in practice.

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[17] Anatole France, *The Red Lily*, 1894, Chapter 7.

[18] Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research (Oct. 2016) at http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/.

The history and effect of this Order conveys President Trump's message loud and clear: "we don't want them here." Thus, this action – excluding Muslims from entering our country – also sends a strong governmental message of disapproval of Islam.

The Executive Order's alleged purpose, to bolster national security, is not served by the Order as written or in effect. The President has emphatically stated the Order's true purpose is to exclude Muslims and favor Christians. The Order, in practice, advances that discriminatory purpose, disproportionately barring the entry of Muslims to the United States. In all, the evidence compels the conclusion that the Executive Order's purpose and primary effect are unconstitutional religious discrimination. It effectively establishes Christianity as a favored religion and Christians as favored members of society, while fervently discriminating against Muslims, thus violating the Establishment Clause.

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[19] *Id.*

II. THE PRESIDENT'S GENERAL AUTHORITY ON IMMIGRATION, ALTHOUGH EXPANSIVE, CANNOT BE USED TO CIRCUMVENT CONSTITUTIONAL MANDATES.

A President's authority, if any, to issue an executive order must be derived from either a power delegated by an Act of Congress or an enumerated executive power in the Constitution itself. Exec. Order No. 11935, 41 FR 37301 (1976); 5 U.S.C. §§ 3301, 3301(1), 3302; U.S. Const. Art. II, § 1, cl. 1, 2. *See also Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 42 (N.D. Cal. Mar. 31, 1997); *accord*, *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Even when acting under the guise of constitutionally enumerated powers, the Court "has unequivocally stated that the political branches' immigration actions are still 'subject to important constitutional limitations.'" *Zadvydas*, 533 U.S. at 695; *see also Chadha*, 462 U.S. at 941-42. Here, the Department of Justice successfully articulated sources of the President's discretionary powers in matters of immigration *generally*. Yet, it failed to address overwhelming evidence that the Executive Order exceeds constitutional limits.

The Department of Justice correctly notes "the President has expansive constitutional authority under Article II over foreign affairs, national security, and immigration[ ]" and then argues "[t]he exclusion of aliens is a fundamental act of sovereignty inherent in the executive power to control the foreign affairs of the nation." *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). *See Department of Justice Emergency Motion page 4*. This amply illustrates that the President has the power *generally* to exclude aliens from entry, but the inquiry cannot end there. The courts have determined that executive discretion "is broad, but not unlimited. It may be subjected to judicial scrutiny on a charge that discretion was arbitrarily exercised or withheld." *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Arbitrary discrimination against entire classes of people in matters of immigration is beyond the zenith of executive power. Obviously, the President could not prohibit all Catholics from entering the country. In *In re Reyes v. United States Dept. of Immigration and Naturalization*, 910 F.2d 611, 613 (9th Cir. 1990), an executive order attempted to authorize the naturalization of only those servicemen and women who served the U.S. military during a particular military campaign. The Ninth Circuit held that the order was an impermissible exercise of executive power. *Id.*

While the geographical discrimination struck down in *Reyes* is similar to the discrimination based on nationality facially present in this case, the Executive Order goes further. Its true purpose, to enact a procedural preference for Christianity and to disfavor Islam, is an unconstitutional government endorsement and preference of Christianity and condemnation of non-Christians. The Department of Justice cites the President's authority to act within the ambit of immigration *generally*, but it fails to legally justify abusing that authority to promulgate sweeping, religiously discriminatory immigration policy.

III. THE PRESIDENT HAS REPEATEDLY SHOWN A DETERMINATION TO USE THE IMMIGRATION AND NATIONALITY ACT TO FAVOR CHRISTIANITY, DISFAVOR ISLAM, AND INHIBIT MUSLIM IMMIGRATION; AS SUCH, A STATUTORY FINDING WILL NOT SUFFICE TO END THIS CASE AND REDRESS THE INJURY AND THE COURT NEEDS TO REACH THE CONSTITUTIONAL QUESTION.

A. Plaintiff's injury cannot be redressed without a ruling against the President's religious intent.

It is well established that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring in judgment). Yet, as a fundamental principle of law, for a plaintiff with Article III standing, a favorable decision will redress that plaintiff's injury. *See* 25 Fed. Proc., L. Ed. § 59:7 (the irreducible constitutional minimum of standing requires that: "it must be likely . . . that the injury will be redressed by a favorable decision.").

If the Court here were to rely on constitutional avoidance and rule on statutory grounds under the Immigration and Nationality Act alone, the injury caused by executive abuse of power would not be redressed. The President has shown unprecedented determination to give preference to Christianity, disfavor Islam, and to codify religious discrimination by promulgating sweeping changes to immigration policy. When the courts struck down the Trump Administration's first Executive Order, referred to by the President himself as a "Muslim ban," a second attempt at the ban was executed. That order, at issue here, was crafted particularly to evade judicial scrutiny while still advancing its principal religious aim. An unequivocal ruling against the President's unconstitutional purpose is necessary to end this campaign of religious establishment and discrimination against religious minorities.

B. "Constitutional avoidance" is a presumption against unconstitutionality, not a license to ignore clearly unconstitutional legislative intent.

The canon of constitutional avoidance "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). It is a tool that "rest[s] on the reasonable presumption that [a legislator] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). No such presumption can stand in the face of the overwhelming evidence of President Trump's religious intent. The Order does nothing to advance its avowed purpose, or any secular purpose. The Order disproportionately harms Muslims and other non-Christians, a disparate impact implemented by design. The President is the Order's sole legislator, and his own public statements consistently and unambiguously declare the Order to be religiously motivated. Constitutional avoidance is a *presumption* against unconstitutional intent, but no presumption can survive the weight of evidence against the Order. The Court cannot ignore the unconstitutional legislative will manifested here.

IV. THE EXECUTIVE ORDER UNCONSTITUTIONALLY CREATES A "RELIGIOUS TEST FOR OFFICE OR PUBLIC TRUST" THAT VIOLATES ARTICLE VI.

The United States of America was founded in part by refugees seeking freedom from government dictation of religion. The Framers adopted an entirely secular Constitution, whose only references to religion in government are exclusionary, such as "no religious test shall ever be required" for public office. U.S. Const. art. VI. The United States was the first nation to adopt a secular constitution, investing sovereignty in "We the People," not a divine entity.

The United States was not founded as a Christian nation, either. There is not a single reference to Christianity or Jesus in the Constitution or its twenty-seven amendments. The 1796 Treaty of Tripoli, negotiated by George Washington, ratified by the Senate, and signed by John Adams, states that "the United States of America is not, in any sense, founded on the Christian religion." The Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary U.S.-Tripoli, art. 11, Nov. 4, 1796, T.S. No. 358. This treaty is a reminder that not only did the Founders intend to create a secular government, but they explicitly held out the United States as a government that separated state from church.

The Executive Order creates a "religious test for citizenship." This unprecedented litmus test betrays core American principles and violates Article VI of the Constitution.

A. Article VI Clause 3 proscribes a religious test for office or public trust.

The separation between state and church derived from the First Amendment is also bolstered by Article VI Clause 3, which dictates "[n]o religious test shall ever be required as a qualification to any office or public trust under the authority of the United States."

> As Supreme Court Justice Joseph Story (1812-45) wrote in his *Commentaries on the Constitution of the United States*, "This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It has a higher object; to cut off for ever every pretence

> of any alliance between church and state in the national government.

James E. Wood, Jr., *"No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution*, 29 J. Church & St. 199 (1987), pg. 207.

The Court in 1961 ruled that States likewise may not impose a religious test for public office under Art. VI of the Constitution. *See Torcaso v. Watkins*, 367 U.S. 488 (1961). Roy Torcaso was appointed to the office of Notary Public by the Governor of Maryland, but was refused a commission to serve because he would not declare his belief in God. In unanimously ruling the Maryland law unconstitutional, this Court stated:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Id. at 495.

B. Article VI Clause 3 necessarily extends to rights of citizenship.

"Article VI not only removed the basis for any preferential treatment of one religion over another for holding public office, but also denied the right of any preferential status of religion over nonreligion in matters of one's political participation in the life of the Republic." James E. Wood, Jr., *"No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution*, 29 J. Church & St. 199 (1987) at 207.

The Court in 1946 also recognized the necessity of extending Article VI to citizenship. In *Girouard v. United States*, 328 U.S. 61 (1946), the Court considered the case of a Seventh Day Adventist, who applied for naturalization, but declared he would not take up arms in defense of the United States. The Court recognized that "[p]etitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices" because of Article VI Clause 3. The Court continued:

> There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of the state.

Id. at 65-66.

"Religious identity is made irrelevant to one's rights of citizenship, e.g., the right to vote and to hold public office. One's religion or irreligion may not be made the basis of political privilege or discrimination." Wood, *supra*, at 207.

The Framers arguably understood Article VI Clause 3 to encompass those seeking entry into our country as well. The religious test proscription extends beyond office holders and includes the "public trust," which "[t]he authors of *The Federalist* understood [] to mean [] an embodiment of a collection on intangible qualities: 'blood and friendship,' 'a personal influence among people,' a 'wisdom to discern and . . . virtue to pursue the common good,' 'pride and consequence,' 'reputation and prosperity.'" Jennifer Anglim Kreder, *The "Public Trust,"* 18 U. Pa. J. of Con. L. 1425, 1437 (2016).

An Executive Order that creates a religious litmus test for citizenship, legal permanent residents, refugees and other visitors to our country, and that creates preferential treatment for Christians over other minority faiths and nonbelievers is "abhorrent to our tradition." *Girouard*, 328 U.S. at 69. We are a nation of immigrants who sought to shed the shackles of religious tyranny. It would be un-American to now deny refuge to those who seek freedom based on their religious beliefs.

◆

CONCLUSION

The Executive Order violates the Establishment Clause of the First Amendment. The Order abuses Executive power and U.S. immigration laws and policies to establish Christianity as preferable to other religions and to nonreligion, disfavor Islam, and to codify religious discrimination in order to further the myth that the U.S. is a Christian nation rather than a pluralistic society built on the hard work of immigrants and refugees of all religions and none at all. This Administration has demonstrated that it will continue to abuse executive authority to discriminate against minority religious groups until the Court unequivocally rules that actions taken with such intent are unconstitutional *qua intent*.

FFRF agrees with the Joint Declaration by Former National Security, Foreign Policy, and Intelligence Officials Opposing Executive Order declaring that, "Reinstating the Executive Order would wreak havoc on innocent lives and deeply held American values. Ours is a nation of immigrants, committed to the faith that we are all equal under the law and abhor discrimination, whether based on race, religion, sex, or national origin." Government officials seeking to protect our country should work to maintain "an immigration system free from intentional discrimination, that applies no religious tests, and that measures individuals by their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the nation and Constitution," and "rebranding a proposal first advertised as a 'Muslim Ban' as 'Protecting the Nation from Foreign Terrorist Entry into the United States' does not disguise the Order's discriminatory intent, nor makes it necessary, effective, or faithful to America's Constitution, laws, or values." *See* Joint Declaration, *supra*, date Feb. 6, 2017. The Order may have been repackaged, but the principal change was simply a calculated attempt to evade judicial scrutiny. The unconstitutional religious purpose remains inescapably fixed at the heart of the Order.

Respectfully submitted,

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DONALD J. TRUMP,
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v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
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v.
HAWAII, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICI CURIAE* HARDWIRED GLOBAL; IRAQI CHRISTIANS ADVOCACY AND EMPOWERMENT INSTITUTE; CHINA AID; THE MANDAEAN HUMAN RIGHTS GROUP; YAZDA – A GLOBAL YAZIDI ORGANIZATION; GREGORY DOLIN; IRINA TSUKERMAN; AND KATHERINE LITVAK IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are groups and individuals committed to upholding American ideals of providing refuge to those persecuted on the basis of religious beliefs.

Hardwired Global is a non–profit organization dedicated to promoting religious liberty and counteracting religion–based discrimination worldwide.

Iraqi Christians Advocacy and Empowerment Institute is a non–profit organization dedicated to ensuring safety and human dignity of Iraqi Christians and other minority groups both in Iraq and the global Diaspora.

China Aid is an international non–profit Christian human rights organization committed to promoting religious freedom and the rule of law in China as well as supporting Chinese Christians and their families who have experienced persecution at the hands of their government.

The Mandaean Human Rights Group is a non–profit organization that works with Sabian Mandaean community, an ethno–religious, linguistic minority and an indigenous people from Iraq and Iran.

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[1] No counsel for a party authored this brief in whole or in part and no party of counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici* curiae or their counsel made a monetary contribution to its preparation or submission. The parties have all either filed blanket waivers with the Court or have explicitly consented to the filing of this brief.

Yazda – A Global Yazidi Organization is a non-profit multi-national Yazidi global organization established in the aftermath of the Yazidi Genocide in 2014, to support the Yazidi ethno-religious minority and other vulnerable groups.

Gregory Dolin, Irina Tsukerman, and Katherine Litvak are former refugees from the former Soviet Union who were beneficiaries of the Lautenberg Amendment, Pub. L. No. 101–167, § 599D, 103 Stat. 1195, 1265 (1989).

Amici have no direct stake in the outcome of the present litigation. *Amici* take no position on the various provisions of the President's Executive Orders on immigration on direct appeal. *Amici* have joined, however, to address a provision of those orders raised in some lower courts, and that may factor into the present litigation. *Amici* believe that it is entirely proper for the United States to extend preferential protection to persecuted adherents of minority religions. In this brief, *amici* explain that such preferences have been part of American refugee policy for decades, are fully supported by statutory language, do not offend the Establishment Clause, and have been an effective tool to combat religious persecution around the globe. *Amici* also highlight the likely detrimental consequences on persecuted religious communities if the Respondent's and certain other *amici's* arguments concerning the alleged incompatibility of religious preferences in refugee cases and the Establishment Clause are accepted.

INTRODUCTION

The United States has a long and proud history of sheltering those seeking refuge from oppression in their home countries.

> Since 1947 the United States has had a congressionally enacted immigration and naturalization policy which granted immigration preferences to 'displaced persons,' 'refugees,' or persons who fled certain areas of the world because of 'persecution or fear of persecution on account of race, religion, or political opinion.' Although the language through which Congress has implemented this policy since 1947 has changed slightly from time to time the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations.

Rosenberg v. Yee Chien Woo, 402 U.S. 49, 52 (1971).

In recognition and continuation of that history and tradition, in 1980, Congress passed, and the President signed, a comprehensive Refugee Act. Pub. L. No. 96–212, 96 Stat. 102 (1980). The Act (and predecessor legislation) permits the Executive Branch to extend asylum in the United States to those individuals who have suffered "persecution or [have] a well–founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 201 (codified in 8 U.S.C. § 1101(a)(42)); *see also I.N.S. v. Stevic*, 467 U.S. 407, 414–421 (1984) (discussing refugee policy prior to 1980). Under the Act, only hardships resulting from "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" serve as a basis for asylum. *Id.* Other hardships, no matter how severe, do not provide a basis for asylum. *See I.N.S. v. Elias–Zacarias*, 502 U.S. 478, 481–83 (1992). Thus, a person displaced from his home country as a result of war or natural disaster, though a "refugee" in the colloquial sense of the term, is not a "refugee" within the language of the Immigration and Nationality Act. *Id.* at 482.

On January 27, 2017, President Trump issued Executive Order No. 13,769 ("EO–1") which placed certain restrictions on the admission of refugees into the United States. Section 5(b) of that order directed "the Secretary of State, in consultation with the Secretary of Homeland Security ... to prioritize refugee claims made by individuals on the basis of religious–based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Exec. Order 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," §5(b), 82 Fed. Reg. 8,977, 8,979 (Jan. 27, 2017). Almost immediately, the States of Washington and Minnesota filed suit to enjoin § 5(b) and other provisions of that order arguing that the section violated the Establishment Clause of the United States Constitution. *See* Complaint, *Washington v. Trump*, No. 17–141 (W.D. Wash. Jan. 30, 2017), ECF, 1. The U.S. District Court for the Western District of Washington agreed with the Plaintiffs and granted an injunction, which the Ninth Circuit declined to stay. *Washington v. Trump*, 2017 WL 462040 (W.D. Wash., Feb. 3, 2017), stay denied by 847 F.3d 1151 (9th Cir. 2017).

As the litigation over EO–1 was pending, President Trump issued Executive Order No. 13,780 ("EO–2") which rescinded the original order and replaced it with similar, but somewhat modified directive. Exec. Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). Although EO–2 no longer directs the Secretaries of State and Homeland Security to "prioritize refugee claims made by individuals" belonging to minority religions in their home country, it clarified the reasons for EO–1 doing so. *See* EO–2, § 1(b)(iv). Given that statement, and given the separate statutory requirement that available refugee visas be "allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President," 8 U.S.C. § 1157(a)(3), the question of whether the Government can preferentially grant asylum[2] to the adherents of minority religions remains live.

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[2] As a technical matter, a refugee and an asylee are not fully synonymous. A refugee is someone who applies for a refugee visa while outside of the United States, *see* 8 U.S.C. § 1101(a)(42), whereas an asylee is someone who applies while within the United States. *Id.* § 1158(a). However, because the standard for granting the application is the same in both cases, *see id.* § 1158(b)(1)(B)(i), in this brief, the terms are used interchangeably.

SUMMARY OF THE ARGUMENT

The United States has a long and proud history of offering asylum to those seeking refuge from religious persecution. This refuge is most often sought by those who belong to minority faiths in their native land. From the time of the Pilgrims and the Quakers, America has been a safe haven for adherents of minority religions.

That adherents of minority faiths are disproportionally likely to seek asylum is not a surprise. The ability to oppress rather than be oppressed is frequently correlated with the relative size of two populations. Because too many members of too many faiths insist that the Truth of their faith entitles them to oppress those who deny it, the combination of religious differences and minority status can serve as a pretext for brutality. The decades–long policy of the United States, as expressed in statutory language and executive actions, has thus been to give preferences in the processing of refugees to adherents of minority religious faiths.

Such an approach is necessary because the United States cannot admit every otherwise-qualified person seeking asylum. Sadly, in any given year, there are significantly more individuals in the world persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion," than can be admitted to the United States. As a result, the Government must select some rational basis for prioritizing the admission and rejection of otherwise qualified asylum seekers. Without denying the plight of any asylum seeker, it is entirely reasonable to conclude that adherents of minority religions face graver dangers than do other refugees. Aligning United States policy with that recognition fulfills the Congressional command that asylum be extended to "refugees of special humanitarian concern to the United States," and is fully consistent with the Establishment Clause. A decision prohibiting the government from extending particular solicitude to the adherents of minority faiths would do more than substitute the Court's judgment for that of the political branches. It would result in exposing those most vulnerable to persecution to additional and unjustifiable risk of harm.

ARGUMENT

I. Asylum is Inextricably Entwined with Religious Practices.

Unlike most other government benefits, asylum is often granted because of the applicant's religious beliefs. Indeed, "religion is the *only* universal basis for asylum." Lance Hampton, *Step Away from the Altar, Joab: The Failure of Religious Asylum Claims in the United States in Light of the Primacy of Asylum Within Human Rights*, 12 Transnat'l L. & Contemp. Probs. 453, 462 (2002) (emphasis added). Religion–based asylum has been recognized from the earliest days of the American colonies. The Quakers and Mennonites settled in Pennsylvania after escaping persecution in their home countries. The Roman Catholics came to Maryland to avoid harassment in Great Britain. Jews fleeing the Inquisition sought haven in New York when it was still New Amsterdam. Though there was no formal "refugee" status or asylum procedure in the U.S. law until the middle of the 20th century, *see* Pub. L. No. 85–316, 71 Stat. 639

(1957),[3] the practice of admitting and preferencing immigrants fleeing religious persecution has a much longer pedigree.[4]

When Congress first defined "refugee," it explicitly conferred the status on people who fled their country of residence because of persecution on "account of race, *religion*, or political opinion." Pub. L. No. 85–316, § 15(c), 71 Stat. 639 (1957) (emphasis added). This definition, though somewhat broadened, remains the law today. *See* 8 U.S.C. § 1101(a)(42) (defining "refugee" as someone persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion.").

A. Adherents of Minority Faiths Are Most Vulnerable to Persecution

Throughout history, minority faiths have suffered ostracism or worse in repressive societies. It should, therefore, be uncontroversial to note that in countries where people are persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion," minorities falling into one or more of those categories suffer the brunt of the maltreatment.[5] Although examples sadly abound, the *amici* wish to focus on two exemplars with which they have special familiarity and which provide an appropriate context for analyzing policies that favor minority religions over others in the context of immigration.

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[3] In 1950, Congress prohibited removal of aliens who would be subject to physical persecution, but did not grant these individuals any legal status, nor did it create a system for people outside of the United States to apply for similar protections. *See* Subversive Activities Control Act of 1950, § 23, 64 Stat. 1010 (1950). Similarly, the Immigration and Nationality Act of 1952, gave the Attorney General the authority to withhold deportation of people to places where they may be physically persecuted. Again, this provision did not confer a legal status on the beneficiary nor was it applicable to people outside of the United States. *See* Pub. L. No. 82–414, § 243(h), 66 Stat. 214 (1952).

[4] Admittedly, the commitment to the "historic policy of ... respond[ing] to the urgent needs of persons subject to persecution in their homelands," Pub. L. No. 96–212, § 101(a), 94 Stat. 102 (1980), has sometimes been honored more in the breach than in practice.

1. The Treatment of Jews and Other Religious Minorities in the USSR

The former Soviet Union was well known for being inhospitable to dissent in any form. Adherence to a faith or philosophy other than Communism was considered dissent. The Soviet government thus destroyed entire religious communities. *See* Lynn D. Wardle, *The "Withering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926*, 2 Geo. J.L. & Pub. Pol'y 469, 480 (2004). At best, the Soviets practied internal deportation to remove religious adherents from their usual places of abode. At worst, religious adherents were executed.

Although the USSR was formally atheist, traditional Russian Orthodoxy was tolerated and sometimes coopted, particularly after the beginning of

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[5] Occasionally, a minority group will seize or possess enough power and persecute the majority. Because such circumstances are the exception rather than the rule, it is appropriate for U.S. policy and law to address them on a case-by-case basis.

World War II.[6] *See* John Moroz Smith, *The Icon and the Tracts: A Restrained Renaissance of Religious Liberty in Ukraine*, 2001 B.Y.U. L. Rev. 815, 820 (2001). On the other hand, minority religions, including Ukrainian Catholic and Ukrainian Orthodox churches, were suppressed, their property confiscated, and their adherents jailed. *See* Alex Inkeles, *Social Change In Soviet Russia* 254–55 (1968) (noting that "[a]ll of the minority religions [had], of course, been the object of repressive measures.").

Most notorious, perhaps, was the Soviet treatment of Jewish citizens. Some forms of discrimination were legally codified, while others were practiced as a result of secret Communist Party edicts. For example, ritual circumcision—a rite practiced by the Jewish community for millennia—was forbidden. Saturday school attendance was compulsory despite the conflict with the Jewish Sabbath. *See* Joseph Kulesa, *Paradise Lost: The Impact of the Changed Country Conditions in Post-Soviet Ukraine on Pending Religious Asylum Proceedings in the United States*, 6 Rutgers J. L. & Religion 6, n.74 (2004). Religious rites were virtually impossible to perform. On Yom Kippur—the holiest day in the Jewish calendar—the militia and plain–clothed KGB officers often erected roadblocks and detained people on the way to their synagogues. *See* Documents on

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[6] Indeed, many of the Soviet–era officials in the recognized Russian Orthodox Church have long been thought to be officers in the KGB. *See* Keith Armes, *Chekists in Cassocks: The Orthodox Church and the KGB*, 1 Demckratizatsiya 72 (1991), *available at* https://www2.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/01-04_armes.pdf.

Ukrainian–Jewish Identity and Emigration, 1944–1990, 200–01 (Vladimir Khanin, ed. 2002). Because of the official hostility to Judaism, many cities with sizable Jewish populations went years (or decades) without any ordained rabbis to minister to the Jewish community. *See* Amy Louise Kazmin, *Soviet Jews Study Their Lost Religion*, L.A. Times at A14 (Sept. 14, 1989). Institutions of higher learning had "unspoken" and "unofficial" but very real quotas for the admission of Jewish students, and certain universities and jobs were all but closed to Soviet Jews. *See* Richard S. Levy, Antisemitism: A Historical Encyclopedia of Prejudice and Persecution (vol. 1) 725 (2005). With World War II having a central role in the historiography of the USSR, the Soviet government promoted the myth that Jews did not serve in combat units and instead "lay low on the home front." *See* Zvi Gitelman, *Why They Fought: What Soviet Jewish Soldiers Saw and How It is Remembered* at 4, 20–21 (Nat'l Council for Eurasian and E. European Research, 2011), *available at* https://www.ucis.pitt.edu/nceeer/2011_824-03g_Gitelman.pdf.

Although the Soviet government at various times undertook campaigns against other minorities (*e.g.*, Chechens and Crimean Tatars), the division of the country into ethnically–based constituent Republics and autonomous regions allowed most ethnic minorities to constitute a majority in a part of the country where such overt discrimination against them became harder, if not altogether impossible. Jews were among the few minorities lacking an enclave within the USSR where they constituted a majority (others included Evangelical Christians, Ukrainian Catholics, and Ukrainian Orthodox).

Discrimination against them was therefore nationwide.[7] *See* 135 Cong. Rec. H3734 (July 13, 1989) (statement of Rep. Lipinski).[8]

2. The Treatment of Religious Minorities in Some Middle Eastern Countries

Because portions of the challenged Executive Order relate exclusively to Muslim–majority countries in the Middle East and North Africa, the conditions under which that region's minority faiths labor should be discussed. The Department of State and various NGOs agree that minority faiths are heavily discriminated against in that part of the world.

For example, according to a Department of State report on Syria, "[t]he Alawite–led government and its Shia militia allies killed, arrested, and physically abused Sunnis and members of targeted religious minority groups, and intentionally destroyed their property." U.S. Dep't of State, *Syria 2015 International Religious Freedom Report* at 5 (2016). Although the government of Syria continues to tolerate Christians, non–state actors such as ISIS[9] have "tortured and beat [Christians in a village near Aleppo] before crucifying them." *See id.* at 10. The minority Druze community has suffered a similar fate. *Id.* The victims have been targeted solely for their faith. *Id.* The small Jewish communities of Aleppo and Damascus have likely ceased to exist. *Id.* at 2–3. ISIS has also committed atrocities against Shiites, allegedly in retaliation for "the government's 'massacres of Sunnis.'" *Id.* at 9. However, unlike the Christian, Jewish, or Druze population of Syria, the Shia who are threatened by ISIS are at least somewhat able "to relocate to traditional [government] strongholds." *Id.* at 14. It is only the powerless minority religions who can find no refuge anywhere in Syria.

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[7] Although in 1928, the Soviet government established the Jewish Autonomous District around the Far East city of Birobidzhan, at no point did the Jewish population of the "Jewish Autonomous District" exceed 17% of the region's total population. This is because the district was intentionally established in a region that was geographically remote from any Jewish population centers.

[8] As a result of continued discrimination of minority faiths in present day Russia, *see, e.g.*, Amanda Erickson, *Russia just effectively banned Jehovah's Witnesses from the country*, WashingtonPost.com, 2017 WLNR 12246791 (Apr. 20, 2017); Jewish Telegraphic Agency, *Russian Prosecutors Raid Second Jewish Educational Institution* (June 15, 2015), *available at* http://www.jta.org/2015/06/15/news-opinion/world/russian-prosecutors-raid-second-jewish-educational-institution-2, the U.S. government has continued to extend preferential treatment to adherents of certain minority faiths in Russia. *See* Part II.A, *post*.

The plight of minority religions in Yemen is also deplorable. For example, the small Jewish community has endured "continued harassment … by the local population, including [] throwing stones and coercion to convert to Islam. Jewish students reportedly continued to stay away from public schools due to social pressures and security concerns." U.S. Dep't of State, *Yemen 2015 International Religious Freedom Report* at 6 (2016). The "concerns over security and the children's future" has prompted "members of the Jewish community [to] depart[] Yemen" and become displaced persons. *Id.* Christians in Yemen have seen their spiritual leaders flee and their churches burned. *Id.* Members of the Bahai faith have been arrested, tortured, and held without charges for indefinite periods. *Id.* at 1, 3–4. All of these groups, together, comprise less than 1% of the Yemeni population, and have nowhere within Yemen to seek protection. *Id.* at 2.

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[9] Islamic State in Iraq and Syria (ISIS) is also known as Islamic State in Iraq and Levant (ISIL) or by its name in Arabic, al–Dawla al–Islamiya fi al–Iraq wa al–Sham, abbreviated as Daesh. It is the latter name that the State Department uses in its reports.

Iraq is a home to a number of minority religious communities, and is also a place where some of the worst atrocities against the adherents to minority faiths is taking place. As the United Nations Office of High Commissioner for Human Rights reports, ISIS fighters have conducted mass executions of Yazidi men and teenage boys, while forcing women and children to watch. U.N. Office of High Comm'r for Human Rights, *"They Came to Destroy": ISIS Crimes against the Yazidis* at 8–9, A/HRC/32/CRP.2 (2016). The survivors were forcibly converted to Islam. *Id.* at 9. Women and girls between the ages of nine and sixty have been sold into sexual slavery, *id.* at 9–16, while women over the age sixty have been summarily executed. *Id.* at 11. Young children have been routinely beaten, molested, and, in case of males, conscripted to fight as child soldiers. *Id.* at 16–19. ISIS has attempted to destroy the entire Yazidi culture through the destruction of temples and shrines, *id.* at 19, and forcibly transferring the Yazidi population out of their ancestral homes. *Id.* These horrors have been visited on the Yazidi community solely because they are Yazidi. The Sunni Arabs of the region have not been subjected to the same treatment at the hands of ISIS. *See, e.g.*, *id.* at 30 ("No other religious group present in ISIS-controlled areas of Syria and Iraq has been subjected to the destruction that the Yazidis have suffered. Arab villagers who did not flee Sinjar in advance of the ISIS attack were allowed to remain in their homes, and were not captured, killed, or enslaved.").

Nor are the Yazidis the only minority faith that is facing virtual annihilation in Iraq. For example, Iraqi Mandaeans[10] who until recently numbered between 60,000 and 70,000 are now "facing extinction" as a result of religion–based attacks by ISIS. *See* Angus Crawford, *Iraq's Mandaeans "Face Extinction,"* BBC (March 4, 2007), available at http://news.bbc.co.uk/1/hi/world/middle_east/6412453.stm. In Iraqi regions overrun by ISIS, Christians were given "a choice: They could either convert or pay the *jizya*, the head tax levied against all 'People of the Book': Christians, Zoroastrians and Jews. If they refused, they would be killed, raped or enslaved, their wealth taken as spoils of war." Eliza Griswold, *Is This the End of Christianity in the Middle East?*, N.Y. Times Magazine at 31 (July 22, 2015).

Unlike Syria, Yemen and Iraq, Iran is not in the midst of a civil war. Yet the mistreatment of religious minorities in Iran is both common and well documented. The Iranian government has repeatedly confiscated non–Islamic religious texts, including Bibles. U.S. Dep't of State, *Iran 2015 International*

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[10] Mandaeans are adherents of Mandaeism, a Gnostic religion that developed in the first three centuries of the Common Era. *See generally* Kurt Rudolph, Madaeism (Brill, 1978).

Religious Freedom Report at 13–15 (2016). In 2015, "Christians, particularly evangelicals and converts, continued to experience disproportionate levels of arrests and high levels of harassment and surveillance," and are required to register with the police and are prohibited from holding services on any day other than Sunday. *Id.* at 13. The Bahai community is particularly hard–hit. They "are banned from government employment and from all leadership positions in the military. They are not allowed to participate in the governmental social pension system. Bahais cannot receive compensation for injury or crimes committed against them and cannot inherit property." *Id.* at 6. The Bahais are often prosecuted on trumped–up charges, they cannot assemble, be employed in a number of professions, or bury their dead in accordance with their customs. *Id.* at 9–10, 15, 18–19. Numbering less than one–half of one percent of the population, the Bahai have no ability to protect themselves in Iran. Indeed, "[a]ccording to law, Bahai blood may be spilled with impunity, and Bahai families are not entitled to restitution," whereas "[t]he law authorizes collection of 'blood money' as restitution to families for the death of Muslims." *Id.* at 2, 7.

Other Middle Eastern states, especially those where ISIS is active, also present peculiar and heightened dangers to individuals professing a minority faith (*i.e.*, Christianity, Bahai, Judaism, disfavored sects of Islam, and others). Adherents to minority religions within the region face a significantly higher risk of violence and death from both government and non–government actors than do followers of the majority religion. *See* Griswold, *End of Christianity*, *supra*.

B. Proving Individualized Persecution on the Basis of Religion is Often Quite Hard, Even for Members of Minority Religions

While discrimination against members of minority faiths *writ large* is a common occurrence in certain regions, it does not mean that every adherent of that faith is personally persecuted.

Some Soviet Jews succeeded despite the obstacles the government placed in their way. There were Jewish doctors, lawyers, musicians, chess champions, etc. *See* 118 Cong. Rec. 12,941 (Apr. 17, 1972) (statement of Rep. Halpern).

In Saddam Hussein's Iraq, Deputy Prime Minister Tariq Aziz was a Chaldean Christian, notwithstanding the regime's heavy anti-Christian discrimination—including the ethnic cleansing of several towns during the Anfal campaign of 1988. Iran reserves at least three parliamentary seats for Christians, notwithstanding the Iranian government's harassment of Christian churches and the limitations it places their ability to function. *Iran 2015 Report*, *supra* at 5.

In Syria, though the Assad regime has abused and discriminated against Sunni Muslims, many Sunnis support the regime in large part because of the success they have achieved as individuals. *See* Michael Pizzi & Nuha Shabaan, *Sunnis Fill Rebel Ranks, but Also Prop Up Assad Regime*, USAToday.com (Aug. 1, 2013).[11]

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[11] This sort of alliance between individual Sunnis and an anti–Sunni regime reiterates one of the differences between a targeted minority faith and a targeted majority. A minority

Though evidence of life under ISIS remains sketchy, it is likely that at least some non–Sunnis escape individualized discrimination. After all, even Nazi Germany could point to a Field Marshal with a Jewish parent—Erhard Milch.[12] *See* Obituaries, *Erhard Milch, 79, Luftwaffe Chief*, N.Y. Times at 32 (Jan. 29, 1972).

Discrimination against a group thus need not translate into discrimination against every member of that group. Asylum seekers hoping to avail themselves of American protection, however, must show that they have personally "suffered past persecution or ... ha[ve] a well–founded fear of future persecution ... on account of race, religion, nationality, membership in a particular social group, or political opinion" as an individual. 8 C.F.R. § 208.13(b); *Li Sheng Wu v. Holder*, 737 F.3d 829, 832 (1st Cir.2013); *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007); *Harchenko v. I.N.S.*, 379 F.3d 405, 410 (6th Cir. 2004). The burden of proving this fear rests with the applicant. 8 C.F.R. § 208.13(a); *I.N.S. v. Cardoza–Fonseca*, 480 U.S. 421, 456 (1987).

In many circumstances then, applicants are unable to show individualized "past persecution." *Cf.*

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regime seeking to govern a country where another group constitutes a significant numeric majority must find many allies among its majority citizens. Such alliances are far less imperative for a majority group dominating a minority.

[12] The legal machinations that permitted Milch to escape the fate of other Jews and to climb the highest rungs of German military command caused Hermann Goering to famously quip "I decide who is a Jew." Reuters, *Historian: Jewish Officers Fought For Nazis*, Chicago Trib. at 14 (Apr. 3, 1997).

Nagoulko v. I.N.S., 333 F.3d 1012, 1017 (9th Cir. 2003) (finding that witnessing the beating of co–workers is insufficient to establish past persecution); *Zhou Ji Ni v. Holder*, 635 F.3d 1014, 1018 (7th Cir. 2011) ("[A]n asylum applicant cannot rely on "derivative persecution" to establish that he was subjected to persecution in the past.").

The "well–founded fear of future persecution" would be equally difficult to prove if each applicant were required to show that he *personally* received threats of harm "because, 'an authentic refugee is often limited in his ability to offer direct corroboration of specific incidents of persecution.'" *Shah v. I.N.S.*, 220 F.3d 1062, 1070 (9th Cir. 2000) (quoting *Mejia–Paiz v. I.N.S.*, 111 F.3d 720, 722 n. 1 (9th Cir.1997)); *see also Ahmadshah v. Ashcroft*, 396 F.3d 917, 920–21 (8th Cir. 2005). For this reason, regulations implementing the Congressionally–created system for admitting refugees permits an applicant to carry the burden by showing that he or she belongs to a group of persons against whom "there is a pattern or practice ... of persecution ... on account of race, religion, nationality, membership in a particular social group, or political opinion" in the applicant's home country. 8 C.F.R. 208.13(b)(2)(iii). In other words, when it comes to discrimination on the basis of religion, showing that the applicant is an adherent of a persecuted faith may suffice to qualify for asylum.

II. Preferences For Persecuted Religious Minorities Have Long Been Part of the U.S. Law

Congress, the Executive Branch, and the courts have long realized that in many instances it will be nearly impossible for an asylum seeker to prove individualized persecution. As a result, Congress has, on numerous occasions, exhibited particularized concern for individuals in certain social groups by providing them with an eased path towards asylum. The earliest example of such solicitude is the Cuban Adjustment Act of 1966, passed in the wake of Communist takeover of Cuba. Pub. L. No. 89–732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2017)). The revolution caused a number of Cubans to go into exile. "In order to enhance the resettlement of refugees, Congress passed the Cuban Adjustment Act of 1966, providing for employment and education, opportunities not generally accorded other refugee groups." Nicholas Merlin, *Immigration Policy and the Expedited Removal Rule: "Equality for Some, Justice for None"*, 16 St. Thomas L. Rev. 163, 165 (2003). Recognizing the brutality that Communist dictators often visited upon opponents (or even suspected opponents) of the regime, Congress resolved to provide preferential treatment to Cuban exiles, without extending the same to asylum seekers from other parts of the world. *See* Note, *The Cuban Adjustment Act of 1966: ¿Mirando Por Los Ojos De Don Quijote O Sancho Panza?*, 114 Harv. L. Rev. 902, 910 (2001). The courts have uniformly rejected the numerous challenges to that Act. *See* Merlin, *supra*, at 165; 177–80.

More recently, Congress has created special privileges for additional groups. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101–649, § 303 (granting Temporary Protected Status to citizens of El Salvador). Of particular relevance to the present case is Congress' action in 1989, when it enacted what became known as the "Lautenberg Amendment."

Pub. L. No. 101–167, § 599D, 103 Stat. 1195, 1265 (1989).

A. The Lautenberg Amendment is a Strong Precedent for Extending Preferential Treatment to Minority Religions

In the late 1980s, with the loosening of emigration rules in the Soviet Union, the number of Soviet citizens (especially Jewish ones) seeking asylum in the United States rose quickly. H. Rep. No. 101–122, at 3–4 (1989). Unsurprisingly, the number of cases lacking material proof of individualized past or future persecution witnessed a corresponding increase. Victor Rosenberg, *Refugee Status for Soviet Jewish Immigrants to the United States*, 19 Touro L. Rev. 419, 426–28 (2003). Some American officials argued that a large portion of the Soviet Jewish émigrés were not “‘refugees,’ but ‘[ ] rather, prospective immigrants, and as such, they should enter this country according to the requirements of our own immigration laws.’” *Id.* at 427 (quoting written testimony of Immigration and Nationalization Service Commissioner Alan Nelson).

As a result, the percentage of Soviet Jewish applicants denied refugee status grew from barely 1% to a high of 37%. H. Rep. No. 101–122, at 5. At the same time, the discriminatory policies of the Soviet government, *see* Part I.A.1, *ante*, continued. H. Rep. No. 101–122, at 3.

Congress responded to this dilemma by passing legislation giving preferential treatment to Soviet citizens belonging to several minority religions. Pub. L. No. 101–167, § 599D, 103 Stat. 1265. The Lautenberg Amendment (named after its chief sponsor, Sen. Frank Lautenberg) lowered the burden of proof required to obtain asylum for Soviet Jews, Evangelical Christians, Ukrainian Catholics, and Ukrainian Orthodox. *Id.* Followers of these minority religions no longer had to prove a "well–founded fear of persecution," but merely to "assert[ ] such a fear and assert[] a credible basis for concern about the possibility of such persecution." *Id.* § 599D(b)(2)(A–B). Other Soviet citizens did not receive the same preferential status.[13]

The legislative history of this provision explains why Congress felt it necessary to treat adherents of some religions differently from others. For instance, presaging the passage of the Amendment, a majority of U.S. Senators urged the Administration to classify "all Soviet Jews as refugees," because of "the history of anti–Semitism in Russia and the Soviet Union." Rosenberg, *supra* at 432. The House Judiciary Committee report accompanying one of the bills that eventually became the Lautenberg Amendment noted that although "[t]he Soviet state has always maintained a hostile stance toward religion," including the Russian Orthodoxy, "Soviet Jews and Evangelicals" were subject to particular hardships. H. Rep. 101–122, at 5. At the same time, the report recognized that the "United States does not have the capacity to accept all Soviet citizens who wish to emigrate…." *Id.* Given the limited capacity, the Committee believed that groups subject to particular hardships should be prioritized. *Id.* Recognizing the tenuous status of Soviet reforms and the precarious position of the minority religions, Congress ultimately passed the Act, though it acknowledged that there had been "tremendous improvement in terms of religious practices in the Jewish community as well as Jewish emigration patterns; [and] in terms of Baptists and Evangelicals being allowed to establish their own seminary and publish their own literature," as well other religious practices. *See* 135 Cong. Rec. H3735 (July 13, 1989)(statement of Rep. Henry). In doing so, Congress explicitly rejected the argument raised by the opponents of the bill that the approach violates the "fundamental principle of treating all immigrants equally." *Id.* (statement of Rep. Smith).

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[13] The Lautenberg Amendment also offered the same status to certain categories of the citizens Vietnam, Laos, and Cambodia. Pub. L. No. 101–167, § 599D(b)(2)(C).

In keeping with the original purpose of aiding particularly vulnerable religious minorities, the Lautenberg Amendment's coverage has expanded since it was passed. In 2004, Congress extended it to include religious minorities in Iran. Pub. L. No. 108–199, § 213(1)(C), 118 Stat. 3, 253 (2004).

B. The Executive Branch is Statutorily Required to and has been Prioritizing Certain Groups of Potential Refugees for Decades

Even though, unlike the Lautenberg Amendment, Section 5(c) of the EO–1 was not enacted by Congress, it stands on equally strong footing. As an initial matter, INA § 207(a)(3) directs the President to allocate the admission slots "among refugees of special humanitarian concern to the United States." 8 U.S.C. § 1157(a)(3). This direction necessarily means that while there may be individuals who are eligible for refugee status, they may not receive a visa because they are not of "*special* humanitarian concern."

The Department of Homeland Security has followed that Congressional direction by establishing three separate priority tiers for the admission of refugees. The first order priority is reserved for individualized cases and is available for "persons ... with compelling protection needs, for whom resettlement appears to be the appropriate durable solution." U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017*, at 7 (2016) ("FY 2017 Admissions"). The second order priority is given to a particular group of people based on "whether the group is of special humanitarian concern to the United States and whether individual members of the group will likely be able to qualify for admission as refugees under U.S. law." *Id.* at 8. As required by INA § 207(d) and 8 U.S.C. § 1157(d), these designations are updated on a yearly basis. *Id.* at 1. Furthermore, new "[g]roups may be designated as Priority 2 during the course of the year as circumstances dictate, and the need for resettlement arises." *Id.* at 8. Currently, this category includes, *inter alia*, beneficiaries of the Lautenberg Amendment with close family in the United States, members of persecuted religious minorities from Cuba and Iran, certain categories of ethnic minorities from Burma, Bhutanese living in Nepal, and Congolese living in Rwanda. *Id.* at 9–11.[14] The designation of other religious minorities for priority treatment is consistent with the requirements of INA § 207 and historical practice of the Executive Branch.

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[14] The third priority tier is reserved for "to members of designated nationalities who have immediate family members in the United States who initially entered as refugees or were granted asylum." FY 2017 Admissions, *supra*, at 12. Currently, 22 nationalities are eligible for this tier. *Id.* at 14.

III. Preferencing Adherents of Particular Religions in the Context of the Refugee Program Does Not Constitute Invidious Discrimination Against Other Religions

The Respondents have argued that giving preference in refugee admissions to the adherents of minority religions impermissibly "tilt[s] the scales in favor of Christian refugees at the expense of Muslims." Motion for TRO, at 12, *Washington v. Trump*, No. 17–141 (W.D. Wash. Jan. 30, 2017), ECF, 3. According to the Respondents, this violates the Establishment Clause because "one religious denomination cannot be officially preferred over another." *Id.* at 11 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Such an approach is contrary to history and inconsistent with the principles underlying longstanding American refugee policy.

The United States refugee policy is based on several principles. First, individuals are eligible for asylum only if they are persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). Though other individuals may be in dire straits because of war or natural disasters in their home country, as a matter of law they do not qualify for the refugee status.[15]

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[15] Individuals who experience threats to personal safety as a result of an armed conflict or natural disaster may be eligible to obtain Temporary Protected Person status ("TPS"). *See* 8 U.S.C. § 244. Currently, 10 countries are designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. *See* https://www.uscis.gov/humanitarian/temporary-protected-status.

The second principle recognizes that the United States cannot admit all those who would otherwise qualify for asylum. Congress has thus required the President to set an annual limit on the number of refugee admissions. 8 U.S.C. § 1157(a)(2). That limit is consistently set far below the number of people who could potentially qualify for refugee status. For example, the current conflict in Syria alone has produced over 6 million displaced persons.[16] Undoubtedly, many of these individuals fled Syria because of the dangers of war, rather than persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." Nonetheless, even if only 5% of the total number fled because of persecution, that number of individuals would be nearly three times the entire Fiscal Year 2017 refugee limit.[17] *See* FY 2017 Admission, *supra* at 5.

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[16] According to the U.N. High Commissioner for Refugees, "there are at least 10 million people worldwide who are not recognized as nationals of any state and are therefore stateless." FY 2017 Admissions, *supra*, at 2. Because of their status, these individuals are deprived of basic civil rights including ability to "access police protection and systems of justice." *Id.* Many of these individuals could qualify for asylum in the US, *id.*; however, the United States cannot possibly admit all of these individuals.

[17] The FY 2017 limit itself is the highest annual limit in over 20 years, *see* Department of State, Office of Admissions—Refugee Processing Center, Refugee Admissions by Region Fiscal Year 1975 through 30–Jun–2017, *available at* http://www.wrapsnet.org/s/Graph–Refugee–Admissions–since–19757317.xls.

The third principle follows directly from the second. Recognizing that the United States cannot absorb all of the world's refugees, Congress has directed the President to allocate the admission slots "among refugees of *special* humanitarian concern to the United States." 8 U.S.C. § 1157(a)(3)(emphasis added). Something is special only when it is "[d]istinguished by some unusual quality." Webster's Third New International Dictionary of the English Language 2186 (3d ed.1961) (1986 rptg.); *see also 1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C. 1990) ("An item is special only in the sense that it is not ordinary..."); *United States v. Vasquez*, 279 F.3d 77, 81 (1st Cir. 2002)(recognizing that "special" is a synonym of "unusual or atypical."). All persecuted individuals in the world certainly deserve sympathy and, where possible, help. But not every such individual is of "special" or "unusual" humanitarian concern to the United States. A construction that established a single level of concern applicable to all persecuted persons would impermissibly "rob the term '[special'] of its independent and ordinary significance," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338–39 (1979). Because courts "are obliged to give effect, if possible, to every word Congress used," *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) (quoting *id.* at 339), such a construction would be erroneous.

These three principles, which together form the basis of U.S. refugee policy, emphasize the need to choose whom to admit. Because choosing people who are particularly vulnerable to persecution because of their status as a religious minority is consistent with America's core principles and history, it has been

American policy for decades. President Trump's Executive Orders simply continue and reiterate that policy.

Respondent's complaint that Section 5(b), which operates worldwide, *see* EO–2, § 1(b)(iv), favors Christians "at the expense of Muslims" makes sense only if the majority of the world's refugees arrive fleeing Muslim-majority countries.[18] As a matter of simple math, the principle of favoring targeted minority faiths can work against Muslims only if Muslims are responsible for the majority of the discriminatory targeting.

The logic driving Respondents' argument is thus disturbing on two points. First, Respondents simply presume the disproportionate culpability of Muslims in creating the world's refugees. Second, Respondents argue that the Establishment Clause prohibits American immigration policy from preferencing people facing discrimination *if and only if* the discrimination is rooted in religion. We share neither Respondents' dismal opinion of Muslims nor their inverted reading of the First Amendment. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) ("Free Exercise Clause did guard against the government's imposition of 'special disabilities on the basis of religious views or religious status.'" (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872,877 (1990)).

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[18] While Muslims from the Middle East may be disadvantaged, Muslims fleeing most countries in Europe, East Asia, Sub–Saharan Africa, or the Americas would be preferenced. *See* EO–2, § 1(b)(iv). Furthermore, § 5(b) does not preclude the recognition that there are different strains within Islam and that, for example, Iranian Sunni Muslims or Saudi Arabian Shia Muslims, each being a minority within their respective countries, may benefit from preferences for minority religions. *Id.* Furthermore, even if EO–1's § 5(b) were limited to the Middle East, and even if it treated Islam as a uniform whole, the Respondents are incorrect in their assertion that the minority preference provision benefits only Christians. The Bahai, Yazidis, Jews, and other minority faiths would reap the same benefits.

Furthermore, Respondents have not differentiated between the preferences at play here and those in the Lautenberg Amendment, special policies that give preferences to Cuban refugees, or any other group that currently receives preferences in refugee processing. Preferences do not automatically incorporate invidious discrimination. Rather, they indicate an American government offering refuge to the people it has determined need it most (without disregarding the very real suffering of others). Because adherents of minority faiths are least likely (at least among those claiming persecution on the basis of religion) to be in a position to protect themselves, prioritizing their applications over others is not only entirely consistent with the Constitution, the statutory language, and historical practice, it is indeed the *only* way to allocate the available refugee slots on the basis of relative need. The only alternative would be some form of lottery among those who qualify for asylum, thus giving everyone an equal chance at a refugee visa. Such a luck-based approach would ignore the Congressional edict that "[a]dmissions [of refugees] shall be allocated among refugees of special humanitarian concern to the

United States." 8 U.S.C. § 1157(a)(3).[19] In addition, Congress explicitly rejected such an approach during the debates leading to the Lautenberg Amendment. *See* Part II.A, *ante*.

Finally, while it is true that not *every* adherent of a minority faith *always* has higher risk of persecution *than every* follower of a majority religion, and therefore preferences to the former group may well be over–inclusive, Congress is not required to create a perfect system for prioritizing immigration applications. *See United States v. Flores–Villar*, 536 F.3d 990, 996 (9th Cir. 2008), aff'd, 564 U.S. 210 (2011) and abrogated on other grounds by *Sessions v. Morales–Santana*, 137 S. Ct. 1678 (2017) (holding that "in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship" its classifications survive judicial review even when "the fit is not perfect.").

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[19] It is ironic that in the days immediately following President Trump's issuance of EO–1, numerous press reports drew upon the experience of the *MS St. Louis.* The 900 passengers on that ship were Jews fleeing Nazi Germany in 1939—shortly before the outbreak of the second World War. Because of immigration quotas then in place, the U.S. rejected their petitions for admission, and returned them all to Europe. Nearly all contemporary commentators view FDR's decision in this matter as a tragic error—almost certainly employing hindsight bias about the genocide awaiting their return. Yet under the standard that Respondents urge, the passengers of the St. Louis would have qualified merely as German citizens complaining about the regime then running their country—not Jews fleeing an imminent campaign of extermination. https://www.theatlantic.com/politics/archive/2017/01/jewish-refugees-in-the-us/514742/.
https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/a-ship-full-of-refugees-fleeing-the-nazis-once-begged-the-u-s-for-entry-they-were-turned-back/?utm_term=.5dd72530bfa6 .

It is well settled that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)). Courts "uphold[] immigration statutes so long as they are 'conceivably related to the achievement of a federal interest.'" *Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (quoting *Almario v. Attorney General*, 872 F.2d 147, 152 (6th Cir.1989)). Thus, although in a given year, preferencing adherents of minority religions may come "at the expense of Muslims," "[t]hose are ... the consequences of the congressional decision not to accord preferential status to this particular class of aliens," a "decision [that] remains ... 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'" *Fiallo*, 430 U.S. at 788–89 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

Congress gave the President the authority to designate particular groups as being of "special humanitarian concern" to the United States. 8 U.S.C. § 1157(a)(3). Bestowing this status on adherents of minority faiths is both reasonable and consistent with long–standing practices. The Court should not stray from precedent. The Court should allow the political branches to determine which groups are most in need of American protection. Indeed, the Appellants can cite no case from any court holding that religion–based preferences in any immigration context violate the Establishment Clause.

IV. Holding that Religious Preferences in the Context of the Refugee Program Violate the Establishment Clause Will Result in Further Endangering the Most Vulnerable Groups

A decision holding that the Constitution prohibits preferencing adherents of minority religions in the asylum context would be worse than merely contrary to this Court's own precedents and decades of Congressional and Executive Branch practice. It would further endanger the very individuals most in need of American protection.

It does not diminish the plight of millions of displaced persons throughout the world to acknowledge that the adherents of minority religious faiths often have nowhere to go in their home countries. In the Middle East, most Sunni and Shia Muslims can find at least some semblance of protection in certain parts of their home countries. Adherents of minority faiths often cannot.[20] Whereas Syria, Iraq, and numerous other countries in the Middle East and North Africa have both majority–Sunni and majority–Shia areas and cities, the region's many other faiths have no such sanctuaries. Jews have been all–but–eliminated from every country in the region, and consolidated into Israel. Christian majority areas exist only in Lebanon, and to a far smaller extent, Egypt. The Bahai, Yazidis, and numerous smaller religions are majorities nowhere. *See* Part I.A.2, *ante*.

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[20] In some cases, if internal relocation is feasible, the applicant may be denied asylum. *See* 8 C.F.R. § 208.13(b)(1)(i)(b).

The sad but fundamental truth is that the United States cannot accept every refugee seeking admission and cannot save every person in need of saving. Hard and heart–wrenching choices need to be made. Everyone appears to be in agreement that, given a ceiling on the number of refugee admissions, the process is in essence a "zero–sum game," in which the grant of asylum to one person means someone else eligible for the same status will not get it. By calling into question preferential treatment for the adherents of minority faiths, all the Court will do is substitute its own choices for those of Congress and the Executive Branch. Withdrawing these preferences will not allow more people to enter the United States. It will simply redistribute the probability of admission from some people and groups to others.

Worse still, though the *availability* of asylum is a "zero–sum game," the *effect* of it is not. For instance: granting a refugee visa to someone who is not persecuted denies that slot to someone who *is* persecuted. The number of refugees admitted does not change, but admitting an unqualified person condemns the qualified one whose slot was given away to continued privations and possibly even death at the hands of his oppressors. This outcome would undermine "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands," Pub. L. No. 96–102, § 101(a). Far from creating an ideal world where neither of these two hypothetical individuals is oppressed (one because he was never persecuted and the other because he received asylum), it would create a world where the persecuted individuals remain persecuted. The Constitution cannot possibly compel such an outcome.

Such a hypothetical misallocation of an asylum slot to a fully unqualified applicant is, concededly, a straw man. *Amici* do not dispute that many members of majority faiths in refugee camps qualify for asylum. Nonetheless, some qualified people face graver danger than others merely because of who they are or how they worship. The United States should remain free to recognize the different levels of danger, and prioritize the extension of its protection to those it has determined are most vulnerable. Denying the Government the opportunity to preferentially protect those who are the least likely to obtain protection in their home countries solely because of how they commune with their Creator would greatly increase the risk of harm to these individuals. The Court should not consign them to this unenviable fate.

CONCLUSION

Individuals forced to flee their countries and seek asylum in an unknown land are some of the most vulnerable people in the world. Regrettably, the United States cannot accept every refugee in the world (nor can any other country). Because there are significantly more refugees in the world than can be admitted to the United States, the U.S. Government must decide which qualified individuals to admit. Some of the people seeking refuge in this country are particularly susceptible to, and defenseless in the face of, persecution and discrimination in their countries of origin. Members of religious minorities fall into that group far too often.

In determining the validity of the President's Executive Orders, the Court should be careful to avoid making it more difficult for the United States to protect religious minorities, lest it make the world even more inhospitable to those who are already most vulnerable.

Respectfully submitted,

August 22, 2017

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Nos. 16-1436 & 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF OF HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC, ALONG WITH UNIVERSITY PROFESSORS AND HIGHER EDUCATION ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET. AL.*

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Amici curiae, the Howard University School of Law Civil Rights Clinic,[1] along with University Professors and Higher Education Associations (listed in Appendix B), submit this proposed brief as *amici curiae* in support of the Respondents in this case. *Amici* all share a common interest in ensuring that the President's March 6 Executive Order does not have an adverse impact on the diversity that strengthens the learning environment at institutions of higher education. We respectfully submit this brief in support of Respondents in the belief that any analysis of the constitutionality of the discriminatory impact of the March 6 Executive Order must take into account the impact upon Muslim students and scholars and the American institutions of higher education that serve them. The CRC urges the Court to award the relief requested by Respondents.[2]

STATEMENT OF INTEREST

Amici curiae are the Howard University School of Law Civil Rights Clinic, along with University Professors and Higher Education Associations. As one of the oldest among historically black colleges and universities, Howard University School of Law has long placed the defense of human rights, equality, and dignity at the heart of its educational practice. While Howard is often referred to as one of the nation's premier historically Black universities, the University's mission has always been to provide a premier education to all regardless of race, nationality, ethnic origin or gender. Our history and experience in student diversity has also been driven by the clear-eyed acknowledgement that institutions of higher education only flourish when there is diversity of thought and ideas, which is facilitated through diverse scholars, faculty, staff and students.

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[1] Counsel obtained consent from the counsel of record for the respondents, International Refugee Assistance Project, *et. al.*, and the State of Hawaii, *et. al.*, to file this amicus brief. The views expressed by Howard University School of Law's Civil Rights Clinic are not necessarily those of Howard University or the School of Law.

[2] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. No person, other than *amici*, their members, or counsel, contributed money intended to fund preparing or submitting this brief.

Howard University School of Law Civil Rights Clinic along with interested university professors and higher education associations serve the unique role of providing this Court with the irreparable harm that the Executive Order will have, and is currently having, on our institutions. Specifically, the Executive Order impacts the strength and mission of institutions of higher education through its diminishment of the diversity and number of international students and scholars, and its legitimization of anti-Muslim suspicion and antagonism which has led to an increase in hate crimes at institutions of higher learning.

ARGUMENT

As the U.S. Supreme Court has held, a petitioner seeking a preliminary injunction must demonstrate that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). With this brief, *Amici* seek to provide important insight into how the March 6, 2017 Executive Order *Protecting the Nation From Foreign Terrorist Entry Into The United States* (hereinafter

"Executive Order") inflicts irreparable harm on the respondents, as well as American institutions of higher education, by restricting the free exchange of ideas and persons across borders and by legitimizing anti-Muslim suspicion and antagonism that has led to increased hate incidents and violence against Muslim-American and foreign Muslim faculty, staff and students on university and college campuses across the country. 82 Fed. Reg. 13,209. *Amici* also seek to demonstrate that the public interest lies firmly in support of injunctive relief, as America thrives when foreign scholars and students are able to freely exchange ideas across borders with U.S. students and scholars in American institutions of higher learning free from antagonism and violence.

I. THE EXECUTIVE ORDER INFLICTS IRREPARABLE HARM BY DIMINISHING THE STRENGTH AND MISSION OF AMERICAN INSTITUTIONS OF HIGHER EDUCATION WHICH THRIVE ON DIVERSITY AND THE FREE EXCHANGE OF IDEAS ACROSS BORDERS, INCLUDING FROM STUDENTS AND SCHOLARS FROM MUSLIM-MAJORITY COUNTRIES.

A. Diverse Students and Scholars from Muslim-majority Countries Contribute to the Free Exchange of Ideas that Strengthen Institutions of Higher Education in the United States.

American colleges and universities regularly rank among the highest in the world[3] and attract students and scholars from around the world because of their global reputation for excellence and inclusion. The free exchange of ideas, students and scholars across borders is a hallmark of American higher education and is essential for U.S. colleges and universities to maintain excellence in their teaching, scholarship and research and to provide a diverse and comprehensive academic experience for students. As the Supreme Court has recognized, U.S. colleges and universities have a compelling interest in obtaining the educational benefits that flow from a diverse student body. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2005) (holding that diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities and that the University of Michigan law school's race-conscious admissions program was sufficiently tailored to achieve that goal). These educational benefits include preparing students for an increasingly global marketplace through exposure to widely diverse people, cultures, ideas and viewpoints.[4]

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[3] *See World Univ. Rankings 2016-2017,* Times Higher Educ., https://www.timeshighereducation.com/world-university-rankings/2017/world-ranking# (last visited Sep 15, 2017).

The Executive Order temporarily banning travel into the United States from nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen undermines American universities' ability to attract and admit students and scholars from Muslim-majority nations and threatens their mission to prepare students for a global marketplace through exposure to scholars and students from every region of the planet, including from Muslim-majority nations. The Executive Order also threatens American colleges and universities' ability to conduct the best research, to produce the best scholarship, and to provide the best instruction by drawing from faculty and scholars from every region of the planet, including from Muslim-majority nations.

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[4] *Grutter v. Bollinger* at 330.

During the 2015-16 academic year, 108,227 international students and scholars from the Middle East and North African ("MENA") region studied, researched and taught at American universities and colleges.[5] This was slightly more than ten percent of the 1,043,839 international students and scholars at United States colleges and universities in the 2015-16 academic year.[6] MENA countries covered by the travel ban collectively sent 15,165 students and scholars to the U.S. – 12,269 Iranians, 1,514 Libyans, 783 Syrians, and 599 Yemenis. The other two listed countries, Somalia and Sudan, respectively sent 35 and 253 international participants to the United States out of the 7,690 visiting students and scholars from the East African region. All of the listed countries are Muslim-majority countries, so the travel ban has an outsized impact upon the presence of foreign Muslim students and scholars at American institutions of higher learning.[7]

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[5] Institute of International Education, *International Student Totals by Place of Origin 2014/15- 2015/16*, Open Doors Data (2016), http://iie.org/Research-and-Publications/Open-Doors/Data/International-Students/All-Places-of- Origin/2014-16.

[6] *Id.*

[7] According to CIA World Factbook, the Muslim populations are estimated as follows: Iran - 82 million (99.4%); Libya - 6.3 million (96.6%); Syria – 16.6 million (97%); and Yemen – 27 million (99.1%). The CIA World Factbook does not have the specific percentage of the population that practices Islam in Somali and Sudan, as it is the official religion of these nations. One can presumptively estimate Muslim populations to be around 10 million and 36 million respectively. CIA, *The World*

The impact of a decline in international students and scholars at American institutions of higher learning cannot be overstated. International students and scholars contribute to the international diversity and inclusion that defines the American educational experience. International students and scholars contribute to enhanced knowledge and global understanding through their teaching, scholarship, research, and contributions both inside and outside of the classroom. The presence of internationally diverse scholars and students on U.S. campuses facilitates important academic discussion, exploration, and understanding that can only occur through exposure to individuals with varying, cultural, religious and national backgrounds, and life experiences. Interactions with diverse faculty and scholars provides the opportunity for students and faculty alike to have their assumptions challenged and to expand their understanding through exposure to people with beliefs different from their own.

For example, Iranian-American Howard University School of Law Student, **SR** astutely notes her concern that:

> many Americans are not exposed to different cultures. The travel ban only further prevents Americans from being exposed to an educational experience that could diminish their fear and ignorance about an entire culture and religion.[8]

In an era where ideological and violent conflicts abound around the planet, greater exposure to people

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Factbook, CIA.gov, https://www.cia.gov/library/publications/the-world-factbook/ (last updated as of Mar. 28, 2017).

[8] Statement on file with Counsel

with beliefs different from one's own is needed to contribute to global cross-cultural understanding.

B. The Executive Order Has Adversely Impacted U.S. Colleges and Universities' Research, Capital, and Recruitment of Talented Students and Scholars.

Uncertainty regarding whether the 90-day ban will become permanent has caused students and scholars who otherwise might come to the United States to reconsider their options. In a recent survey conducted by the American Association of Collegiate Registrars and Admissions Officers ("AACRAO"), nearly forty percent of 250 surveyed colleges and universities reported a decrease in applications from international students, with the highest declines in applications from students from the Middle East.[9] Thirty-nine percent of surveyed institutions report a decline in undergraduate applications for Fall 2017 from the Middle East and thirty-one percent of institutions report a decline in graduate applications for Fall 2017 from the Middle East.[10]

International student recruitment professionals report a great deal of concern from students and families around the globe, with seventy-nine percent of the concerns raised from the Middle East.[11] For example, Muslim Howard University School of Law Student, **FS** astutely notes his concern that:

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[9] AACRAO, *Trending Topics Survey: International Applicants for Fall 2017- Institutional and Applicant Perceptions*, 1 (Mar. 13, 2017), http://www.aacrao.org/docs/default-source/TrendTopic/Immigration/intl-survey-results-released.pdf

[10] *Id.* at 2.

[11] *Id.*

> As a Muslim student at Howard Law School, I had suggested to the administration to allow me to recruit other students from Muslim-majority countries. Now, I cannot do that because, in all honesty, I do not want them to live in the U.S. with the fear of not being able to travel.[12]

Nearly half of graduate schools have reported a drop in international students and the President of the Council of Graduate Schools stated that graduate deans are describing a "chilling effect" on applications.[13]

The timing of the Executive Order had a damaging impact on both the size of the applicant pool and the yield of admitted applicants. The January 27 Executive Order was announced as deadlines approached for many graduate programs and the March 6 Executive Order was instituted just as applicants were making enrollment decisions prior to the April 15 deadline.[14] The AACRAO survey stated that among the most frequently raised concerns by international applicants and their families are: (1) a perception that the climate in the U.S. is now less welcoming to students from other countries, (2) concerns that benefits and restrictions around visas could change around the ability to travel, re-enter after travel, and obtain employment, and (3) concern that the travel ban will expand to include additional countries.[15]

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[12] Statement on file with Counsel.

[13] Stephanie Saul, *Amid Trump Effect Fear, 40% of Colleges See Dip in Foreign Applicants*, New York Times (Mar. 16, 2017), https://mobile.nytimes.com/2017/03/16/us/international-students-us-colleges-trump.html.

[14] *Id.*

The anti-immigrant and anti-Muslim rhetoric of the Trump presidential campaign and the issuance of the Executive Orders, are the source of these concerns, the corollary drop in applications and the anticipated drop in international student enrollment. If American universities are unable to guarantee international students and scholars that they will be able to obtain visas and re-enter the United States after going abroad to visit family or to conduct research and attend symposia, American universities will be unable to attract the best foreign talent and will struggle to maintain the diversity of experience and expertise that make U.S. institutions of higher education world class leaders.

The travel ban has already created problems for many foreign-born medical students hoping to come to the United States or to return to the United States to continue their post-medical school training in residency programs at U.S. medical institutions. The Chair and CEO of the National Residency Match Program (NRMP), a non-profit that organizes the match between students and hospitals, released a statement expressing concern that foreign medical students with valid visas would be delayed or not admitted at borders.[16] The same concern applies to newly matched residents who must apply for a visa or seek to renew a visa. Most of the three to five year long residency programs begin on July 1, and many U.S. medical institutions feared that the Executive Order would prevent foreign students from beginning their residencies on time.[17] Similarly, Indiana University-Purdue University Indianapolis planned to welcome the first class of Iranian graduate students to their campus as part of a new engineering program, established in partnership with the University of Tehran, but they had to put the program on hold because the students could not secure visas.[18]

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[15] AACRAO, *supra* note 9, at 2.

[16] Kathleen Struck, *'Match Day' For Foreign Medical Students Runs Into US Travel Ban*, VOA News (Mar. 18, 2017), http://www.voanews.com/a/us-medical-residency-programs-trump-travel-ban/3771735.html.

In addition to negatively impacting international students and scholars who visit universities for the entire academic year, the Executive Order also negatively impacts academic researchers who participate in academic exchanges that are crucial to fulfilling the research mission of American institutions of higher learning. The Executive Order prevents foreign scholars and students studying and teaching in the United States from participating in foreign research and academic exchanges, out of fear that they will be unable to re-enter the country. More than 43,000 academics and researchers, including over 31,000 US faculty members, 62 Nobel Laureates, 521 Members of the National Academies of Sciences, Engineering, and the Arts, and 142 winners of the Pulitzer Prize, MacArthur Fellowship, Fields Prize and other prestigious academic awards signed a petition making their view clear that the Executive Order limits "collaborations with researchers from these nations by restricting entry of these researchers to the U.S. and can potentially lead to the departure of many talented individuals who are current and future researchers and entrepreneurs in the U.S."[19]

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[17] *Id.*

[18] Collin Binkley, *Travel Ban Throws Research, Academic Exchange Into Turmoil*, AP News (Jan. 31, 2017), http:// bigstory.ap.org/article/43b52752391f45c8a416ec6f8928a02c/travel-ban-throws-research-academic-exchange-turmoil.

Many U.S. scholars fear that the gains that the United States has made with research in the Middle East will be undermined by the Executive Order.[20] Research with scholars in the Middle East is wide-ranging. The National Institutes of Health reports that U.S. and Iranian researchers have teamed up to study cancer, heart disease, hepatitis, and opiate addiction.[21] An HIV researcher at Harvard Medical School reports that the Executive Order has placed her critical collaboration with Iranian counterparts into question, as well as the ability of an Iranian colleague to teach at Harvard Medical School.[22] Students at Columbia Law School's Human Rights Clinic have been working with researchers at a think tank in Yemen to study the health consequences of civil war. They planned to move their conference from New York to Canada because Yemeni researchers would not be able to attend.[23] International scholars have also advocated the boycott of academic conferences held in the United States, in solidarity with those impacted by the restrictions. Shortly after the January Executive Order, 3,000 international scholars signed a pledge committing themselves to boycott academic conferences held in the United States during the pendency of the Administration ban.[24] By March 6, the day that the new Executive Order was released, more than 6,600 international scholars had joined the call for a boycott.[25] Nicholas Dirks, the Chancellor of the University of California-Berkeley, believes that the ban gives an advantage to countries that compete with the United States for scholars and "allowing them to replace [the United States] as the prime destination for the most talented students and researchers would cause irreparable damage and help them to achieve their goal of global leadership."[26]

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[19] *Academics Against Immigration Executive Order*, https://notoimmigrationban.com/ (last visited Sep. 15, 2017).

[20] Binkley, *supra* note 18.

[21] *Id.*

[22] *Id.*

[23] *Id.*

The Executive Order also has a negative economic impact on U.S. institutions of higher education, and by extension the United States. According to a report by the Brookings Institution, foreign students contributed $56.5 Billion in tuition and $39.1 Billion in living expenses from 2001-2012.[27] A Study by NAFSA: Association of International Educators determined that international students contributed $32.8 Billion to the U.S. economy, and supported 400,000 jobs in the

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[24] Elizabeth Reddin, *In Protest of Trump Entry Ban, Some Scholars are Boycotting U.S.-Based Conferences*, Inside Higher Education (Jan. 31, 2017), https://www.insidehighered.com/news/2017/01/31/protest-trump-entry-ban-some-scholars-are-boycotting-us-based-conferences.

[25] "In Solidarity with People Affected by the 'Muslim Ban': Call for an Academic Boycott of International Conferences Held in the US," https://docs.google.com/forms/d/e/1FAIpQLSeNN_2HHREt1h-dm_CgWpFHw8NDPGLCkOwB4lLRFtKFJqI25w/viewform (last visited Sep. 15, 2017).

[26] Reddin, *supra* note 24.

[27] Neil G. Ruiz, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations*, Metropolitan Policy Program at Brookings Institution, 9 (August 2014), https://www.brookings.edu/wp-content/uploads/2014/08/foreign_students_final.pdf.

2015-16 academic year.[28] The report also assessed that every seven international students supported the creation of approximately three U.S. jobs.[29] Iranian students, the largest contingent of the listed countries, contributed $386 Million to the U.S. economy during the 2015-16 academic year.[30] The barring of international students and scholars from the listed Muslim-majority countries, and the corollary decline in attendance from other international students and scholars, will deny much needed tuition to U.S. colleges and universities and much needed expenditures to the U.S. real estate, transportation, retail, dining, telecommunications, and health insurance sectors.

C. The Executive Order Adversely Impacts American Higher Education's Crucial Role in Building Mutual Cross-Cultural Understanding Which Enhances Friendly Relations Between Nations.

The Executive Order also undermines American higher education's crucial role in building mutual cross-cultural understanding between peoples and nations. When governments have hostile relations, educational exchange and collaboration builds bridges among those countries' citizens and can become the basis for future diplomatic engagement.[31] Among the six countries included in the Executive Order, the United States has hostile relations with the Governments of Syria, Iran and Sudan.[32] The governments that the United States recognizes in Libya, Yemen, and Somalia lack full control over those countries, and the U.S. has strained relations with the competing regimes that seek to overthrow the legally recognized governments.[33]

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[28] NAFSA: Association of International Educators, *NAFSA International Student Economic Value Tool*, NAFSA.org, http://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/NAFSA_International_Student_Economic_Value_Tool (last visited Sep 15, 2017).

[29] *Id.*

[30] Institute of International Education, *Open Doors Fact Sheet: Iran,* Open Doors Data (2016), http://www.iie.org/Research-and-Insights/Open-Doors/Data/Fact-Sheets-and-Infographics/Leading-Places-of-Origin-Fact-Sheets/2016 (last visited Sep. 15, 2017).

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[31] Sara Custer, *US State Department Endorses 'Education Diplomacy'*, Pie News (July 10, 2015), https://thepienews.com/news/us-state-department-endorses-education-diplomacy.

[32] Hostile relations between U.S. and Syria, Iran, and Sudan have lasted for decades. *See e.g.*, George Baghadid, *U.S.-Syria Relations: Rollercoaster Diplomacy*, CBS News (May 24, 2010) http://www.cbsnews.com/news/us-syria-relations-rollercoaster-diplomacy (reporting bilateral hostilities with Syria since 2004); BBC, *US-Iran relations: A brief guide* (Nov. 24, 2014) http://www.bbc.com/news/world-middle-east-24316661 (noting the tensions between the U.S. and Iran since the Iranian Revolution and U.S. Embassy-Tehran hostage crisis of 1979); Jeffrey Gettleman, *United States to Lift Sudan Sanctions*, N.Y. Times (Jan 13, 2017) https://www.nytimes.com/2017/01/13/world/africa/sudan-sanctions.html (noting nearly twenty years of hostile relations between the U.S. and Sudan).

[33] Relations have been strained between the U.S. and Libya, Yemen, and Somalia for many years. *See, e.g.*, *US-Libya Relations Contentious During Gadhafi's Leadership*, VOA News (Oct. 19, 2011) http://www.voanews.com/a/us-libya-relations-were-contentious-during-gadhafis-leadership-132260478/146937.html (citing a "rocky" relationship between the U.S. and Libya for four decades); Jackie Northam, *As Yemen's War Worsens, Questions Grow About The U.S. Role*, NPR (Oct. 11, 2016) http://www.npr.org/sections/parallels/2016/10/11/497563923/u-s-reconsiders-support-of-saudi-led-coalition-in-yemen-conflict (describing U.S.-Yemen relations as "increasingly embroiled"); Conor Gaffey, *A Short History of Somali-U.S. Relations*,

It is precisely because of the U.S. government's tensions with the Iranian, Syrian and Sudanese governments, and the U.S. government's opposition to hostile regimes that control wide swaths of Libya, Yemen, and Somalia, that banning educational exchange with students and scholars from these countries is particularly short-sighted. U.S. engagement with these nations' scholars and students can help to build bridges that will lead to improved state to state and citizen to citizen interaction in the future. America has educated world leaders from nations identified in the travel ban. Shukri Ghanem, who served as the Prime Minister to Libya from 2003 to 2006, earned his PhD from the Fletcher School of Law and Diplomacy at Tufts University in Massachusetts.[34] Abdul-Aziz Abdul-Ghani, the former Prime Minister of Yemen, studied political science at Colorado College.[35]

American institutions have helped sculpt the international landscape by educating world leaders and Nobel laureates. Kofi Annan, renowned U.N. Secretary General, completed his undergraduate economics work at Macalester College in St. Paul, Minnesota.[36] Mr. Annan was a joint recipient of the 2001 Nobel Peace Prize, for his work "for a more

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Newsweek (Aug. 10, 2016) http://www.newsweek.com/short-history-somali-us-relations-489125 (noting decades of U.S. military intervention and struggle in Somalia).

[34] U.S. Dep't of State, *Foreign Students Yesterday, World Leaders Today*, https://www.csustan.edu/sites/default/files/OIE/documents/yedterdaysinternationalstudents.pdf (last visited Mar. 24, 2017).

[35] *Id.*

[36] United Nations, *Former Secretary-General: Kofi Annan*, UN.org, https://www.un.org/sg/en/formersg/annan.shtml (last visited Sep. 15, 2017).

peaceful world."[37] Juan Manuel Santos, currently serving as the President of Colombia, earned his BA from University of Kansas and MPA from Harvard.[38] Mr. Santos was the sole recipient of the 2016 Nobel Peace Prize, for his "resolute efforts to bring [Colombia's] more than 50-year-long-civil war to an end."[39]

Further, an American education has had a profound impact on prominent world leaders from Muslim-majority countries. Benazir Bhutto, who served as Prime Minister to Pakistan from 1993 to 1996, was the first woman to head a Muslim-majority nation.[40] She earned her BA in comparative government at Harvard University, later describing the experience as "the very basis for [her] belief in democracy."[41] Former President of Indonesia Susilo Bambang Yudhoyono earned his master's degree at Webster University.[42]

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[37] Nobel Media AB, *The Nobel Peace Prize 2001*, Nobelprize.org, https://www.nobelprize.org/nobel_prizes/peace/laureates/2001 (last visited Sep. 15, 2017).

[38] Monica Lungu, *Where Have the World Leaders Pursued Their Higher Education,* MastersPortal.eu (Apr. 27, 2016), http://www.mastersportal.eu/articles/1724/where-have-the-world-leaders-pursued-their-higher-education.html.

[39] Nobel Media AB, *The Nobel Peace Prize 2016*, Nobelprize.org, http://www.nobelprize.org/nobel_prizes/peace/laureates/2016 (last visited Sep. 15, 2017).

[40] New York Times, *Not Forgotten: Obituaries*, N.Y. Times (June 21, 2016), https://www.nytimes.com/interactive/projects/cp/obituaries/archives/benazir-bhutto.

[41] Harvard Crimson, *Benazir Bhutto '73 Assassinated,* TheCrimson.com (Dec. 27, 2007), http://www.thecrimson.com/article/2007/12/27/benazir-bhutto-73-assassinated-pakistani-opposition.

[42] U.S. Dep't of State, *Foreign Students Yesterday, supra* note 34.

He served as Chairman of the Democratic Party and later as head of the Global Green Growth Institute, an international organization promoting economic growth and environmental sustainability.[43] Former President of Bangladesh Iajuddin Ahmed earned both his masters and PhD at the University of Wisconsin.[44] Numerous high-ranking Afghani officials have sought an American education.[45]

Further, academic institutions play a role in supporting academic freedom and protecting scholars who are agents of change targeted by corrupt regimes in their home countries. For example, Scholars At Risk ("SAR") is an international network of higher education institutions dedicated to protecting scholars and promoting academic freedom around the world. SAR partners with higher education institutions to find temporary assignments for scholars facing grave threats so that their ideas are not lost, and they can keep working until conditions improve in their home countries.[46] Since 2000, SAR has provided sanctuary to more than 700 scholars.[47] SAR has supported scholars from throughout the Middle East and Africa, including countries covered on the travel ban – in recent years, Iranian scholars constituted 25% of scholars receiving support from SARS and Syrian scholars comprised 21% of the scholars receiving support.[48] The Executive Order would bar U.S. academic institutions from fulfilling this critical role and from providing crucial support to threatened scholars and students who can become positive change agents in their home countries.

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[43] Global Green Growth, *Press Release: President of Indonesia Yudhoyono announced as next GGGI Assembly President and Council Chair at GGGI Leaders' Gathering*, GGGI.org (Sept. 23, 2014), http://gggi.org/president-of-indonesia-yudhoyono-announced-as-next-gggi-assembly-president-and-council-chair-at-gggi-leaders-gathering.

[44] Bangladesh Ministry of Foreign Affairs, *President's Life Sketch Prof. Dr. Iajuddin Ahmed*, WebArchive.org, https://web.archive.org/web/20070810115053/http://www.mofa.gov.bd/president.htm (last visited Sep. 15, 2017).

[45] *E.g.*, Vice-President Hedayat Amin-Arsala, Southern Illinois University; Minister of Higher Education Amir Shah Hasanyar, Colorado State University; Minister of Transport Enayatullah Qasemi, Baltimore University; Minister of Health Amin Fatemi, Boston University; Ambassador to the United States H. E. Ishaq Shahryar, University of California at Santa Barbara; former Prime Minister Abdul Zahir, Columbia University. U.S. Dep't of State, *Foreign Students Yesterday, supra* note 34.

The United States has previously witnessed the impact of a restricted visa policy on institutions of higher education. NAFSA reports that after September 11th, the U.S. experienced successive declines in international student attendance in 2003-2005, following several years of 5-6% international student increases prior to September 11th.[49] In the NAFSA's assessment, the visa restrictions sent a message to international students that they were not wanted.[50] In this instance, no recent terrorist attack or threat has occurred which warrants this overly restrictive banning of international students and scholars from the designated Muslim-majority countries.

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[46] Scholars at Risk Network, *About*, Scholarsatrisk.org, https://www.scholarsatrisk.org/about (last visited Sep. 15, 2017).

[47] Scholars at Risk Network, *Protection*, Scholarsatrisk.org, https://www.scholarsatrisk.org/protection (last visited Sep. 15, 2017).

[48] Scholars at Risk Network, Getting Involved Handbook, 2 (Apr. 15, 2016), https://www.scholarsatrisk.org/wp-content/uploads/2016/05/Getting_Involved.pdf; *see also* Scholars at Risk Network, *A Future For Syria's Scholars,* Scholarsatrisk.org, https://www.scholarsatrisk.org/a-future-for-syrias-scholars (last visited Sep. 15, 2017).

[49] NAFSA: Association of International Educators, *Restoring U.S. Competitiveness for International Students and Scholars* (June 2006), http://www.nafsa.org/uploadedFiles/NAFSA_home/Resource_Library_Assets/Public_Policy/ restoring_u.s.pdf.

Finally, although the Executive Order includes a waiver provision, the waiver provision is discretionary and provides no assurance that individuals from listed countries will be able to enter the United States to study, teach, or research at a U.S. institutions of higher learning. The relevant waiver provision only permits the entry, on a case-by-case basis and *at the discretion* of consular officers and U.S. Customs and Border Protection officials, of individuals who have previously been admitted to the United States for an extended period of work, study, or other long term activity and they seek to resume that activity.[51] The provision appears only to apply to individuals who were located outside of the United States and had an existing visa at the time that the March 6 Executive Order took effect. For such individuals, the discretionary nature of the waiver provision does not guarantee that they will be able to re-enter the United States to resume their academic study, research or teaching. Further, the waiver provision is unavailable to students and academics who did not have a visa at the time that the Executive Order took effect, effectively barring any new students and scholars hoping to come the United States after March 16, 2017, and during the pendency of the Executive Order.

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[50] *Id.*

[51] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 § 3(c) (Mar. 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

II. THE EXECUTIVE ORDER INFLICTS IRREPARABLE HARM BY LEGITIMIZING ANTI-MUSLIM SUSPICION AND ANTAGONISM THAT HAS LED TO INCREASED HATE INCIDENTS AND VIOLENCE AGAINST MUSLIM-AMERICAN AND FOREIGN MUSLIM FACULTY, STAFF AND STUDENTS ON UNIVERSITY AND COLLEGE CAMPUSES ACROSS THE COUNTRY.

There has been a rise in hate incidents against Muslim Americans in the United States; particularly on college and university campuses. Unfortunately, the Executive Order reverses the basic principle that discrimination against Muslims is unlawful and an unacceptable cultural norm. The impact of the Executive Order's stigmatizing and legitimating effect on discriminatory societal norms is apparent nationwide and specifically on U.S. university and college campuses with the increase in discrimination and harassment of Muslim students, faculty, and staff.

The travel ban continues a national narrative begun during the Trump presidential campaign that validates discriminatory behavior. Legal norms reinforce cultural norms and community practices. Cultural norms that are legitimized through the law entrench ideas and give community members the "the sense of being natural and part of the way things are or should be."[52] In the United States, progress towards equality has begun within the courts to dismantle deep discriminatory cultural norms and community practices codified in the law.[63] In anti-discrimination jurisprudence, courts have recognized the legitimating power the law has to reinforce discriminatory norms. Thus, one of the steps in combatting deeply held discriminatory societal norms starts with invalidating discriminatory *de jure* laws.

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[52] Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18.1 Ind. J. Global Legal Stud. 87, 90 (2011), http://scholarship.law.cornell.edu/facpub/187.

The Supreme Court case *Korematsu* is an example of an overly broad discriminatory Executive Action, justified on national security grounds, that marks a shameful time in American history. In 1942, the president issued Executive Order No. 9066 pursuant to his national security authority while at war with Japan.[64] This order authorized the president to take "*every possible* protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." *Korematsu v. United States*, 323 U.S. 214, 217 (1944).

Pursuant to this order, Mr. Korematsu was prosecuted for his failure to follow Exclusion Order No. 34 "which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded [from an area in California]." *Id.* at 215–16. The Supreme Court upheld the executive actions as part of the President's authority as Commander In Chief to protect the national security of the country. *Id.*

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[63] *See generally*, *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (allowing in-state tuition for African-American students); *Sipuel v. Bd. of Regents of Univ. of Okl.*, 332 U.S. 631 (1948) (allowing African Americans to enroll in law school); *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) ("Brown I"), sub nom. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) ("Brown II") (eliminating discrimination in schools based on race); *Loving v. Virginia*, 388 U.S. 1 (1967) (eliminating discrimination in marriage based on race); *Oncale v. Sundowner Offshore Servs.*, Inc., 523 U.S. 75 (1998) (recognizing discrimination in workplace based on same-sex harassment); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (extending marital rights to same-sex couples).

[64] National Archives and Records Administration, 7 Fed. Reg. 1407 (Feb. 25, 1942).

In Justice Murphy's dissenting opinion, he insightfully mentions:

> This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

Id. at 233. Justice Murphy noted that that group characteristics were not correlated or related to "the dangers of invasion, sabotage and espionage." *Id.* at 239–40. Rather, the Executive Order and Exclusion Order:

> reasons appear, instead, to be largely an accumulation of much of the *misinformation, half-truths and insinuations* that for years have been directed against Japanese Americans by people with racial and economic prejudices— the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by

> independent studies made by experts in these matters.

Id. at 239–40. *Korematsu* is instructive to this case in that it is direct evidence of when deep discriminatory cultural norms and community practices are unjustifiably codified into the law based upon *misinformation, half-truths and insinuations* directed at individuals from Muslim-majority countries.

The travel ban continues a narrative that began during the Presidential campaign that validates hate speech and violence against Muslim Americans and International Muslim students in the United States based on misinformation, half-truths, and insinuations. During Trump's Presidential campaign, he made several statements indicating that he intended to implement a Muslim travel ban:

- Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. Trump declared in December 2015.[55]
- Former Mayor Rudy Giuliani stated "So when (Trump) first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[56]

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[55] Donald J. Trump Statement On Preventing Muslim Immigration, (Dec. 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (last visited Mar. 27, 2017).

[56] Amy Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally'*, Washington Post, (Jan. 29 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-

The Executive Order implements Trump's campaign statements and demonstrates the promulgation of misinformation, half-truths and insinuations about Muslims. These statements adversely impact the diversity and learning environment on university and college campuses and are used to legitimize hate incidents against Muslim Americans.

Researchers at California State University, San Bernardino documented the rise in hate crimes across the country, specifically examining hate crimes against Muslims.[57] "The Federal Bureau of Investigations defines a hate crime as a 'criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender or gender identity.'"[58]

California State University researchers found that the surge in hate crimes against Muslims in the U.S. to be manifold including recent terrorist attacks, divisive political rhetoric, and the political climate which "has taken an extremist ideology into the mainstream of our political machine." [59] Since the election of President Trump, "in the ten days following the election, there were almost 900 reports of harassment and intimidation from across the nation.

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and-ordered-a-commission-to-do-it-legally/?utm_term=.9541ebd 63 d8b.

[57] Masood Farivar, *Hate Crimes in US Rising, Particularly in Big Cities*, VOA News (Mar. 09, 2017), http://www.voanews.com/a/us-hate-crimes-rising-particularly-in-big-cities/3756604.html.

[58] *Id.* (citing FBI, *2015 Hate Crime Statistics*, Uniform Crime Reporting, https://ucr.fbi.gov/hate-crime/2015).

[59] Farivar, *supra* note 57.

Many harassers invoked Trump's name during assaults, making it clear that the outbreak of hate stemmed in large part from his electoral success."[60]

The number of hate groups in the United States rose to 917 in 2016 from 892 in 2015. The most dramatic increase was in the number of anti-Muslim hate groups, which jumped to 101 in 2016 from 34 in 2015.[61] "Hate crimes, including attacks against American Jews and Muslims, spiked in several key U.S. cities in 2016, underscoring an upsurge that started during the presidential campaign and has continued unabated, according to data collected by researchers at California State University, San Bernardino."[62]

University and college campuses across the nation have been a common venue for hate incidents.[63] In a study by the Southern Poverty Law Center,[64] the center found that the most common venue for hate incidents was schools—both secondary and higher education institutions.[65] The report found 140 incidents out of 843 of targeted hate incidents since Trump was elected occurred in schools. Further, the report specifically focuses in on the type of discrimination noting that 49 or 6% of incidents nationwide were anti-Muslim hate incidents and 293 or 32% nationwide were anti-immigrant sentiment hate incidents.[66] The report specifically cites that:

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[60] Southern Poverty Law Center Report, Ten Days After Harassment and Intimidation in the Aftermath of the Election, 4 (Nov. 2016), https://www.splcenter.org/sites/default/files/com_hate_incidents_report_final.pdf.

[61] Farivar, *supra* note 57.

[62] *Id.*

[63] Southern Poverty Law Center Report, *supra* note 60, at 13; Caitlin Dickerson & Stephanie Saul, *Campuses Confront Hostile Acts Against Minorities After Donald Trump's Election*, N.Y. Times, Nov. 10, 2016.

[64] The Southern Poverty Law Center acknowledges that some incidents of hate incidents are falsely reported. Southern Poverty Law Center Report, *supra* note 60.

[65] *Id.* at 5.

> Muslim women wearing hijabs have been particularly vulnerable to threats and assault. Women reported being grabbed by their hijab, including a San Jose State University student who was choked and fell when a man pulled her head scarf from behind in a parking garage. [67]

A narrative of hate against any minority serves to only embolden individuals whose false perceptions are based on discriminatory misinformation. The promulgation of this narrative results in the rise of fear. Other minority groups not specifically targeted have also been subjected to hate incidents. For example, due to a lack of cultural awareness, those espousing hate often mistakenly target non-Muslim minorities (i.e. violence against Sikhs, ostensibly because of turbans). On March 15, 2017, an "Indian-American IT engineer employed by a US company was fatally shot and his Indian colleague wounded by a white man who thought they were Middle Easterners and who was heard telling them to 'get out of my country' at the time of the shooting."[68] Regrettably, these discriminatory incidents against students on campuses are on the rise in the wake of nationwide university efforts to promote diversity and acceptance of cultural differences.[69]

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[66] *Id.* at 7, 10.

[67] *Id.* at 10.

[68] Raj Haldar, *Indian Americans won't be safe as long as the White House is inciting fear*, Washington Post (Mar. 14, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/14/indian-americans-wont-be-safe-as-long-as-the-white-house-is-inciting-fear/?utm_term=.36316116187e.

The rise in hate crimes has sparked nationwide campus protests in solidarity with Muslim students and widespread support within campus communities to assuage fears of uncertainty.[70] Muslim students are afraid that the Executive Order and Trump's rhetoric against Muslims has empowered individuals to act on their discriminatory beliefs.[71] The protests supporting Muslims demonstrate that campus communities recognize how disturbing and destructive anti-Muslim rhetoric and hate incidents are to the learning environment which thrives on diversity.

Since the President's Executive Order, college and university campuses across the country have been protesting and issuing statements in opposition to the discriminatory travel in solidarity with Muslim members of the campus communities and the diversity that Muslims bring to academia.[72] The students' chants demonstrate the rallying behind immigrant communities in statements ranging from "Student solidarity" to "No hate, no fear! Refugees are welcome here!"[73] In addition, the administrators at several universities and colleges have adopted sanctuary policies to protect immigrant students from immigration authorities.[74] The extensive actions taken at institutions of higher education demonstrate the value placed on maintaining diversity and acknowledging the importance of diversity in contributing to an innovative learning environment for scholars, faculty, staff and students on campuses.

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[69] Dickerson, *supra* note 63 (stating "a year after students at campuses nationwide pushed for greater sensitivity toward cultural differences . . . just last year, a wave of anti-racism protests broke out on campuses across the country. In response, many universities cracked down on students' insensitivity, and some fired school administrators. But this week, students began to worry that all their work was fruitless with Mr. Trump's election success. To many, Mr. Trump is the champion of anti-political correctness and embodies the opposition to "safe spaces").

[70] *Id.*

[71] *Id.*

[72] Samantha Grasso, *NYC students walk out in protest of Trump, DeVos, Muslim ban*, The Daily Dot, (Feb. 7, 2017),

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https://www.dailydot.com/irl/nyc-student-walkout-protest-trump-muslim-ban (With painted signs and popular chants, high school and college students rallied at Foley Square in lower Manhattan around noon, denouncing Trump's decisions against banning immigrants from seven Muslim-majority countries.); *see e.g.*, Hannah Natanson & Claire E. Parker, *Faust, Administrators Criticize Immigration Order*, The Harvard Crimson (Jan. 30, 2017), https://www.thecrimson.com/article/2017/1/30/faust-immigration-email (Harvard Students); Alexandra Kurland, *GU Students Protest Trump's Muslim Ban* (Feb. 26, 2017), http://guprogressive.com/gu-students-protest-trumps-muslim-ban (George Washington University students); Joel Brown, *Hundreds Protest Trump's Immigration Ban at Marsh Plaza Rally* (Jan. 31, 2017), https://www.bu.edu/today/2017/rally-against-trump-muslim-immigration-ban (Boston University students); Margaux MacColl, *Students host 'walkout' to protest Muslim Ban* (Feb. 1, 2017), http://www.northbynorthwestern.com/story/students-host-walkout-to-protest-muslim-ban (Northwestern University Students).

[73] Brown, *supra* note 72.

[74] Julia Preston, *Campuses Wary of Offering Sanctuary to Undocumented Students*, N.Y. Times (Jan. 26, 2017), https://y2017/01/26/education/edlife/sanctuary-for-undocumented-students.html?utm_source=AOL&utm_medium=readMore&utm_campaign=partner.

CONCLUSION

For all of the foregoing reasons, the Executive Order irreparably harms Muslim and Muslim-American students and scholars and U.S. institutions of higher education and we encourage the Court to grant Respondents' Request for a nationwide injunction.

Respectfully submitted,

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Amicus Curiae in Support of the Respondents [75]

September 18, 2017

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[75] We are grateful to Jennifer Breaux, Chelsea Daniels, Ashley Beard, Sean McMillon and the members of the Howard University School of Law Muslim Law Students Association for their contributions to this submission. Professor Karla McKanders served as Visiting Professor and Supervising Attorney of the Civil Rights Clinic during the 2017-18 academic year, when she and Professor Johnson co-authored the first iteration of this brief. She is currently at another academic institution and continues to serve as counsel for amici in her personal capacity. The views expressed by Howard University School of Law's Civil Rights Clinic are not necessarily those of Howard University or the School of Law.

APPENDIX

APPENDIX A

Higher Education Association Signatories

American Anthropological Association (AAA) is the world's largest association of professional anthropologists, with 10,000 members. Based in Washington, DC, the Association was founded in 1902. The Association is a 501(c)(3) not-for-profit organization, whose mission is to advance the public understanding of humankind through anthropological research, and to apply this understanding in addressing some of the world's most pressing problems. Our Association's interest in this brief is derived from our longstanding commitment to diversity in the learning environment at institutions of higher education, and to the principles of academic freedom and human rights for all scholars and students, regardless of national origin or religious affiliation.

The American Sociological Association (ASA) is a professional society serving almost 13,000 teachers, scholars, and practitioners of sociology. Founded in 1905, ASA is dedicated to serving sociologists in their work, advancing sociology as a science and profession, and promoting the contributions and use of sociology to society. ASA's interest in this case stems from a recognition that, while scientific progress depends fundamentally on an open exchange of ideas, the Executive Order will have the effect of limiting interaction among scholars. As sociologists, we oppose this Executive Order because it affects our colleagues and students as well as the conditions for knowledge production. In addition, sociologists have documented and analyzed the ways in which symbolic boundaries are made more rigid and result in the social exclusion of specific groups. This Executive Order targeting specific groups of individuals has effects not only on its immediate victims, but also on how our society understands itself and its orientation toward diversity and human rights.

American Studies Association (ASA) promotes meaningful dialogue about the U.S., across the globe. Our purpose is to support scholars and scholarship committed to original research, innovative and effective teaching, critical thinking, and public discussion and debate. As an organization that has long included scholars addressing U.S. traditions of freedom to practice, or not, religion, and as an organization opposed to both state-enacted and other forms of bigotry, the ASA strongly reproves the recent wave of attacks on synagogues, mosques, and religious community centers in North America and on the Jewish and Muslim people using those institutions. These incidents are heinous in and of themselves, but also indicate the vulnerability of all religious minorities to such hatred, including practitioners of Indigenous traditions and traditions like Sikhism that do not conform to western conventions. American studies scholars have studied the toll taken by nativist religious campaigns, and have shown that at their best U.S. responses to religion and religious differences have actively exceeded mere toleration. They have included mutual defense of the right to hold and act on minority beliefs and to limit the actions of those claiming to express majority opinion, or national character, where religion is concerned. The ASA therefore deplores these contemporary efforts to determine the religious character of the nation, whether by individuals and groups or by the U.S. state. In its efforts to favor the entry of Christian refugees over that of those practicing other religions or no religion, and its attempts to prohibit migration from seven Muslim-majority countries, the U.S. state not only abrogates the principle of freedom of religion, but also authorizes the current resurgence of violence against Jewish and Muslim people. The ASA stands firmly alongside those groups and individuals who are the targets of religion-based hatred and is committed to working with all groups and individuals seeking to ensure the hospitability of our communities and institutions regardless of religious affiliation.

Association for Slavic, East European, and Eurasian Studies (ASEEES), established in 1948, is a nonprofit, non-political, scholarly society. It is the leading international organization dedicated to the advancement of knowledge about Central Asia, the Caucasus, Russia, and Eastern Europe in regional and global contexts. As the premier membership organization in the world with over 3,000 members, ASEEES supports teaching, research, and publication relating to the study of the region and has cultivated the field's intellectual landscape for over fifty years through its chief publication, Slavic Review, its Annual Convention, its book prizes, and its organizational newsletter. ASEEES also maintains the intellectual vitality of the field by hosting an Annual Convention - an international forum wherein over 2,000 attendees (scholars, professionals, and graduate students—domestic and international) exchange new research and information face-to-face on an annual basis.

The Linguistic Society of America (LSA) is a scholarly professional association dedicated to advancing the scientific study of language. Founded in 1924, the LSA aspires to a world in which the essential nature of language and its central role in human life is well understood. As a science dedicated to the study of human language, linguistics strives to understand the diversity of language and the cultures in which they are embedded. Immigration restrictions limit the ability of scholars and students to pursue linguistic research which is often transnational. These restrictions have the potential to bring danger and uncertainty to anyone engaged in education and knowledge, especially jeopardizing the ability of US institutions to host international conferences and events, including those related to language and linguistics.

Modern Language Association of America (MLA) was founded in 1883 and provides opportunities for its members to share their scholarly findings and teaching experiences with colleagues and to discuss trends in the academy. MLA is comprised of over 24,000 members in 100 countries. MLA members host an annual convention and other meetings, work with related organizations, and sustain one of the finest publishing programs in the humanities. For more than a century, members have worked to strengthen the study and teaching of language and literature.

The Shakespeare Association of America (SAA) is a non-profit professional organization headquartered in Washington, D.C. and founded on principles of inclusion, open exchange, and mutual respect. The Association holds an annual conference for the advanced academic study of William Shakespeare's plays and poems, his cultural and theatrical contexts, and the many roles these have played in world culture. The distinguishing feature of the SAA conference is its pioneering program of working research seminars. These seminars are incubators for new interpretations, research methodologies, pedagogical strategies, and scholarly publications. The SAA welcomes scholars from all locations and of all professional standings to meet as equals around its seminar tables. We value the international diversity of our membership and condemn all policies or directives that impede the movement of scholars into and out of the United States.

The Society of American Law Teachers (SALT) joins as a signatory to the Howard University School of Law Civil Rights Clinic's amicus curie brief in support of Respondents International Refugee Assistance Project, et. al. SALT joins this brief as an organization comprised of law professors who have experienced the benefits of diversity first-hand in their teaching, research and scholarship. SALT was founded in 1973; its membership includes law professors, deans, librarians, and administrators from law schools across the country. SALT has been working for more than 40 years to improve the legal profession, the law academy and expand the power of law to underserved communities. SALT engages in work within and beyond the law school to advance social justice.

Scholars At Risk Network (SAR) is an international network of institutions and individuals whose mission it is to protect scholars and promote academic freedom. By arranging temporary academic positions at member universities and colleges, SAR offers safety to scholars facing grave threats, so scholars' ideas are not lost and they can keep working until conditions improve and they are able to return to their home countries. SAR also provides advisory services for scholars and hosts, campaigns for scholars who are imprisoned or silenced in their home countries, monitoring of attacks on higher education communities worldwide, and leadership in deploying new tools and strategies for promoting academic freedom and improving respect for university values everywhere.

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Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS**

BRIEF OF HUMAN RIGHTS FIRST, NO ONE LEFT BEHIND, AND VIETNAM VETERANS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Curiae Human Rights First (formerly known as the Lawyers Committee for Human Rights) is a nonprofit, nonpartisan international human rights organization that has worked since 1978 to promote fundamental human rights and protect refugees' rights. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and other international human rights instruments.

In November 2015, Human Rights First launched a project, Veterans for American Ideals ("VFAI"), to engage veterans to continue advocating for policies that uphold the human rights ideals that first motivated them to serve in the armed forces. VFAI leverages veterans' experiences, leadership abilities, and credibility to advance those ideals, including working to ensure safe passage to the United States of translators and others who worked with the U.S. military and other U.S. entities in Iraq and Afghanistan, to advocate for the protection of refugees through refugee resettlement, and to challenge the rise of anti-Muslim rhetoric and policies.

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[1] This brief was paid for entirely by the amici and/or their attorneys. No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondents consent to the filing of this brief.

Amicus Curiae No One Left Behind is a veterans organization dedicated to helping Afghan and Iraqi wartime allies with special immigrant visas resettle safely in the United States. This includes providing assistance with the visa process, and with housing, employment, and cultural adaptation upon arrival in the United States.

Amicus Curiae Vietnam Veterans of America is the only national Vietnam veterans organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. Their mission is to promote and support the full range of issues important to all veterans, to create a new identity for this generation of veterans, and to change public perception of Vietnam veterans.

These consolidated cases test the legal and constitutional validity of President Donald Trump's Executive Order No. 13,780 (the "Executive Order" or "Order"). Among other things, the Order temporarily suspends the United States Refugee Admissions Program (the "USRAP"). Consequently, thousands of refugees otherwise eligible for resettlement in the United States have been stranded across the globe, inflicting pointless suffering and harm. The purpose of this *amici* brief is to explain why the Executive Order is indeed needless, and how and why it harms the security interests of the United States, as well as the interests of its critical allies.

STATEMENT

I. The First Executive Order

On January 27, 2017, President Trump signed the first of two executive orders entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."[2] The first order temporarily prohibited entry of all nationals from seven majority-Muslim countries, and directed the Secretary of State to "suspend the U.S. Refugee Admissions Program (USRAP) for 120 days."[3] While the USRAP was suspended, the order provided that "the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis . . . only so long as they determine that the admission of such individuals as refugees in in the national interest – including when the person is a religious minority in his country of nationality facing religious persecution[.]"[4]

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[2] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

[3] *Id.* at 8979.

[4] *Id.*

Upon resumption of the USRAP, the first order directed similar religious minority prioritization and instructed the Secretary of State, in consultation with the Secretary of Homeland Security, to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individuals' country of nationality."[5]

The first executive order sparked numerous lawsuits across the country. Following a series of adverse judicial rulings, the Government withdrew the order.

II. The Second Executive Order

President Trump issued the second Executive Order on March 6, 2017, which Order bears the same title as its predecessor.[6] In section 2(c), the Executive Order prohibits for 90 days entry of all nationals from six of the seven majority-Muslim countries named in the first order, excepting only nationals of Iraq.[7] Like the first order, the Executive Order in section 6 "suspend[s] travel of refugees into the United States under the USRAP" and suspends decisions on applications for refugee status for 120 days.[8] In spite of the suspension of the USRAP, "the Secretary of State and Secretary of Homeland Security may jointly determine to admit . . . refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States."[9] Section 6(b) caps the number of refugees who may enter in 2017 to 50,000.[10] Unlike the first order, the Executive Order does not expressly prefer religious minorities.

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[5] *Id.*; *see also* David Brody, ***Trump Says Persecuted Christians Will be Given Priority as Refugees.*** CBN NEWS, (Jan. 27, 2017), http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees (Interview with President Trump where he stated the prioritization of religious minorities was intended to favor Christian Refugees.).

[6] Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

III. The *IRAP* Litigation

Six individuals and three organizations challenged section 2(c) of the Executive Order under the INA and the Establishment Clause.[11] After expedited briefing and argument, the Maryland District Court enjoined section 2(c) and held that the three individuals had standing to challenge the section on statutory grounds. The Government appealed to the Fourth Circuit, which subsequently affirmed in part and reversed in part, and sought a stay, which was denied.[12] On June 1, 2017, the Government sought a stay from this Court, which consolidated the Fourth Circuit matter with litigation in the Ninth Circuit and entered various orders discussed below.

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[7] *Id.* at 13211-2.

[8] *Id.* at 13215-6.

[9] *Id.* at 13216.

[10] *Id.*

[11] *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

IV. The *Hawaii* Litigation

On March 7, 2017, the State of Hawaii brought an action challenging the Executive Order. On March 15, 2017, the Hawaii District Court issued a temporary restraining order preventing sections 2 and 6 of the Order from going into effect, finding that the State of Hawaii showed a strong likelihood of success on the Establishment Clause claim asserting that the Order was in fact a "Muslim ban."[13] After the Ninth Circuit affirmed,[14] the Government sought review in this Court.

This Court consolidated the Fourth and

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[12] *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted,* 137 S. Ct. 2080 (2017).

[13] *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1134 (D. Haw. 2017).

[14] *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

Ninth Circuit matters and granted certiorari review.[15] The Court also modified the preliminary injunction, stating that the "Government's interests in enforcing § 2(c) . . . are undoubtedly at their peak when there is no tie between the foreign national and the United States."[16] Accordingly, this Court stayed the injunction to "the extent the injunction[] prevent[s] enforcement of § 2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States."[17] The stay also applied to relief from section 6 of the Executive Order for those "refugees who lack any such connection to the United States."[18]

Following this Court's ruling, the State of Hawaii filed an emergency petition in the Hawaii District Court challenging the Government's interpretation of this Court's order regarding the scope of permissible entries. The District Court ordered modifications to the Government's interpretation.[19] The Government appealed directly to this Court, which stayed the ruling in part pending resolution of the Government's appeal to the

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[15] *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

[16] *Id.* at 2088.

[17] *Id.* at 2087.

[18] *Id.* at 2089.

[19] *State v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 2989048 (D. Haw. July 13, 2017).

Ninth Circuit.[20] On September 7, 2017, the Ninth Circuit affirmed the District Court's modifications, which also was subsequently stayed in part.

SUMMARY OF THE ARGUMENT

The Executive Order imposes a needless and counterproductive travel ban. The ban is needless because refugees, especially those targeted by the ban, are already exhaustively vetted and screened for national security risks. The ban is counterproductive because it harms national security interests in critical ways without supplying corresponding benefit. As former military and national security officials have made clear, the ban jeopardizes the stability of U.S. allies, erodes essential good will by reneging on promises made to certain refugee groups, makes it more difficult for the United States to recruit heart-and-minds support abroad, otherwise undermines the ability of the United States to pursue military operations, and endangers U.S. military personnel.

Regardless of the intentions behind the Executive Order, it is understandably perceived domestically and abroad as a "Muslim Ban," fueling the perception that the United States is at war with Islam. This only feeds into the propaganda narrative of terrorists seeking to harm U.S. interests. Because the ban inflicts injury and suffering without justifying benefit, the decisions of the courts below should be affirmed.

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[20] *Trump v. Hawaii*, No. 16-1540, 2017 WL 3045234, at *1 (U.S. July 19, 2017).

ARGUMENT

I. In Enacting the Travel Ban, the United States Ignores Vetting Protections Already in Place, Jeopardizes the Stability of U.S. Allies, and Breaks U.S. Promises to Iraqi Refugees.

In the midst of the largest worldwide refugee crisis ever,[21] the United States cites national security to justify its decision to enact the travel ban and accept fewer refugees for resettlement. Blocking refugees, however, harms more than helps U.S. national security interests. Among other things, the travel ban jeopardizes the stability of U.S. allies in the Middle East, betrays promises to Iraqis who risked everything to assist our efforts in the region, and undermines U.S. military operations and personnel.

A. Refugees Are Already Rigorously Vetted.

The travel ban is needless because the U.S. refugee vetting process is already rigorous, lengthy, and effective. Notably, the ban impacts vulnerable refugees who have already passed through a vetting process that is "the most rigorous screening of any such program elsewhere in the world."[22] Indeed, according to the U.S. State Department, refugees undergo the "most intensive security screening of any traveler to the United States."[23] By blocking these vetted refugees, the ban ignores the safeguards already in place, causing additional hardship and pointless suffering.

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[21] UNHCR, *Global Trends: Forced Displacement in 2016* 3 (June 20, 2017), http://www.unhcr.org/5943e8a34.

Refugees are recognized by national and international principles as among the "world's most vulnerable people."[24] Their status as a class requiring heightened protections and international cooperation is enshrined in the United Nations Convention Relating to the Status of Refugees (the "Convention") and the 1967 Protocol to the

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[22] Doris Meissner & James W. Ziglar, *Halting Refugee Resettlement Compromises the Security of All*, THE HILL (Dec. 3, 2015), http://thehill.com/blogs/congress-blog/foreign-policy/261840-halting-refugee-resettlement-compromises-the-security-of.

[23] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs* (Jan. 20, 2017), https://www.state.gov/j/-prm/releases/factsheets/2017/266447.htm. Syrian refugees are subject to even more heightened security screening. *See* U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening* (Dec. 3, 2015), http://www.uscis.gov/refugeescreening.

[24] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs* (Jan. 20, 2017), https://www.state.gov/j/prm/releases/ factsheets/2017/266447.htm.

Convention (the "Protocol").[25] According to the Convention and Protocol, the term refugee "shall apply," *inter alia*, to any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country[.][26]

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[25] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Convention] and United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol], http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html. The United States is party to the Protocol and has "undertake[n] to apply articles 2 to 34 inclusive of the Convention" to refugees by virtue of its accession. Protocol, art. 1(1); *see also* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 9, http://www.unhcr.org/4d93528a9.pdf ("By accession to the 1967 Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline."). The United States has codified certain principles of these conventions as part of national law. *See* 8 U.S.C. § 1522.

[26] Convention, art. 1(A)(2); Protocol, art. 1 (extending the Convention definition of refugee to encompass those who became refugees due to events that proceeded January

In other words, refugees are by definition victims of persecution, not perpetrators of it. These victims then undergo multiple layers of the most exacting forms of scrutiny before they are resettled in the United States.

The vetting process typically begins with the office of the United Nations High Commissioner for Refugees ("UNHCR"), which interviews and screens the applicant, and determines whether the applicant may qualify as a refugee and where the applicant may resettle.[27] Next, the

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1951). Under U.S. law, a refugee is similarly defined as "[a]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" 8 U.S.C. § 1101(a)(42).

[27] *See* U.S. Dep't of State, *U.S. Refugee Admissions Program*, https://www.state.gov/j/prm/ra/admissions/index.htm. In certain circumstances, specially trained non-governmental organizations will identify the refugee and begin this process. *See id.* Certain refugees may start the application process without a referral from the UNHCR or entity. *Id.* These refugees are often close relatives of asylees and refugees already in the U.S., or belong to specific groups identified in by statute or the U.S. Department of State as eligible for direct access to the refugee and resettlement program. *Id.*

Resettlement Support Center ("RSC")[28] will interview the applicant and enter the relevant application document into the Department of State's Worldwide Refugee Admission Processing System ("WRAPS"), cross reference and verify the data, and send information required for a background check to other U.S. agencies.[29] Multiple national security agencies, including the National Counterterrorism Center, Department of Homeland Security ("DHS"),[30] Federal Bureau of Investigations ("FBI"),[31] Department of State, and intelligence agencies will screen the applicant and assess any security threats, including any connections to known bad actors, as well as past immigration and criminal violations.[32]

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[28] The RSC is funded by the U.S. Department of State's Bureau of Population, Refugees and Migration ("PRM"). *Id.*

[29] *Id.*

[30] DHS will conduct an advanced screening of Syrian refugees. *Id.*

[31] The FBI and intelligence community partners will conduct and prepare a Security Advisory Opinion ("SAO"), which is a biographic check "for an applicant who is a member of a group or nationality that the United States government has designated as requiring this higher level check." *See* U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening* (Dec. 3, 2015), https://www.uscis.gov/refugeescreening.

[32] *Id.* United States refugee law includes several exclusions from refugee status rendering certain categories of individuals ineligible for asylum protections. The exclusions include, for example, a person who participated in persecution or who has been convicted by a final judgment

Once results are screened, the United States Citizenship and Immigration Services ("USCIS"), a component of DHS, will interview the applicant in a host nation or, in exceptional circumstances, in the applicant's country of origin. During this interview, a USCIS officer collects additional biometric data.[33] This biometric data is used to conduct an additional series of checks. Additionally, anytime the applicant's information changes during the process, the information is entered into WRAPS, and new security checks are initiated.[34] Inconsistencies will place the case on hold until resolved.[35] Should the ap-

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of a "particularly serious crime" and therefore "constitutes a danger to the community of the United States[.]" *See* 8 U.S.C. §§ 1158(b)(2)(A)(i)-(vi).

[33] *See* U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening* (Dec. 3, 2015), https://www.uscis.gov/refugeescreening. Fingerprints are stored in a DHS database and screened against: the FBI biometric database, the DHS biometric database, and the U.S. Department of Defense database. U.S. Dep't of State, *U.S. Refugee Admissions Program*, http://www.state.gov/j/prm/ra/admissions/index.htm.

[34] U.S. Dep't of State, *U.S. Refugee Admissions Program*, http://www.state.gov/j/prm/ra/admissions/index.htm.

[35] *See id.* The Department of State, through the Consular Lookout and Support System ("CLASS"), will also initiate name checks on the applicant's primary names and any variations used by the applicant. Responses are received before the USCIS conducts its interview, and possible

plication proceed, applicants must complete a cultural orientation course and a medical screening, the results of which are also entered into WRAPS. If the case is cleared, resettlement agency representatives, who meet weekly to review WRAPS information, will determine where to resettle the refugee. Should the applicant be assigned to the United States, the applicant will be subject to further screening from United States Customs and Border Protection, and the Transportation Administration's Secure Flight Program.[36]

A somewhat different, but no less exacting, process applies to certain Iraqi refugees affiliated with the United States ("U.S.-affiliated Iraqis"). The United States' invasion of Iraq in March 2003

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matches are reviewed and adjudicated by USCIS headquarters. If another name or variation is identified during the USCIS interview, another name will be screened through CLASS. *See* U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening* (Dec. 3, 2015), https://www.uscis.gov/refugeescreening. CLASS also includes information from: National Counterterrorism Center/Terrorist Screening Center; Treasury Enforcement Communications System, Interpol. Drug Enforcement Administration, Health and Human Services, and FBI. *Id.* Additionally, if, during the process, any national security concerns are raised, USCIS conducts an additional review through the Controlled Application Review and Resolution Process. *Id.*

[36] U.S. Dep't of State, *U.S. Refugee Admissions Program*, http://www.state.gov/j/prm/ra/admissions/index.htm.

created one of the largest humanitarian crises in recent history.[37] The situation became especially perilous for Iraqis who chose to work for the U.S. government, the U.S. military, U.S. contractors, or U.S.-based media groups or nongovernmental organizations ("NGOs").[38] Militia groups within Iraq targeted these individuals and their families with threats, harassment, kidnapping, violence, and murder.[39] The United States provided insufficient attention to the unfolding humanitarian crisis in Iraq—despite its central role in the Iraq war itself and its deep debt to the Iraqis who risked their lives working with and for Americans.[40]

In response, the late Democratic Senator Edward Kennedy and former Republican Senator Gordon Smith introduced the Refugee Crisis in Iraq Act in 2007 (the "RCIA").[41] Recognizing the importance of protecting our Iraqi allies, Senator Kennedy stated that "[r]egardless of where we stand on the war with Iraq, we are united in our belief that America has a fundamental obligation to assist the Iraqis who have courageously supported our forces and our effort in Iraq and whose lives are in peril as a result."[42] Senator Smith likewise spoke of "a national moral commitment to resolving the Iraqi refugee issues as quickly as possible."[43] The RCIA received strong bipartisan support, and President George Bush signed the RCIA into law on January 28, 2008, as part of the Department of Defense Authorization Act for Fiscal Year 2008.[44]

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[37] *See* Human Rights First, ***Living in Limbo: Iraqi Refugees and U.S. Resettlement*** 30 (2010).

[38] *Id.* at 29.

[39] *Id.*

[40] *See id.*

[41] *See* Refugee Crisis in Iraq Act, S. 1651, 110th Cong. (2007).

Congress's clear intent in passing the RCIA was to protect Iraqis who were in danger due to their assistance to and relationship with the United States. To accomplish its purpose, Congress structured the law in two ways. First, the RCIA created a new class of Special Immigrant Visas ("SIV") for Iraqis who had worked for the United States.[45] Second, the RCIA designated certain Iraqis as "[r]efugees of special humanitarian concern eligible for Priority 2 [("P2")] processing under the refugee resettlement priority system who may apply directly to the [USRAP]."[46] Under the RCIA, Iraqis eligible for P2 processing include those who work or worked in Iraq for the U.S. government, U.S. contractors, or U.S.-based media or NGOs, as well as their close relatives.[47] The RCIA called on the U.S. Secretary of State, in consultation with the Secretary of Homeland Security, to "establish or use existing refugee processing mechanisms in Iraq and in countries, where appropriate, in the region in which . . . [the] aliens described in section 1243 may apply and interview for admission to the United States as refugees."[48] This entire process became known as

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[42] *Living in Limbo*, at 30.

[43] *Id.*

[44] *See* Refugee Crisis in Iraq Act of 2007, Pub. Law No. 110-181, 122 Stat. 395 (2008).

[45] *Id.* § 1244, 122 Stat. 395 (2008). The Iraqi SIV program stopped accepting applications as of September 2014. *See* Human Rights First, *Fact Sheet, President Trump's Executive Order on Refugees Harms Our Iraqi Allies* (2017), http://www.humanrightsfirst.org/sites/default/files/P2-SIV-Iraqis-Factsheet.pdf; *see also* U.S. Dep't of State, Bureau of Consular Affairs, *Special Immigrant Visas for Ira-*

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qis – Who Were Employed by/on Behalf of the U.S. Government, https://travel.state.gov/content/visas/en/immigrate/iraqis-work-for-us.html (last visited Sept. 15, 2017).

[46] *See* § 1243, 122 Stat. 395 (2008). USCIS defines three "processing priorities," which enable a refugee applicant the opportunity to interview with a USCIS officer. *See* U.S. Citizenship and Immigration Servs., *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities* (May 5, 2016), https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities.

[47] *See* § 1243, 122 Stat. 395 (2008).

[48] *Id.* § 1242.

the USRAP "Direct Access Program for U.S.-affiliated Iraqis" (the "DAP for U.S.-affiliated Iraqis").[49]

By designating certain U.S.-affiliated Iraqis as eligible for P2 processing through the DAP, the RCIA allows eligible individuals to file for resettlement in the United States *directly with* the United States—eliminating the United Nations referral requirement given their U.S. relationships.[50] Further, while refugees usually must be outside their homelands to be eligible for the USRAP, the RCIA allows eligible Iraqis to apply for P2 processing from *inside* Iraq.[51]

Notably, the DAP for U.S.-affiliated Iraqis does not reduce the legal requirements or security checks needed for resettlement to the United States. All applicants are interviewed by USCIS officers to determine eligibility for resettlement, including whether they meet the refugee definition, present no known security risk, and are otherwise admissible to the United States under federal immigration law. The process is lengthy and exhaustive. Despite the program's goal to bring at-risk U.S.-affiliated Iraqis quickly to safety, Human Rights First estimated in 2010 (based on attorney accounts) that the entire processing time for resettlement under the DAP for U.S.-affiliated Iraqis was 12 to 21 months.[52]

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[49] *See* U.S. Dep't of State, *U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-affiliated Iraqis* (Mar. 11, 2016), https://www.state.gov-/j/prm/releases/factsheets/2016/-254650.htm.

[50] *See* § 1242, 122 Stat. 395 (2008).

[51] *Id.*

In sum, before *any* refugee can resettle in the United States, national intelligence agencies screen them, scan and check their fingerprints and other biometric data against terrorist and criminal databases, including Interpol—which include data on suspected terrorists and stolen, false, and blank passports from Syria and Iraq—and interview them several times.[53,54] The process is "lengthy and deliberate, taking an average of 18-24 months" and often longer.[55] In addition, the United States continuously reviews its vetting processes "to ensure that the most updated and rigorous measures are applied, and any additional enhancements can be added without halting refugee resettlement or banning people from certain countries."[56]

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[52] *See Living in Limbo*, at 31.

[53] Letter From Former National Security Leaders to U.S. Congress 2-3, Human Rights First (Dec. 2015), http://www.humanrightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf.

[54] Human Rights First, *The Syrian Refugee Crisis and the Need for U.S. Leadership* 16 (Feb. 2016), https://www.humanrightsfirst.org/sites/default/files/HRFSyrianRefCrisis.pdf.

[55] The White House, *Two Former Homeland Security Secretaries Wrote President Obama on Safely Welcoming Syrian Refugees* (Nov. 19, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming.

This rigorous process already makes the resettlement process "an unattractive option for terrorists trying to infiltrate the U.S."[57] And the requirements are even more rigorous for Syrian refugee applicants, all of whom are subject to additional background investigations and heightened levels of scrutiny. For these Syrian refugee applicants, a Refugee Affairs Division ("RAD") officer conducts enhanced reviews at the USCIS headquarters, and the RAD officer can refer cases, where necessary, to the Fraud Detection and National Security Directorate of USCIS for additional review.[58]

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[56] Letter from Bipartisan Group of Former Officials to President Donald J. Trump, Human Rights First (Mar. 10, 2017), http://www.humanrightsfirst.org/sites/default/files/LetterFormerOfficialsonMarch6EO.pdf.

[57] The Heritage Foundation, *The U.S. Refugee Admissions Program: A Roadmap for Reform* 4 (2017), http://www.heritage.org/sites/default/files/2017-07/BG3212.pdf.

[58] Harvard Law School, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security & Building the U.S. Economy through Refugee Admissions* 22 (2017), https://harvardimmigrationclinic.files.wordpress.com/2017/06/syria-final-draft-v9.pdf.

Moreover, the United States considers "only the most vulnerable" refugees as candidates for resettlement, such as children, women, and survivors of torture and violence.[59] In other words, "[r]efugees are victims, not perpetrators, of terrorism[,]"[60] and the vetting process allows the United States to "safely admit the most vulnerable refugees while protecting the American people."[61]

Notwithstanding these precautions, the issuance of the travel ban has essentially ground the U.S. resettlement program to a halt. USCIS resettlement interviewing officers returned to the United States in the wake of the first executive order, and the referral of new resettlement cases to the United States has largely stopped. In addition, U.S. resettlement processing centers overseas terminated many positions following the order.[62] Resettlement experts in Africa have reported that, due to the cuts and resulting delays in U.S. resettlement processing, it will likely take as long as five years or more to process refugee cases for resettlement.[63] This needless suspension offers little or nothing for the United States, while undeniably generating intense suffering that is contrary to our national security interests.

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[59] The White House, *Two Former Homeland Security Secretaries Wrote President Obama on Safely Welcoming Syrian Refugees* (Nov. 19, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming.

[60] Letter from Former National Security Leaders to U.S. Congress 2-3, Human Rights First (Dec. 2015), http://www.humanrightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf.

[61] The White House, *Two Former Homeland Security Secretaries Wrote President Obama on Safely Welcoming Syrian Refugees* (Nov. 19, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming.

B. Vetted Refugees Must Now Be Absorbed by Countries Like Turkey, Lebanon, and Jordan, Contributing to Instability Contrary to U.S. Security Interests.

Former military and national security officials have made clear that supporting front-line refugee hosting states through resettlement advances U.S. national security interests. These front-line nations include several U.S. allies. Three in particular currently host the most Syrian refugees: Turkey, Lebanon, and Jordan.[64]

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[62] Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 4 (2017), http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans.

[63] *Id.* at 5.

[64] The Heritage Foundation, *The U.S. Refugee Admissions Program: A Roadmap for Reform* 3 (2017), http://www.heritage.org/sites/default/files/2017-07/BG3212.pdf.

The large numbers of Syrian refugees living in these countries is placing tremendous strains on critical infrastructures there—including those supplying water, electricity, sanitation, health care, and education.[65] Left unaddressed, "the strain will feed instability and trigger more violence across the region, which will have consequences for U.S. national security."[66]

The United States historically has been a "global leader in protecting and resettling persecuted refugees,"[67] and the USRAP "has proven integral to preserving and building goodwill with U.S. allies in the Middle East."[68] As the refugee crisis grows, the United States has an opportunity to help relieve the strain on Turkey, Lebanon, and Jordan by resettling more refugees, which "would safeguard the stability of these nations and thereby advance [the U.S.'s] own national security interests."[69,70] Instead, however, the United States has decreased the number of refugees it will accept, setting a historically low annual limit of 50,000 for fiscal year 2017 (down from 85,000 for fiscal year 2016 and the original fiscal year 2017 ceiling of 110,000).[71] The direct consequence of the ban is to exacerbate deteriorating conditions in Turkey, Lebanon, and Jordan, causing more human suffering and serving only to destabilize an entire region.

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[65] Human Rights First, *The Syrian Refugee Crisis and the Need for U.S. Leadership* 27 (2016), https://www.humanrightsfirst.org/sites/default/files/HRFSyrianRefCrisis.pdf.

[66] Ryan Crocker, *The Case for Accepting Syrian Refugees*, WALL ST. J. (Nov. 17, 2015), https://www.wsj.com/articles/the-case-for-accepting-syrian-refugees-1447803302.

[67] Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 1 (2017), http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans.

[68] Harvard Law School, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security & Building the U.S. Economy through Refugee Admissions* 12 (2017), https://harvardimmigrationclinic.files.wordpress.com/2017/06/syria-final-draft-v9.pdf.

a. Turkey

Turkey is a NATO ally that, along with Jordan and Iraq, hosts U.S. military bases used in conducting operations against ISIS and al Qaeda

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[69] Michael V. Hayden & James Stavridis, *U.S. Must Lead On Refugee Crisis*, MIAMI HERALD (July 8, 2016), http://www.miamiherald.com/opinion/op-ed/article88582362.html.

[70] Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 1 (2017), http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans.

[71] The Heritage Foundation, *The U.S. Refugee Admissions Program: A Roadmap for Reform* 5-6 (2017), http://www.heritage.org/sites/default/files/2017-07/BG3212.pdf.

in Syria and Iraq.[72] Turkey has hosted the largest number of refugees in the world for the last three years, with an estimated 2.9 million refugees in 2016.[73] The burden for caring for these refugees has overwhelmed Turkish resources, causing great hardship.[74]

Aid workers in Turkey report "increasing instances of child labor and early marriage" among Syrian refugees in Turkey.[75] According to a 2015 Human Rights Watch Report, of the 708,000 Syrian children residing in Turkey, over 400,000 were not attending school due to language barriers and a lack of temporary education centers.[76] In 2017, despite efforts by the government to reduce the number of Syrian children without access to education, there were still, according to UNICEF, at least 380,000 out of school.[77] Meanwhile, Turkey's large influx of refugees has caused wages and fees for services to drop by 80 percent, exacerbating working conditions among the most vulnerable Turkish citizens and Syrian refugees.[78] Moreover, Turkey faces an unemployment rate of 12.6 percent.[79] Even with financial assistance, Turkey is not likely to overcome these challenges without refugee resettlement assistance.[80]

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[72] Harvard Law School, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security & Building the U.S. Economy through Refugee Admissions* 15 (2017), https://harvardimmigrationclinic.files.wordpress.com/2017/06/syria-final-draft-v9.pdf.

[73] UNHCR, *Global Trends: Forced Displacement in 2016* 3 (2017), http://www.unhcr.org/5943e8a34.

[74] International Crisis Group, *Turkey's Refugee Crisis: The Politics of Permanence* (2016), https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-refugee-crisis-politics-permanence.

[75] Human Rights First, *The Syrian Refugee Crisis and the Need for U.S. Leadership* 8 (2016), https://www.humanrightsfirst.org/sites/default/files/HRFSyrianRefCrisis.pdf.

[76] Human Rights Watch, *Turkey: 400,000 Syrian Children Not in School* (2015), https://www.hrw.org/news/2015/11/08/turkey-400000-syrian-children-not-school.

The United States could help Turkey by increasing the number of vetted refugees it resettles. Instead, refugee resettlement from Turkey has fallen by 79 percent in the first five months of

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[77] *See* UNICEF, *Over 40 Per Cent of Syrian Refugee Children in Turkey Missing Out on Education, Despite Massive Increase in Enrollment Rates* (2017) www.unicef.org/media/media_94417.html.

[78] Human Rights First, *The Syrian Refugee Crisis and the Need for U.S. Leadership* 8 (2016), https://www.humanrightsfirst.org/sites/default/files/HRFSyrianRefCrisis.pdf.

[79] *Turkey's Unemployment Rate Rises to 12.6 Percent in February*, DAILY SABAH (May 15, 2017), https://www.dailysabah.com/economy/2017/05/15/turkeys-unemployment-rate-rises-to-126-percent-in-february.

[80] *See* Bill Frelick, *Syrian Refugee Kids Still Out of School in Turkey*, Human Rights Watch (Jan. 23, 2017), https://www.hrw.org/news/2017/01/23/syrian-refugee-kids-still-out-school-turkey.

2017.[81] This does not help an already tense situation in Turkey, where there are fears of an expansion of the Syrian conflict. This undoubtedly threatens "the United States' ability to conduct counterterrorism operations, and to ensure regional stability and national security in the long term."[82]

b. Lebanon

Lebanon, another U.S. ally that has contended with ISIS and al-Qaeda activity near its border with Syria,[83] hosts more than 1 million Syrian refugees.[84] Remarkably, nearly 25 percent of Lebanon's population is now comprised of these refugees.[85] Approximately 93 percent of refugees live in poverty under the host country's guidelines, and 55 percent live in substandard housing.[86] Families in Lebanon are eating much less and marrying off their young teen girls "because their parents could no longer afford to feed all in the family."[87] Aid workers in Lebanon have noted an increase in the number of Syrian refugee "street children" begging and street vending.[88] Meanwhile, Lebanon's attitude towards refugees has become increasingly negative and hostile.[89]

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[81] Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 8 (2017), http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans.

[82] Harvard Law School, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security & Building the U.S. Economy through Refugee Admissions* 16 (2017), https://harvardimmigrationclinic.files.wordpress.com/2017/06/syria-final-draft-v9.pdf.

[83] The Heritage Foundation, *The U.S. Refugee Admissions Program: A Roadmap for Reform* 3 (2017), http://www.heritage.org/sites/default/files/2017-07/BG3212.pdf.

[84] UNHCR, *Lebanon: Refugee and Asylum Seekers* (2017), http://reporting.unhcr.org/node/15981.

[85] Brookings, *Syrian Refuges and the Slow March to 'Acceptance'* (2017), https://www.brookings.edu/blog/future-

c. Jordan

Jordan is a close and longstanding U.S. ally. President Trump has referred to Jordan as "a staunch ally and partner" in the fight against ISIS, and a "source of stability and hope."[90] As a

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development/2017/09/07/syrian-refugees-and-the-slow-march-to-acceptance/.

[86] Human Rights First, *The Syrian Refugee Crisis and the Need for U.S. Leadership* 7-8 (2016), https://www.humanrightsfirst.org/sites/default/files/HRFSyrianRefCrisis.pdf.

[87] *Id.* at 8.

[88] *Id.*

[89] National Public Radio, *In Lebanon, Syrian Refugees Met With Harassment and Hostility* (Sept. 2, 2017), http://www.npr.org/sections/parallels/2017/09/02/547906231/in-lebanon-syrian-refugees-met-with-harassment-and-hostility.

[90] The White House, *Remarks by President Trump and His Majesty King Abdullah II of Jordan in Joint Press Conference* (Apr. 5, 2017), https://www.whitehouse.gov/the-press-

result of the refugee influx, however, Jordan faces a crippling water crisis. Jordan hosts "at least 656,230 registered refugees (1.4 million in total, according to King Abdullah II)[,]"[91] and has the second highest number of refugees per capita in the world.[92] Jordan is currently able to provide only 150 cubic meters of water per person annually—considerably less than the UN-defined threshold for water scarcity: 500 cubic meters of water per person.[93,94]

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office/2017/04/05/remarks-president-trump-and-his-majesty-king-abdullah-ii-jordan-joint.

[91] Harvard Law School, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security & Building the U.S. Economy through Refugee Admissions* 15 (2017), https://harvardimmigrationclinic.files.wordpress.com/2017/06/syria-final-draft-v9.pdf.

[92] UNHCR, *Jordan Factsheet* 1 (2017), http://reliefweb.int/sites/reliefweb.int/files/resources/JordanFactSheetJanuary2017-FINAL.pdf.

[93] The White House, *Remarks by President Trump and His Majesty King Abdullah II of Jordan in Joint Press Conference* (Apr. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/04/05/remarks-president-trump-and-his-majesty-king-abdullah-ii-jordan-joint.

[94] Oxfam, *Syrian Refugee Influx Adding to Jordan's Water Worries* (2013), https://www.oxfam.ca/blogs/conflict-emergencies/refugee-influx-adding-to-jordans-water-worries.

Meanwhile, only one in five Syrian refugees live in refugee camps, and 93 percent of those outside of these camps live in poverty.[95] Consequences for Syrian children in Jordan include increased rates of child marriage and child labor,[96,97] and low rates of school enrollment.[98] The Jordanian government has severely cut medical care for Syrian refugees.[99] And Syrian refugees have strained the pre-existing medical care and school systems for Jordanians, which has increased negative attitudes in Jordan toward Syrian refugees.[100] These negative attitudes manifest themselves in the form of teachers singling out Syrian refugee students for corporal punishment and Jordanian peers bullying their Syrian counterparts.[101]

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[95] UNHCR, *Jordan Factsheet* 1 (2017), http://reliefweb.int/sites/reliefweb.int/files/resources/JordanFactSheetJanuary2017-FINAL.pdf.

[96] United Nations Office of the Secretary-General's Envoy on Youth, *New Study Finds Child Marriage Rising Among Most Vulnerable Syrian Refugees* (Feb. 8, 2017), http://www.un.org/youthenvoy/2017/02/new-study-finds-child-marriage-rising-among-vulnerable-syrian-refugees/.

[97] Andrew Hosken, *Syrian Child Refugees 'Being Exploited in Jordan'*, BBC NEWS (Nov. 4, 2015), http://www.bbc.com/news/world-middle-east-34714021.

[98] Human Rights Watch, *Barriers to Education for Syrian Refugee Children in Jordan: Summary* (Aug. 16, 2016), https://www.hrw.org/report/2016/08/16/were-afraid-their-future/barriers-education-syrian-refugee-children-jordan.

[99] Ruth Sherlock, *Jordan Repeals Free Medical Aid for Syrian Refugees*, THE TELEGRAPH (Nov. 28, 2014), http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11261468/Jordan-repeals-free-medical-aid-for-Syrian-refugees.html.

C. Banning and Delaying Resettlement of Military Interpreters and Other U.S.-Affiliated Iraqis Breaks Faith with Those Who Supported the United States.

In addition to blocking the resettlement of vetted refugees from Turkey, Lebanon, and Jordon, the travel ban also affects vetted Iraqis affiliated with the United States. As noted, these include military interpreters, translators, and other personnel who supported the U.S. military, U.S. government, and other U.S. entities. As veterans and former military leaders have attested, interpreters and other U.S. allies "wore our uniforms, ate our food, bled our blood, saved our lives and killed our enemies."[102,103] Even though President Trump removed Iraq from the list of banned countries in March 2017, the travel ban nonetheless temporarily halts the entire USRAP for all countries, including Iraq.[104] For these Iraqi wartime allies, their primary path to safety is through the USRAP. Previously, there was a Special Immigrant Visa program for Iraqis, but that program ceased taking new applications as of September 30, 2014.[105] Moreover, U.S.-affiliated Iraqis, like

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[100] Rana F. Sweis, *Resentment Grows Against Syrian Refugees in Jordan*, N.Y. TIMES (May 9, 2013), http://www.nytimes.com/2013/05/09/world/middleeast/09iht-m09-jordan-syria.html.

[101] Human Rights Watch, *supra* note 98.

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[102] Matt Zeller, *Leave No Interpreter Behind*, USA TODAY (June 22, 2015), https://www.usatoday.com/story/opinion/2015/06/22/afghanistan-iraq-army-interpreters-resettlement-column/28905403/.

[103] *See also* Letter from Veterans for American Ideals to President Donald J. Trump (Jan. 29, 2017) ("[M]any veterans can point to a moment when one of our foreign allies saved our lives – often by taking up arms against our common enemies. They acted because they believed in America, in our mission, and in the promise that was given."), http://www.humanrightsfirst.org/sites/default/files/VFAI%20Open%20Letter.pdf.

[104] Corrected Br. of Former National Security Officials as Amici Curiae in Support of Plaintiff-Appellees and Against a Stay Pending Appeal at 17-18, *IRAP v. Trump*, No. 8:17-cv-00361-TDC (4th Cir. Apr. 13, 2017), https://cases.justia.com/federal/appellate-courts/ca4/17-1351/126/0.pdf?ts=1494442944.

[105] *See* Human Rights First, *Fact Sheet, President Trump's Executive Order on Refugees Harms Our Iraqi Allies* (2017), http://www.humanrightsfirst.org/sites/default/files/P2-SIV-Iraqis-Factsheet.pdf; *see also* U.S. Dep't of State, Bureau of Consular Affairs, *Special Immigrant Visas for Iraqis – Who Were Employed by/on Behalf of the*

all other vetted refugees, are subject to the overall reduction in refugee admissions—despite being given priority access to U.S. resettlement under the RCIA.[106] As a result, their resettlement "will now likely be delayed as security clearance and other approvals expire, adding many more months onto their processing."[107]

As former military leaders and former national security officers have stated, the United States has a "moral obligation to protect these allies,"[108] but instead betrays them by letting them languish in unsafe conditions. In reference to the RCIA's passage in 2007, co-sponsor Senator Kennedy observed that the U.S. recognized its "fundamental obligation to assist the Iraqis who have courageously supported our forces and our effort in Iraq and whose lives are in peril as a result."[109]

U.S. Government, https://travel.state.gov/content/visas/en/immigrate/iraqis-work-for-us.html (last visited Aug. 2, 2017).

[106] Letter from Bipartisan Group of Former Officials to President Donald J. Trump, at 1-2 (Mar. 10, 2017), http://www.humanrightsfirst.org/sites/default/files/Letter-FormerOfficialsonMarch6EO.pdf.

[107] *Id.*

[108] *Id.* at 2.

[109] Human Rights First, Living in Limbo: Iraqi Refugees and U.S. Resettlement 30 (2010), http://www.humanrightsfirst.org/wp-content/uploads/Living-in-Limbo-final.pdf.

To this end, the RCIA created designated pathways for U.S.-affiliated Iraqis to apply for U.S. resettlement, including through the DAP for U.S.-affiliated Iraqis.[110] Currently nearly 60,000 Iraqis are waiting to be processed for resettlement through this program.[111] While the United States resettled nearly 4,000 Iraqi refugees during the first six months of 2016, the United States resettled only 1,795 Iraqi refugees during the first six months of 2017, a decline of 55 percent.[112]

Behind these numbers are many individual stories.[113] For example, Anas Nasir, a 30-year-old Iraqi, worked for a U.S. security contractor in Baghdad, and later received many death threats as a result. He has applied for admission to the United States, but has not yet received permission to resettle.[114]

In return for the service of these Iraqis, as veteran James LaPorta told the Washington Post, the United States "promised to help give them asylum. . . . We promised to leave no man behind."[115] But now, because of the travel ban, "[i]t just seems more like a cheap bumper sticker than a bond of trust."[116]

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[110] Human Rights First, *supra* note 105, at 1.

[111] *Id.* at 2

[112] Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 11 (2017), http://www.humanrightsfirst.org/sites/default/files/HRF-US-Leadership-Forsaken-FINAL.pdf.

[113] *Id.*

[114] Tim Arango, *'You Have Let Us Down, Trump': Iraqis See U.S. Relations Recast*, N.Y. TIMES (Jan. 30, 2017) https://www.nytimes.com/2017/01/30/world/middleeast/iraq-trump-refugee-ban.html?mcubz=1.

D. Banning the Resettlement of Refugees Makes It More Difficult for the United States to Recruit Foreign Allies, Undermines Ongoing and Future U.S. Military Operations, and Endangers U.S. Troops.

The travel ban also undermines ongoing and future U.S. military operations by "discouraging future assistance and cooperation from . . . affected military allies and partners . . . ."[117] The travel ban "sends a very negative message to countries where we will need indigenous support"[118] because, without the ability to offer safety to interpreters, peacekeepers, and other local national allies, "we will be reducing the likelihood that those in countries targeted by the ban will work with us in the future."[119] This will serve only to "endanger U.S. troops in the field" by sending exactly the wrong message to those who "have risked much or all to keep Americans safe—and whom our officers had promised always to protect with the full might of our government and our people."[120,121,122] This result is plainly not in the best interests of the United States.

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[115] Dan Lamothe, *Among Veterans, Raw Responses to Trump's Effort to Block Refugees and Others from Muslim Countries*, WASH. POST (Jan 29, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/01/29/among-veterans-raw-responses-to-trumps-effort-to-block-refugees-and-others-from-muslim-countries/?utm_term=.0d74b8cb980e.

[116] *Id.*

[117] Corrected Br. of Former National Security Officials as Amici Curiae in Support of Plaintiff-Appellees and Against a Stay Pending Appeal, *supra* note 104, at 18.

[118] Hollie McKay, *U.S.-backed Iraqi Fighters say Trump's Refugee Ban Feels like 'Betrayal,'* FOX NEWS (Jan. 27,

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2017), http://www.foxnews.com/politics/2017/01/27/u-s-backed-iraqi-fighters-say-trumps-refugee-ban-feels-like-betrayal.html.

[119] Jeff Stein, *Spy Veterans Say Trump's Muslim Country Visa Ban Will Hurt Recruitment*, Newsweek (Jan. 28, 2017 7:32 PM), http://www.newsweek.com/spy-veterans-trump-visa-ban-hurt-recruitment-549588.

[120] Joint Decl. of Madeleine K. Alrbight, Avril D. Haines, Michael V. Hayden, John F. Kerry, John E. McLaughlin, Lisa O. Monaco, Michael J. Morell, Janet A. Napolitano, Leon E. Panetta, Susan E. Rice, *Washington v. Trump*, No. 17-35105 (9th Cir. 2017), https://assets.documentcloud.org/documents/3454270/Declaration-of-National-Security-Officials.pdf.

[121] *See also* David Cohen, *How Trump Hurts the Spying Business*, N.Y. Times (May 16, 2017) (stating that the Trump administration's policies are "[t]arnishing the idea that America stands for something uniquely good" and "makes it harder for the CIA to recruit spies"), https://www.nytimes.com/2017/05/16/opinion/how-trump-hurts-the-spying-business.html?_r=0.

[122] *See also* Michael V. Hayden, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash.

the United States "promised to help give them asylum. . . . We promised to leave no man behind."[115] But now, because of the travel ban, "[i]t just seems more like a cheap bumper sticker than a bond of trust."[116]

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[115] Dan Lamothe, *Among Veterans, Raw Responses to Trump's Effort to Block Refugees and Others from Muslim Countries*, WASH. POST (Jan 29, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/01/29/among-veterans-raw-responses-to-trumps-effort-to-block-refugees-and-others-from-muslim-countries/?utm_term=.0d74b8cb980e.

[116] *Id.*

[117] Corrected Br. of Former National Security Officials as Amici Curiae in Support of Plaintiff-Appellees and Against a Stay Pending Appeal, *supra* note 104, at 18.

[118] Hollie McKay, *U.S.-backed Iraqi Fighters say Trump's Refugee Ban Feels like 'Betrayal,'* FOX NEWS (Jan. 27,

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2017), http://www.foxnews.com/politics/2017/01/27/u-s-backed-iraqi-fighters-say-trumps-refugee-ban-feels-like-betrayal.html.

[119] Jeff Stein, *Spy Veterans Say Trump's Muslim Country Visa Ban Will Hurt Recruitment*, Newsweek (Jan. 28, 2017 7:32 PM), http://www.newsweek.com/spy-veterans-trump-visa-ban-hurt-recruitment-549588.

[120] Joint Decl. of Madeleine K. Alrbight, Avril D. Haines, Michael V. Hayden, John F. Kerry, John E. McLaughlin, Lisa O. Monaco, Michael J. Morell, Janet A. Napolitano, Leon E. Panetta, Susan E. Rice, *Washington v. Trump*, No. 17-35105 (9th Cir. 2017), https://assets.documentcloud.org/documents/3454270/Declaration-of-National-Security-Officials.pdf.

[121] *See also* David Cohen, *How Trump Hurts the Spying Business*, N.Y. Times (May 16, 2017) (stating that the Trump administration's policies are "[t]arnishing the idea that America stands for something uniquely good" and "makes it harder for the CIA to recruit spies"), https://www.nytimes.com/2017/05/16/opinion/how-trump-hurts-the-spying-business.html?_r=0.

[122] *See also* Michael V. Hayden, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash.

II. Whatever Its Intention, the Travel Ban is Perceived Abroad as a "Muslim Ban," Reinforcing the Perception that the United States Is at War with Islam, Further Harming Our Interests.

Whatever intentions underpin the travel ban, it is perceived as a "Muslim Ban" abroad, not only because of the statements that preceded and accompanied its release, but also because it disproportionally affects Muslims.[123] This perception reinforces the idea that the United States is at war with Islam and damages U.S. efforts to build stronger relationships in volatile regions. This is important because the U.S. military relies on the goodwill of many Muslim communities abroad. The travel ban alienates our majority-Muslim allies in the Middle East and elsewhere, threatening the goodwill of those communities.

Post (Feb. 5, 2017), https://www.washingtonpost.com/opinions/former-cia-chief-trumps-travel-ban-hurts-american-spies--and-america/2017/02/05/a5acce36-ebd9-11e6-9973-c5efb7ccfb0d_story.html?utm_term =.155afc6ba632.

[123] *See generally* Human Rights First, *supra* note 112.

A. The Ban Disproportionately Affects Muslims.

Since President Trump issued the Executive Order, the actual number of resettled Muslim refugees has plunged dramatically.[124] As of July 2017, Muslims now make up only a small minority of the recently-resettled refugee population in the United States.[125] Conversely, non-Muslims represent a large majority, up significantly from the six months before the Executive Order.[126]

Moreover, the Pew Research Center has found that the religious composition of refugees has shifted monthly since February 2017, just after President Trump's first executive order.[127] Notably, Muslims have been adversely impacted by this change.[128]

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[124] *Id.* at 2.

[125] *Id.* at 8.

[126] *Id.*

[127] Phillip Connor & Jens Manuel Krogstad, *In First Months of Trump Presidency, Christians Account for Growing Share of U.S. Refugee Arrivals*, Pew Research Center (July 12, 2017), http://www.pewresearch.org/fact-tank/2017/07/12/in-first-months-of-trump-presidency-christians-account-for-growing-share-of-u-s-refugee-arrivals/.

[128] *Id.*

The reduction in admitted Muslim refugees is even more pronounced when narrowed to individual Muslim-majority countries, where the declines in refugee resettlements are most significant. For example, in the six months since the issuance of the first executive order, the United States has cut its resettlement of Syrian refugees by 80 percent.[129] Since then, the United States has resettled only 1,573 Syrian refugees, whereas the United States had resettled over 15,000 Syrian refugees in the previous calendar year.[130] The decline is so significant that Syria is no longer in the top five countries of origin for refugee resettlement in the United States—despite Syria representing the largest global resettlement need.[131] Even after President Trump's removal of explicit reference to the indefinite ban on Syrians in the second Executive Order, Syria has dropped further on the list.[132]

The number of refugees from Iraq resettled in the United States similarly has declined, falling by 55 percent since the first executive order when compared to the first six months of 2016.[133] Only 2,884 refugees have resettled from Jordan between January and May 2017, despite over

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[129] Human Rights First, *supra* note 112, at 6.

[130] *Id.*

[131] *Id.* at 6-7.

[132] *Id.*

[133] *Id.* at 3, 11.

19,000 having resettled from Jordan in 2016.[134] Resettlement from Turkey, which is the world's largest refugee hosting country, has declined by 70 percent.[135] Resettlement from Lebanon has also seen a 35 percent decline.[136]

B. Good Relations within Muslim Communities Are Critical to U.S. Security Interests and Jeopardized by the Travel Ban.

The travel ban's disproportionate impact on Muslims feeds the perception that the United States is engaged in a religious war with Islam. This perception is a present danger to U.S. efforts to build relationships with Muslim communities in volatile regions. The importance of these relationships is particularly evident in Iraq and Afghanistan, where the hostility or support of a local community is often critical to the safety of an entire U.S. base, the success of a mission, and, by extension, overall U.S. national security.

The U.S. Army Field Manual on Counterinsurgency emphasizes the importance of establishing and maintaining relationships in places in which the military conducts counterinsurgency operations, recognizing that trusted networks

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[134] *Id.* at 9.
[135] *Id.*
[136] *Id.* at 10.

"displace enemy networks" and include "local allies, community leaders, and local security forces."[137] Conversely, "[a]ctions that undermine trust or disrupt these [trusted] networks—even those that provide a short-term military advantage—help the enemy."[138] The Army Field Manual further cites then-Marine Corps Major General James Mattis for his maxims "first do no harm" and "no better friend-no worse enemy."[139] Major General Mattis worked to establish a secure local environment by diminishing support for the insurgency and maintaining the support of various Iraqi factions.[140]

Operators in the field agree. For example, Peter Keirnan, a former special operations Marine, explains that the U.S. military yields strategic advantages in countries abroad by forming a "partner force" with the local commandos.[141] U.S. and partner forces fight "arm-in-arm on raids against Taliban insurgencies in the deserts and mountains of Afghanistan."[142] The most essential elements underlying this relationship are "respect and trust."[143] The travel ban, however, "shatters the trust these teams have painstakingly built."[144]

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[137] U.S. Dep't of the Army, FM 3-24, Counterinsurgency A-5 (2006), http://usacac.army.mil/cac2/Repository/Materials/COIN-FM3-24.pdf.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 4-7.

[141] Peter James Kiernan, *A Former MARSOC Raider Explains how the Travel Ban Endangers Special Operations Forces*, Task & Purpose (Feb. 2, 2017), http://taskandpurpose.com/former-marsoc-raider-explains-travel-ban-endangers-special-operations-forces/.

As Michael Leiter, the former director of the National Counterterrorism Center emphasized:

> [W]e have to remember the ways in which [the travel ban] alienates the people with whom we have to partner, domestically and internationally. It's the Muslim community in the U.S which helps us identify terrorists and radicalized individuals and stop them. And critically, it's the international partners that we need help from in the Middle East and majority Muslim nations who I fear will be alienated by some of these steps.[145]

As the United States presents itself in ways that reinforce the impression that it is anti-Islam, the result may very well be that it will lose help and goodwill from these partners.

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] PBS NEWSHOUR, *Immigration Ban Misses Greatest Threat, Counterterrorism Expert Says* (Jan. 31, 2017, 6:45 PM), http://www.pbs.org/newshour/bb/immigration-ban-misses-greatest-threat-counterterrorism-expert-says/.

Working with local communities can also help reduce violence. For example, in 2006, Marine Corps leaders in Iraq were approached by several Iraqi leaders, who were "more fearful of Al Qaeda in Iraq than of the Americans," to team up against the insurgents.[146] Within a year, violence in the province "dropped dramatically."[147] Reduced violence in these regions saved American lives.[148] This relationship, however, may not have existed had the Iraqi leaders felt differently about approaching Americans.

Not only will local communities become more hesitant to work with the United States, terrorists have and will exploit the perception that the travel ban is a Muslim ban. In addition, the Executive Order has even chilled U.S. relations with nations that are not directly implicated by its terms. Politicians in Malaysia have called it "inhumane" and have urged the Malaysian Prime Minister to condemn the U.S.'s position. Indonesian Foreign Minister Retno Marsudi told Reuters that the government held "deep regrets about the policy."[149] Their concern is justified. Shortly after the travel ban took effect, human rights activists protested in Indonesia and Malaysia, calling upon their respective governments to take action.[150] The leader of the opposition in Indonesia stated that the travel ban encourages Islamic radicalization.[151] The foreign relations fallout from the Executive Order thus extends beyond relationships with the specific nations identified in the order.

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[146] Dexter Filkins, *James Mattis, A Warrior in Washington*, THE NEW YORKER (May 29, 2017), http://www.newyorker.com/magazine/2017/05/29/james-mattis-a-warrior-in-washington.

[147] *Id.*

[148] *See id.*

C. The Travel Ban Fuels Anti-U.S. Terrorist Propaganda.

After its issuance, the first executive order was immediately condemned by intelligence officials and military veterans.[152] Robert Richer, former deputy chief of the CIA Operations Directorate, categorized the ban as "a win for jihadists and other anti-U.S. forces," as "[i]t fuels the belief out there that Americans are anti-Islam."[153] In a separate interview, former CIA director general Michael Hayden stated:

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[149] Nyshka Chandran, *Trump's Immigration Order Troubles Muslim-Majority Indonesia, Malaysia*, CNBC (Jan. 29, 2017, 8:01 PM), https://www.cnbc.com/2017/01/29/trumps-immigration-order-reverberates-to-indonesia-malaysia.html.

[150] Francis Chan & Trinna Leong, *Travel Ban Stirs Unease In Indonesia, Malaysia*, THE STRAITS TIMES (Feb. 5, 2017, 5:00 AM), http://www.straitstimes.com/asia/travel-ban-stirs-unease-in-indonesia-malaysia.

[151] *Id.*

[152] *See, e.g.*, PBS NEWSHOUR, *Immigration Ban Misses Greatest Threat, Counterterrorism Expert Says* (Jan. 31, 2017, 6:45 PM), http://www.pbs.org/newshour/bb/immigration-ban-misses-greatest-threat-counterterrorism-expert-

> what we're doing now has probably made us less safe today . . . we are now living the worst jihadist narrative possible, that there is undying enmity between Islam and the West. Muslims out there who were not part of the jihadist movement are now being shown that the story they're being told by the jihadists – they hate us; they're our enemy – that's being

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says/; Letter to Secretary Kelly, et. al. from Over 100 Former Officials (Jan. 30, 2017), http://www.politico.com/f/?id=00000159-f0ef-d46b-abdf-f4efdd310001; Eliza Mackintosh, *Trump Ban Is Boon for ISIS Recruitment, Former Jihadists and Experts Say*, CNN (Jan. 31, 2017, 10:51 AM), http://www.cnn.com/2017/01/30/politics/trump-ban-boosts-isis-recruitment/index.html.

[153] Joby Warwick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/world/national-security/jihadist-groups-hail-trumps-travel-ban-as-a-victory/2017/01/29/50908986-e66d-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.2595e0d4b6e0.

> acted out by the American government.[154]

These concerns are serious and reflect how the Executive Order plays into the hands of extremists. Immediately after the ban took effect, jihadists lauded it for bringing about a new wave of terrorist recruits.[155] Some even praised the ban for fulfilling the predictions of Anwar al-Awlaki, an American born al-Qaeda leader who famously said that the "West would eventually turn against its Muslim citizens."[156]

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[154] National Public Radio, *National Security Council Changes Are Very Significant, Hayden Says* (Jan. 30, 2017, 4:58 AM), http://www.npr.org/2017/01/30/512400246/former-nsa-director-weighs-in-on-national-security-council-changes.

[155] *See, e.g.*, Eliza Mackintosh, *Trump Ban Is Boon for ISIS Recruitment, Former Jihadists and Experts Say*, CNN (Jan. 31, 2017, 10:51 AM), http://www.cnn.com/2017/01/30/politics/trump-ban-boosts-isis-recruitment/index.html; Bethan McKernan, *ISIS Hails Donald Trump's Muslim Immigration Restrictions as a 'Blessed Ban,'* THE INDEPENDENT (Jan. 30, 2017, 11:40 AM), http://www.independent.co.uk/news/world/middle-east/isis-donald-trump-muslim-ban-immigration-iraq-iran-restrictions-travel-islamic-state-us-visa-a7552856.html; Joby Warwick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/world/national-security/jihadist-groups-hail-trumps-travel-ban-as-a-victory/2017/01/29/50908986-e66d-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.2595e0d4b6e0.

Policies such as the Executive Order can have an effect on terrorist recruitment harmful to the United States.[157] Terrorist organizations rely on propaganda as a recruiting tool to encourage the radicalization of civilians.[158] For the propaganda to be effective, it must resonate with the individuals it is meant to target.[159] Social scientists have evaluated the psychological factors that make an individual more susceptible to radicalization:

> The more ▯ participants reported feeling culturally homeless – that is, fully belonging neither to American culture nor to that of another nation – and discriminated against

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[156] Joby Warwick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/world/national-security/jihadist-groups-hail-trumps-travel-ban-as-a-victory/2017/01/29/50908986-e66d-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.2595c0d4b6e0.

[157] Sarah Lyons-Padilla & Michele J. Gelfand, *The Social Scientific Case Against a Muslim Ban*, N.Y. TIMES (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/opinion/sunday/the-social-scientific-case-against-a-muslim-ban.html.

[158] *Id.*

[159] *Id.*

> on the basis of their religion, the more they said they experienced a lack of meaning in their lives. In turn this lack of meaning was associated with greater support for fundamentalist groups and extremist causes.[160]

Terrorists know this and use this to their advantage, specifically relying on the claim that the United States is anti-Islam.[161] The Executive Order promotes the very psychological conditions that contribute to the radicalization threatening our national security.[162]

This line of analysis is nothing new. For years, experts have advised the United States to avoid catering to terrorist propaganda.[163] In a December 1, 2015 letter to Congress, several respected national security leaders argued that categorically refusing to take in refugees "only feeds the narrative of ISIS that there is a war between Islam and the West, that Muslims are not welcome in the United States and Europe, and that the ISIS caliphate is their true home."[164] More succinctly, in 2015 former Homeland Security Secretary Michael Chertoff stated: "You do not want to play into the narrative of the bad guy. That's giving propaganda to the enemy."[165] The Executive Order does nothing but send the wrong message at the wrong time at the expense of our national security interests, as well as those of our allies.

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[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *See, e.g.*, Letter from Former National Security Leaders to U.S. Congress (Dec. 1, 2015), http://www.humarightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf; Michael Hayden & James Stavridis, *U.S. Must Lead on Refugee Crisis*, MIAMI HERALD (July 8, 2016, 8:00 PM), http://www.miamiherald.com/opinion/op-ed/article88582362.html; Jason Riley, *Mistrusting Obama on ISIS – and Refugees*, WALL ST. J. (Nov. 18, 2015, 2:37 PM), https://www.wsj.com/articles/mistrusting-obama-on-isisand-refugees-1447803738.

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[164] Letter from Former National Security Leaders to U.S. Congress (Dec. 1, 2015), http://www.humarightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf.

[165] Jason Riley, *Mistrusting Obama on ISIS – and Refugees*, WALL ST. J. (Nov. 18, 2015, 2:37 PM), https://www.wsj.com/articles/mistrusting-obama-on-isisand-refugees-1447803738.

CONCLUSION

For the foregoing reasons, as well as those briefed by Respondents, the decisions of the courts below should be affirmed.

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In The
Supreme Court of the United States

DONALD J. TRUMP, *ET AL., PETITIONERS,*
v.
INTERNATIONAL REFUGEE ASSISTANCE
PROJECT, *ET AL., RESPONDENTS.*

DONALD J. TRUMP, *ET AL., PETITIONERS,*
v.
STATE OF HAWAII, *ET AL., RESPONDENTS.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF IMMIGRATION EQUALITY, THE NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, THE NATIONAL QUEER ASIAN PACIFIC ISLANDER ALLIANCE, AND THE LGBT BAR ASSOCIATION OF LOS ANGELES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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United States Department of State, Bureau of Democracy, Human Rights and Labor, *2016 Country Reports on Human Rights Practices – Sudan* (Feb. 27, 2014), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265306................................15

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STATEMENT OF INTEREST

This brief sets forth the legal and policy concerns of *Amici Curiae* Immigration Equality, The New York City Gay and Lesbian Anti-Violence Project, The National Queer Asian Pacific Islander Alliance, and The LGBT Bar Association of Los Angeles (collectively, "*Amici Curiae*") regarding Executive Order 13780 (Mar. 6, 2017) (the "EO").[1]

Amicus Curiae Immigration Equality is the nation's largest legal service provider for LGBTQ[2] and HIV-positive immigrants. Each year, the organization provides legal advice to nearly 3,000 individuals and families, actively manages more than 650 immigration cases, and appears in federal circuit courts as counsel or *amicus curiae*.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") is a non-profit organization founded in 1980 that empowers LGBTQ and HIV-affected communities and allies to end all forms of violence through organizing, education, counseling, direct legal representation, and advocacy. AVP's legal services include immigration support for LGBTQ immigrants. AVP is also the convener for the National Coalition of Anti-Violence Programs, which addresses the needs of LGBTQ communities, including LGBTQ immigration support.

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[1] No party to the appeal, nor counsel for any party to the appeal, authored any part of this brief. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this *amicus* brief.

[2] Lesbian, gay, bisexual, transgender and queer ("LGBTQ") individuals are sometimes also referred to herein as LGBT or LGBTI (lesbian, gay, bisexual, transgender, intersex).

The National Queer Asian Pacific Islander Alliance ("NQAPIA") is a federation of LGBTQ Asian American, South Asian, Southeast Asian, and Pacific Islander ("API") organizations. NQAPIA builds the capacity of local LGBTQ API groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaboration, and challenges anti-LGBTQ bias and racism. NQAPIA has spearheaded an educational and advocacy campaign in support of immigrants' rights.

The LGBT Bar Association of Los Angeles is a bar association of gay, lesbian, bisexual and transgender lawyers, judges, law students and other legal professionals. The Association is dedicated to furthering justice and equality, and the advancement of gay, lesbian, bisexual and transgender rights throughout California and beyond.

Amici Curiae are deeply troubled by the impact that the EO would have on LGBTQ people in the United States and the six predominantly Muslim countries from which the EO would drastically restrict — if not effectively ban — immigration, as well as the import of the EO on refugees from around the world. The EO is bad policy made worse because it assaults established United States legal principles and constitutionally protected rights. *Amici Curiae* respectfully urge the Court to affirm the Fourth and Ninth Circuits' decisions in *International Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. May 25, 2017) and *Hawaii v. Trump*, No. 17-15589 (9th Cir. June 12, 2017), and to dissolve the stay of those decisions entered by this Court, thereby avoiding the significant, irreversible harms that the EO would inflict while the litigation proceeds below.

SUMMARY OF ARGUMENT

Individuals who identify as lesbian, gay, bisexual, transgender and queer live, in many countries around the world, in persistent, grave danger. As of October 2016, homosexual conduct was still outlawed in more than 70 countries worldwide, 13 of which made such conduct punishable by death.[3] Some regimes deny the very existence of LGBTQ people, making it impossible for LGBTQ individuals to seek government protection from the severe persecution and violence to which they are routinely subjected.[4]

Like other immigrants, LGBTQ persons who already have family or partners living in the United States are eligible to apply for visas based on this family status. The process is long and difficult in the best of circumstances and the difficulty is only compounded by the EO, not only for would-be immigrants but also for refugees desperately seeking freedom from persecution experienced because of their identities.

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[3] Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws*, International Lesbian, Gay, Bisexual, Trans and Intersex Association 36-37 (11th ed. 2016), http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf ("*World Survey*").

[4] Human Rights Watch, *We Are a Buried Generation* (Dec. 15, 2010), https://www.hrw.org/report/2010/12/15/we-are-buried-generation/discrimination-and-violence-against-sexual-minorities ("*Buried Generation*") (recounting statement of Iran's then-President Mahmoud Ahmadinejad in 2007 that "[i]n Iran we don't have homosexuals like you do in your country. This does not exist in our country.").

The EO, if enforced, would halt visa processing from Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "six countries") for an indefinite period of time, at the discretion of the Executive Branch. For LGBTQ individuals, this shutdown is not simply a bureaucratic inconvenience, but potentially a matter of life and death. A family-based visa delayed by the EO is, in effect, a visa denied. Visa approvals grinding to a halt under the EO mean LGBTQ individuals must remain in hostile and unsafe conditions for longer (and perhaps indefinitely, given the terms of the EO), delaying reunification with their family members in safe communities. The danger is heightened because merely seeking visas from local consular officials, while citing a same-sex relationship as the basis for a waiver, reveals applicants' sexual orientations or gender identities to local communities and government officials.

LGBTQ individuals who seek admission into the United States as refugees based on persecution in their home countries are similarly endangered by the EO. The EO would halt the admission of *all* refugees to the United States, again, with the Administration retaining discretion to continue the ban indefinitely. Without this crucial path to safety, refugees are forced to languish in refugee camps that are often no safer for LGBTQ individuals than their countries of origin.

As organizations committed to serving and advocating on behalf of the LGBTQ community in the United States and abroad, *Amici Curiae* believe it is in the public interest to affirm the injunctions curtailing the EO and to honor the United States' long-standing commitment to protecting families, upholding our constitutional values, and serving as a place of refuge for persecuted and displaced people from around the world. LGBTQ people will suffer greatly and irreparably if the EO is enforced.

FACTUAL BACKGROUND

I. MANY LGBTQ INDIVIDUALS FACE PERSECUTION AND HOSTILE SOCIAL ENVIRONMENTS IN THEIR COUNTRIES OF ORIGIN, ESPECIALLY IN THE SIX COUNTRIES TARGETED IN THE EO

While the United States recently has made strides in advancing LGBTQ rights, including the right to form an officially-recognized family, the situation in many countries around the globe remains exceedingly grim. Even in countries where LGBTQ status is not considered a crime, LGBTQ individuals are still unable to forge family relationships due to severely anti-LGBTQ legal regimes.[5]

To escape persecution, LGBTQ individuals often relocate to the United States to marry, to reunite with close family members, or to seek refuge. For those seeking family-based visas, documenting their LGBTQ status in their countries of origin leaves them exposed to persecution and violence, causing many visa-seekers to fear the consequences of providing documentation of their status for those visa applications.

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[5] *World Survey*, *supra* n.3, 27.

Similarly, individuals applying through the United States Refugee Assistance Program ("USRAP") — a program designed "[t]o offer resettlement opportunities to persons overseas who are of special humanitarian concern"[6] — are severely disadvantaged by delays. Many refugees are moved to camps or similar establishments while they await adjudication of their refugee applications.

While violence and inhumane treatment are common in refugee camps, LGBTQ refugees face risks that other refugees do not. [7] LGBTQ individuals often "encounter rejection in refugee camps and institutionalized homophobia" in their host countries, even those that are considered to be "frontline host countries in the global refugee crisis."[8] LGBTQ individuals in refugee camps often face "marginalization and hostility," and "transgender people are particularly vulnerable to violence."[9] Thus, even after they flee their home countries, many LGBTQ individuals continue to face "extreme risks and persecution" until they are permitted to resettle in the United States.[10]

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[6] U.S. Citizenship and Immigration Services, *The U.S. Refugee Admissions Program* 2 (2011), https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/Refugee_Admissions_Program.pdf.

[7] Human Rights Watch, *Lebanon: Syrian Refugee's Account of Torture* (Dec. 21, 2016), https://www.hrw.org/news/2016/12/21/lebanon-syrian-refugees-account-torture.

[8] Human Rights First, *LGBT Refugees and President Trump's Refugee Ban Executive Order, Fact Sheet: March 2017* (Mar. 7, 2017), http://www.humanrightsfirst.org/sites/default/files/hrf-lgbt-refugees-trump-refugee-ban-eo-march-2017.pdf ("*LGBT Refugees Fact Sheet*").

[9] *Id.*

The EO, as drafted, would significantly impair, if not block, many LGBTQ individuals' chances at family unification or resettlement as refugees, dramatically increasing the risk of harm to these applicants abroad. Each of the six countries targeted by the EO explicitly criminalizes homosexual conduct, some of them authorizing or even mandating the death penalty for such offenses.[11] And in all of these countries, LGBTQ individuals "face a climate of societal and institutionalized homophobia," many suffering persecution from multiple sources, including disapproving family members, government and police forces, and terrorist groups.[12] The treatment of LGBTQ people in the six countries covered by the EO — treatment to which the EO would indefinitely consign LGBTQ family members and refugees — is detailed below:

Iran. As the U.N. Human Rights Council has noted and condemned on multiple occasions, LGBTQ people in Iran consistently "face harassment, persecution, cruel punishment, and are denied basic human rights." [13] Iran criminalizes same-sex relations between consenting adults, and even mandates the death penalty for the "passive" male engaged in "sodomy" and for fourth-time "lesbian" offenders. [14] Authorities conduct many of these executions in public.[15] Those who are not subject to the death penalty may nonetheless be punished by up to 100 lashes for engaging in same-sex relations.[16] Because LGBTQ individuals may face prosecution under Iranian law if they seek help from authorities, the law "creates a 'chilling effect' on the ability (and desire) of victims to report abuses against them, and renders them more vulnerable to harassment, abuse, blackmail, and extortion by private actors."[17]

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[10] *Id.*

[11] *World Survey*, *supra* n.3, 36-37.

[12] *LGBT Refugees Fact Sheet*, *supra* n.8 ("Halting the refugee admissions program — or the resettlement of refugees from the targeted Muslim-majority countries — leaves vulnerable LGBT refugees awaiting resettlement to face violence, discrimination, and even death.").

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[13] U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran* 20, U.N. Doc. A/HRC/22/56 (Feb. 28, 2013), http://www.ohchr.org/Documents/Countries/IR/A-HRC-22-56_en.pdf.

[14] Mission for Establishment of Human Rights in Iran, *Islamic Penal Code of Iran*, Part 2, Article 111; Part 3, Article 131 5, 7, http://mehr.org/Islamic_Penal_Code_of_Iran.pdf ("*Iran Penal Code*").

[15] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Iran* 3, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport /index.htm?year=2016&dlid=265496.

[16] *Iran Penal Code*, *supra* n.14, Part 2, Articles 112, 113; Part 3, Article 129 5-7.

[17] *Buried Generation*, *supra* n.4.

LGBTQ people in Iran also face pervasive harassment, abuse, and violence "at the hands of private actors, including members of their family and society at large," as well as "members of Iran's police, security, and intelligence forces in public spaces."[18] The Iranian Penal Code does not include hate crime laws or other criminal justice mechanisms to aid in the prosecution of bias-motivated crimes.[19] These conditions have caused numerous LGBTQ Iranians to apply for asylum in the United States, many citing the threat of execution and violence due to their sexual orientation.[20]

The EO has already impeded the resettlement of would-be immigrants and refugees fleeing persecution in Iran. One Iranian refugee was accepted for resettlement in the United States after receiving a death sentence because of his sexuality.[21] However, his resettlement interview was abruptly canceled after the first EO took effect, forcing him to live in fear and subjecting him to multiple assaults while awaiting further action by the United States.[22] Another gay Iranian refugee was scheduled to travel to the United States until the EO blocked his plans.[23] The EO has thus already exacerbated the latent threats to LGBTQ lives in Iran, indefinitely suspending peoples' prospects for resettlement and peace.

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[18] *Id.*

[19] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., ***2016 Country Reports on Human Rights Practices – Iran*** 43-44, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265496.

[20] *See, e.g.*, Shahirah Majumdar, *Trump's Travel Ban Could Be a Death Sentence for Queer Muslim Refugees*, Vice (June 29, 2017), https://www.vice.com/en_us/article/padyjv/trumps-travel-ban-could-be-a-death-sentence-for-queer-muslim-refugees; CBC Radio, *'Everybody Has Forgotten LGBT Refugees': Trump's Travel Ban Dashes Iranian Couple's Hopes* (June 30, 2017), http://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.4167703/everybody-has-forgotten-lgbt-refugees-trump-s-travel-ban-dashes-iranian-couple-s-hopes-1.4167706.

Libya. Libya's Penal Code criminalizes consensual same-sex sexual acts, which are punishable by up to five years in prison for both partners.[24] "In the Libyan society, to be gay [is] considered against Islam."[25] Indeed, in 2012, Libya's representative to the U.N. proclaimed in a U.N.

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[21] Nina dos Santos, *US travel ban leaves LGBT refugees in limbo*, CNN (Mar. 7, 2017), http://www.cnn.com/2017/03/07/world/trump-ban-blocks-gay-iranian-refugee.

[22] *Id.*

[23] Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 14, http://www.humanrightsfirst.org/sites/default/files/HRF-US-Leadership-Forsaken-FINAL.pdf.

[24] Libya: Penal Code of 1953, as amended by Law 70 of October 2, 1973, Articles 407(4), 408(4).

[25] U.N. Human Rights Council, *Summary Prepared by the Office of the United Nations High Commissioner for Human Rights* (February 23, 2015), http://www.ecoi.net/file_upload/1930_1453302677_g1503174.pdf.

Human Rights Council meeting that "gays threaten the continuation of the human race."[26]

Reflecting these social mores, official and societal persecution and violence against LGBTQ individuals in Libya are widespread, [27] and no legislation exists to protect LGBTQ individuals against such mistreatment.[28] In its 2016 report on human rights in Libya, the State Department noted several reports of physical violence, harassment, and blackmail based on sexual orientation and gender identity. "Militias often policed communities to enforce compliance with militia commanders' understanding of 'Islamic' behavior, and harassed and threatened with impunity individuals believed to have LGBTI orientations and their families."[29] For example, in 2013, reports emerged that 12 men, believed to be homosexual, were detained and threatened with execution by an armed group seeking to enforce a strict form of Islamic Sharia law.[30] Other individuals have reported being arrested and raped by Libyan police due to their sexual orientation.[31]

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[26] Canada: Immigr. and Refugee Bd. of Canada, *Libya: Situation of sexual minorities, including legislation; treatment by society and authorities; state protection and available services (2011-July 2014)*, July 17, 2014, http://www.refworld.org/docid/54ca12544.html ("*Libya: Situation of Sexual Minorities*").

[27] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., ***2016** Country Reports on Human Rights Practices – Libya* 28, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265510 ("*Libya's Human Rights Practices*").

[28] *Libya: Situation of Sexual Minorities*, *supra* n.26.

[29] *Libya's Human Rights Practices*, *supra* n.27, 28.

Somalia. Homosexual conduct is outlawed in Somalia. In northern Somalia, where the Somalian Penal Code governs, homosexual intercourse is punishable by imprisonment from three months to three years.[32] In southern Somalia, under the control of militants, consensual same-sex sexual acts are punished by flogging or by death.[33]

Somali society largely deems sexual orientation and gender identity to be taboo.[34] Thousands of LGBTQ individuals in Somalia keep their sexual orientation a "closely guarded secret," knowing that revealing that information could attract potential retribution from terrorist groups or armed gangs.[35] As one source described it, "LGBT people in Somalia are silent and invisible, often facing violence and rejection from their families and communities that results in honour killings and suicides."[36]

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[30] United Kingdom: Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report - Libya* 194 (Apr. 15, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408376/Cm_8593_Accessible_complete.pdf.

[31] *Libya: Situation of Sexual Minorities*, *supra* n.26.

[32] Somalia: Penal Code, Legislative Decree No.5/1962, Article 409.

[33] Amnesty Int'l, *Making Love a Crime, Criminalization of Same-Sex Conduct in Sub-Saharan Africa* (June 24, 2013).

[34] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Somalia* 38 (Mar. 3, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265300.

Violence against LGBTQ people in Somalia is rampant. For example, the U.N. Human Rights Council reported a 2013 incident in which a gay Somali 18-year-old teen was blindfolded, buried up to his waist, and then stoned to death for allegations of homosexuality.[37] There have been reports of gangs of armed men searching the streets of Somalia for people suspected of being LGBTQ.[38]

Sudan. Sudan's Penal Code criminalizes "sodomy," with punishment ranging from 100 lashes to life imprisonment and even death.[39] Additionally, the Penal Code provides that anyone who engages in acts considered indecent or an affront to public morals will be punished by flogging not exceeding 40 times, a fine, or both.[40]

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[35] Catarina Stewart, *Young Somali activist sentenced to death for being a lesbian*, The Independent (Jan. 30, 2016), http://www.independent.co.uk/news/world/Africa/young-somali-activist-sentenced-to-death-for-being-a-lesbian-a6844216.html.

[36] Swedish Int'l Government Cooperation Agency, *The Rights of LGBTI People in Somalia* 1 (Nov. 2014), http://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-somalia.pdf ("*LGBTI People in Somalia*").

[37] U.N. Human Rights Council, *Universal Periodic Review second cycle, Summary of stakeholders' information* 3 (Jan. 22, 2016).

[38] *LGBTI People in Somalia*, *supra* n.36, 1.

[39] Eur. Country of Origin Info. Network, *Sudan Penal Code 1991*, Chapter 15, Section 148, https://www.ecoi.net/file_upload/1329_1202725629_sb106-sud-criminalact1991.pdf.

The criminalization of "sodomy" and "indecent" acts accompanies pervasive anti-LGBTQ sentiment in Sudanese society. Many LGBTQ individuals have expressed concern for their safety. Vigilantes frequently target suspected gay men and lesbians for violent abuse, and public demonstrations against homosexuality are commonplace.[41] The State Department has documented such abuse, including by reporting that an individual was detained, harassed, and beaten by authorities due to his suspected affiliation with LGBTQ-friendly groups.[42]

Syria. The Syrian Penal Code prohibits "carnal relations against the order of nature," and provides for at least three years' imprisonment for violations.[43] Though the law does not specifically address LGBTQ activity, police have used this provision to persecute LGBTQ people.[44] Police also frequently target LGBTQ individuals by arresting them without basis on pretexts such as abusing social values; selling, buying, or consuming illegal drugs; and organizing and promoting "obscene" parties.[45]

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[40] *Id.* Section 151.

[41] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., ***2016** Country Reports on Human Rights Practices – Sudan* (Feb. 27, 2014), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265306.

[42] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., ***2016** Country Reports on Human Rights Practices – Sudan* (Mar. 3, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265306.

[43] Syria: Penal Code of 1949, Articles 517, 520.

The State Department has recognized "overt societal discrimination based on sexual orientation and gender identity in all aspects of [Syrian] society."[46] Throughout the past year, Syrian media reported numerous examples of government and police forces using accusations of homosexuality as a pretext to detain, arrest, and torture LGBTQ people.[47] It is difficult to determine how common this conduct is because police rarely report the basis for their arrests. Moreover, because of the social stigma surrounding LGBTQ identity, many survivors of such abuse are hesitant to come forward to report it.[48]

LGBTQ people in Syria also face extreme threats of violence at the hands of militant Islamist groups. For example, last year, one group's media office issued a "photo report about the imposition of [] punishment" on those suspected of being gay. The photographs included images of a boy being pushed from the top of a building.[49] Human Rights Watch has documented similar violence, including a 15-year-old boy who was stoned to death after he was accused of being gay, and three men — one of whom was just 17 years old — accused of homosexuality who were "sentenced" to death by shooting. A witness to the shooting described the horrific scene: "When I approached the crowd, I saw the body of the boy shot twice . . . . A man standing there told me that he was shot . . . in front of all the people because he was gay."[50] According to the Syrian Observatory for Human Rights, at least 25 Syrian men were murdered in 2016 by extremist groups "on suspicion of homosexuality or for sodomy."[51]

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[44] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Syria* (Mar. 29, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265520.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

Yemen. "Yemen is a conservative Arab state where homosexuality is seen as taboo and is condemned under the country's strong Islamic beliefs."[52] Yemen's Penal Code outlaws same-sex relations, with punishments ranging from 100 lashes to death by stoning.[53] Yemen's laws similarly do not protect against discrimination or hate crimes against LGBTQ individuals.[54] Quite the opposite. "[T]he most serious issue connected to the ban on homosexuality is that victims of hate crimes cannot seek help from the authorities."[55]

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[49] *Id.*

[50] Amnesty Int'l, *Torture was my Punishment: Abductions, Torture and Summary Killings Under Armed Group Rule in Aleppo and Idleb, Syria* (July 2016), http://www.amnestyusa.org/sites/default/files/embargoed_5_july-_torture_was_my_punishment-final_version.pdf.

[51] Human Rights Watch, *World Report 2017: Events of 2016*, https://hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

[52] Int'l Refugee Rights Initiative, *Rights In Exile Programme, Yemen LGBTI Resources*, http://www.refugeelegal

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Because of the risk of criminal prosecution and severe punishment, as well as the societal condemnation they face, most LGBTQ individuals in Yemen are forced to live in hiding, and few LGBTQ people are open about their sexual orientation or gender identity.[56] As a result, "homosexuality in the

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aidinformation.org/yemen-lgbti-resources ("*Yemen LGBTI Resources*").

[53] Int'l Labour Org., *Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties*, Section 11, Article 264, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf.

[54] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Yemen* 44 (2016), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265528.

[55] Ben Gladstone, *For Yemen's gay community social media is a savior*, The Irish Times (Aug. 22, 2015), http://www.irishtimes.com/news/world/middle-east/for-yemen-s-gay-community-social-media-is-a-saviour-1.2324447 ("*Yemen's Gay Community*").

[56] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Yemen* 44 (2016), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265528.

State is both 'unseen and unheard'. It is kept underground, hidden from authorities and a disapproving society."[57]

The plight of LGBTQ people in Yemen has been exacerbated by the ongoing civil war there.[58] Although "[t]he situation is very bad for people in general," the war "has a particularly severe effect on sexual minorities."[59] "Even in peacetime, however, homosexuality in Yemen has always been suppressed. Whatever the outcome of the civil war, the country's gay community has a tough battle ahead before any semblance of widespread acceptance can be achieved."[60]

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[57] *Yemen LGBTI Resources*, *supra* n.52.

[58] Collin Stewart, *Yemen's hidden gay community under siege*, Erasing 76 Crimes (Aug. 19, 2015), https://76crimes.com /2015/08/19/yemens-hidden-gay-community-under-seige.

[59] *Id.*

[60] *Yemen's Gay Community*, *supra* n.55.

ARGUMENT

I. THE UNIQUE HARDSHIPS IMPOSED ON LGBTQ POPULATIONS BY THE EO ARE CONTRARY TO U.S. LAW AND AGAINST THE PUBLIC INTEREST

A. Constitutional And Federal Law Emphasize The Importance Of Family Reunification And Marriage

The public interest in protecting family units, both LGBTQ and otherwise, is enshrined in constitutional law. As this Court has long recognized, the right to marry is fundamental. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." (citation omitted)). In *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), the Court made clear that these rights extend to LGBTQ people. 135 S. Ct. at 2604 ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

The right to marry regardless of sexual orientation inheres in all persons within the United States, not just U.S. citizens. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

The United States' commitment to enabling families to live together is also embodied in its visa policies, which provide special allowances for family-sponsored visas. *See, e.g.*, 8 U.S.C. § 1153(a)(2) (allowing legal permanent residents to sponsor spouses, children, and unmarried sons or daughters); 8 U.S.C. § 1157(c)(2) (providing that spouses and children may be granted the same status as refugees whom they are accompanying or following to join); 8 U.S.C. § 1158(b)(3) (providing that spouses and children may be granted the same status as asylees whom they are accompanying or following to join).

Members of the LGBTQ community may normally avail themselves of family reunification visas to assist family members living abroad, including those suffering persecution in countries that discriminate against LGBTQ people. For example, LGBTQ individuals might apply for admission on a K-1 "fiancé(e)" visa, which requires the K-1 visa applicant's sponsor in the United States to petition the U.S. Citizenship and Immigration Services ("USCIS") to bring the applicant to the United States to be married.[61]

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[61] *See* U.S. Dep't of State, Bureau of Consular Affairs, *Nonimmigrant Visa for a Fiancé(e) (K1)*, https://travel.state.gov/content/visas/en/immigrate/family/fiance-k-1.html (last visited Sept. 5, 2017); U.S. Citizenship and Immigration Services, *K-1 Process: Step by step*, https://www.uscis.gov/family/k-1-process-step-step (last visited Sept. 5, 2017). Once approved, the applicant must submit substantial documentation, including proof to substantiate the

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Immigration law must take family unity into account because "[p]ublic policy supports recognition and maintenance of a family unit." *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The Immigration and Nationality Act ('INA') was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."); *see also INS v. Errico*, 385 U.S. 214, 220 (1966) ("The intent of the Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.").[62]

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applicant's relationship with his or her fiancé(e) in the United States, to a U.S. Consulate or Embassy, participate in an in-person interview, and submit to a medical examination. *Id.*

[62] Congress recognized in enacting and amending the INA that the immigration system is designed to preserve family units. *See* H.R. Rep. No. 85-1199, at 2 (1957) (the "legislative history of the [INA] clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united."); H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952) (the INA implements "the underlying intention of our immigration laws regarding the preservation of the family unit"); *cf. Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("[T]he legislative history of the provision at issue here establishes that congressional concern was directed at 'the problem of keeping families of United States citizens and immigrants united.' To accommodate this goal, Congress has accorded a special 'preference status' to certain aliens who

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Moreover, the value of family unification is an important limitation on deportation proceedings, wherein the Government is required to consider "humanitarian or public interest considerations," including the "compelling humanitarian interest in keeping families united." *United States v. Raya-Vaca*, 771 F.3d 1195, 1207-08 (9th Cir. 2014) (citing cases); *see also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) (noting that "the preservation of family unity is recognized as a critical factor in admitting refugees to a country").

The United States has further recognized that the public interest includes consideration of LGBTQ families by its ratification of the International Covenant on Civil and Political Rights ("ICCPR") in 1992. 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).[63] Specifically, in ratifying the ICCPR, the United States recognized that its domestic law incorporates the fundamental precept that "the

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share relationships with citizens or permanent resident aliens.").

[63] Even if the ICCPR is not a self-executing treaty, the United States declared that "U.S. law generally complies with the Covenant[.]" S. Exec. Report 102-23 (102d Cong., 2d Sess.). Ratified treaties — even without implementing legislation — remain the supreme law of the land. *See* U.S. Const. art. VI, cl. 2. Thus, the ICCPR may be a "useful guide" to interpret domestic law. *See Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (a treaty that does not have force of law nonetheless serves as a "useful guide" in interpreting other provisions of law) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)); *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) (same).

family is the natural and fundamental group unit of society and is entitled to protection by society and the State." ICCPR, art. 23, § 1. That principle obligates the United States to recognize the right of a family to live together, and to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[64]

Thus, the public has a strong interest in maintaining personal and familial relationships for persons within the United States and those seeking to immigrate to the United States.

B. "Familial Relations" Should Be Construed Broadly To Give Equal Dignity To LGBTQ Families

Family reunification and "familial relations" should cover *all* families — including embracing kinship arrangements that, due to discriminatory legal barriers, cultural factors, or circumstance, do not fit the traditional nuclear family model. A narrow conception of "family" that is limited to immediate legal or genetic family fails to account for the lived experiences of many LGBTQ families. Accordingly, a narrow construction would cause concrete harms for those families by excluding from admission to the United States extended family and others whose relationships are no less "close" or "bona fide" than nuclear family members.

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[64] Human Rights Committee, *General Comment No. 18, para. 6*, U.N. Doc. HRI/GEN/1Rev.1, at 26 (1994).

For instance, same-sex marriage and step-parent or joint adoption of children by same-sex couples are not permitted in any of the six targeted countries.[65] As a result, LGBTQ families in these countries may be made up of permanent partners, parents, and children who are not legally recognized as belonging to the same family.[66] Moreover, many LGBTQ people, disowned by immediate family because of their sexual or gender identity, are raised by grandparents or other extended family, or form their own supportive networks with legally unrelated people.[67] Indeed, many LGBTQ people are forced to flee violence and oppression from their families of origin because of their sexual or gender identity. To the extent they have "traditional" family members in the United States, they may be unwilling or unable to draw upon those relationships.

The refugee experience itself fosters the creation of nontraditional families built on mutual affection and support rather than genetics or law. Refugee families, "more so than many others, are likely to be melded from the remnants of conventional families" as the "trauma of persecution and flights, the frequency of family separation, and the exigencies of life in exile create many families of choice and circumstance."[68]

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[65] *See World Survey*, *supra* n.3, 50-54 (surveying countries that recognize marriage and adoption by same-sex couples).

[66] *See Obergefell*, 135 S. Ct. at 2595 (discussing the legal patchwork that precluded adopted children of LGBTQ families from claiming two legal parents).

[67] For example, a 27-year-old lesbian left Iran in 2014 after receiving death threats because of her activities as the editor of an online magazine focusing on LGBTQ issues. She described the hardships faced by LGBTQ refugees, noting that "[a]t least with religious refugees, they have the support of their families, we don't even have that. Our families are [ashamed] of us." *See* Saeed Kamali Dehghan, *US travel ban leaves Iranian LGBT refugees in limbo*, The Guardian (Feb. 1, 2017), https://www.theguardian.com/world/2017/feb/01/us-travel-ban-leaves-iranian-lgbt-refugees-in-limbo.

In this country, too, economic necessity and changing cultural factors have made non-nuclear families increasingly common. As this Court noted seventeen years ago, "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The number of people living in multi-generational or skipped-generation families in the United States has doubled in recent decades.[69] Likewise, many LGBTQ individuals in the United States rely on "families of choice" or alternative family structures for the support that their biological families are unable or unwilling to provide.[70]

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[68] Kate Jastram & Kathleen Newland, *Family unity and refugee protection*, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 583 (Erika Feller, et al. eds., 2003).

[69] *See* Richard Fry & Jeffrey S. Passel, *In Post-Recession Era, Young Adults Drive Continuing Rise in Multi-Generational Living*, Pew Research Center (July 17, 2014), http://www.pewsocialtrends.org/2014/07/17/in-post-recession-era-young-adults-drive-continuing-rise-in-multi-generational-living/ ("A record 57 million Americans . . . lived in multi-generational family households in 2012, double the number who lived in such households in 1980.").

This Court has acknowledged that such non-traditional families are no less worthy of protection. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (association with extended family members is constitutionally protected); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987) (the Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life") (citations omitted). In the immigration context, the reason for this flexibility is simple: the "humane purpose of the [INA] to reunite families would be frustrated by an overly strict interpretation of who is considered a family member. *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (father was not required to prove his relationship with his child born out of wedlock under the strict laws of his home country, noting the "purpose of the Act . . . is to prevent continued separation of families").

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[70] *See generally* Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, Los Angeles: The Williams Institute (Aug. 2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-A-Review.pdf.

As the District of Hawaii observed, "context matters."[71] Recognizing that families do not look the same everywhere, the UNHCR has advocated, with respect to family reunification, that "[e]conomic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions." [72] International humanitarian law supplies a context-sensitive approach, "recogniz[ing] that a family consists of those who consider themselves and are considered by each other to be part of the family, and who wish to live together."[73]

LGBTQ persons come to the United States to achieve formal recognition and protection for their often unconventional families. A broad construction of "family" serves the public interest in family reunification and avoids perpetuating the policies that prevent LGBTQ people in the six targeted countries from realizing co-equal status in society.

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[71] Order, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, at 12 (D. Haw. July 13, 2017).

[72] Jastram & Newland, *supra* n.68, 586 (citing UNHCR, *Background Note: Family Reunification in the Context of Resettlement and Integration*, Annual Tripartite Consultations on Resettlement, Geneva 20-21 (June 2001)).

[73] *Id.* at 585-86 (citing *Commentary to the Additional Protocols* of the 1949 Geneva Conventions).

C. Federal Law Reflects The United States' Commitment To Accept LGBTQ Refugees

As a matter of both historic practice and commitment, the United States accepts and resettles refugees into the United States.[74] In fiscal year 2016, the United States accepted and resettled 84,994 refugees from around the world.[75] America's determination to accept and resettle refugees is a necessary concomitant of its worldwide leadership in guaranteeing and securing human rights for all.

When the United States ratified the Protocol on the Status of Refugees in 1968, *see* 19 U.S.T. 6223, T.I.A.S. No. 6577, and enacted the Refugee Act of 1980, it sought to conform domestic law to international obligations. Pub. L. No. 96-212, 94 Stat. 102; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("[O]ne of Congress' primary purposes [in enacting the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol . . . ."). Those obligations include accepting LGBTQ refugees who are fleeing state-sanctioned persecution on account of their sexual or gender identities.

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[74] *See* U.S. Dep'ts of State, Homeland Sec., & Health & Human Servs., *Proposed Refugee Admissions for Fiscal Year 2016* ii (2015) ("On the occasion of World Refugee Day, June 20, President Obama re-affirmed our nation's commitment to helping refugees and our leading role in providing safe haven."), https://www.state.gov/documents/organization/247982.pdf; *see also* 8 C.F.R. § 207 (the maximum number of refugees who may be annually admitted to the United States is subject to modification by the President based on humanitarian concerns).

[75] *See* Dep't of State, Bureau of Population, Refugees, & Migration, *Summary of Refugee Admissions as of 31-March-2017*, http://www.wrapsnet.org/s/Refugee-Admissions-Report-2017_03_31.xls ("2016" worksheet) (last visited Sept. 5, 2017).

Establishing the United States' policy toward refugees, the Refugee Act expanded the legal definition of refugees to include those subject to "persecution on account of . . . membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). It is now well established that LGBTQ individuals are deemed to belong to such a "particular social group" entitled to refugee status because of their frequent persecution in other countries, as discussed above. *See Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) ("Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group."); *Maldonado v. Att'y Gen. of U.S.*, 188 F. App'x 101, 104 (3d Cir. 2006) ("homosexuality can be the basis for an asylum claim based on membership in a "particular social group"); *Moab v. Gonzales*, 500 F.3d 656, 662 (7th Cir. 2007) ("The Board of Immigration Appeals has recognized explicitly that homosexuality qualifies as a 'particular social group.'" (citing *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990))); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("[A]ll alien homosexuals are members of a 'particular social group'" for asylum purposes).[76] Consequently, the United

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[76] *See also Pitcherskaia v. INS*, 118 F.3d 641, 646-47 (9th Cir. 1997) (remanding denial of an asylum application of a Russian lesbian who cited fear of conversion therapy); *accord Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (remanding a denial of relief and noting that "unique identities and vulnerabilities of transgender individuals must

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States has a well-developed policy in favor of accepting LGBTQ refugees, regardless of their country of origin.

II. THE EO CONTRAVENES U.S. LAW AND POLICY, WHICH ACCEPT LGBTQ INDIVIDUALS AS IMMIGRANTS AND REFUGEES

Many LGBTQ individuals apply for visas to permanently relocate to the United States, including the spouses, parents, children, and fiancés of U.S. citizens, residents, and asylees. LGBTQ individuals who cannot obtain family reunification visas may seek to enter the United States as refugees to avoid persecution in their countries of origin. The EO would foreclose both avenues.

The EO shuts down visa processing for 90 days for anyone seeking a visa from Iran, Libya, Somalia, Sudan, Syria, or Yemen. EO §§ 2(c), 3(a). After 90 days, the Government *may* reinstitute the visa application process, although the EO contemplates that the President may proclaim that certain categories of foreign nationals are permanently prohibited from entry. EO § 2(e). The EO allows for certain case-by-case exceptions to the ban on issuing visas, including "to visit or reside with a close family member" in the case of "undue hardship." EO § 3(c). The waiver provisions, as

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be considered in evaluating a transgender applicant's asylum, withholding of removal, or [Convention Against Torture] claim").

discussed below, provide no guarantee that LGBTQ individuals will be able to obtain visas under the EO.

The EO also suspends the USRAP for 120 days and lowers the refugee admissions cap to 50,000 refugees. The EO permits the Executive Branch to make exceptions to the ban on refugee admissions and allow refugees on a case-by-case basis where entry is in "the national interest."

A. The EO Prevents LGBTQ Individuals From Accessing The Mechanisms In Place For Family Reunification

The public policy goal of family reunification would be thwarted if the EO were to take effect by preventing U.S. citizens and residents from sponsoring U.S. visa applications of LGBTQ family members located in the six countries. The EO would deprive those U.S.-based family members of the fundamental right to family reunification, the very policy the INA was designed to accomplish. *See Solis-Espinoza*, 401 F.3d at 1094.

For example, the EO would impair residents and citizens whose fiancés or partners are located in the six countries from exercising the fundamental right to marry, as their partners would be prohibited from obtaining a K-1 "fiancé(e)" visa to visit the United States. *See* EO § 2(c). That harm is exacerbated for same-sex couples because those individuals cannot travel to one of the six countries to get married, as those countries do not recognize same-sex marriages. By the same token, U.S. children and family members of same-sex couples, unable to marry because they are stranded in one of the six countries, would be uniquely deprived of the ability to form a legally recognized family, and are thus forced to bear "the stigma of knowing their families are somehow lesser" because their families receive unequal treatment under the EO. *See Obergefell*, 135 S. Ct. at 2600.

The EO is an extension of the same context-blind immigration policies that have disparately impacted LGBTQ immigrants and their families.[77] Although same-sex couples can take advantage of immigration benefits previously available only to opposite-sex couples, other avenues for family reunification remain closed or only available after surmounting additional hurdles. For instance, proving a parent-child relationship is significantly complicated, if not impossible, for a de facto parent who by the law of her country of origin cannot adopt or gain legal custody of her child, or marry the child's biological parent.[78] And to the extent this Court recognizes in-laws, such as Respondent Dr. Elshikh's mother-in-law, as a "clear" example of close family, no same-sex couples in the six targeted countries have in-laws, unless they were married in a country that recognizes their relationships.[79]

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[77] As this Court and others have recognized, the federal government until only very recently categorically discriminated against LGBTQ people in the immigration context by, among other things, making homosexuality grounds for inadmissibility and by refusing to recognize same-sex spouses. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2596 (noting that gays and lesbians have been "excluded under immigration laws"); *Boutilier v. INS*, 387 U.S. 118 (1967) (determining that the INA's exclusion of aliens afflicted with "psychopathic personality" was intended by Congress to exclude homosexuals from admission); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014) ("The federal government categorically discriminated against gays and lesbians in immigration until 1990, barring all gay and lesbian noncitizens from entering the United States. . . . And the [INA] labeled gay and lesbian people as mentally ill." (citations omitted)).

Moreover, those U.S.-based family members would be forced to watch and wait as their LGBTQ loved ones are persecuted in the six countries. The EO indefinitely delays the ability of LGBTQ foreign nationals to leave the six countries, even though many of these individuals would have strong cases to obtain visas by virtue of their familial relationships with U.S. citizens or residents. If LGBTQ visa applicants in the six countries are forced to wait an indefinite period of time for the visa process to begin again, they will be waiting in hostile political and social environments. Each day the EO suspends the processing of visa applications, meritorious visa applicants will be exposed to the likelihood of violence — and the certainty of discrimination — in the six countries.

By refusing to accept visa applications from any individual in the six countries, many LGBTQ individuals may find themselves forced to seek refugee status instead of the visa they otherwise might lawfully obtain. However, as discussed below, applying for refugee status presents unique challenges and perils to LGBTQ individuals, many of whom reasonably fear that "outing" themselves could put them or their loved ones in danger.

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[78] *See, e.g.*, 8 U.S.C. §§ 1101(b)(1), (c)(1) (defining "child" to include a genetic child, a stepchild by marriage, a child legitimated by law, or an adopted child in the adoptive parent's legal custody).

[79] These examples illustrate how the EO, even as modified by the injunctions under review, is too narrow to protect all close family relationships.

B. The EO Increases LGBTQ Refugees' Exposure To Dangerous Conditions

LGBTQ individuals are disparately affected by draconian immigration requirements because they are often unable to obtain the records necessary to demonstrate their abuse in the six countries to obtain refugee status.[80] Likewise, because consular staff in the six countries may include both U.S. citizens and foreign nationals, LGBTQ individuals often have well-founded fears of revealing their sexual orientation or gender identity in applying for refugee status. News of an LGBTQ person's sexual orientation or gender identity might be spread by personnel working in consulates in the six countries, provoking violence and discrimination towards such individuals.

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[80] *See* U.S. Citizenship & Immigr. Servs., *RAIO Directorate – Officer Training, Guidance for Adjudicating LGBTI Refugee & Asylum Claims* 38-46 (2011), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf ("reliable information regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead [an officer] to presume that LGBTI individuals are not at risk of mistreatment").

Suspending USRAP and lowering the annual refugee resettlement cap thus prolong the already lengthy and arduous process for LGBTQ individuals escaping persecution and seeking to reunite with their families. Indeed, the broad sweep of the EO disrupts a lifeline for *all* LGBTQ refugees fleeing persecution on the basis of their sexual or gender identity. Notwithstanding the already comprehensive security measures in place, applicants for admission to the United States will be forced to wait several more months while the Administration determines "whether, and if so what, additional information will be needed" to determine that individuals seeking admission to the United States do not pose a security or public-safety threat. EO § 2(a). The EO does not state how current procedures are deficient, nor even whether they are deficient, nor does it provide any assurance that refugee programs will resume after the 120-day suspension.

Moreover, the 120-day suspension snowballs into substantially longer delays as refugees' security and medical screenings expire and must be conducted again and again. These delays impact HIV-positive refugees in particular, many of whom are LGBTQ, who must undergo tuberculosis testing as part of the medical screening process.

During this indefinite delay, LGBTQ people will continue to be exposed to the ever-present risks to their safety in resettlement camps and other manifestly hostile environments. As described above, the immigration process for LGBTQ people in the six countries is uniquely fraught with danger, and the risks they face are aggravated every additional day that they have to remain in conditions where public exposure of their sexual orientation or gender identity could lead to harm and possibly death.

Many LGBTQ refugees outside the six countries face similar hardships. Human Rights First reports that LGBTQ refugees fleeing persecution in Uganda have been stranded in Kenya as a result of the EO. Subject to harassment and violence in Kenya because of their sexuality and lacking access to necessary medical care, these refugees face grave danger while their refugee applications are held up by the EO.[81]

Even refugees who had been accepted for resettlement in the United States, but whose travel was not planned to occur prior to June 29, 2017, are excluded from admission under the Government's implementation of the EO.[82] For example, a gay Iraqi refugee was approved for resettlement to the United States in January after having been raped and beaten to the point of hospitalization in his home country. Even though he currently resides in Turkey, his resettlement was put on hold as a result of the EO, forcing him to endure continued persecution for his sexuality. Similarly, after fleeing her home country of Iraq, a 20-year-old transgender refugee continues to receive death threats in her host country of Lebanon. After completing her U.S. resettlement interviews, her case was put on hold and travel plans delayed, placing her, like many others, in a state of constant vulnerability awaiting resettlement.

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[81] *U.S. Leadership Forsaken*, *supra* n.23, 14-15.

[82] *See* U.S. Dep't of Homeland Sec., Office of Public Affairs, *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* (July 21, 2017) ("*DHS FAQs*"), https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

The EO also affects asylum-seekers who are already present in the United States. An immigration attorney representing a gay man from Syria in asylum proceedings described how USCIS told him that his client's application was on hold due to his country of origin and the EO, even though the client already resides in the United States. Meanwhile, the same attorney has said that his non-LGBTQ clients have not faced the same delays. These wide-ranging and chaotic consequences have upended the status quo with no logical relation to the stated goals of the EO. For every day the EO adds uncertainty and disrupts established expectations, the EO increases the dangers to LGBTQ lives.

III. THE EO'S WAIVER PROVISIONS DO NOT LESSEN THE IMPACT OF THE EO ON LGBTQ INDIVIDUALS

The EO's waiver provisions for visa-seekers and refugees do little to mitigate the harms LGBTQ individuals would face if the EO were allowed to go into effect. The EO suggests that waivers of its bar on travel by nationals of the six countries might be available "on a case-by-case" basis in cases of "undue hardship" and where the foreign national's entry into the United States "would not pose a threat to national security and would be in the national interest." EO §§ 3(c), 6(c). Whether to grant a waiver, however, is entirely discretionary and dependent upon an Administration that has demonstrated an intent to interpret the EO as narrowly as possible and on individual consular officers located in the six countries. *Id.*

It is difficult to believe that the Government will issue a significant number of waivers in light of the Administration's reaction to the Supreme Court's order that the EO may only restrict entry by individuals "who lack any bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. ___, 137 S. Ct. 2080, 2087 (2017). Initial guidance after this order limited "bona fide relationships" to only a handful of close familial connections and notably excluded fiancés.[83] Additional categories of relationships were only added after public pressure and additional litigation. [84] Should this Court ultimately uphold the EO as written, the Administration will likely revert to its original plan of excluding all individuals from the six countries and other refugees regardless of their connection to the United States.

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[83] *See* Defendants' Opposition to Emergency Motion to Clarify Scope of Preliminary Injunction, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, at 2 (D. Haw. July 3, 2017) (admitting that initial guidance did not include fiancés in the definition of "close familial relationship").

[84] *Id.* (acknowledging that the Government revised its definition of close familial relationships to include fiancés after the *Hawaii* plaintiffs challenged the Government's exclusion).

Waivers are unlikely to offer real protection. Neither the EO itself nor the Administration has provided visa-seekers with meaningful guidance on the criteria that will be used in considering waiver applications. The EO vaguely suggests that "[c]ase-by-case waivers could be appropriate" in certain circumstances, including an applicant having "previously established significant contacts with the United States," "significant business or professional obligations," or "if the foreign national is . . . someone whose entry is otherwise justified by the special circumstances of the case." EO § 3(c). This vague language is insufficient, and could be easily abused. Nor does the EO define what conditions are "in the national interest" or what would constitute "undue hardship" under section 3(c), creating further uncertainty as to whether LGBTQ persons would be able to avail themselves of the waiver provisions.

The Departments of State and Homeland Security have done little to elaborate on the waiver requirements. Instead, the Department of Homeland Security broadly instructs that refugees can only claim a "close familial relationship" to a person in the United States to obtain a waiver if the would-be refugee presents "sufficient documentation or other verifiable information supporting that claim."[85] Likewise, the State Department advises visa applicants that "consular officers may seek additional information, as warranted, to ensure underlying relationships are bona fide, rather than being established for the purpose of unlawfully obtaining a visa, including by evading the E.O."[86]

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[85] *DHS FAQs, supra* n.82.

However, as discussed above, many LGBTQ individuals in the six affected countries lack documentation or other evidence that could demonstrate their familial relationships due to their unequal status under the laws of their countries of origin.[87] Thus, in contrast with similarly situated non-LGBTQ persons whose relationships are officially recognized by the six countries, LGBTQ persons stand to be disproportionately excluded from obtaining waivers due to the vagaries of the EO's waiver provisions and implementing guidance.

Moreover, even assuming an LGBTQ individual might qualify for a waiver, LGBTQ individuals would likely be deterred from applying for one. To qualify for many of the exceptions, an LGBTQ person would be required to reveal information about their sexual orientation or gender identity to consular officers, and possibly the consulate's staff of foreign nationals, posing additional dangers beyond those typically faced by

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[86] U.S. Dep't of State, *Important Announcement* (July 14, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html.

[87] Neither the EO nor the Administration's guidance explains whether the waivers would apply to LGBTQ persons seeking admission to the United States on account of their romantic or familial relationships. *See* U.S. Dep't of Homeland Sec., Office of Public Affairs, *Q&A: Protecting the Nation From Foreign Terrorist Entry to the United States* (Mar. 6, 2017), https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states.

LGBTQ persons seeking to travel to the United States. The resulting chilling effect on LGBTQ persons' desire to apply for admission to the United States would only compound their suffering in the six countries. The waiver provisions therefore do not diminish any of the special risks and dangers imposed by the EO on LGBTQ persons from the six countries seeking either a visa or applying for refugee admission.

CONCLUSION

For all the reasons stated above, *Amici Curiae* respectfully request that the Supreme Court affirm the orders of the Courts of Appeal for the Fourth and Ninth Circuits, enjoining the Government from enforcing the EO.

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
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v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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INTEREST OF AMICI CURIAE

Amici are immigration law scholars. They teach immigration and refugee law, have written numerous scholarly articles on immigration and refugee law, and are familiar with the practical aspects of immigration law through client representation. They submit this brief to show that the Immigration and Nationality Act ("INA") as a whole constrains the authority delegated to the Executive Branch under 8 U.S.C. §§ 1182(f) and 1185(a)(1), rendering the Executive Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO"), *ultra vires.*[1]

SUMMARY OF THE ARGUMENT

While Congress has delegated broad powers over immigration to the Executive Branch, the INA's content, structure, and usage limit those powers. Viewing the INA in its entirety, as an integrated statute, undermines the Government's arguments that Congress imposed "*no constraints*" on the President's power to suspend the entry of classes of aliens under 8 U.S.C. §§ 1182(f) and 1185(a)(1). *See* Pet'r's Br. 40–42 (emphasis added).

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*—contributed money that was intended to fund preparing or submitting the brief. A Motion for Leave to File is not required pursuant to Sup. Ct. R. 37.2(a), because counsel for Respondents in Nos. 16-1436 and 16-1540 have consented in writing to the filing of this brief *amici curiae*, and Petitioners lodged their blanket consent to *amici* briefs with the Clerk.

First, Congress has carefully crafted the categories of aliens who may and may not be admitted to the United States, specifically addressing terrorism-related and foreign policy grounds of inadmissibility. *See* 8 U.S.C. § 1182(a)(3)(B)–(C). There would be no point in constraining the Executive's discretion through these inadmissibility grounds if Congress intended to grant unbridled power to the President under 1182(f) and 1185(a)(1). Second, the INA's nondiscrimination provision that Congress added in 1965, and the detailed refugee admissions process added in 1980, would be meaningless if the President had unchecked power to suspend entry under 1182(f) and 1185(a)(1).

The broad grant of authority under 1182(f) and 1185(a)(1) can only be reconciled with the rest of the statute if construed to apply in exceptional situations involving diplomacy and the President's Commander-in-Chief powers, where the President's authority is at its peak. This interpretation is consistent with past presidential usage of the provisions, such as suspending entry of Iranians during the 1980 hostage crisis and suspending entry of Cubans after Cuba violated an immigration agreement with the United States. In the present case, there is no evidence that the EO is related to an exigency involving diplomacy or military affairs. On the contrary, the EO was promulgated under unique and unprecedented circumstances, without any precipitating, urgent diplomatic or military trigger.

Since 1952, when 1182(f) and 1185(a)(1) were enacted, Congress has repeatedly amended the INA. One of the critical changes that occurred in 1965 involved abandoning a system rooted in national origin discrimination and creating a much more equitable method for determining admission. Congress has also repeatedly constrained executive discretion over the past several decades to further prevent discriminatory practices. This historical trajectory underscores the importance of construing 1182(f) and 1185(a)(1) in the context of the contemporary INA, with its current structure, content, objectives, and purpose.

In this brief, we demonstrate how the INA *as a whole* unambiguously dooms the EO, making it unnecessary for the Court to reach the constitutional questions raised.

ARGUMENT

I. CONGRESS HAS GIVEN THE PRESIDENT BROAD, BUT IN NO WAY UNLIMITED, POWERS OVER IMMIGRATION.

Primary responsibility over immigration lies with Congress. It is Congress that has the power to "establish an uniform Rule of Naturalization," "regulate Commerce with foreign Nations," "declare War," and, in a veiled reference to slavery, prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit" after the year 1808. U.S. Const. art. I, § 8, cl. 3, 4, 11 & § 9, cl.1. Based on these enumerated powers, combined with the Necessary and Proper Clause, this Court has long recognized that regulating immigration is primarily, if not exclusively, within Congress's domain.[2] *See, e.g.*, *Galvan v. Press*, 347 U.S. 522, 531

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[2] While this Court has suggested in *dicta* that the President has some inherent power over immigration derived from the foreign

(1954) ("[T]hat the formulation of [immigration policy] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340 (1909) ("[T]he authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject.").

Congress can, of course, delegate authority to the Executive Branch. *See Yamataya v. Fisher*, 189 U.S. 86, 97–98 (1903); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). In the INA, Congress has delegated substantial authority to Executive Branch officials, including the President, Attorney General, Secretary of State, Secretary of Homeland Security, Secretary of Labor, and Secretary of Health and Human Services.[3] *See, e.g.*, 8 U.S.C. §§ 1103(a)

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affairs power, those cases involved actions taken pursuant to statutory delegations of authority. *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539–41 (1950) (explaining that the President acted pursuant to a 1941 Act that authorized him to impose additional restrictions on entry and departure "during the national emergency proclaimed May 27, 1941," upon finding that the interests of the United States required it); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (stating that the Executive Branch denied a waiver of inadmissibility pursuant to a delegation of authority in 8 U.S.C. § 1182(a)(28)); *Kerry v. Din*, 135 S. Ct. 2128, 2131–32 (2015) (upholding the denial of a visa by a consular official acting pursuant to a statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities).

[3] The Homeland Security Act of 2002 transferred certain powers from the Attorney General to the Secretary of the Department of

(delegating authority to the Secretary of Homeland Security), 1104 (Secretary of State), 1182(a)(1)(A) (Secretary of Health and Human Services), and 1188(a)(2) (Secretary of Labor).

Part A below explains the main powers that Congress has delegated to the Executive Branch regarding immigration enforcement and the admission of individuals. Part B turns to the authority delegated under the two specific provisions at issue in this case: 8 U.S.C. §§ 1182(f) and 1185(a)(1). The brief explains that in this case the President's powers pursuant to these two provisions must be construed narrowly, in part, because the EO was not promulgated pursuant to exigent diplomatic or military concerns when the President's authority is at its peak. *See Youngstown Steel and Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

A. Congress Has Delegated Significant Yet Restricted Powers Over Immigration to the Executive Branch.

The broadest delegations of authority to the Executive Branch pertain to enforcement and removal, rather than admission. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 464–65 (2009). Congress has charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities," and, even more generally, with "the administration and enforcement" of immigration law.

Homeland Security ("DHS"). Homeland Security Act, H.R. 5005, 107th Cong. (2002).

6 U.S.C. § 202(5); 8 U.S.C. § 1103(a). These powers allow the President, through the Secretary of Homeland Security, to prioritize certain classes of noncitizens for removal and provide guidance regarding the use of prosecutorial discretion. Although Congress has set forth detailed grounds of deportability, *see* 8 U.S.C. § 1227, decisions about who is actually placed in removal proceedings and who is ultimately deported remain largely in the hands of the Executive Branch.

In addition, the Executive Office for Immigration Review ("EOIR"), an agency within the Department of Justice, conducts immigration court proceedings and appellate review of most removal decisions. As part of this process, EOIR officials are authorized to make determinations about whether to grant certain forms of relief and protection from removal, once an individual satisfies the eligibility criteria in the INA. Decisions about whether to grant asylum, different types of cancellation of removal, voluntary departure, and adjustment of status require an exercise of discretion. *See* 8 U.S.C. §§ 1158, 1229b, 1229c, 1255(c).

Congress has also delegated authority to the Executive Branch concerning the admission of individuals into the country, including discretionary waivers of certain inadmissibility grounds in individual cases. One of the broadest, 8 U.S.C. § 1182(d)(3), allows DHS to waive almost any inadmissibility ground for an individual seeking a "nonimmigrant" (temporary) visa. Congress has not delegated any comparable waiver authority with respect to "immigrant" visas. Many other types of waivers may be granted only if the applicant satisfies specific statutory requirements. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of three and ten-year bars for unlawful presence), (a)(9)(C)(iii) (waiver for aliens unlawfully present after previous immigration violations), (d)(4) (waiver of requirement to have a valid entry document), (d)(11) (waiver for alien smuggling), (d)(12) (waiver for document fraud), (e) (waiver of two-year foreign residency requirement for educational exchange visitors), (g) (waiver of health-related inadmissibility ground), (h) (waiver of several inadmissibility grounds), and (i) (waiver for fraud and willful misrepresentation). For refugees, Congress has included a special provision that authorizes the Executive Branch to waive certain inadmissibility grounds "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1157(c)(3). The Executive Branch has also been authorized to grant "parole," which allows individuals to enter the country "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

Furthermore, Congress has authorized the Executive Branch to determine the form and manner of processing "immigrant" and "nonimmigrant" visa applications. 8 U.S.C. § 1202(a), (c). For nonimmigrant visas, Congress has authorized the Executive Branch to decide what supporting documents must be presented to consular officers. 8 U.S.C. § 1202(d). For immigrant visas, on the other hand, the statute specifies what documents must be provided. 8 U.S.C. § 1202(b). Although the INA generally requires every individual aged 14 to 79 who is applying for a nonimmigrant visa to appear for an in-person interview, the Secretary of State may waive this requirement if it is "in the national interest of the United States" or "necessary as a result of unusual or emergent circumstances." 8 U.S.C. § 1202(h)(1)(C). The Secretary of State is also authorized to grant an exception to the general rule that overstaying a nonimmigrant visa makes an individual ineligible to be readmitted as a nonimmigrant if "extraordinary circumstances" exist. 8 U.S.C. § 1202(g)(2)(B).

Compared to these specific delegations of authority pertaining to visa issuance and admission, the two statutory provisions on which the Government relies in this case—1182(f) and 1185(a)(1)—grant the President broad power in certain circumstances.[4] Contrary to the Government's arguments purporting unlimited power, however, the text of these provisions, their historical usage, and the INA as a whole constrain them.

B. The Delegations of Authority Under 1182(f) and 1185(a)(1) Give the President Broad Discretion in Exigencies Involving Diplomacy or Military Affairs, But Do Not Provide Unlimited Power.

The President may suspend the "entry" of classes of aliens under 1182(f) only if he "finds" that such entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). In addition, any rules regulating entry prescribed by the Secretary of State under 1185(a)(1) must be "reasonable." Each of these terms must have some meaning to avoid being mere surplusage, as well as to avoid rendering the statutory admission scheme and its restraints on executive discretion surplusage. *See Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

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[4] The boilerplate language in 1185(a)(1) has never been held by itself to authorize any particular Executive Branch restriction on entry; 1182(f) is the broader grant of authority, subsuming 1185(a)(1). *See Jean v. Nelson*, 727 F.2d 957, 966–67 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Yet the Government claims that these are not limiting words at all, arguing that "Congress placed *no restrictions* on which 'interests' count or what 'detriment[s]' would suffice for the President to invoke his suspension authority, *committing all of those matters to the President's judgment and discretion*." *See* Pet'r's Br. 41–42 (emphasis added). Under this interpretation, if the President decided to suspend the entry of aliens with bad table manners, asserting that it would be detrimental to the nation's interests, there would be nothing anyone could do. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 622 (4th Cir. 2017) (Wynn, J., concurring) (finding that "an alien's race, nationality, or religion is as irrelevant to the potential for his entry to harm the interests of the United States as is the alien's addiction to baseball or his poor table manners") (citing *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 490–91 (2d Cir. 1950) (Hand, J.)).

The Government's interpretation conflicts not only with the plain language of the statute, but also with the delegation of authority canon, which prohibits "find[ing] in [a] broad generalized power an authority to trench so heavily on the rights of the citizen." *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see also INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001) (holding that the Antiterrorism and Effective Death Penalty Act and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 did not repeal habeas jurisdiction in the absence of "a clear indication that Congress intended that result"); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) ("We cannot find . . . any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."). Here, the generalized power delegated in 1182(f) and 1185(a)(1) should not be construed as restricting the rights of Americans to meet with family, friends, and colleagues from six other nations, or as otherwise encroaching on fundamental rights or commitments, as with refugee resettlement, without any clear indication that Congress intended to delegate that kind of unbridled power.

Prior Presidents' usage of 1182(f) and 1185(a)(1) provides further assistance in interpreting the scope of delegated power. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) (turning to "judicial precedent and historical practice" in interpreting the President's power to decide what foreign power is legitimate); *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (putting "*significant weight upon historical practice*" in interpreting the President's powers under the Recess Appointments Clause, and explaining that "[t]he longstanding 'practice of the government' . . . can inform [the Court's] determination of 'what the law is'" in a separation-of-powers case (citations omitted)); *see also* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097 (2013) (addressing the importance of history in defining the scope of executive power).

Presidents have typically drawn on 1182(f) and 1185(a)(1) in emergency situations that implicate their Commander-in-Chief powers and their authority concerning international diplomacy. *See* U.S. Const. art. II, § 2, cl. 1–2. Such situations include suspending entry of classes of aliens after foreign coups or revolutions; putting pressure on a foreign government, often as part of broader sanctions; enforcing a treaty; and responding to an act of aggression or an emergency. *See* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens* 6–10 (2017) (listing all previous presidential suspensions). In these types of situations, the President's power is at its zenith. By contrast, when the President attempts to restrict entry of classes of aliens in situations that do not implicate specific diplomatic exigencies or military crises, he is intruding on Congress's undelegated power to establish the classes of persons who may and may not be admitted to the United States, and his power is at its lowest ebb. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

In response to the 1980 Iranian hostage crisis, for example, President Carter invoked 1185(a)(1) and directed the Secretary of State to invalidate and suspend the issuance of visas to Iranians "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." President's Announcement of Sanctions Against Iran, 16 Weekly Comp. of Pres. Doc. 611 (Apr. 7, 1980). Restricting the entry of Iranians was just one of several measures, including ending diplomatic relations, which President Carter used to increase pressure on Iran to release the hostages taken during the storming of the U.S. embassy. *Id.*

Perhaps the most sweeping use of 1182(f) was President Reagan's exercise of power to "suspend entry into the United States as immigrants by all Cuban nationals," subject to certain exceptions. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). President Reagan issued this Proclamation in response to the Cuban government's refusal to honor an immigration agreement between the two countries and disruption of normal migration procedures. *Id.* Two years prior to the Proclamation, this Court upheld President Reagan's ability to restrict U.S. citizens' travel to Cuba citing "weighty concerns of foreign policy" as the justification for the ban. *Regan v. Wald*, 468 U.S. 222, 241–42 (1984).

Unlike these historical exercises of presidential authority, President Trump's order suspending the entry of nationals of six countries, as well as the admission of refugees, cannot fairly be characterized as an act related to exigent diplomatic or military affairs. There is no evidence, for example, that the President suspended entry to negotiate or enforce a treaty with any of these six countries; or to respond to an act of aggression by or a coup or recent revolution in any of the six countries.[5]

The EO in this case was promulgated under unique and unprecedented circumstances. The initial version of the EO was issued on January 27, 2017, within days of the President's inauguration and corresponded only to his campaign promises—not to any identifiable, even classified, security review that could conceivably have been ordered in such a short time. There were therefore no "findings" to support either the initial or the revised EO, and no nexus to any identifiable U.S. interests. Furthermore, both the initial and the current EO include provisions indicating a discriminatory purpose by mandating the collection of information "regarding the number and types of acts of gender-based violence against women, including so-called 'honor killings.'" Executive Order No. 13780, 82 Fed. Reg. 13,209, 13,217 (Mar. 9, 2017); Executive Order No. 13769, 82 Fed. Reg. 8,977, 8,981 (Jan. 27, 2017).[6] As immigration scholars have emphasized, such a directive "has no conceivable relation to the alleged national security purpose of the travel ban." Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, Just Security (June 9, 2017). Under these particular circumstances, the EO exceeded the authority delegated by Congress.

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[5] While the Government contends that the Visa Waiver Program provides a rationale for restricting entry from the six countries named in the EO, that argument ignores how Congress designed the Visa Waiver Program to *constrain* executive discretion. *See infra* Section II(D).

[6] In discussing the exercise of parole authority with respect to Haitians, the Supreme Court specifically found that the INA's prohibition of discrimination based on race or national origin limited the wide discretion given to executive officials. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (requiring a "determination [regarding] whether the INS officials are observing this limit upon their broad statutory discretion to deny parole to class members in

II. THE INA AS A WHOLE CONSTRAINS THE DELEGATION OF AUTHORITY IN 1182(f) AND 1185(a)(1).

The statutory provisions on which the Government relies must be interpreted in a manner that is consistent with the statute as a whole. *See, e.g.*, *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (internal quotation marks omitted)); *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

Indeed, the Court has cautioned that reading provisions of the INA in isolation could lead to "so much trickery, violating the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 549 U.S. 47, 56 (2006) (citations and internal quotation marks omitted). That is precisely "why our

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detention"). Similarly, President Trump's EO must be considered in light of the limits imposed by the nondiscrimination provision of the INA, discussed *infra* Section II(C).

interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them . . . ." *Id.* As shown below, reading whole sections of the INA together fixes the meaning of 1182(f) and 1185(a)(1).

Congress has carefully determined the classes of aliens who may and may not be admitted to the country. In the sixty-five years since 1182(f) was added to the INA, Congress has also repeatedly legislated constraints on executive discretion in matters involving admission. The President is not free to ignore those constraints, except under highly limited circumstances involving exigent diplomatic and military affairs. Reading 1182(f) and 1185(a) in the context of the entire INA demonstrates that these isolated provisions do not authorize the unique and improper EO at issue in this case.

A. The INA Constrains the President's Authority by Specifying Classes of Aliens Who May Be Admitted to the United States.

The INA provides detailed categories of aliens who may be admitted to the United States, which the President cannot unilaterally alter. For individuals seeking permanent residence, Congress has established three main ways to obtain an immigrant visa: family relationships, employment, and the diversity lottery. 8 U.S.C. § 1153(a)–(c). Family relationships are the most common way to obtain an immigrant visa. There are an unlimited number of visas available to spouses, children, and parents of U.S. citizens, known as "immediate relatives." 8 U.S.C. § 1151(b)(2)(A)(i). In addition, Congress has specified four preference categories based on other types of family relationships to a U.S. citizen or permanent resident.[7] With respect to employment-based immigrant admissions, Congress has created five preference categories that take into account factors such as professional accomplishments, education, occupation, and investments.[8] For both the family and employment-based categories, Congress has devised an intricate method for calculating the number of visas available. *See* 8 U.S.C. § 1153(a)–(b).

The third route to obtaining an "immigrant" visa is the diversity lottery, which requires applicants to meet certain threshold conditions and then applies a complicated, statutorily-designated formula to determine the number of people who will be admitted in a random order from certain underrepresented geographical regions.[9] 8 U.S.C. § 1153(c)–(e).

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[7] The family-sponsored preference categories are: (1) unmarried sons and daughters over 21 years of age of U.S. citizens; (2A) spouses and children of permanent residents; (2B) unmarried sons and daughters over 21 years of age of permanent residents; (3) married sons and daughters of U.S. citizens; and (4) brothers and sisters of U.S. citizens. 8 U.S.C. § 1153(a).

[8] The employment-based preference categories are as follows: (1A) individuals with exceptional ability; (1B) outstanding professors and researchers; (1C) multinational executives and managers; (2) those with advanced degrees or exceptional ability; (3) individuals with bachelor's degrees or in shortage occupations; (4) special immigrants; and (5) investors. 8 U.S.C. § 1153(b).

[9] The threshold requirements are (1) a high school education or its equivalent; and (2) at least two years of experience in an occupation that requires at least two years of training or experience within five years preceding the application. 8 U.S.C. § 1153(c)(2).

For nonimmigrants, who comprise the vast majority of individuals admitted to the United States, Congress has created an equally elaborate system. *See* U.S. Dep't of State, Bureau of Consular Affairs, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts: 2012–2016, *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableI.pdf. This system includes an alphabet soup of nonimmigrant visa categories, including, but not limited to, visas for individuals coming to the United States for tourism, business, investment, study, training, agricultural or seasonal work, artistic performances, athletic events, and exchange programs. 8 U.S.C. § 1101(a)(15).

In addition to these carefully created categories for the admission of immigrants and nonimmigrants, Congress has provided a comprehensive scheme for admitting refugees. Congress has delegated to the President the authority to determine, after "appropriate consultation" with Congress, how many refugees should be admitted in the next fiscal year. 8 U.S.C. § 1157(a)(1)–(3), (d), (e). In the event of an "unforeseen emergency refugee situation" that justifies the admission of additional refugees, the President is authorized to determine, again after "appropriate consultation," the number of additional refugees that should be admitted in response to the emergency. 8 U.S.C. § 1157(b). The statute defines "appropriate consultation" to include a detailed list of information that should "be provided at least two weeks in advance" of discussions between "designated Cabinet-level representatives of the President" and members of Congress, as well as a hearing to review the President's plans, "unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals." 8 U.S.C. § 1157(d)–(e).

Given the unambiguous statutory text of 1157, which requires that the President consult with Congress in setting the number of refugees to be admitted, the plain language of the statute must determine its meaning. *See Tankersley v. Almand*, 837 F.3d 390, 395 (4th Cir. 2016) ("When the words of a statute are unambiguous, then . . . judicial inquiry is complete." (internal citations and quotation marks omitted)). Congress's explicit grant of power to increase the pre-determined number of refugees and its silence regarding the power to decrease that number indicate that Congress did not provide the President with the latter. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (noting that where "Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent" (citations omitted)).

The President's EO directly contravenes the deliberate and systematic process for immigrant, nonimmigrant, and refugee admissions set forth in the INA.[10] By unilaterally suspending entry from six countries, halting the refugee admissions program, and decreasing the number of refugees to be admitted without consulting Congress, the EO upends the statutory scheme Congress created and is thus "incompatible with the express or implied will of Congress." *Zivotofsky*, 135 S. Ct. at 2084 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). Where, as here, the President's power is "at its lowest ebb," it "must be scrutinized with caution." *Id.*

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[10] The initial version of the EO explicitly stopped the *issuance of visas* to nationals of designated countries, while the current version stops the *admission* of individuals coming from the designated countries. Executive Order No. 13769, 82 Fed. Reg. 8,977, 8,977–78 (Jan. 27, 2017); Executive Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). As a practical matter, the distinction is meaningless. Although the President can prevent a visa-holder from entering the country if that visa-holder fails to meet the INA's admission requirements, he cannot preemptively

B. The INA Constrains the President's Authority by Specifying Classes of Aliens Who May *Not* Be Admitted to the United States, Including Based on National Security and Foreign Policy Concerns.

Just as Congress has specified categories for admission, so too, has it specified categories of aliens who may *not* be admitted. 8 U.S.C. § 1182(a). These inadmissibility grounds render certain aliens "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a). The inadmissibility grounds include, but are not limited to, categories based on: health, criminal convictions, conduct even without a conviction (e.g., trafficking in controlled substances, alien smuggling, and engaging in prostitution or commercialized vice), immigration violations (e.g., prior periods of unlawful presence and prior orders of removal), indigence (being a "public charge"), misrepresentation, national security, and foreign policy. 8 U.S.C. § 1182(a). Congress has

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stop the entry of all visa-holders from specified countries because to do so would render the visa worthless, undermining Congress's authority and the INA's eligibility requirements.

incorporated into this framework very specific exceptions to certain inadmissibility grounds, as well as discretionary "waivers" of certain grounds of inadmissibility. *See supra* Section I.A.

The two grounds of inadmissibility addressing national security and foreign policy are critical in interpreting the scope of the President's authority under 1182(f) and 1185(a)(1). First, the national security ground in 8 U.S.C. § 1182(a)(3)(B) provides very broad definitions of "terrorist activity" and "engag[ing] in terrorist activity," facilitating their use in a discretionary manner by consular officials and immigration officers. *See generally* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L.J. 313, 321–22 (2000). For example, the definition of "terrorist activity" includes any unlawful use of a weapon or dangerous device "other than for mere personal monetary gain," and "[e]ngag[ing] in terrorist activity" includes providing "material support" for any "terrorist activity" or organization. 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b), (B)(iv). Congress has also provided a mechanism for seeking an exemption from this inadmissibility ground. 8 U.S.C. § 1182(d)(3)(B). It would be pointless for Congress to legislate specific criteria for terrorism-related inadmissibility, as well as inadmissibility exceptions and exemptions, if Congress also authorized the President to exclude entire nations based on vague references to national interest. *See Abourezk v. Reagan*, 785 F.2d 1043, 1057–58 (D.C. Cir. 1986) (prohibiting the Executive Branch from using the general exclusionary authority conferred by Congress in one provision of the INA to circumvent a more specific provision dealing with exclusion of aliens on the basis of organizational affiliation).

Second, the foreign policy inadmissibility ground applies to any alien "whose entry or proposed activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States." 8 U.S.C. § 1182(a)(3)(C). Congress has carved out two exceptions to this inadmissibility ground that curb the Secretary of State's discretion, providing that a person generally should not be excluded based on "past, current, or expected beliefs, statements, or associations that would be lawful within the United States." 8 U.S.C. § 1182(a)(3)(C)(ii)–(iii). The conference committee report accompanying the 1990 Immigration Act, which introduced the foreign policy ground, provides:

> Under current law there is some ambiguity as to the authority of the Executive Branch to exclude aliens on foreign policy grounds . . . . The foreign policy provision in this title would establish a single clear standard for policy exclusions (which is designated as 212(a)(3)(C) of the INA). The conferees . . . expect that, with the enactment of this provision, aliens will be excluded not merely because of the potential signal that might be sent because of their admission, but when there would be a clear negative foreign policy impact associated with their admission.

H.R. Rep. No. 101-955, at 128–29 (1990). There would be no point in requiring the Executive Branch to have "reasonable grounds to believe" that an individual "would have potentially serious adverse foreign policy consequences for the United States" before denying the admission of such an individual if the president had *carte blanche* authority to restrict entry under 1182(f) or 1185(a). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (construing a statute to avoid "the superfluity of a specific provision that is swallowed by the general one").

Construing 1182(f) and 1185(a)(1) as broadly as the Government suggests would allow the President to destabilize—and ultimately destroy—the detailed admission structure described above. The President would effectively be able to create new categories of inadmissible aliens by suspending entry of classes he defines, thereby also altering the categories of people admitted to the country. For example, the President would upend the statute if he invoked 1182(f) or 1185(a)(1) to suspend the entry of spouses of permanent residents or anyone without an advanced degree. The President could also influence the geographic allocation of visas that plays an important role in the diversity lottery by suspending entry based on nationality. Congress clearly did not intend to delegate such unlimited discretion under 1182(f) or 1185(a)(1).

C. The INA's Nondiscrimination Provision Constrains the President's Authority Under 1182(f) and 1185(a)(1).

Section 1152(a)(1)(A) of Title 8 of the U.S. Code prohibits discrimination on the basis of nationality and place of birth in the issuance of immigrant visas. Introduced as part of the Immigration Act of 1965, the INA's nondiscrimination provision was designed to remedy the "harsh injustice of the national origins quota system." Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 Pub. Papers 1037, 1038 (Oct. 3, 1965) (noting the national origins quota system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man"); *see also Olsen v. Albright*, 990 F.Supp. 31, 37 (D.D.C. 1997) (discussing enactment of the 1965 Amendments, including "[t]he legislative history surrounding the 1965 Act [which] is replete with the bold anti-discriminatory principles of the Civil Rights Era," and noting that visas may not be denied through applying prejudicial national stereotypes); Manuel, Cong. Research Serv., *supra*, 1–10. Congress even rejected a proposal to gradually transition away from national origin quotas, preferring instead to require their immediate abolition and to limit the Executive's discretion in the visa allocation process. S. 500/H.R. 2580, 89th Cong., 1st Sess. (1965) (Hart-Celler, Johnson administration bill); H.R. 8662, 89th Cong., 1st Sess. (1965) (Feighan bill).

Considering Congress' specific intent to repeal the national origin quota and its discriminatory foundation, it is unsurprising that the text of the nondiscrimination provision is succinct and unambiguous: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). That text is clear and should be interpreted in accordance with its plain meaning. *See Puello v. Bureau of Citizenship & Immigr. Servs.*, 511 F.3d 324, 327 (2d Cir. 2007). The nondiscrimination provision thus reflects a significant step by Congress to end discriminatory immigration practices previously allowed by the INA. It is through that nondiscriminatory lens that the President's statutory authority must be construed.

Although the nondiscrimination provision is broadly applicable, it is not absolute. Congress did create some narrow statutory exceptions to the provision, none of which the EO satisfies. Most significantly, Congress can discriminate by assigning per-country caps on the number of family and employment-based visas that are issued. 8 U.S.C. § 1152(a)(1)(A), (a)(2).[11]

Notably, however, Congress did not exempt from the nondiscrimination provision the President's authority pursuant to 1182(f) and 1185(a)(1). *See Hillman*, 133 S. Ct. at 1953 ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citations omitted)). In addition, none of the exceptions to the nondiscrimination provision grant the President the authority to create his own exceptions. It is therefore unsurprising that the President's statutory authority is not exempt from the nondiscrimination provision. There would be no point to a law that proscribes the President from discriminating except when the President chooses to discriminate.

Presidential authority pursuant to 1182(f) and 1185(a)(1) must therefore be construed in conformance with the INA's nondiscrimination provision. Only then can both statutory provisions be given effect as Congress intended. *See Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute."); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (holding that an interpretation of one statutory provision that renders another provision superfluous "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect").

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[11] Congress has also made clear that the Secretary of State can make determinations regarding the location of and procedures for immigrant visa application processing. 8 U.S.C. § 1152(a)(1)(B).

Although the President has the authority to suspend the entry of immigrants "detrimental to the interests of the United States" via 1182(f), he cannot establish blanket prohibitions against immigrants based solely on their nationality or place of birth. *See Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980) ("[U]nder 8 U.S.C. § 1152(a), INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency."). To do so would undermine the visa allocation system over which Congress retains authority, and it would specifically run afoul of the INA's nondiscrimination provision.

D. The Overall Historical Trajectory of the INA Supports Interpreting the Statute as Constraining the President's Authority Under 1182(f) and 1185(a)(1).

Congress has repeatedly amended the INA to constrain executive discretion, and the restrictions on executive authority, described above, would be meaningless if the President had total and unreviewable discretion to ignore them. The overall structure and historical trajectory of the INA thus reflect Congress's intent to limit the President's power over admissions.

In addition to the statutory provisions on inadmissibility and nondiscrimination, previously discussed, Congress has repeatedly amended the INA to curb what it saw as excessive executive discretion regarding refugee admissions. The purpose of the Refugee Act of 1980 was to reform the prior ad hoc and discriminatory approach to U.S. refugee admissions. *See, e.g.*, H.R. Rep. No. 96-781, at 1 (1980) (Conf. Rep.) (noting that the Refugee Act aimed to "establish a more uniform basis for the provision of assistance to refugees"); S. Rep. No. 96-590, at 1 (1980) (Conf. Rep.) (same); *see also* S. Rep. No. 96-2, at 3757 (1980) ("[T]he consultation process is now specifically outlined in the statute, ending the current parole process which is merely governed by custom and practice.") (statement of Sen. Kennedy). Dissatisfied with the use of administrative discretion, Congress passed the Refugee Act, adding sections 207 and 208 to the INA, now 8 U.S.C. §§ 1157 and 1158, to create orderly and nondiscriminatory procedures for individuals to be resettled as refugees and claim asylum. The Refugee Act of 1980, 96 Pub. L. No. 96-212, 94 Stat. 102 (1980). The legislative history of 1157 demonstrates that Congress enacted the Refugee Act of 1980 to provide itself with "much greater and more explicit power than it [] had before with regard to the numbers and nature of refugees to be admitted to this country." *See*

H.R. Rep. No. 96-2, at 4501 (1980) (statement of Rep. Holtzman).[12]

In deliberations leading up to the passage of the Refugee Act, members of the House expressed "extreme[] concern[] about assuring that Congress ha[d] a proper and substantial role in refugee admissions, given [its] plenary power over immigration." H.R. Rep. No. 96-1, at 35814 (1979) (statement of Rep. Holtzman); *see also Admissions of Refugees into the United States: Hearings before the Subcomm. on Immigr., Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong. 59 (1977) (statement of Rep. Eilberg) ("Our bill represents an attempt to restore [Congress's] authority [to regulate U.S. refugee admissions] and, at the same time, to establish a proper balance between the executive and the legislative branches of Government in establishing the appropriate procedures governing their admission."). Again, in light of this history, Congress could not have intended to give the President general authority to suspend refugee admissions and unilaterally cut the number of refugees to be admitted after it was set in appropriate consultation with

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[12] In the context of refugee admissions, 1157 supersedes 1182(f) because 1157 was enacted twenty-eight years after 1182(f) and is more specific. *Compare* Immigration and Nationality Act, 66 Pub. L. No. 66-414, 66 Stat. 163 (1952) *with* The Refugee Act of 1980, 96 Pub. L. No. 96-212, 94 Stat. 102 (1980). In 1157, Congress explained the process for determining the number of refugees to be admitted each fiscal year and provided a detailed, precise framework for the administration of the refugee admission process. Given these detailed, specific, and more recently enacted provisions, the President's general authority under 1182(f) cannot be interpreted to conflict with 1157.

Congress.[13] Rather, such presidential actions must be limited to emergencies within the President's power over diplomatic and military affairs.

The 1996 amendments to the INA also deleted the definition of "entry"—a term of art that was used in 1182(f)—and removed its significance as a marker of substantive rights in immigration law. Illegal Immigration and Immigrant Responsibility Act of 1996, PL 104-208, 110 Stat. 3009-546, § 308(f). Before 1996, any noncitizen who had made an "entry" (meaning physical entry) into the United States thereby acquired the right to the formality of a deportation proceeding in the language of the pre-1996 statute. It is this "entry" that 1182(f) addresses. In 1996, this entire scheme changed. Physical entry into the United States no longer is associated with entitlement to any particular procedures for adjudicating claims. *See* Linda Bosniak, *A Basic Territorial Distinction*, 16 Geo. Immigr. L.J. 407, 408–10 (2002). This statutory change, too, has served to limit executive discretion.

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[13] While Congress did not give the President the power to suspend refugee admissions or unilaterally decrease the number of refugees that may be admitted, Congress understood the practical realities of refugee admission and resettlement. *See*, Cong. Research Serv., Refugees in the U.S. Laws, Programs, and Proposals (1979). Budgetary, logistical, and other practical constraints have meant that the number of refugees actually admitted often falls below the number set by the President and Congress. *See*, Refugee Processing Ctr., Bureau of Population, Refugee & Migration, U.S. Dep't of State, Cumulative Summary of Refugee Admissions (May 31, 2017); *see also* Migration Policy Inst., U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980–2016. Further, the President can amend refugee screening procedures at any time. *See*, Andorra Bruno & Katherine Bush, Refugee Admissions and Resettlement Policy, at 2 (2002); United States Committee for Refugees and Immigrants, *In the Aftermath of September 11: U.S. Refugee Resettlement on Hold*, 2 Refugee Report 9/10 (2001), *available at* http://www.refworld.org/docid/3c5809994.html (accessed Aug. 1, 2017). What the President cannot do is suspend refugee admissions entirely or decrease the number of refugees that may be admitted after it has been fixed in consultation with Congress.

A more recent rejection of executive discretion came in 2000, with the permanent adoption of a Visa Waiver Program for certain countries whose nationals rarely remain in the United States after a temporary visit. 8 U.S.C. § 1187. (The Government discusses this program in its brief but gets its significance backwards). As 1187(c) sets out in mind-numbing detail, designation as a program country reflects a mathematical calculation of a given country's immigration history. Only if a country meets the requirements set forth by Congress may the Attorney General, in consultation with the Secretary of State, designate a country for the program. And, when a country ceases to be eligible for the Visa Waiver Program (as is true of the countries affected by the EO), its nationals are still eligible to come to the United States if they apply for the relevant visa and go through the careful visa-vetting process. As described above, these visa processes are well defined under 8 U.S.C. § 1202 and cannot be changed at the whim of the Executive Branch.

These amendments to the statute indicate that Congress has moved away from a discriminatory immigration scheme to one that promotes equitable treatment and constrains executive discretion.

Construing 1182(f) and 1185(a)(1) in this context cuts against any notion of absolute power.

E. Given the Constraints Imposed by the INA, the Court Need Not Reach the Constitutional Issues in this Case.

The arguments set forth above show that the INA unambiguously constrains the President's authority under 1182(f) and 1185(a)(1), rendering the EO *ultra vires* and inconsistent with the statute. Therefore, there is no need to apply the canon of constitutional avoidance, which "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible to more than one construction; and the canon functions *as a means of choosing between them.*" *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

Like the Ninth Circuit, the Court may avoid the constitutional issues by disposing of the case on statutory grounds. *See Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017) (discussing the Supreme Court's "admonition that 'courts should be extremely careful not to issue unnecessary constitutional rulings,' '[p]articularly where, as here, a case implicates the fundamental relationship between the Branches'") (quoting *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989)) (per curiam); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("[J]udicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").[14]

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[14] In ruling on the constitutional claims, the Fourth Circuit skipped over the statutory ones, mentioning only briefly that the

Accordingly, the Court need not determine whether the EO "raise[s] serious constitutional problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 586, 575 (1988); *see also* Adrian Vermeule, *Saving Constructions*, 15 Geo. L.J. 1945, 1948–49 (1997) (explaining the differences between "procedural," "classical," and "modern" avoidance). However, if the Court finds the INA ambiguous with respect to the authority delegated under 1182(f) or 1185(a)(1), then the Court would "construe the statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Id.*

At a minimum, the arguments set forth above demonstrate that construing the INA to constrain the President's authority is not "plainly contrary to the intent of Congress." *Id.* On the contrary, interpreting the INA to allow the unlimited executive discretion that the President claims to have flies in the face of congressional intent, given that Congress has repeatedly and expressly restricted the President's discretionary authority under the INA. *See Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (explaining that the constitutional avoidance doctrine serves the "basic democratic function of maintaining a set of statutes that reflect, rather than

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nondiscrimination provision in 8 U.S.C. § 1152(a)(1)(A) could not support a nationwide preliminary injunction because it applied only to the issuance of immigrant visas. *IRAP v. Trump*, 857 F.3d 554, 580–81 (4th Cir. 2017). The error in that analysis is that the Fourth Circuit considered the nondiscrimination provision in isolation.

distort, the policy choices that elected representative have made").

CONCLUSION

Based on the foregoing, *Amici* respectfully submit that the Court should find the EO *ultra vires*.

Dated: September 18, 2017

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In The
Supreme Court of the United States

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DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

◆

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

◆

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Fourth And Ninth Circuits**

◆

BRIEF FOR AMICUS CURIAE IMMIGRATION REFROM LAW INSTITUTE IN SUPPORT OF PETITIONERS

◆

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not-for-profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this brief to urge this Court to reverse the U.S. Courts of Appeals for the Ninth and Fourth Circuits. Respondents have not, and cannot, meet their burden of showing that federal courts have subject matter jurisdiction over their statutory claims, and respondents' constitutional claims are both foreclosed under clearly-applicable precedent of this Court and have legal consequences whose stark absurdity shows the wisdom of those same precedents.

---

[1] Petitioners have given blanket consent to the filing of *amicus curiae* briefs in this case, and respondents have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

◆

SUMMARY OF THE ARGUMENT

The federal courts lack subject matter jurisdiction to hear respondents' statutory claims against President Trump's March 6, 2017, Executive Order ("Order") under the provisions of the Immigration and Nationality Act ("INA") they claim it contravenes. None of these provisions provides a private right of action. Nor, of course, does 28 U.S.C. § 1331 provide a private right of action to respondents to bring claims under the INA. Furthermore, the Administrative Procedures Act ("APA") fails to confer jurisdiction here both because the INA commits such action as the Order commands to agency discretion and because the Order is presidential action exempt from the APA.

Subject matter jurisdiction cannot be waived; indeed, federal courts, including this Court, have a duty to determine whether they have subject matter jurisdiction, and to dismiss claims over which they lack such jurisdiction. Thus, far from holding for the Hawaii respondents on statutory grounds, the Ninth Circuit should have dismissed their statutory claims.

For its part, in finding that the Order probably violated the Establishment Clause, the Fourth Circuit defied a large body of precedents of this Court establishing that, in First Amendment challenges, courts should give no more than limited scrutiny to presidential directives in the area of war, foreign relations, and the admission of aliens. The Fourth Circuit's reasoning, moreover, entails a train of striking absurdities that unmistakably shows the wisdom of these same precedents.

Specifically, under the Fourth Circuit's reasoning, private litigants could enjoin President Trump's war on the religious group known as the Islamic State. The reasoning of the Fourth Circuit also pits different clauses of the First Amendment (to wit, the Establishment Clause and the Free Speech Clause) against each other, and it implies (absurdly) that what is constitutional for one president is unconstitutional for another. Lastly, the Fourth Circuit's reasoning, if applied broadly, would make this country vulnerable to long-term foreign threats.

To safeguard the vital right of the people of the United States, acting through the political process, to protect themselves and their interests by controlling the admission of aliens, this Court must reject the Fourth Circuit's holding and its rationale.

◆

ARGUMENT

I. THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO HEAR RESPONDENTS' STATUTORY CLAIMS.

The courts below, and this Court, lack subject matter jurisdiction over petitioners' statutory claims. Federal courts are "courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They possess "only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Id.* (internal citations omitted). Furthermore, the presumption is that "a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted). Want of subject matter jurisdiction cannot be waived, and federal courts have an independent obligation to examine their own jurisdiction, and dismiss claims over which they lack jurisdiction. *United States v. Hays*, 515 U.S. 737, 742 (1995); *see, e.g.*, *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 876, 883-85, 887-91 (N.D. Cal. 2008) (dismissing INA claims because Congress had not provided a private right of action and going on to consider constitutional claims); *see also Victorian v. Miller*, 796 F.2d 94, 95-96 (5th Cir. 1986) (upholding the dismissal of appellants' statutory claims because of a lack of a private right of action while considering their constitutional claims).

In none of the provisions of the INA the Ninth Circuit found were violated by the Order did Congress provide a private right of action. Nor does either 28

U.S.C. § 1331 or the APA provide respondents with a private right of action, or otherwise waive sovereign immunity.

A. Respondents Lack A Cause Of Action Under The INA.

The Ninth Circuit upheld the U.S. District Court for the District of Hawaii's preliminary injunction of the Order based on several statutory claims, rather than the respondents' constitutional ones, finding that "'judicial restraint requires that the courts avoid reaching constitutional issues'" where possible. J.A. at 1177-78 (quoting *Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)). The Ninth Circuit found that the president had "exceeded the scope of the authority delegated to him by Congress," and it used several "statutory bases" to affirm the district court's injunction of Sections 2 and 6 of the Order. J.A. at 1165-66. The Ninth Circuit found that the president exceeded several "statutory . . . restraints" of the INA. Specifically, the Ninth Circuit found that the president: 1) failed properly to assert his authority to suspend the entry of classes of aliens in 8 U.S.C. § 1182(f), J.A. at 1196-1205; 2) improperly reduced the number of refugees to be admitted in fiscal year 2017 under 8 U.S.C. § 1157, J.A. at 1208-09; 3) discriminated on the basis of nationality in violation of both 8 U.S.C. § 1152(a)(1)(A) and the INA in general, J.A. at 1209-16; and 4) failed to set specific criteria for determining terrorism-related inadmissibility in violation of 8 U.S.C. § 1182(a)(3)(B), J.A. at 1221.

The Ninth Circuit neglected, however, to consider whether any cause of action under the INA gave it subject matter jurisdiction to examine these provisions.

Like substantive federal law itself, private rights of action to enforce federal law must be created explicitly by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Statutory intent" to create a private right of action is "determinative," and without it, a private right of action "does not exist and a court may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute." *Id.* at 286-87. Determining whether causes of action exist under the specified provisions of the INA begins and ends with the "text and structure" of the provisions themselves. *Id.* at 288. If the statute does not "evince Congress' intent to create the private right of action asserted," then "no such action will be created through judicial mandate." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). When it comes to statutory rather than constitutional claims, federal courts must be even more careful to recognize only explicit causes of action. When Congress enacts a statute, "there are specific procedures and times for considering its terms and the proper means for its enforcement." *Id.* at 1856. Therefore, it is "logical" to assume that Congress will be "explicit if it intends to create a private cause of action." *Id.*

Thus, respondents must be able to point to explicit language establishing a private right of action in the provisions of the INA they claim the president has violated. No such explicit cause of action exists for any of the statutory provisions the Ninth Circuit found had been violated by the Order.

First, the Ninth Circuit found that the president had improperly asserted his statutory authority for suspending classes of aliens in 8 U.S.C. § 1182(f), which reads:

Suspension of entry or imposition of restrictions by president:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

J.A. at 1195-97.

Second, the Ninth Circuit found that the president had improperly lowered the number of refugees previously set by former President Obama for the 2017 fiscal year in violation of 8 U.S.C. § 1157(a)(2), which reads:

> (2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of

> the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

J.A. at 1208-09.

Third, the Ninth Circuit found that the Order conflicts with INA § 1182(a)(3)(B), which makes aliens inadmissible on the basis of engaging in "terrorist activities." J.A. at 1221-22. The Ninth Circuit held that the president ignored a Congressional "requirement" of INA § 1182(a)(3)(B)(i)(II), which states that an alien is inadmissible if "a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable grounds to believe is engaged in or is likely to engage in after entry any terrorist activity . . . ."

Fourth, the Ninth Circuit found that the Order violated § 1152(a)(1)(A) of the INA by discriminating on the basis of nationality. J.A. at 1209-16. This provision reads: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

None of these statutory provisions breathes the slightest hint of congressional intent to confer a private right of action. Therefore, under *Sandoval*, no such private right of action may be created by the courts. Needless to say, neither respondents nor the Ninth Circuit adduced any occasion when a court has found a private right of action under any of these provisions. The Ninth Circuit mentions one case when this

Court considered, and rejected, claims under another section of the INA. J.A. at 1192 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993)). But this Court made no mention of a private right of action in that case, and has never considered itself bound by its own *sub silentio* "rulings" on jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 533 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us") (citing *United States v. More*, 3 Cranch 159, 172 (1805); *King Mfg. Co. v. Augusta*, 277 U.S. 100, 134-35 n.21 (1928) (Brandeis, J., dissenting)).

Finally, the Ninth Circuit found that the president had exceeded his authority under the INA as a whole by discriminating on the basis of nationality. J.A. at 1216. The Ninth Circuit apparently came to this conclusion on the (inadequate) ground that Congress passed the INA of 1965 with the animating principle of eliminating discrimination in the immigration system. J.A. at 1209, 1212. But no private right of action arises by implication from the animating principles of statutory schemes. Even before *Sandoval*, Courts never found that the animating principles of the INA created a cause of action for individuals affected by either the proper or the improper implementation of the INA's provisions. For example, in *United States v. Richard Dattner Architects*, 972 F. Supp. 738, 743 (S.D.N.Y. 1997), the court declined to find a private right of action to protect American citizens in the broad policy goals of the INA, which the court described as "a regulatory statute that establishes the circumstances under which people may be admitted to the United States."

Federal courts are courts of limited jurisdiction rather than common law courts free to fashion remedies at will for parties that have suffered statutory wrongs. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision."). The need for a private right of action before federal courts may hear statutory claims prevents exactly the kind of free-ranging analysis, not sanctioned by the intent of Congress, that the Ninth Circuit engaged in here. The Ninth Circuit may not empower district courts to enjoin the president's actions any time they have a difference of opinion with the executive branch about the proper interpretation of a statute, with no need to find a private right of action or subject matter jurisdiction. Such an exercise is beyond the power of a federal court.

B. The Federal Courts Do Not Have Jurisdiction Over Respondents' Statutory Claims Under Either 28 U.S.C. § 1331 Or The APA.

28 U.S.C. § 1331, by itself, does not create a private right of action under the INA, and by itself does not confer subject matter jurisdiction on federal courts to

hear respondents' statutory claims, because § 1331 does not constitute a waiver of federal sovereign immunity. As the U.S. Court of Appeals for the Sixth Circuit has explained:

> Section 1331 is the general federal-question-jurisdiction statute. Because [appellants] named the secretary of HUD in his official capacity, they must do more than invoke this general statute; they also must "identify a waiver of sovereign immunity in order to proceed." *Reetz v. United States*, 224 F.3d 794, 795 (6th Cir. 2000); *see also United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993) (affirming dismissal of suit against federal agency because federal sovereign immunity "extends to agencies of the United States" and "[t]he federal question jurisdictional statute is not a general waiver of sovereign immunity").

Toledo v. Jackson, 485 F.3d 836, 838 (6th Cir. 2007). *See also, e.g.*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378-79 (2012) ("[W]hen federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331"); *Jefferson County v. United States*, 644 F. Supp. 178, 181 (E.D. Mo. 1986) ("§ 1331 does not, of its own force, waive the federal government's sovereign immunity from suit. In the absence of an express waiver of immunity by Congress, suits against the United States are barred by the doctrine of sovereign immunity. Similarly, suits against a federal agency are barred. This bar is jurisdictional – that is, unless a statutory waiver exists, the district court lacks jurisdiction to entertain a suit against the United States or its agency.") (internal citations omitted).

Nor does the APA provide a private right of action here, or otherwise confer jurisdiction. 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) ("[U]nder § 701(a)(2) agency action is not subject to judicial review to the extent that such action is committed to agency discretion by law. . . . § 701(a)(2) makes it clear that review is not to be had in those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute (law) can be taken to have committed the decisionmaking to the agency's judgment absolutely.") (internal citations and quotation marks omitted). Here, § 1182(f) gives the president the widest discretion to suspend the entry of classes of aliens "in the national interest." *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992).

Furthermore, the Order is unreviewable under the APA because it is the action of the president. *Dalton v. Specter*, 511 U.S. 462, 468-77 (1994) (holding that decisions of the president's subordinates about military base closings were not reviewable under the

APA because the statute in that case conferred decision-making authority on the president, and, because the president is not an agency, the APA does not apply to actions of the president) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 796-801 (1994)). *See id.* at 477 ("Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."). As the U.S. District Court for the District of Columbia has explained:

> [A]n unreviewable presidential action must involve the exercise of discretionary authority vested in the President; an agency acting on behalf of the President is not sufficient by itself. Since the Constitution vests the powers of the Executive Branch in one unitary chief executive officer, *i.e.*, the President, an agency always acts on behalf of the President. Nonetheless, there is a difference between actions involving discretionary authority delegated by Congress to the President and actions involving authority delegated by Congress to an agency. Courts lack jurisdiction to review an APA challenge in the former circumstances, regardless of whether the President or the agency takes the final action. However, "[w]hen the challenge is to an action delegated to an agency head but directed by the President, a different situation obtains: then, the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001).

Detroit Int'l Bridge Co. v. Gov't of Can., 189 F. Supp. 3d 85, 101-04 (D.D.C. 2016). *See also, e.g.*, *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001) ("A court has subject-matter jurisdiction to review an agency action under the APA only when a final agency action exists. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA.") (citing *Dalton*, 511 U.S. at 470; other internal citations omitted).

Indeed, a court considering a challenge to the precursor of the instant Order under the APA correctly concluded that the APA did not apply because the order in that case was the action of the president:

> [T]he Presidency is not an "agency" as defined in the APA, § 701(b)(1), and thus actions by the President are not subject to the APA. . . . Here, Congress has granted the President authority to suspend entry for any class of aliens if such entry would be "detrimental to the interests of the United States." 8 U.S.C. 1182(f). Pursuant to, and without exceeding, that grant of discretionary authority, the President issued EO 13,769 and suspended entry of aliens from the seven subject countries. The President's action is thus unreviewable under the APA.

Louhghalam v. Trump, No. 17-10154, 2017 U.S. Dist. LEXIS 15531, at *17-18 (D. Mass. Feb. 3, 2017) (citing *Franklin*, 505 U.S. at 800-01 and *Detroit Int'l Bridge*, 189 F. Supp. 3d at 104-05).

Accordingly, this Court should reverse the decision of the Ninth Circuit and dismiss respondents' statutory claims for lack of jurisdiction. And, as shown below, it should also reverse the ruling of the Fourth Circuit that the Order probably violates the Establishment Clause of the First Amendment to the U.S. Constitution.

II. THE FOURTH CIRCUIT FLOUTED CLEARLY-APPLICABLE PRECEDENT IN REACHING ITS ESTABLISHMENT CLAUSE HOLDING.

The Constitution should not be interpreted to imperil the safety of the United States, or its people, from foreign threats. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."). Also, the United States has a right inherent in its sovereignty to defend itself from foreign dangers by controlling the admission of aliens. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . inherent in [both Congress and] the executive department of the sovereign"). Accordingly, the ability of private litigants to challenge presidential exercises of alien-admission powers on grounds of individual rights protected in the Constitution is sharply limited. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Thus, even if exercises of these powers were not non-justiciable political acts, they could receive no higher level of scrutiny from a court than a form of rational-basis review. *See*, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) ("We hold that when the Executive exercises th[e] power [to exclude aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."). In applying (indeed, misapplying) a much higher level of scrutiny to the Order, the Fourth Circuit erred egregiously.

The Fourth Circuit did not even attempt to distinguish *Mandel* on the (unconvincing) ground that it concerned only the Free Speech Clause, as opposed to the Establishment Clause, of the First Amendment. (Had it done so, it would have been hard-pressed to explain why the claimed loss of rights under the latter clause triggers a higher level of scrutiny than the claimed loss of rights under the former, despite the equal prominence given to the two provisions textually.) Instead, taking *Mandel*'s holding that this Court will not look behind "a facially legitimate and bona fide reason" as authorizing judicial inquiry into whether a proffered reason for an exclusion was given in bad faith, the Fourth Circuit looked behind the proffered reason for the Order at statements President Trump had made as a candidate. J.A. 179-81, 219-24. Based on these statements, the court held that the proffered reason was a pretext for the president's actual motivation: to exclude Muslims from this country. J.A. 219-22. Then the court looked behind the proffered reason again, at those same campaign statements, and concluded that the Order was primarily motivated by a desire to exclude Muslims, and therefore probably violated the Establishment Clause. J.A. 222-23, 235-36.

It is hard to imagine a more thorough evisceration of *Mandel*'s bar on looking behind proffered reasons for exclusion orders, at least when they are challenged under the Establishment Clause. In any given case where there is insufficient evidence of pretext, there also will be insufficient evidence that religion was the primary motive for a challenged decision. Thus, under the rubric pioneered by the Fourth Circuit, courts will obey *Mandel*'s injunction not to look behind the proffered reason only when their so refraining will make no difference to the outcome of the case.

If, instead of seizing on the above means of gutting *Mandel*, the Fourth Circuit had adequately considered the inherent right to sovereignty of the United States, and the separation of powers found in the structure of the Constitution, it would have found every reason to apply the *Mandel* line of cases straightforwardly – and so (as will be seen) avoid many unfortunate results.

III. THE FOURTH CIRCUIT'S REASONING LEADS TO MANY ABSURD CONSEQUENCES.

The Fourth Circuit's reasoning has innumerable absurd consequences that show, without question, both how faulty that reasoning is and the wisdom of the contrary case law that the Fourth Circuit brushed aside. A few of the more notable absurdities the court committed itself to are drawn out as follows:

A. Private Litigants Could Enjoin President Trump's War Against The Islamic State.

If its own statements are any indication, the Islamic State, also known as ISIS ("the Islamic State of Iraq and Syria") or ISIL ("the Islamic State of Iraq and the Levant"), is as much a religious group as a military force or aspiring state. It has declared its leader a caliph, that is, "a successor of Muhammad as . . . spiritual head of Islam," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/caliph, and is dedicated to the forcible conversion of nonbelievers to its distinctive religious faith. *E.g.*, Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State with "Restoration of Caliphate" in Middle East*, Independent (June 30, 2014), *available at* http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html (reporting on this declaration); *The Islamic State of Iraq and the Levant*, Wikipedia (June 8, 2017), https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant ("As caliph, [the leader of ISIL] demands the allegiance of all devout Muslims worldwide . . . ISIL has detailed its goals in its *Dabiq* magazine, saying it will continue to seize land and take over the entire Earth until its: '[b]lessed flag . . . covers all eastern and western extents of the Earth, filling the world with the truth and justice of Islam' ").

Many authorities within mainstream Islam have rejected the religious teachings of the Islamic State. *Id.* But even if this group is, properly speaking, not Islamic, and its distinctive beliefs are (at best) a heretical deviation from true Islam, plainly it still is a religious group with a religious leader, and easily qualifies as a religion under the broad definition used for First Amendment purposes. *See, e.g.*, *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (refusing to find that a sermon by the pope was less "religious" than a mass; "[s]uch a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity[,] an impossible task in an age where many and various beliefs meet the constitutional definition of religion.") (footnote omitted); *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (listing "religions in this country," including Secular Humanism, "which do not teach what would generally be considered a belief in the existence of God"); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir. 1994) (defining religion as "any set of beliefs addressing matters of ultimate concern occupying a place parallel to that filled by God in traditionally religious persons") (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970)) (internal quotation marks and ellipsis omitted); Black's Law Dictionary 1293-94 (7th ed. 1999) ("In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have construed the term *religion* quite broadly to include a wide variety of theistic and nontheistic beliefs.").

Nevertheless, President Trump has vowed not only to attack the Islamic State, but to eradicate it. President Donald Trump, Remarks in Joint Address to Congress (Feb. 28, 2017) ("As promised, I directed the Department of Defense to develop a plan to demolish and destroy ISIS. . . . We will work . . . to extinguish this vile enemy from our planet.").

Islamic (in the true sense) or not, persons who bear allegiance to the caliph of the Islamic State may be residing in this country as citizens or lawful permanent residents. Once President Trump's order to the Department of Defense is complied with, and the president further orders the Department to implement its plan to destroy the Islamic State, these U.S. coreligionists of the Islamic State might have close family members placed in immediate peril by the latter order. They also might feel excluded by its message of condemnation of the Islamic State. If the Fourth Circuit's reasoning were correct, these circumstances would be more than enough for them to have standing to challenge that order in court, under the Establishment Clause. *See* J.A. 199-200, 202. Worse, if the Fourth Circuit were correct, they would probably win their case. If the Order probably violated the Establishment Clause because Donald Trump, during the election campaign, called for a temporary pause in entry to the country by Muslims, as the Fourth Circuit held, J.A. 179-81, 219-23, what would a like-minded court make of President Trump's vow, before a joint session of Congress, to "extinguish" the Islamic State "from our planet"? If calling for a temporary pause in Muslim entry reveals impermissible animus, surely announcing a war of extermination on a particular religious body does so even more. Yet no one believes that a federal court has the power to enjoin our nation's military campaign against the Islamic State.

There is no helpful distinction for the Fourth Circuit here between the president's war-making power and his power to regulate the admission of aliens. Both involve the safety of the nation and its people, and the power to fight our enemies abroad would mean little without the power to prevent them from entering the country. *See Harisiades*, 342 U.S. at 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power. . . .").[2] But even if the distinction could be made, it would not help the Fourth Circuit; the proposition that the president could not block the admission of members of the Islamic State into the country without violating the Establishment Clause, in light of the animus revealed by his avowed intention to destroy that religious group, is an equally-absurd result of the Fourth Circuit's reasoning.

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[2] Another seeming defense against this *reductio ad absurdum* – namely, that a court would never enjoin a war, because to do so would be giving aid and comfort to the enemy in time of war, and thus, by definition, be treason, U.S. Const. art. III, § 3, cl. 1 – begs the question. A court as averse as the Fourth Circuit to accepting that presidential determinations in this area are close to unreviewable could easily conclude that treason cannot lie if the

Also, that no one (most likely) would bring a lawsuit challenging President Trump's war on the Islamic State does not avert this absurdity. The logic of the Fourth Circuit's holding remains, like a fatal gas. The correct rule of law in this case cannot be one that implies that all of the members of the armed forces who are fighting the war on the Islamic State, and also their civilian superiors, are violating their oaths to uphold the Constitution by prosecuting that war. Yet the Fourth Circuit's reasoning implies just that.

B. The Fourth Circuit's Reasoning Pits The First Amendment Against Itself.

Free discussion of governmental affairs and the free exchange of ideas during a political campaign are the heart of America's democracy. *Brown v. Hartlage*, 456 U.S. 48, 52-53 (1985). "Freedom of speech reaches its high-water mark in the context of political expression." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 863 (8th Cir. 2001), *rev'd on other grounds*, 536 U.S. 765

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underlying war is unconstitutional, as, of course, it would be if it violated the Establishment Clause.

(2002). The Free Speech Clause protects not just political speech by private citizens but such speech by political candidates running for public office. *Id.* at 53.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (concurring opinion), applies with special force to candidates for public office.

Buckley v. Valeo, 424 U.S. 1, 52-53 (1976). *See also Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal citations and quotation marks omitted).

In relying on the campaign statements of President Trump while a candidate, the Fourth Circuit thus set the Establishment Clause against the Free Speech Clause in the latter's most vital application. Yet both provisions are at the same level in the text of the First Amendment, and, accordingly, this Court has been at least as solicitous of free speech rights as of rights under the Establishment Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that a public university's refusal to permit the funding of a student religious group on equal terms with other groups was viewpoint discrimination that violated the Free Speech Clause and was not required by the Establishment Clause; "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 397 (1993) (holding that a school district violated the Free Speech Clause by denying a group permission to show a film with a religious purpose on school premises); *see also, e.g., Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986) (recognizing that both clauses stand on equal ground).

The chilling effect of such judicial inquiry into campaign statements can easily be imagined; for example, candidates who oppose abortion, or support the State of Israel, might shrink from saying that their religion motivates their position, thus depriving the voters of potentially important information. Given the equal primacy of the Free Speech Clause (and also the Free Exercise Clause), it is absurdly contrary to democratic freedom that candidates for president (or other offices) must tread carefully from now on when commenting on a wide range of policy issues, including national security, for fear that courts will enjoin their actions if they are elected. Yet this chilling effect on core political speech is a clear result of the Fourth Circuit's holding.

C. The Fourth Circuit's Reasoning Implies That What Is Constitutional For One President Is Unconstitutional For Another.

The Fourth Circuit held that the Order probably violated the Establishment Clause because statements by President Trump, when a candidate, revealed an impermissible anti-Muslim motivation. It follows that had the exact same order, with exactly the same stated purpose, been issued by President Obama, it would not have violated the Establishment Clause (assuming that President Obama had made no statements the court could construe as revealing animus toward the Muslim religion). This is an absurd result, if only because a president might have a clear duty to protect the country against a pressing foreign threat, and whether that duty could be performed should not depend on whether the nation had, or did not have, a president who might feel illicit racial or religious animus against that threat, and enjoy his duty too much. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982)

("'In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.'") (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)); *cf. Spalding, supra* ("[P]ersonal motives cannot be imputed to duly authorized official conduct."); *see also Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (refusing to examine the president's motives for declaring a national emergency during the Libyan crisis); *but see Korematsu v. United States*, 323 U.S. 214, 223 (1944) (stating in dicta that the internment of an American citizen of Japanese descent during World War II would have been unconstitutional if motivated by racial prejudice).

This result of the Fourth Circuit's holding is dangerous in another way, for it gives the impression, at least, that courts are taking political sides. Diminishing the power of a particular president, as opposed to others, because of his statements in the political arena seems perilously close to diminishing his power because of his politics – of which an onlooker could easily assume the court disapproves. It goes without saying that the appearance of such political partisanship in judging should be avoided in our democracy, since the Constitution gives the federal courts the power to decide "Cases" and "Controversies," and no other power, U.S. Const., art. III § 2 – certainly not political power. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 455 (1996) (surveying cases and commenting that, for this Court, "[j]udicial restraint preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters.") (footnotes omitted); *In re V.V.*, 349 S.W.3d 548, 576 (Tex. App. 2010) (Jennings, J., dissenting) ("Judges should decide the cases that come before them based upon the facts in evidence and the governing law, not upon their moral preferences, desires, or the dictates of their emotions. The obvious problem with results-oriented judging is that it . . . guts the rule of law . . . [and] produces bad consequences on a system-wide basis.") (internal quotation marks and footnotes omitted); *cf.* Code of Conduct for United States Judges, Canon 5, 28 U.S.C.S. app. (stating that federal judges should refrain from political activity).

D. The Fourth Circuit's Reasoning Would Put The United States At The Mercy Of Foreign Threats.

The following absurdity is wholly hypothetical, but nonetheless devastating to the Fourth Circuit's reasoning. Imagine a religion that, as a fundamental tenet, demanded the sacrifice of children to "the gods" on a regular basis. Suppose this religion, called Molochism,[3] had followers around the world numbering in the billions, but as yet few in the United States. Even though the members of this religion in the United States would be (constitutionally) hampered in its exercise by neutral, generally-applicable laws against murder, *see Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), they could still advance their religion, and eventually all of its practices, through the courts and through our immigration system – that is, if the tenor of the Fourth Circuit's reasoning became generally accepted, and domestic civil rights law applied to all immigration restrictions challenged by suitably-affected U.S. plaintiffs. Specifically, if Congress passed a law barring immigration by, say, those who believe they have an obligation to take innocent human life, it is likely that some members of Congress who voted for this ban would have made clear, if only in campaign statements, that it was aimed at Molochians. If U.S.-citizen Molochians felt "deeply saddened" by this law, and feared it would lessen their ability to associate with those of other faiths, they would have standing to sue, under the Fourth Circuit's reasoning. And under that same reasoning, the ban on such immigration would violate the Establishment Clause because it was improperly motivated by anti-Molochian animus.

After the ban on immigration by those who believe they have an obligation to take innocent human life was, accordingly, permanently enjoined, let us suppose that the pace of continued Molochian immigration was very rapid, so rapid that a political uproar resulted, complete with anti-Molochian statements by leading politicians promising to stem the tide. At that point, a court of the Fourth Circuit's stripe might well conclude that *any* step with the predictable result of lowering Molochian immigration – even bringing *all* immigration to a near-standstill – would only be a transparent pretext for a measure that really pertained to an anti-Molochian establishment of religion. Thus, by court order, actual or merely threatened, the door to heavy overall immigration would remain open, and Molochians could continue to come in. Over time, let us suppose, American Molochians would become so numerous that any ban on their immigration would become politically difficult, even if the courts would uphold one. Still later, suppose that Molochians became politically dominant, in part through sheer force of numbers, and were able to adjust U.S. laws to allow their full religious practices, including the long-deferred one of the sacrifice of children to the gods.

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[3] After the ancient fire god to whom children were sacrificed. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/Moloch.

Of course, it is to be hoped that no series of events as horrific as this – the transformation of the United States into a country of legalized child sacrifice – would ever take place. Still, that the United States and its people would be without power to defend themselves against that disaster because of the Establishment Clause is absurd in the highest degree. As a matter of pure logic, such gross absurdity is fatal to the Fourth Circuit's reasoning.

◆

CONCLUSION

For the foregoing reasons, the judgements of the courts of appeals should be reversed.

Respectfully submitted,

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Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICI CURIAE* IMMIGRATION, FAMILY, AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are leading scholars of immigration, family, and constitutional law who are interested in the proper interpretation and application of U.S. laws as they concern Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). This brief addresses issues specifically within amici's scholarly expertise. The Appendix to this brief contains biographical information on the amici, who are participating in their individual capacities and not as representatives of the institutions with which they are affiliated.

All parties have consented to the filing of this amicus brief.[1]

SUMMARY OF THE ARGUMENT

Amici, experts in immigration, family, and constitutional law, write to emphasize how the Executive Order infringes the constitutional family rights of American citizens and lawful permanent residents to a degree not permitted even in a case involving immigration, and undermines the congressional purpose of facilitating family reunification. Many of the individuals directly affected by the Executive Order are American citizens and residents who possess constitutionally protected interests in residing with and enjoying the companionship of family members who live outside the United States.

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[1] No counsel for any party authored any portion of this brief, nor did any person or entity other than amici curiae or their counsel make any monetary contribution to the preparation or submission of this brief. One of the amici, Professor Hiroshi Motomura, is Vice Chair of the Board of Directors of the National Immigration Law Center, which is co-counsel for the respondents in Docket No. 16-1436. However, Professor Motomura participated in preparing this brief not in his capacity as a board member or representative of the National Immigration Law Center but rather as an independent legal scholar.

Noncitizens without family in the United States have suffered from the effects of the Order, and they, too, have constitutional claims. This brief, however, focuses on the Order's impact on American citizens and lawful permanent residents whose relatives' entry into the United States is restricted based on their race, religion, and nationality.

Notwithstanding the deference afforded to the executive and legislative branches in immigration matters, this Court has made clear that Americans' constitutional rights do not disappear in the immigration context. Rather, the Court safeguards those rights while also recognizing the government's important interest in foreign affairs and national security. Even assuming that foreign nationals residing abroad have no constitutional right to enter the United States, American citizens and lawful permanent residents do have justiciable constitutional interests in the context of an immigration restriction, as the Court recognized in cases that include *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Landon v. Plasencia*, 459 U.S. 21 (1982), and *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Where, as here, the interests of American citizens and lawful permanent residents are at stake, *Mandel* instructs courts to defer to the government's admissions decisions, but only when those decisions are supported by a "facially legitimate and bona fide" reason. 408 U.S. at 770. The Court has applied this important check on the government's immigration decisions in cases involving constitutional family interests; recognizing a "limited judicial responsibility under the Constitution" in *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977); and acknowledging the "facially legitimate and bona fide" requirement in *Fiallo*, *id.* at 794–95, and most recently in *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015). This degree of judicial scrutiny carries with it a serious possibility of invalidating the government decision for failure to meet this standard.

The Court's approach to immigration laws and policies implicating individual constitutional rights has developed over time to reflect changes in the Court's understanding of equal protection and fundamental rights, including constitutional family rights. Nineteenth-century decisions affirmed the exclusion of Chinese nationals by endorsing racially discriminatory rationales that reflected the long-ago discredited view of equal protection expressed in contemporaneous cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896). Similarly, the Court's First Amendment jurisprudence has evolved to invalidate laws motivated by "animosity" toward or "distrust" of particular religious identities and practices. Cold War-era Court decisions declining to review the political branches' immigration decisions preceded the Court's recognition of constitutional family interests such as the right to marry unfettered by discrimination, and the right to share a household and associate with extended family members. Even when applying more deferential standards of review, the Court has forbidden statutes and regulations motivated by hostility toward disfavored groups—especially where, as here, such laws also infringe upon the constitutional family rights of American parties.

Congressional enactments such as the Immigration and Nationality Act ("INA") prioritize family relationships, facilitating the reunification of nuclear and extended families by preferring relatives in the issuances of permanent resident and temporary visas, naturalization, derivative citizenship, and removal criteria. While the congressional purpose to support family reunification does not negate the executive's delegated authority under INA § 212(f), 8 U.S.C. § 1182(f), to suspend immigration, it qualifies that authority and supports greater scrutiny of executive decisions that contravene the INA's statutory structure for evidence of unconstitutional animus.

This Court has long recognized equal protection and due process protections for family relationships such as those burdened by the Executive Order. The Order's broad sweep affects married couples, fiancés, parents, children, siblings, grandparents, aunts, uncles, and cousins of American citizens and residents, implicating rights recognized by this Court in cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000). Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court explained how the dignity inherent in choosing a life partner and in making autonomous decisions about family life; the opportunity for mutual care and companionship; the nurturing of children; and the exercise of responsible citizenship all support the recognition of a constitutional interest in family relationships, including but not limited to marriage.

These constitutional family interests are particularly profound for transnational families, in which relatives who are especially reliant upon one another for support in times of hardship and adversity face the possibility of long-term or even permanent separation. The "personal choice" regarding marriage and family formation "inherent in the concept of individual autonomy" does not stop at a national border. *See Obergefell*, 135 S. Ct. at 2589. The "two-person union," *id.*, is especially integral to families separated by distance, or riven by war, famine, or persecution. The reunification of parents and children "safeguards children and families" and facilitates Americans' exercise of their "rights of childrearing, procreation, and education." *See id.* at 2590. If marriage is generally "a keystone of our social order," *id.* at 2601, it is particularly so in relationships involving immigrants, who are the "building block[s] of our national community" and often rely on family to facilitate their integration into the polity. *Id.*

This Court has been especially protective of individuals where, as here, government action simultaneously infringes fundamental constitutional rights and discriminates based on unlawful animus. By targeting persons from six predominantly Muslim countries for disparate treatment, the executive uses race, religion, and nationality to treat the family members of some American citizens and residents differently from others in violation of equal protection. By denigrating the religious identities, traditions, and practices of American Muslim families, the Executive Order violates the Establishment and Free Exercise Clauses. And the Order violates the procedural due process rights of American citizens and residents whose family members seek admission to the United States. Unlike cases in which individuals have been found to pose a specific threat, the government has no evidentiary basis for believing that admitting the individuals targeted by the Order would endanger national security or any other bona fide or legitimate government interest.

The discriminatory racial, religious, and nationality-based animus underpinning the Executive Order by itself contravenes fundamental constitutional principles. The Order's targeting of noncitizens on these invidious grounds, by "slicing deeply into the family itself," *Moore*, 431 U.S. at 498, also violates the constitutionally protected dignity and integrity of family relationships. Notwithstanding the deference afforded executive authority over immigration, the Order offends the Constitution and cannot survive meaningful judicial review.

ARGUMENT

Amici write to apply their expertise in immigration law and family law to the scope of federal power over immigration and the role of the judicial branch in cases involving immigration restriction and constitutional family interests. Many other noncitizens who do not have family in the United States have also been affected adversely by the Order. They, too, have constitutional claims. This brief, however, focuses on the specific impact of the Order on American citizens and lawful permanent residents (hereinafter, "American citizens and residents") with family abroad.

I. AMERICAN CITIZENS AND LAWFUL PERMANENT RESIDENTS HAVE A CONSTITUTIONAL INTEREST IN THEIR FAMILY RELATIONSHIPS

The March 2017 Executive Order disrupted the lives of many individuals, both in the United States and abroad. Many of those most directly affected are American citizens and lawful permanent residents who possess constitutionally protected interests in residing and associating with their family members. The Order's broad sweep prevents them from reuniting with their noncitizen spouses, fiancés, parents, children, grandparents, siblings, and aunts and uncles. The Order has affected adversely many American citizens and residents who wanted their loved ones to travel to the United States on temporary visas to join them for a variety of reasons: to mark important life events, such as a wedding, graduation, funeral, or the birth of a child; to provide care to a new baby or an ill relative; or to receive medical care unavailable in their home country. The strength of the constitutional interests of these diverse individuals varies, but they all share a dignity interest in having their family relationships recognized and respected by the government.

A. Courts review cases implicating constitutional rights and interests when Congress and the executive regulate immigration

Both Congress and the executive routinely regulate the flow of immigrants into the United States. Although there is no textual grant of authority to either the legislature or the executive in the U.S. Constitution, this Court has repeatedly held that such authority is a necessary one for a sovereign nation to enjoy. *See, e.g., Fong Yue Ting v. United States,* 149 U.S. 698, 712 (1893) (finding that "[t]he Constitution has granted to Congress the power to regulate commerce with foreign nations, including . . . the bringing of persons into the ports of the United States"). This power, however, sits side-by-side with the judicial branch's obligation to enforce the limitations on government power set forth in the U.S. Constitution. In particular, citizens and lawful permanent residents have a greater constitutional interest than noncitizens seeking first-time admission to the United States because of their ties to the nation. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (noting that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"). Moreover, the Court has not foreclosed the possibility of constitutional review for discriminatory actions against noncitizens who are unlawfully present in the country. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (upholding decision to deport unlawfully present noncitizen against constitutional challenge, but leaving open "the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations [regarding the potential undermining of executive discretion] can be overcome"); *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas law discriminating against undocumented children).

Separation-of-powers principles thus require courts to scrutinize immigration laws and actions that implicate the constitutional rights of American citizens and lawful permanent residents, but in a manner that affords deference to Congress and the executive branches in light of their important interest in foreign affairs and national security. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), provides an example of the Court's recognition of the constitutional interests of American citizens in the context of an immigration restriction. There, the Court considered whether the government's decision to deny admission to the Belgian Marxist scholar Ernst Mandel was unlawful because it violated the First Amendment rights of persons in the United States to meet and speak with him. The Court determined that Mandel's abuses of the limitations on his visas in previous visits to the United States constituted a "facially legitimate and bona fide reason" sufficient to deny Mandel the temporary visa he sought. *Id.* at 769–70. This Court recognized, however, that the American scholars who had invited Mandel to speak had a constitutionally protected interest in meeting and speaking with Mandel. Even though Mandel himself, "as an unadmitted and nonresident alien," did not have a constitutional right of entry, the other plaintiffs—all individuals in the United States—had constitutional claims that the courts must hear and adjudicate. *Id.* at 762.

In other cases, the recognition of a resident noncitizen's constitutional interest has resulted in the Court's rejection of the executive branch's position. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court invalidated the indefinite detention of noncitizens beyond six months absent a significant likelihood of removal in the reasonably foreseeable future. *See id.* at 701. The Court's analysis included two steps. First, it made clear that well-established constitutional protections apply to lawful permanent noncitizen residents, even those who lose that lawful permanent resident status because of criminal convictions. *Id.* at 693. Second, it reasoned that the indefinite detention of former noncitizen residents raised a constitutional question that was serious enough, applying the doctrine of constitutional avoidance, to limit detention under 8 U.S.C. § 1231(a)(6). 533 U.S. at 694–95. In both steps of *Zadvydas*, the Court employed constitutional reasoning. Even if it were possible to dismiss the second step's application of a "serious constitutional doubt" standard as subconstitutional, the Court's first step left no doubt that noncitizen residents may invoke the protections of the U.S. Constitution where, as here, a government immigration law decision impairs their interests. In each of these cases, the Court has been careful to be deferential to Congress's authority while simultaneously recognizing the constitutional interests of citizens and noncitizens alike, and—where those interests are or would be violated—providing a remedy.

Many of the cases in which an American citizen or lawful permanent resident has an interest in the visa status of a noncitizen are cases in which the American party has an interest in sharing a household or visiting with the noncitizen. In these cases, this Court has recognized the American party's interest when adjudicating whether the government's denial of admission or decision to remove the noncitizen is constitutionally permissible. For example, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court reviewed a constitutional challenge to Congress's definition of "child" in the Immigration and Nationality Act, 8 U.S.C. §§1101(b)(1)(D), 1101(b)(2). In reviewing, though ultimately upholding, these portions of the INA, the Court recognized its "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." 430 U.S. at 793 n.5. Similarly, in *Landon v. Plasencia*, the Court recognized that a lawful permanent resident has "without question" a "weighty interest" sufficient to invoke procedural due process protections: "She stands to lose the right 'to stay and live and work in this land of freedom,'" and "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." 459 U.S. at 34 (remanding deportation case for application of *Mathews v. Eldridge* procedural due process test).

More recently, in *Kerry v. Din*, 135 S. Ct. 2128 (2015), this Court reaffirmed its authority to decide cases implicating constitutional family rights even where Congress has exercised its authority over immigration. In *Din*, a U.S. citizen to whose spouse the State Department had denied a permanent residency visa petitioned the Court for additional process. *See id.* at 2142 (Breyer, J., dissenting) ("Din, an American citizen, wants to know why the State Department denied a visa to her husband, a noncitizen"). The Court split in its analysis, but six of the nine justices acknowledged that a court may continue to recognize a citizen's constitutional family rights even where the political branches have an interest in immigration control. *See id. at* 2140–41 (Kennedy, J., concurring) (holding that the Court "need not decide" the issue of "whether Din has a protected liberty interest" because "the notice she received regarding her husband's visa denial satisfied due process"); *id.* at 2142 (Breyer, J., dissenting) (stating that Din "possesses the kind of 'liberty' interest to which the Due Process Clause grants procedural protection"). Although in *Din* the concurring (and controlling) opinion determined that the government's concerns that a specific individual posed a terrorist threat overrode the U.S. citizen's interest in additional process, it honored the citizen's constitutional family interest in residing with her husband by applying the same "facially legitimate and bona fide" test that it applied to an action that implicated the First Amendment rights of U.S. citizens in *Mandel*. *Id.* at 2139–41 (Kennedy, J., concurring).

In *Din*, like *Mandel* before it, the Court found that the Executive satisfied the requirement of a "facially legitimate and bona fide reason." *Id.* It is clear, however, that if the government acts for a reason that is *not* "facially legitimate and bona fide," the challenge must be sustained and the denial of admission must be invalidated. Indeed, judicial decisions calling for application of the "facially legitimate and bona fide reason" standard make up a substantial body of case law that scrutinizes government decisions to deny admission. *See Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125–26 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990).

In summary, courts routinely scrutinize immigration laws and actions, and even though the standard applied is generally more deferential than in other contexts, courts have the authority to invalidate laws and actions that violate citizens' and residents' constitutional rights.

B. The Court's current approach to balancing individual constitutional interests with the political branches' authority over immigration has evolved over time

Earlier in our nation's history, this Court afforded much more deference to the political branches in cases involving immigration than it does today. Much of this change is the result of the evolution of the Court's jurisprudence of equal protection and fundamental rights, including constitutional family rights.

The earliest cases establishing congressional authority over immigration upheld the exclusion and deportation of Chinese immigrants by embracing racially discriminatory rationales. *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (affirming government's power to determine that "foreigners of a different race" are "dangerous"); *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893) (affirming government power to require "one credible white witness" for Chinese residents to obtain the certificate necessary to avoid deportation). The Court decided these cases during the same era in which it concluded that Jim Crow laws and racial segregation did not present constitutional problems. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding "separate but equal" railway cars for blacks and whites and opining that "the underlying fallacy of the plaintiff's argument" is "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

Today's Court no longer understands the Constitution to support racial discrimination. This Court's equal protection jurisprudence has evolved, so that "separate but equal" treatment of individuals based on race or other constitutionally protected suspect characteristics is no longer constitutionally permissible. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955) (declaring racial discrimination in public education unconstitutional); *United States v. Virginia*, 518 U.S. 515 (1996) (categorical exclusion of women from a particular educational opportunity violates equal protection). Similarly, the Court's Free Exercise Clause and Establishment Clause jurisprudence have also developed, to forbid statutes that "stem from animosity to religion or distrust of its practices," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), or "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

Even in cases involving a deferential standard of review, this Court has repeatedly held that "animus" or a "bare . . . desire to harm" a particular group is sufficient to invalidate a statute. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535

(1973)) (holding that the "Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group'"); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (same). As a result, although the Court still gives wider latitude to Congress in matters involving immigration than in other areas, the racially discriminatory statutes at issue in *Chae Chan Ping* and *Fong Yue Ting* would now not survive even the most deferential review, nor would a statute targeting religious minorities or using immigration law to establish religion. *See American-Arab Anti-Discrimination Comm.*, 525 U.S. at 491 (noting that "discrimination" that is "outrageous" could result in the invalidation of executive action in an immigration case).

A similar evolution has occurred in the recognition of the constitutional status of family relationships. During the Cold War, this Court heard cases brought by the spouses of U.S. citizens who had been excluded from the country and denied the due process they sought. In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the German-born wife of an American citizen was excluded from the United States without a hearing on the ground that her admission would be "prejudicial to the interests of the United States." *Id.* at 539. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a permanent resident of the United States left his wife and children in upstate New York to visit his dying mother abroad and was denied entry upon his return on suspicion of communist activity because of his trip behind the "Iron Curtain." In both cases, this Court invoked immigration authority to avoid deciding the cases, stating that it could not review decisions of the political branches to exclude a particular alien. 338 U.S. at 543; 345 U.S. at 212.

Just as it decided *Chae Chan Ping* and *Fong Yue Ting* prior to the development of modern equal protection doctrine, the Court decided *Knauff* and *Mezei* during the very brief period in which the Court no longer recognized family rights as established by the common law in the immigration context but had not yet developed its modern constitutional approach to family rights. *See* Kerry Abrams, *Family Reunification and the Security State*, 32 Const. Comm. 247, 250-58 (2017) (showing how courts used common law family rights to interpret restrictive immigration statutes to allow for family reunification prior to *Knauff* and *Mezei* and applied constitutional family rights afterwards). Thus, in *Knauff* and *Mezei*, the Court did not consider the constitutional interests of family members to share a common residence, to marry unconstrained by racial discrimination, or the many other facets of constitutional family rights recognized by the Court today. *See infra* Part II. As this Court recently declared in *Obergefell v. Hodges*, "the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 135 S. Ct. 2584, 2603 (2015). It was not until, first in *Fiallo v. Bell* and again in *Kerry v. Din*, discussed above, that the Court acknowledged its duty to adjudicate immigration cases that touch on constitutional family rights.

C. Executive action, like congressional lawmaking, in the immigration area is subject to judicial review

Although the primary authority over immigration recognized by this Court lies with Congress, the Court has consistently recognized that the executive performs an important function in enforcing the law and exercising authorities delegated to it by Congress. Indeed, many of the cases in which the Court has scrutinized government action have involved delegated authority to the executive. *See, e.g.*, *Din*, 135 S. Ct. 2128 (evaluating State Department's decision to deny noncitizen spouse admission to United States); *Mandel*, 408 U.S. 753 (evaluating Attorney General's decision to deny visa to noncitizen).

The President in this case cites as his authority to issue the Executive Order one such delegation—section 212(f) of the Immigration and Nationality Act, which delegates authority to the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants." 8 U.S.C. § 1182(f). Congress enacted this provision in 1952. Just as congressional lawmaking must be read in light of the equal protection and fundamental rights jurisprudence this Court has developed since 1952, so too must the executive's exercise of his delegated authority.

Indeed, Congress, like the Court, has evolved in its understanding of the importance of family reunification since 1952. To facilitate family reunification, Congress has enacted a complex statutory scheme designed to reunite U.S. citizens and residents with their family members abroad, in order to foster the dignity, autonomy, protection of children, and responsible citizenship this Court recognized as the purposes underpinning constitutional family rights in *Obergefell*.

135 S. Ct. at 2599–2603. The current Immigration and Nationality Act facilitates family reunification in many ways, including offering permanent residency to the immediate relatives of U.S. citizens, as well as to the immediate relatives of U.S. permanent residents and to the adult and married children and siblings of U.S. citizens. 8 U.S.C. § 1153. These statutory provisions provide long-term family reunification for both nuclear and extended families. The statutory supports for family reunification, however, extend far beyond issuing permanent residency visas to family members. In 2015, the most recent year for which data is available, over half of the "employment-based" and "diversity" permanent residency visas went to the spouses and children of primary beneficiaries, as did over a third of refugee and asylee visas. Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status, Lawful Permanent Residents (LPRS)*, Table 7d, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.

All told, the family members of U.S. citizens or permanent residents received around 80% of the permanent resident visas allocated in 2015. *Id.* (at least 839,203 of the 1,051,031 are either family-preference, immediate-relative, or derivative-beneficiary visas). Similarly, many people holding temporary visas do so as the spouses or children of temporary visitors on many categories of work visas. 8 U.S.C. §1101(a)(15). Further preferences for family members include a shorter waiting period for eligibility to become a naturalized citizen for the spouses of U.S. citizens, 8 U.S.C. § 1430, derivative citizenship by birth and automatic naturalization for the children of American citizens, 8 U.S.C. §§ 1401, 1431, 1433, and cancellation of removal criteria that allow some otherwise removable immediate family members of American citizens and lawful permanent residents to remain in the United States. 8 U.S.C. § 1229b.

The existence of congressionally approved family reunification provisions does not negate the executive's delegated INA § 212(f) authority to suspend immigration. The congressional scheme, however, can help highlight the scope and consequences of, as well as motivations behind, a President's use of the § 212(f) power. Where the executive's actions contravene not only accepted constitutional principles but also the structure and function of the entire admissions portion of the Immigration and Nationality Act, courts must scrutinize these actions for evidence of animus against the classes of noncitizens targeted by the executive. *See Romer v. Evans*, 517 U. S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37–38 (1928)) (holding that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision").

This scrutiny is especially critical where the constitutional family interests of American citizens and lawful permanent residents are at stake, and where the government's motivation is tainted by invidious discrimination based on race, religion, or nationality. The next Part will explore the contours of these constitutional family interests and their intersection with equal protection.

II. THIS COURT HAS AFFORDED BROAD PROTECTIONS TO THE FAMILY UNDER THE CONSTITUTION, AND THESE PROTECTIONS TRIGGER SPECIAL SCRUTINY WHEN THEIR INFRINGEMENT IS COMBINED WITH INVIDIOUS DISCRIMINATION

Under the framework outlined above, Courts must scrutinize allegations of constitutional deprivations under, at a minimum, rational basis review. Where, as here, the executive couples its abridgement of constitutional family rights with invidious racial and religious discrimination, an even higher standard of review is appropriate, even in the immigration context.

A. This Court has recognized a broad array of family rights protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment

This Court has long recognized that the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution protect family relationships. U.S. Const. Amend. XIV; *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing parental interest in shaping child's education under the Due Process Clause); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing right to marry under the Due Process Clause and right to racial equality in marriage laws under the Equal Protection Clause). The family interests recognized previously by the Court include the right of adults to marry, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); the right to choose whether to bear or beget a child, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942); and the right to procedural due process in the termination of a legal parent-child tie, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The scope of family interests recognized by this Court extends far beyond rights to fair and equal treatment in the entry into and exit from family relationships. Those family interests also encompass the rights enjoyed by family members by virtue of their legal relationships. These include the right of family members to live in a shared household, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); the right of parents to make decisions about their children's education, *Meyer*, 262 U.S. at 399; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); and the right of adult couples to privacy in intimate matters, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

In addition to recognizing a diverse array of interests under the broad umbrella of constitutional family rights, this Court has also defined family capaciously, to include not only marital relationships and biological parent-child relationships, but also relatives beyond the nuclear family. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), for example, the Court embraced an expansive definition of constitutionally protected family relationships worthy of due process protection. As Justice Powell observed, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and deserving of constitutional recognition." *Id.* at 504 (plurality opinion); *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (reaffirming the importance of extended family ties, particularly for children whose parents are unable to care for them); *id.* at 98 (Kennedy, J., dissenting) (observing that "[f]or many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood"); *Prince v. Massachusetts*, 321 U.S. 159 (1944) (analyzing the constitutional parental rights of an aunt who was guardian for her nine-year-old niece).

Most recently, this Court recognized the importance of constitutional family rights in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In affirming the right of same-sex couples to marry, the Court explained the principles underlying its previous constitutional family jurisprudence. *Id.* at 2598–2601. First, "personal choice regarding marriage is inherent in the concept of individual autonomy." *Id.* at 2599. Marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity." *Id.* (quoting *Goodridge v. Massachusetts*, 798 N.E. 2d 941, 955 (Mass. 2003)). Second, the right to marry is "fundamental because it supports a two-person union unlike any other in its importance to the committed individuals . . . Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." *Id.* at 2599–2600. Third, marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 2600. Fourth, marriage is a "keystone of our social order." *Id.* at 2601.

The principles undergirding judicial recognition of constitutional family rights as articulated by the Court in *Obergefell* apply with equal, if not greater force, to transnational families, both nuclear and extended. Indeed, the increasingly interconnected nature of the world means that binational and transnational families abound within the United States. The "personal choice" regarding marriage and family formation "inherent in the concept of individual autonomy" does not stop at a national border, *see id.* at 2599, a principle that our immigration laws recognize by facilitating family reunification. The importance of the "two-person union" is especially profound in instances where a family faces potentially life-long separation; it is for these families that the "universal fear" of living without contact with one's loved ones is particularly acute. *See id.* at 2600. The reunification of parents and children "safeguards children and families" and facilitates American citizens' and residents' exercise of their "rights of childrearing, procreation, and education." *See id.* Finally, if marriage is generally "a keystone of our social order," *id.* at 2601, it is particularly so in relationships involving immigrants, who are the "building blocks of our community" and often rely on family to facilitate their integration into the polity. *Id.*; *see also Moore*, 431 U.S. at 503-04 ("[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural").

The notion that American citizens and lawful permanent residents could simply relocate to their relatives' countries of legal residence would not cure a restrictive statute or order's constitutional infirmity. Many American citizens and lawful permanent residents simply cannot relocate to another country, either because that country's legal system does not possess the constitutional commitments to family interests and nondiscrimination that ours does, or because the American might suffer persecution there. Even if, however, an American could safely relocate, forcing a citizen to do so would result in the same constitutional deprivation suffered by the Lovings in *Loving v. Virginia*. There, the couple had the option of moving from Virginia to Washington, D.C.—indeed, they traveled to the District of Columbia to solemnize their marriage because they were prohibited from doing so in Virginia. The statute in question, however, prohibited them from returning to Virginia to live as a married couple, and this Court found that limitation constitutionally impermissible. *See also Obergefell*, 135 S. Ct. at 2595 (noting that nonrecognition of a marriage legally entered into in another state creates a "substantial burden" on a couple's right to travel).

Despite the broad protection this Court has recognized for family relationships, it has never viewed constitutional family rights as automatically overriding the government's interests in regulating members of families. Rather, the Court gives family members' claims the solemn consideration they deserve while also fairly weighing the government's interest. For example, in cases where individuals alleged that the government's action discriminated against them because of their group membership or violated their fundamental rights under the Due Process or Equal Protection Clauses, this Court applied the appropriate level of scrutiny to the government's actions. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (holding that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans*, 517 U. S. 620, 633 (1996)) (holding that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision"). In cases involving procedural due process, the Court has read the Due Process Clause to require, among other things, a "clear and convincing" evidentiary standard for the termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 748 (1982); the waiver of court fees and costs for indigent litigants in divorce cases, *Boddie v. Connecticut*, 401 U.S. 371 (1971); and the waiver of judicial transcript fees for indigent appellants in parental termination cases, *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) *id.* at 129 (Kennedy, J., concurring) (state required to waive fee because case involved "the rights and privileges inherent in family and personal relations").

In immigration cases, courts consider the competing priorities that Congress must take into account when regulating immigration. Immigrant families, for example, often endure long waiting periods for visas, because the Immigration and Nationality Act privileges some family relationships over others, and privileges the family relationships of citizens over those of lawful permanent residents. See INA §§ 201, 203, 8 U.S.C. §§ 1151, 1153. This Court has acknowledged that although "it could be argued that the line should have been drawn at a different point[,] . . . these are policy questions entrusted exclusively to the political branches of our Government." *Fiallo*, 430 U.S. at 798. As discussed above, however, the relatively deferential review provided in immigration cases is not a rubber stamp. It does not insulate the government from judicial review where the "policy questions" involved infringe the due process rights of American citizens and lawful permanent residents, or when the government regulates immigration in an invidiously discriminatory manner.

B. This Court takes particular care in safeguarding the constitutional interests of individuals whose fundamental rights are infringed through discriminatory action

Where government action impinges upon two independent constitutional interests, courts often read these interests as reinforcing one another. In *Loving v. Virginia,* for example, the Court struck down the discriminatory statute at issue under both the Equal Protection and Due Process clauses, explaining that "[t]o deny this fundamental freedom [the freedom to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." 388 U.S. at 12. Most recently, in *Obergefell*, the Court addressed the interaction of the Due Process and Equal Protection clauses directly: "[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." 135 S. Ct. at 2603; *see also M.L.B.*, 519 U.S. at 120 (noting that the Court's "decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns"). In cases in which two constitutional interests, such as equality and a fundamental right, are at stake, those interests work together synergistically.

Sometimes, this mutual reinforcement is even enough to allow for constitutional scrutiny of a claim that would otherwise receive none, or to increase the constitutional scrutiny of a claim that would otherwise receive a more deferential standard of review. For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), using an intermediate scrutiny analysis, this Court struck down a law withholding funding from school districts that employed those funds to educate undocumented children. It did so even though the undocumented noncitizens were not a "protected class" and education was not a "fundamental right." *Id.* at 223. The discrimination, coupled with the importance of both the children's need for education and society's interest in fostering the education of its residents, were enough, taken together, for the application of intermediate scrutiny. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 Boston U. L. Rev. 1309, 1338–39 (2017).

Just as courts can apply heightened scrutiny when government action involves invidious discrimination coupled with infringement of a fundamental right, they may also do so when a government action infringes individual rights while also violating structural constitutional principles. For example, in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), this Court declared unconstitutional a section of the Immigration and Nationality Act that allowed a Congressional veto of the executive's decision, made under its delegated power, to allow a deportable noncitizen to remain in the United States. *See id.* at 923, 959. Although *Chadha* concerned the individual rights of a particular lawful permanent resident under the immigration statute, the Court decided the case based on structural constitutional principles. *Id.* at 950–52. It did so *despite* the "political" nature of the decision to deport a noncitizen, noting that "despotism comes on mankind in different shapes," and that the framers of the Constitution designed it to prevent both Congress and the executive from succumbing to despotism. *Id.* at 949 (quoting 1 M. Farrand, The Records of the Federal Convention of 1787, at 254 (1911)).

The requirement of a bicameral legislature at issue in *Chadha* is not the only structural constitutional provision that safeguards the individual rights of Americans. Many other constitutional provisions are also structural in nature, not least of which is the Establishment Clause. U.S. Const. amend. I. This Court has noted that the intent of the Establishment Clause "was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation." *McGowan v. Maryland*, 366 U.S. 420, 465–66 (1961).

In summary, courts apply heightened scrutiny to government action that infringes upon fundamental family rights under the Constitution. Where these fundamental rights are infringed upon in a way that also violates equal protection, or where they are violated in a way that also contravenes the Constitution's structural provisions, courts enforce constitutional protections even in contexts, such as immigration, where review is generally deferential.

III. THE COURT SHOULD INVALIDATE THE EXECUTIVE ORDER BECAUSE IT IMPINGES UPON, INTER ALIA, THE CONSTITUTIONAL FAMILY RIGHTS OF AMERICAN CITIZENS AND LAWFUL PERMANENT RESIDENTS

The Executive Order at issue in this case impinges upon the constitutional family rights of American citizens and lawful permanent residents in two distinct but related ways. First, by targeting the residents of predominantly Muslim countries for disparate treatment, the Order deploys invidious racial and religious discrimination to deny American citizens and lawful permanent residents their fundamental constitutional family rights.

Granted, this discrimination alone might be enough, even without the constitutional family interests discussed here, to invalidate the Order. The targeting of particular noncitizens for unfavorable treatment based solely on their religion, race, or nationality violates principles of Equal Protection, as well as the Free Exercise and Establishment Clauses. This rank stereotyping of an entire people as undesirable is exactly the type of "rare case" of "outrageous" discrimination anticipated by this Court in *American-Arab Anti-Discrimination Committee*, 525 U.S. at 491; *see also Plyler*, 457 U.S. 202 (striking down law discriminating against undocumented children).

Here, however, the government has gone even further. The Order has targeted noncitizens based on race, religion, and nationality by "slicing deeply into the family itself," *Moore*, 431 U.S. at 498, in violation of the family dignity rights affirmed by this Court's long line of constitutional family cases, from *Loving* to *Obergefell*. It uses impermissibly discriminatory means to interfere in the ability of American citizens and lawful permanent residents to meaningfully nurture and maintain their close family relationships. Just as it did in *Loving*, the Court should recognize that the "denial of fundamental freedom on so unsupportable a basis as . . . racial classifications" deprives citizens and lawful permanent residents of their liberty without due process of law.

Second, the Executive Order violates the procedural due process rights of American citizens and residents whose family members seek admission to the United States by barring consideration of evidence of admissibility. This Court has held that the constitutional family interests of American citizens and residents are sufficiently grave to merit procedural due process when curtailed. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that an individual's private interest must be balanced with the risk of erroneous deprivation of the interest and the government's interest in not providing process); *Landon*, 459 U.S. at 34 (finding the "right" of lawful permanent resident "to rejoin her immediate family" sufficient to require procedural due process analysis under *Mathews*); *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (holding that where government made specific finding of noncitizen's inadmissibility under the INA's terrorism bars, this finding satisfied procedural due process). Just like the plaintiff in *Din*, the American family members of those noncitizens affected by the Order have a constitutional family interest in reunification with their relatives. *See also Landon*, 459 U.S. at 23 (recognizing the due process interests of a lawful permanent resident who "established a home in Los Angeles with her husband, a United States citizen, and their minor children"). This interest holds whether the relative is a spouse, *see Obergefell*, 135 S.

Ct. 2584, a child, *see Troxel*, 530 U.S. 57, or an extended family member, *see Moore,* 431 U.S. 494.

Because this case arises in an immigration context, the standard of review is more deferential than in other contexts. *See Fiallo*, 430 U.S. 787. But even under that deferential standard, the Order fails. Under *Din* and *Mandel*, the Court must determine whether the executive had a "bona fide" and "facially legitimate" reason to exclude the specific individuals who were targeted by the Order. Unlike the Executive Order at issue in this case, the *Din* Court was evaluating an agency decision about a *specific* individual's *specific* activities that allegedly made him inadmissible under the terrorism bars. 135 S. Ct. at 2141 (Kennedy, J., concurring). In contrast, in this case, the government has made no specific findings as to any of the plaintiffs. Instead, the Executive Order excludes *all* visa applicants from six predominantly Muslim countries, regardless of whether there is any evidence of inadmissibility under the statute or harm to the nation's security. By precluding any consideration of this evidence, the Executive Order violates procedural due process.

The waiver process set forth in the Order does not cure the problem. Order § 3(c). The government appears to suggest that the waiver process relieves it of the burden to demonstrate a "bona fide and facially legitimate reason" for the Order's restrictions on visas. However, the waiver process places a new burden of demonstrating "undue hardship" on the shoulders of the people seeking visas. These individuals are still being targeted based on their religion, race, and nationality; other noncitizen family members of American citizens and residents seeking admission who do not reside in one of the six predominantly

Muslim countries do not have to demonstrate "undue hardship." As discussed above, discrimination based on animus toward a particular race, religion, or nationality is not a "bona fide" or "facially legitimate" reason to revoke a visa, or to impose additional burdens on those seeking visas. Under the "bona fide and facially legitimate" test mandated by *Mandel* and *Din*, the Executive Order fails.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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In the Supreme Court of the United States

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Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writs Of Certiorari
To The United States Courts Of Appeals
For The Fourth and Ninth Circuits

BRIEF OF INTERFAITH COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE* INTERFAITH COALITION

Amici are a coalition of individuals and organizations of diverse religions.[1] Although they profess different faiths, they are united in the belief that religious tolerance is critical to the safety and well-being of our local and national community. Because Section 2(c) of President Trump's Executive Order No. 13,780 (March 6, 2017) ("Executive Order") discriminates on the basis of religion, the Order is anathema to this core tenet that all members of our coalition share.

Amici include:

- Congregation B'nai Jeshurun, a nonaffiliated Jewish synagogue in New York City.
- The Muslim Public Affairs Council, a public service agency working for the civil rights of American Muslims, for the integration of Islam into American pluralism, and for a positive, constructive relationship between American Muslims and their representatives.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. A letter from Petitioners' counsel consenting to the filing of all timely amicus briefs, and written consent from Respondents' counsel to the filing of this brief, have been submitted to the Clerk. Unless stated otherwise, *Amici* are acting on their own behalf, and not on behalf of any organizations with which they are associated.

- The National Council of Churches, a community of Christian churches encompassing 40 million Christians in over 100,000 congregations from 38 diverse member communions that recognizes the importance of interreligious relationships and has worked to strengthen partnerships between different faith groups to reduce suspicion and anti-Muslim and anti-Semitic sentiment in society in a post-9/11 world.

- The Right Reverend Sally Dyck, Bishop of the Northern Illinois Annual Conference of the United Methodist Church. The Northern Illinois Annual Conference encompasses more than 370 churches and 30 new faith communities spanning the upper one-third of the state of Illinois.

- The Right Reverend Andrew Dietsche, the Episcopal Bishop of New York. The Episcopal Diocese of New York is made up of over 200 congregations encompassing Manhattan, the Bronx, and Staten Island in New York City, and the counties of Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester in the state of New York.

- The Right Reverend Allen K. Shin, Bishop Suffragan of the Episcopal Diocese of New York.

- The Right Reverend Mary D. Glasspool, Bishop Assistant of the Episcopal Diocese of New York.

- The Right Reverend Mariann Edgar Budde, Bishop of the Episcopal Diocese of Washington, which includes Washington, D.C. and the counties of Montgomery, Prince George's, Charles, and St. Mary's in Maryland.

- Imam Abdul Malik Mujahid, a Muslim imam actively involved in interfaith work. Imam Mujahid has served as Chairman of the Parliament of the World's Religions and on the Council of Foreign Relations' Independent Task Force on Civil Liberties and National Security. He is the founder of Sound Vision, an Islamic charity.
- The Sikh Coalition, which was founded on September 11, 2001 to, *inter alia*, ensure religious liberty for all people.
- The seven United States Franciscan provinces of the Order of Friars Minor ("OFM"), a Franciscan order that strives to bring the Gospel into the everyday experience of men and women through a life in fraternity and compassionate service to all:
    - Very Rev. James Gannon, OFM Provincial Minister, for the Assumption of the Blessed Virgin Mary Province, Franklin, WI.
    - Very Rev. Kevin Mullen, OFM Provincial Minister, for the Holy Name Province, New York, NY.
    - Very Rev. Robert Campagna, OFM Provincial Minister, for the Immaculate Conception Province, New York, NY.
    - Very Rev. Jack Clark Robinson, OFM Provincial Minister, for the Our Lady of Guadalupe Province, Albuquerque, NM.

  - Very Rev. William Spencer, OFM Provincial Minister, for the Sacred Heart Province, St. Louis, MO.
  - Very Rev. David Gaa, OFM Provincial Minister, for the Saint Barbara Province, Oakland, CA.
  - Very Rev. Jeff Scheeler, OFM Provincial Minister, for the Saint John the Baptist Province, Cincinnati, OH.
- The Right Reverend Lawrence C. Provenzano, the Episcopal Bishop of Long Island. The Episcopal Diocese of Long Island has ecclesiastical jurisdiction over Brooklyn and Queens in New York City, and the counties of Nassau and Suffolk in the state of New York.
- The Right Reverend Marc Handley Andrus, the Episcopal Bishop of California. The Episcopal Diocese of California has ecclesiastical jurisdiction over San Francisco, Alameda, Contra Costa, Marin, and San Mateo Counties, along with the northernmost portion of Santa Clara County, in California.
- Rabbi Joy Levitt, the Executive Director of JCC Manhattan.
- Reverend Curtis W. Hart, Editor-in-Chief of the *Journal of Religion and Health* and Lecturer in the Departments of Medicine and Psychiatry, Division of Medical Ethics, at Weill Cornell Medical College.
- Congregation Beit Simchat Torah, a non-affiliated Jewish synagogue in New York City

that serves Jews of all sexual orientations and gender identities.

- Rabbi Sharon Kleinbaum, the Senior Rabbi of the Congregation Beit Simchat Torah in New York City.
- Reverend Timothy B. Tutt, Senior Minister at the Westmoreland Congregational United Church of Christ in Bethesda, Maryland.
- Rabbi Joel Mosbacher, the Senior Rabbi of Temple Shaaray Tefila in New York City.
- Rabbi Frederick Reeves, the Rabbi of the KAM Isaiah Israel Congregation in Chicago.
- Rabbi Peretz Wolf-Prusan, the Chief Program Officer and a Senior Educator at Lehrhaus Judaicam, a non-denominational center for adult Jewish studies in San Francisco.
- Rabbi Noa Kushner, the leader of The Kitchen, a Jewish community building a spiritually alive generation and a new resonant approach to religious life in San Francisco.
- Union Theological Seminary, the oldest independent seminary in the United States. The seminary's education is rooted in Christian traditions but instructed by other faiths.
- Rabbi John Rosove, the Senior Rabbi of the Temple Israel of Hollywood in Los Angeles.
- United Methodist Women, the largest denominational faith organization for women with approximately 800,000 members whose mission is fostering spiritual growth, developing leaders, and advocating for justice.

- Rabbi James Ponet, the emeritus Howard M. Holtzmann Jewish Chaplain at Yale University.
- The Hyde Park & Kenwood Interfaith Council, which, since its founding in 1911, has strived for the increased efficiency of the spiritual forces of our community along cooperative lines. The Council's members agree to respect the integrity of their different faiths and the right to practice their beliefs.
- Rabbi Michael Strassfeld, Rabbi Emeritus of the Society for the Advancement of Judaism, a Manhattan synagogue.
- IKAR, a leading edge Jewish community in Los Angeles that seeks to inspire people across the religious spectrum.
- Rabbi Sharon Brous, the founder and Senior Rabbi of IKAR.
- Reverend Jeannette DeFriest, Rector of St. Luke's Episcopal Church, Evanston, Illinois.
- Rabbi Amichai Lau Lavie, founding spiritual leader of Lab/Shul NYC, an organization that seeks to redefine the role of sacred gatherings that nourish our thirst for meaning, connection, spirituality, and community.
- Imam Suhaib Webb, former imam of the Islamic Society of Boston Cultural Center, the largest mosque in New England.
- Rabbi Ayelet Cohen, the Senior Director of New Israel Fund's New York/Tri-State Region. Rabbi Cohen is the former Director of The

Center for Jewish Living and The David H. Sonabend Center for Israel at JCC Manhattan.

- Hyattsville Mennonite Church, a Christian congregation in the Washington, D.C. area that seeks to break down the divisions of economic and social status, sexuality, gender, race, ethnicity, culture, education, age, mental and physical health, and religion, in order to build a more diverse and complete faith community.
- Women's Alliance for Theology, Ethics, and Ritual, a center for dialogue on feminism, faith, and justice that connects activists, religious leaders, students, scholars, and allies who are using feminist religious values to create social change.
- Reverend Julie Windsor Mitchell, the Campus Minister of the University Christian Ministry at Northwestern University.
- The Baptist Joint Committee for Religious Liberty, a religious liberty education and advocacy organization comprised of 15 national and state Baptist conventions and conferences and congregations throughout the country, focuses exclusively on church-state issues and has worked to promote vigorous enforcement of both the Establishment and Free Exercise Clauses to ensure religious liberty for all since 1936.

SUMMARY OF ARGUMENT

Two documents establish the Establishment Clause violation in this case. The first is the March 6, 2017 Executive Order itself.[2] The second is a report of the State Department, the *Country Reports on Terrorism 2015* (the "Report").[3] The Executive Order expressly states that the Report informs the selection of the six Muslim-majority nations for inclusion under the travel ban imposed by Section 2(c) of the Order.

Taken together, these two documents compel one conclusion: that six Muslim-majority nations were selectively targeted for the travel ban. This is demonstrated by the fact that at least two Christian-majority nations, Venezuela and the Philippines, were not included in the ban. This omission is striking. According to the Report, these two counties satisfy the criteria the Executive Order purports to apply when determining whether a country should be subject to the ban. Indeed. the Report reveals that Venezuela and the Philippines allegedly satisfy these criteria by a greater margin than at least one of the Muslim-majority nations included in the ban.

To be clear, *Amici* do not vouch for statements in the Report. *Amici* do not contend that Venezuela or the Philippines should be included in the travel ban. Nor do they purport to second guess the

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[2] *Protecting the Nation From Foreign Terrorist Entry Into the United States*, Exec. Order No. 13.780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[3] U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism. Country Reports on Terrorism 2015 (June 2016). https://www.state.gov/documents/organization/258249.pdf.

Administration's assessment of the security risks posed by various countries. *Amici* merely contend that if the criteria set forth in the Executive Order are applied fairly, and the factual basis of the Executive Order's determination is set forth primarily (if not entirely) in the Report, then there is no principled basis for the Executive Order's "Muslim only" list.

This analysis is sufficient to establish a violation of the Establishment Clause. At the very least, the selective burdening of one nation over another opens the door to consideration of the intent of the drafter of the travel ban. In such circumstances, the Court must carefully scrutinize the statements of President Trump to determine whether the purpose of the travel ban violates the Establishment Clause.

ARGUMENT

I. The Establishment Clause Forbids National Security Laws That Selectively Burden One Religion

A. The Establishment Clause Bars Even Facially Neutral Laws From Burdening One Religion and Not Another

Under the Establishment Clause, the government cannot prefer one religion over another. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither [a state nor the Federal

Government] can pass laws which . . . prefer one religion over another."); *cf. Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion . . . .").

The government also cannot hide behind facial neutrality and claim that a law which burdens one religion over another is constitutional simply because it does not mention religion. The court's analysis "does not end with the text of the statute at issue." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994). Rather, a facially neutral law that imposes arbitrary distinctions that are not explained by the law's alleged purpose, but instead are designed to burden or benefit one religion over another, runs afoul of the First Amendment. *See Larson*, 456 U.S. at 255.

To root out the true nature of a facially neutral law, courts look to both the structure and history of the law. In *Larson*, for example, the Court noted that the structure of the challenged regulation appeared to create an arbitrary distinction between religions. *Id.* at 252. In particular, the law exempted certain religions that received fifty percent of their contributions from members or affiliated organizations from a requirement to register with and provide the state with annual financial reports. *Id.* at 231-32. The Court looked to the legislative history and found that the drafters had sought to avoid imposing a burden on the Catholic Church. *Id.* at 254. After considering the structure and history of the "fifty percent rule," the Court concluded that the rule served no legitimate purpose and violated the Establishment Clause. *Id.* at 255.

B. The Establishment Clause Applies with Full Force in the Immigration and National Security Context

Although the Executive Order regulates immigration and purports to rest on national security grounds, those factors do not alter the Establishment Clause analysis. The political branches have considerable authority over immigration, but that power "is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also INS v. Chadha*, 462 U.S. 919, 941 (1983) (affirming courts' authority to review whether the federal government "has chosen a constitutionally permissible means of implementing" its power to regulate immigration). Moreover, this Court has often reviewed the constitutionality of, and struck down, measures taken to promote national security. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (striking down law that stripped federal courts of jurisdiction to review habeas petitions of enemy combatants detained at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that enemy combatants held at Guantanamo Bay had the right to challenge the factual basis of their detention); *United States v. Robel*, 389 U.S. 258 (1967) (striking down law making it unlawful for members of Communist organizations to be employed at defense facilities).

The courts have applied this principle in the circumstances of this case. After the Trump Administration issued the first version of this Executive Order,[4] which similarly burdened individuals from seven Muslim-majority countries (Iran, Iraq, Syria, Libya, Yemen, Sudan, and Somalia), lawsuits were filed across the country challenging its constitutionality. In addressing these suits, courts reaffirmed that it is "beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action," *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), and that the Executive Order "must still comply with . . . the constraints of the Constitution, including the Bill of Rights," *Aziz v. Trump*, 234 F. Supp. 3d 724, 732 (E.D. Va. 2017).

The same analysis applies to the revised Executive Order, which continues to burden individuals from six of the seven Muslim-majority countries singled out in the original Order. Regardless of the immigration and national security justifications proffered by the Administration, the Court must still adjudicate the constitutionality of the Order. In doing so, the Court is not bound by the justifications offered by the government, and should conduct a regular Establishment Clause analysis. As set forth below, this analysis reveals that the Executive Order unconstitutionally burdens Muslims.

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[4] *Protecting the Nation from Foreign Terrorist Entry Into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

II. Section 2(c) of the Executive Order Selectively Burdens Muslim-Majority Countries While Exempting Comparable Christian-Majority Countries

A. The Executive Order's Selection Criteria and its Reliance on the Report

1. Requirements of Section 1(d)

Section 1(d) of the Executive Order states that the six Muslim-majority countries were chosen for the travel ban "because the conditions in these countries present heightened threats." Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. This constitutes an evolution in the Administration's articulation of its approach to the travel ban.

Section 1(b)(i) of the Executive Order notes that the six counties were among the seven identified in the January 27, 2017 Executive Order 13,769, which relied upon the countries designated under section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1187(a)(12). Exec. Order No. 13,780, 82 Fed. Reg. at 13,209. That statutory provision concerns restrictions on eligibility for the Visa Waiver Program. Pursuant to section 217(a)(12), persons who are citizens of one of these six countries (or Iraq), or who have visited these countries in the last five years, are ineligible to participate in the Visa Waiver Program. Instead, if they wish to enter the United States as nonimmigrant visitors, they must apply for a visa. *See* 8 U.S.C. § 1182(a)(7)(B)(i)(II); *id.* § 1187(a). Of course, this statutory provision stops well short of imposing a blanket travel ban.

Section 1(d) of the revised Executive Order seeks to address this problem with the original Executive Order by offering a further justification of the travel ban. The new Executive Order asserts that the six Muslim-majority selected countries "warrant additional scrutiny" when viewed in light of the following four factors:

> [1] Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.
>
> [2] Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States.
>
> [3] Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.
>
> [4] Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. As set forth in the next section, the first three of these factors are discussed in the State Department's Report, which is expressly cited in Section 1(e) of the Executive Order.

Factor One. The Executive Order states that a critical criterion for determining whether a country would be selected for inclusion in the travel ban was that a nation must be either (1) "a state sponsor of terrorism"; (2) "significantly compromised by terrorist organizations"; or have (3) "active conflict zones." Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. The second category encompasses "terrorist safe havens,"[5] which are defined in the Report as including "ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both." Report at 307.

Factors Two and Three. The second and third factors on which the Executive Order purports to base its decision to select the six Muslim-majority nations are: (a) an inability or unwillingness to share information about individuals seeking to travel to the United States, and (b) the significant presence of terrorist organizations and the risk that terrorist activity will be exported to the United States.

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[5] The Executive Order's description of why Somalia should be included in the scope of the Executive Order is illustrative. There is no assertion that it is a state sponsor of terrorism or is an active conflict zone. Instead, the Executive Order states that "[p]ortions of Somalia have been terrorist save havens." Exec. Order No. 13,780, 82 Fed. Reg. at 13,211.

2. Section 1(e) and the Report

Section 1(e) of the Executive Order explains the reasons why the six selected Muslim-majority nations qualified for a travel ban by applying the criteria of Section 1(d). Section 1(e) states that the information recited in the Executive Order was taken "in part" from the Report. Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. No other document is cited. Indeed, much of Section 1(e)'s descriptions of the selected Muslim-majority nations are identical to those in the Report.

On these facts, the Report is an appropriate and indeed critical reference with which to construe the meaning and operation of the Order. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (both the majority and dissent closely scrutinized whether a study, mentioned in a city ordinance as justification for the ordinance, actually supported the purported reason for the regulation).

B. According to the Report, Venezuela and the Philippines Satisfy the Criteria of Section 1(d)

Careful analysis of the Report demonstrates that the Administration has not consistently applied the criteria set forth in Section 1(d). Specifically, a review of the Report reveals that at least two Christian-majority nations—Venezuela and the Philippines—allegedly satisfy the three operative factors set forth in Section 1(d), but were not subjected to the travel ban.

As noted above, *Amici* take no position on whether or not these two nations should be subject to a travel ban or whether the criteria stated in the Executive Order regarding the selected countries are, or are not, the right criteria. Nor do *Amici* vouch for the representations made in the Report. Rather, the analysis of Venezuela and the Philippines set forth below simply demonstrates that the Administration has taken an inconsistent approach to selecting nations for the travel ban that selectively favors Christian-majority countries over Muslim-majority countries. This renders Section 2(c) of the Executive Order fatally defective under the Establishment Clause.

1. Application of the Section 1(d) Factors to the Report's Allegations Regarding Venezuela

Factor One: Terrorist Safe Haven. The Report bases its determination that Venezuela is a safe haven for terrorism on purportedly "credible reports that Venezuela maintained a permissive environment that allowed for support of activities that benefited known terrorist groups." Report at 314-15; *see also* Report at 297. Such groups are said to include the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army, and Basque Fatherland and Liberty, "as well as Hizballah supporters and sympathizers." Report at 297.

According to the Report, the United States has repeatedly sought the assistance of Venezuela in combating terrorism. For the tenth year in a row, however, Venezuela has been deemed "not cooperati[ve]," Report at 297, and has been ineligible to purchase or license any "defense article or defense service" from anywhere within the United States under the Arms Export Control Act, 22 U.S.C. § 2781(a).

Factor Two: Unable and Unwilling to Share or Validate Important Information About Individuals Seeking to Travel to the United States. The Report states that in Venezuela, "[b]order security at ports of entry is vulnerable and susceptible to corruption," and specifically calls attention to the "lack of government transparency." Report at 297. According to the Report, the "government routinely did not perform biographic or biometric screening at ports of entry or exit," and there was "no automated system to collect advanced Passenger Name Records on commercial flights or to cross-check flight manifests with passenger disembarkation data." Report at 297. Moreover, as noted above, the Report states that Venezuela has (for the last ten years) been "not cooperat[ive]" with U.S. anti-terrorism efforts. Report at 297.

Factor Three: Significant Presence of Terrorist Organizations and Risk of Terrorists Travelling to the United States. The Report states that Venezuela provides a fertile environment for terrorist organizations such as FARC, the National Liberation Army, and Basque Fatherland and Liberty, "as well as Hizballah supporters and sympathizers." Report at 297, 314-15. Reporting such conditions about a country so close to the United States suggests that the State Department believes that there is a serious concern that "conditions will be exploited to enable terrorist operatives or sympathizers to travel [from

Venezuela] to the United States." *Cf.* Exec. Order No. 13,780, 82 Fed. Reg. at 13,210.

2. Application of the Section 1(d) Factors to the Report's Allegations Regarding the Philippines

Factor One: Terrorist Safe Haven. According to the Report, the Filipino government receives substantial assistance from several American agencies, and it closely cooperates with both the United States government and international organizations to combat terrorism. Report at 80-84. Nonetheless, the country's composition of over 7,100 islands "makes it difficult for the central government to maintain a presence in all areas." Report at 309. Thus, according to the Report, several militant groups, including Abu Sayyaf Group (ASG), Jemaah Islamiya, Bangsamoro Islamic Freedom Fighters (BIFF), the Ansarul Khilafah Philippines (AKP), and the New People's Army, are able to operate out of "base locations" in the Southern Philippines. Report at 78-79, 309.

The Report also focuses on the Sulu/Sulawesi Seas Littoral, an island/maritime region that straddles Indonesia, Malaysia, and the Philippines, and is said to be home to many of the identified terrorist groups. Report at 308. Per the Report, "the expanse remain[s] difficult to control," and any surveillance is "partial at best," as historic smuggling and piracy "provide[] an effective cover for terrorist activities, including the movement of personnel, equipment, and funds." Report at 308. The Report refers to this region as "an area of concern for WMD proliferation and transit" due in part to "[w]eak strategic trade controls, legal and regulatory frameworks, [and] inadequate maritime law enforcement and security capabilities." Report at 308.

Factor Two: Unable to Share or Validate Important Information About Individuals Seeking to Travel to the United States. The Report states that the government of the Philippines has made progress in improving its border security and collaborates closely with the United States and regional groups in doing so. Report at 80-84. Nonetheless, despite this willingness to collaborate with the United States, per the Report, the government is unable to monitor "the movement of personnel, equipment, and funds." Report at 308.

According to the Report, this inability to verify this information is due in part to difficulties in international cooperation and poor surveillance capabilities in the Sulu/Sulawesi Seas Littoral. Report at 308. It is also due to the country's geographic composition, which "makes it difficult for the central government to maintain a presence in all areas." Report at 309. At the time the Report was published, "violent opposition" and a "continued heavy military and police presence" allegedly remained in the southern islands. Report at 78. Moreover, the Report also notes that law enforcement and counterterrorism agencies lack necessary equipment, have a "mixed record of accountability," are "under-resourced and understaffed," and suffer from "widespread official corruption." Report at 80, 82.

Factor Three: Significant Presence of Terrorist Organizations and Risk of Terrorists Travelling to the United States. The Report states that "ISIL was attempting to recruit Filipinos," and that some of the Filipino-based groups including ASG, AKP, and BIFF, "have publicly pledged allegiance to ISIL." Report at 79. According to the Report, in 2015, these groups "displayed ISIL-affiliated images and conducted some of ISIL's most reprehensible practices—including the beheading of hostages." Report at 79. The Report also states that in 2015, terrorist groups in the Southern Philippines engaged in kidnappings of both locals and foreigners, roadside bombings, and the seizing of private vessels and Coast Guard ships. Report at 79-80.

The Report states that these groups export terrorist activity. According to the Report, these Filipino-based groups were responsible for high-profile terrorist attacks, including several outside of the Philippines. These include:

- The 2002 Bali bombings which killed more than 200, including 7 U.S. citizens;
- The October 2002 bombing near a military base that killed an American soldier;
- The August 2003 bombing of the J.W. Marriott Hotel in Jakarta;
- The September 2004 bombing outside the Australian Embassy in Jakarta;
- The October 2005 suicide bombing in Bali that killed 26; and,

- The July 2014 firing upon civilians celebrating the end of Ramadan with assault rifles that left 21 individuals dead.

Report at 352, 380.

C. According to the Report, Venezuela and the Philippines Present a Greater Section 1(d) Risk than Does Sudan

If the allegations of the Report are credited, both Venezuela and the Philippines satisfy the three operative factors of Section 1(d) of the Executive Order. They were nonetheless exempted from the travel ban. This exclusion occurred even though the Report—the sole source cited as support for the inclusion of the six Muslim-majority countries—sets forth allegations that suggest Venezuela and the Philippines are greater threats to the national security of the United States than is Sudan.

By including Sudan and excluding two Christian-majority nations, Venezuela and the Philippines, the Administration's policy is internally and fatally inconsistent.[6] This inconsistency demonstrates that a country's predominant religion is the real basis for its inclusion in the travel ban.

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[6] As noted above. *Amici* take no position on the Administration's assessment of the national security risk posed by Sudan.

1. Basis for Sudan's Inclusion

Section 1(e)(iv) of the Executive Order, relying on information from the Report, is the paragraph used to justify Sudan's inclusion in the travel ban:

> Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

Exec. Order No. 13,780, 82 Fed. Reg. at 13,211. The Report provides only slightly more detail than this paragraph, and significantly less detail than the information provided for Venezuela and the Philippines. *See* Report at 301.

2. A Comparison of the Report's Account of the Three Nations Confirms that the Executive Order Violates the Establishment Clause

a) Factor 1: State Sponsors of Terrorism/Safe Havens

If one accepts the statements of the Executive Order and the Report, all three countries appear to satisfy the first criterion. A careful reading of those materials, however, reveals a significant distinction. Sudan is designated as a state sponsor of terrorism, but such designation is based on historical facts. It was designated as a state sponsor of terrorism in 1993, when it "served as a meeting place, safe haven, and training hub for international terrorist groups." Report at 301. Per the Executive Order and the Report, Sudan has changed its posture significantly since that time. Report at 301 ("Sudan's support to al-Qa'ida has ceased" and "[t]he United States and Sudan worked cooperatively in countering the threat posed by al-Qa'ida and ISIL in 2015."); Report at 301 (noting that "the use of Sudan by Palestinian designated terrorist groups appeared to have declined"); Exec. Order No. 13,780, 82 Fed. Reg. at 13,211 ("Sudan's support to al-Qa'ida has ceased.").

By contrast, both Venezuela's and the Southern Philippines' status as terrorist safe havens are based on *current* facts. The Report notes that Venezuela "maintained a permissive environment that allowed for support of activities that benefited known terrorist groups" *in 2015*. Report at 297. Similarly, the Report details how the Philippines has been unsuccessfully attempting to eradicate terrorist safe havens in the southern islands *in 2015*. Report at 80-84, 308-09.

Put simply, if Sudan satisfies the first Section 1(d) factor, then—in the view of the Report—Venezuela and the Philippines do as well.

b) Factor 2: Ability and Willingness to Share and Validate Information

While Venezuela has been unwilling to cooperate with the United States in combatting terrorism, and the Filipino government has been unable to validate important information, "[t]he United States and Sudan worked cooperatively in countering the threat posed by al-Qa'ida and ISIL in 2015, which included their use of transit and facilitation routes within the country." Report at 301.

Sudan is also reported to be a member of the Partnership for Regional East Africa Counterterrorism (PREACT), a United States-funded program "designed to build counterterrorism capacity and cooperation of military, law enforcement, and civilian actors across East Africa to combat terrorism." Report at 13. This stands in stark contrast to Venezuela's reported lack of cooperation for ten consecutive years, Report at 297, and the Filipino government's apparent inability to establish domain over the southern islands, Report at 308-09.

Again, if Sudan satisfies the second Section 1(d) factor, then (in the view of the Report) Venezuela and the Philippines clearly do so as well.

c) Factor 3: Risk That Terrorists Will Travel to the United States

While terrorist organizations continue to operate in Sudan, their presence is alleged by the Report to be greater in the Philippines. The Report provides a one-sentence description of terrorism in Sudan: "elements of al-Qa'ida and ISIL-linked terrorist groups remained active in Sudan in 2015."[7] Report at 301. The only other recent reference to terrorist activity is an attempted Hamas arms shipment in 2014. Report at 301.

Once again, when compared to the Report's description of kidnappings, roadside bombings, and the seizing of private and Coast Guard Ships in the Philippines, *see* Report at 79-80, or its description of Venezuela's "permissive environment" for "known terrorist groups." Report at 297, the point is quite simple: if Sudan satisfies Factor Three according to the information in the Report, the two Christian-majority nations clearly do so as well.

III. In Light of This Selective Burden Imposed Only on Muslim-Majority Nations, the Court Should Look to the Statements of the Drafters to Determine Its Purpose

When read in light of the Report on which it relies, it is apparent that Section 2(c) of the Executive Order selectively disfavors Muslim-majority countries as compared to similarly-situated non-Muslim countries.[8] The Executive Order's "express design" is

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[7] As with Sudan, the Report does not list any instances of specific terrorist activity that took place in Venezuela. *See* Report at 297-98, 314-15.

[8] A review of the most recent Country Report (released July 2017) indicates that the incongruity set forth above has not changed. *See* U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016.

"to burden or favor selected religious denominations." *Larson*, 456 U.S. at 255. Accordingly, the Executive Order is in clear violation of the Establishment Clause.

The Administration denies that this is the purpose of the Executive Order. While "the government's characterization is . . . entitled to some deference . . . it is nonetheless the duty of the court to distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation and quotation marks omitted); *see also McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005). Courts determine the purpose of a law by considering its history, including statements made by its drafters. *Larson*, 456 U.S. at 254; *Grumet*, 512 U.S. at 699-70. Once the discriminatory impact of the Order has been

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at 301-02 (July 2017), https://www.state.gov/documents/organization/272488.pdf (describing Venezuela, and alleging that "Venezuela was not cooperating fully with U.S. counterterrorism efforts" and "credible reports that Venezuela maintained a permissive environment that allowed for support of activities that benefited known terrorist groups"); *id.* at 83-88 (describing the Philippines and recognizing that "domestic and international terrorism remained a serious problem"); *id.* at 305-06 (describing Sudan and recognizing that "[t]here were no reported terrorist attacks in Sudan in 2016 . . . [or] indications that the Sudanese government tolerated or assisted terrorist organizations within its borders," while commending Sudan for being "a cooperative partner of the United States on counterterrorism" and for making "countering terrorism . . . a national security priority"). Again, *Amici* wish to stress that they are not vouching for statements in the State Department's Report or advocating that a particular country be included in the travel ban. Rather they merely note that the Report the government purportedly relied upon did not support the government's position at the time the Executive Order was drafted, and the annual update of the Report, *see* 22 U.S.C. § 2656f, continues to contradict the government's position.

established, the Court may look behind the Executive Order to determine whether it has a discriminatory purpose that runs afoul of the Establishment Clause.

Here, the intention of at least one of the Defendants to burden a particular religion was articulated publicly. Defendant President Trump's comments related to this Executive Order have made it clear that his intention is to discriminate against Muslims. *See, e.g.*, *Washington*, 847 F.3d at 1167-68 (finding that the States' Establishment Clause claim raised "serious allegations" and "significant constitutional questions" because of "evidence of numerous statements by the President about his intent to implement a 'Muslim ban' as well as evidence [suggesting] that the Executive Order was intended to be that ban"); *see also Aziz*, 234 F. Supp. 3d at 737 (looking to statements made during and after the election by President Trump, and the "dearth of evidence indicating a national security purpose," and concluding that the original Executive Order was likely intended to be a "Muslim ban").

CONCLUSION

For the foregoing reasons, the Executive Order should be invalidated as violating the Establishment Clause. In the alternative, the Court should consider the extrinsic statements of the President regarding the purpose of the Order to evaluate its constitutionality.

Respectfully submitted,

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In The
Supreme Court of the United States

◆

DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.

◆

DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

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UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

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BRIEF FOR INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

Amici curiae, an interfaith group of religious and interreligious organizations, respectfully submit this brief in support of respondents.[1]

INTEREST OF AMICI CURIAE

Amici are a diverse group of thirty-nine faith-based and interfaith religious associations, congregations, and organizations pursuing their respective faiths alongside each other and standing for the right of all believers to practice their religions, as guaranteed by the First Amendment. Amici have a wide array of beliefs and come from different faith traditions, yet they unite here to speak with one voice to urge the Court to affirm the courts of appeals' judgments and to hold that Executive Order 13,780 violates the Constitution.

Amici have a strong interest in this case because the Order harms them and their right to practice their faiths. Although the Order is ostensibly a nationality-based ban, it is focused by design on citizens of majority-Muslim nations. Amici therefore see it for what it is: anti-Muslim discrimination. Such government-imposed discrimination has real harms. By targeting members of a particular faith, it promotes dangerous stereotypes and fosters baseless fear.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioners have filed blanket consents to the filing of amicus briefs. Correspondence from counsel for respondents consenting to the filing of this brief is being submitted to the Clerk.

Discrimination against members of one faith harms people of other faiths as well. All religious people in this Nation depend on the right to practice their faith free from discrimination. When religious-based discrimination is permitted—especially when propagated at the highest levels of government—the free-exercise right of members of all faiths is chilled.

Additionally, amici's various faiths teach that we cannot forsake people in their time of crisis. Amici's faiths therefore commit them to helping others who have been victims of war, hunger, and persecution—and, in particular, to helping refugees. Amici include faith-based refugee-resettlement organizations and local congregations that actively participate in aiding refugees. The Order directly impedes amici's ability to practice their religions and to carry out their refugee-assistance missions.

Amici curiae are as follows:

The **Alliance of Baptists** is a faith community comprised of 140 congregations across the United States and over 3,000 individual members—Christians knit together by love for God, committed to religious liberty for all, whatever their faith tradition, including those of no faith. Its response to the call of God in Jesus Christ to be disciples and servants includes a commitment to prophetic action to bring about justice and healing in our world. The Alliance, whose congregations work with and support refugees and immigrants, joins this amicus brief in response to a Covenant of commitment to side with those who are poor and pursue justice with and for those who are oppressed.

The **American Baptist Churches USA** is a spiritual family of approximately 5,000 churches and 1.3 million members. We are an ethnically diverse people called to radical personal discipleship in Christ Jesus. We believe in promoting a society where justice and love reign. Through the love of Christ, we embrace the world as neighbor. Historically, based on Baptist core convictions such as the infinite value of every person, individual liberty, soul freedom, and separation of church and state, ABCUSA has been a leading Protestant agency advocating for fair immigration laws and assisting refugees to resettle in the United States, regardless of their ethnic, cultural, or religious backgrounds.

American Jewish World Service (AJWS) is the first and only Jewish organization dedicated solely to ending poverty and promoting human rights in the developing world. AJWS has joined this amicus brief because it believes that the policies addressed in the brief run counter to the best traditions of the United States—welcoming refugees and immigrants is central to American identity. Furthermore, as a Jewish American organization, AJWS refuses to stand idly by while ethnic and religious minorities are under attack for simply being who they are.

Avodah, an organization committed to developing Jewish leaders who become lifelong agents for social change, offers Jewish leadership programs for young adults and focuses on integrating Jewish identity and social justice. Avodah has joined this amicus brief because Jewish tradition requires that Jews speak out against injustice, and Jewish history teaches the critical importance of standing up for those targeted by hatred and intolerance.

The **Church of the Brethren** is a Christian denomination committed to continuing the work of Jesus peacefully and simply, and to living out its faith in community. Based in the Anabaptist and Pietist faith traditions, it celebrated its 300th anniversary in 2008 and today counts some 114,000 members across the United States and Puerto Rico, with missions and sister churches around the world. Out of its faith tradition of seeking peace in community and in discipleship to Jesus Christ, the Church of the Brethren opposes the Executive Order barring refugees and citizens of six predominantly Muslim countries from entry to the United States. As declared in its 1982 statement, *Undocumented Persons and Refugees in the United States*, "The primary truth of faith as we consider immigrants and refugees today is that Christ has made another appearance among us, as Himself an immigrant and refugee in the person of political dissidents, the economically deprived, and foreigners on the run. We are to join them as pilgrims in search of that city yet to come, with foundations of love and justice whose architect and builder is God."

Church World Service (CWS), a humanitarian agency that brings together 37 Protestant, Anglican and Orthodox member communions, is one of the nine refugee resettlement agencies in the United States, and, through a center in Nairobi, also assists with the processing of all refugees resettled to the

United States from Africa. CWS, the National Council of Churches, and their constituencies, representing 30 million people in the United States, issued the Ecumenical Declaration: to Protect Welcome and Restore Hope, declaring to the President, members of Congress and their own constituencies their strong opposition to the Executive Order and their "moral responsibility to speak out and advocate alongside all immigrants and refugees to stop these unjust and immoral executive orders."

Disciples Home Missions is the enabling and coordinating expression of the **Christian Church (Disciples of Christ)** in the United States and Canada in the areas of congregational programming and mission in North America. With over 750,000 members in more than 3,800 congregations, DHM and its Refugee and Immigration Ministries engage congregations and members in advocacy to support refugee and immigrant rights, and to ensure ongoing and vigorous resettlement and partnerships with refugees within the United States. It has, since 1949, resettled more than 38,000 refugees and assisted countless people facing immigration problems.

The **Evangelical Lutheran Church in America** (ELCA) is the largest Lutheran denomination in North America and is the fifth largest Protestant body in the United States, with more than 3.7 million members in 9,000 congregations. The ELCA and its predecessor denominations have continually declared opposition to any attempts by government to curb religious liberty through statutory or administrative measures. As Lutherans, many of our ancestors faced the pain of having to flee their homelands and felt the joy of being welcomed in new communities throughout these United States. Throughout our history, millions of Lutherans across this country have honored our shared biblical values, as well as the best of our nation's traditions, by welcoming refugees of all faiths and by offering refuge to those most in need. Lutherans stand firmly against any policies that would scale back this country's refugee resettlement programs.

Faith in Public Life is a strategy center for the faith community advancing faith in the public square as a powerful force for justice, compassion, and the common good. Its #BridgesNotWalls program is a movement to lift up faith voices in solidarity with refugees and immigrants. It joins this brief out of a belief that welcoming refugees and protecting religious liberty reflect the demands of Scripture and our nation's highest ideals.

Inspired by the Gospel of Jesus, and the example of Saints Francis and Clare, the **Franciscan Action Network** (FAN) is a collective Franciscan voice seeking to transform U.S. public policy related to peace-making, care for creation, poverty, and human rights including advocacy on behalf of immigrants and refugees. The Executive Order effectively halting the refugee resettlement process is deeply disturbing to Franciscans all over the country. Providing protection to people seeking safety is one of our nation's proudest and longest standing traditions, which we are morally obligated to uphold. This executive action goes back on America's promise to refugees and abdicates America's leadership role on human rights.

Franciscans for Justice is a joint project of the Franciscan Friars of the St. Barbara Province and the Our Lady of Guadalupe Province that includes more than 200 friars throughout the western United States. For over 800 years, Franciscans have upheld the fact that twice St. Francis of Assisi went to the Muslim sultan, not to convert him, but to befriend him; Franciscans hold Muslim believers dear to our hearts. Franciscans for Justice challenges the U.S. government to reach out to all Muslim refugees—not to ban them, but to befriend them.

The **Friends Committee on National Legislation** is the oldest religious lobby in Washington, D.C., lobbying Congress and the Administration to advance peace, justice, opportunity, and environmental stewardship. FCNL opposes the Executive Order because it goes against our core values of welcome, religious freedom, and assistance to those most in need. The Muslim and refugee ban is discriminatory, unconstitutional, and immoral.

The **General Synod of the United Church of Christ** is the representative body of this Protestant denomination of more than 900,000 members and over 5,000 churches. The United Church of Christ has long advocated for the rights of immigrants and refugees, both in word and deed, publicly stating its support for immigrants and refugees through numerous resolutions throughout its history. At the most recent meeting of the General Synod in 2017, the United Church of Christ proclaimed itself an Immigrant Welcoming Denomination, encouraging the development of U.S. policy dedicated to facilitating the respectful welcome and inclusion of all immigrants.

Interfaith Alliance advocates from a faith perspective for the guarantees of the independence of conscience from government and of government from religion, including special attention to the rights of minorities. It rejects any religious test in this country, not just for elected office but also for securing the blessings of life, liberty, and the pursuit of happiness. It believes the attempt to exclude immigrants and refugees because they are part of a particular religion or subset of that religion violates the nation's basic values and constitutional guarantees.

Interfaith Worker Justice is a national affiliate network of more than sixty worker centers and faith-labor organizations. We support our affiliates in worker-led campaigns to bring dignity and justice to all working people, regardless of faith tradition, national origin, ethnicity, or immigration status. Any travel ban which discriminates based on national origin or faith tradition is not only unconstitutional, it is unjust and immoral.

Islamic Relief USA is a nonprofit humanitarian organization that provides the necessities of life in refugee camps outside the United States and resettlement aid to refugees here. Its work to protect the most vulnerable in the human family, particularly those who have fled poverty, violence, and oppression, is guided by the timeless values and teachings provided by the revelations contained within the Qur'an and prophetic example. Despite the fear and anguish created by this Executive Order, which has profoundly affected its staff, donors and beneficiaries, Islamic Relief USA continues to reach out to its neighbors in love and serve them with dignity believing that what unites us is stronger than the fears that divide us.

The **Leadership Conference of Women Religious** (LCWR), founded in 1956, is an association of leaders of congregations of Catholic women religious. LCWR has nearly 1300 members, who represent approximately 38,800 women religious. LCWR has joined this amicus brief because Catholic sisters began coming to these shores 288 years ago as immigrants to serve the immigrant and refugee communities and continue to this day to minister to refugees and new immigrants in schools, hospitals, and social service agencies.

The **Missionary Servants of the Most Holy Trinity**, founded in 1929, is a congregation of Catholic priests and Brothers who work in the United States and Latin America with the poor and abandoned, including recent immigrants.

The **Multifaith Alliance for Syrian Refugees** (MFA), a project of the Tides Center, is a coalition of 80 faith-based and secular organizations whose mission is to mobilize global support to alleviate the Syrian humanitarian crisis, heighten awareness of the growing dangers of not responding adequately, and advance future stability in the region. Because the Executive Order suspends the U.S. Refugee Admissions Program indefinitely for Syrian refugees and 120 days for others; halts entry into the United States of legal entrants from six Muslim-majority countries for 90 days; halves the ceiling for refugee admission in FY 2017 and otherwise negatively affects potential Syrian and Muslim refugee entrants; and because the Executive Order violates the tenets of every major religious faith and the principles on which our democracy is founded, MFA has significant interest in this litigation.

The **National Advocacy Center of the Sisters of the Good Shepherd** educates and advocates on social-justice issues for the transformation of society to the benefit of all people. The center reflects the spirituality, history, and mission of the Sisters of the Good Shepherd, who have had a presence in the United States for over 175 years. The Sisters and their Mission Partners address the needs of thousands of low-income people in the United States and overseas each year. Dedicated to serving girls, women, and families who experience poverty, exploitation, vulnerability, and marginalization, the Congregation and their lay partners minister to immigrants and victims of human trafficking here and abroad. We strongly oppose the Executive Order barring refugees and citizens of six predominantly Muslim countries from entry to the United States.

The **National Council of Churches** is the largest and oldest ecumenical organization in the United States and is comprised of 38 denominations numbering some 30 million adherents in more than 100,000 local congregations. Based on its understanding of scripture, the NCC believes we have a responsibility to welcome and assist refugees of all faiths and nationalities.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who are inspired by Jewish values to strive for social justice. NCJW joins this brief in keeping with its formal resolve to work for "[c]omprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals."

National Justice for Our Neighbors, a United Methodist ministry, supports a network of 16 sites around the country that provide immigration legal services to low-income immigrants and refugees.

Reverend J. Herbert Nelson, II, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) ("PCUSA") joins this brief as the senior ecclesiastical officer of the PCUSA. The PCUSA is a national Christian denomination with nearly 1.6 million members in over 9,500 congregations. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with seventy years of policies adopted by the General Assembly of the PCUSA expressing the desire that refugees be welcomed into the United States and by our congregations, and with our policies which demand that U.S. immigration law and policy protect family unity and be carried out free of discrimination and full of due process. While the General Assembly does not claim to speak for all Presbyterians, nor do its policies bind the membership of the Presbyterian Church, it is the highest legislative and interpretive body for the denomination and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

NETWORK Lobby for Catholic Social Justice educates, organizes, and lobbies for social and economic transformation. Founded by Catholic Sisters in the progressive spirit of Vatican II, we are rooted in Catholic Social Justice tradition and open to all who share our passion. The NETWORK community of justice-seekers is more than 50,000 strong with members in every state and every congressional district. NETWORK joins in this amicus brief because we are called by faith to welcome the stranger and love our neighbor.

The **Reconstructionist Rabbinical Association,** established in 1974, represents 350 rabbis across North America and serves as a voice of Reconstructionist Jewish values in partnership with more than 100 Reconstructionist Jewish congregations and their members. Its understanding of Jewish tradition and experience compels its support for refugees and immigrants as an act of justice and compassion in the world.

The **Reconstructionist Rabbinical College/Jewish Reconstructionist Communities** is the central organization of the Reconstructionist movement, training leaders, providing resources to communities and raising up the Reconstructionist perspective. We support this brief because it expresses core Jewish values. The Hebrew Bible exhorts us no less than 36 times to welcome and embrace the stranger. It also teaches that every individual is created *betzelem Elohim,* in the image of God. We see that this extends directly and compellingly toward a refugee policy that is as welcoming as can be while taking legitimate security concerns into consideration. We support national policies that live up to the ideals of our faith as well as the founding documents of the American republic.

The **School Sisters of Saint Francis, United States Province** are part of an international congregation of religious women. The United States Province was established when immigrant sisters came to the United States from Europe in order to work with immigrants. Its mission is to serve the poor and otherwise needy. As a province, it joins the ranks of others who wish to speak out to challenge the anti-refugee Executive Order.

The **Sisters of St. Francis of Clinton, Iowa** is a Catholic religious order. The Leadership Team of the order decided to join this amicus brief because the order has taken a corporate stand to welcome immigrants and refugees and to advocate for policies that uphold their basic civil and human rights.

The **Sisters of St. Francis of Penance and Christian Charity, St. Francis Province** are based in Redwood City, California, and are called to solidarity with those who are powerless and work with them to change situations in which the dignity of persons is violated. The Sisters have joined the amicus brief because the ban on refugees and immigrants is counter to their beliefs and values as Franciscan Sisters.

The **Sisters of St. Francis of Philadelphia** are a community of approximately 430 Catholic women who choose a Gospel way of life and uphold a long and honored tradition of loving God through service. A community that "seeks to participate in the Spirit's action in the world," they have joined this amicus brief because of their commitment to directing personal and corporate resources to the promotion of justice, peace, and reconciliation.

The **Sisters of the Holy Names of Jesus and Mary, U.S.-Ontario Province** is a Catholic Women Religious congregation with 430 Sisters and over 300 Lay Associates in the United States and Ontario, Canada. We have great interest in this amicus brief because our values include welcoming and advocating for immigrants and refugees. Several of our Sisters and Associates work and volunteer with immigrants and refugees, so we are familiar with the roadblocks and struggles they have to endure. We wish to be proactive in assisting and welcoming immigrants and refugees to the United States.

Founded in the early 1970s, **Sojourners** believes that U.S. citizens, immigrants, and refugees who practice their Islamic faith in this country are brothers and sisters as fellow human beings and children of God. The violation of the religious freedom of Muslim brothers and sisters must not be accepted by any people of faith.

The **Southwest Conference of the United Church of Christ** is the regional body that provides support and services to 49 local UCC congregations and clergy within Arizona, New Mexico, and El Paso, Texas. We are proud of our progressive view of the Gospel. Our mission statement, "extravagantly welcoming and affirming followers of Christ called to embody God's unconditional justice and love," is manifested in a deep commitment to ministry of extravagant welcome to migrants, undocumented permanent residents, refugees and the lesbian, gay, bisexual and transgender community, to name just a few of our constituents.

Tanenbaum (Tanenbaum Center for Interreligious Understanding) is a secular, non-sectarian organization combating religious stereotypes, hatred, and violence through practical approaches in workplaces, schools, health care institutions and conflict zones. Tanenbaum collaborates with religiously driven Peacemakers in Action, who risk their lives in armed conflicts including in Syria, Yemen, and Iraq. The travel ban that is the subject of this submission targets refugees based on their religious identity; undermines Tanenbaum's work to support religious pluralism and freedom of belief; and directly impairs Tanenbaum's work with our Peacemakers from conflict zones.

T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism, together with all members of the Jewish community, to act on the Jewish imperative to respect and advance the human rights of all people. We join this amicus brief to express our condemnation of the Executive Order, which effectively closes our borders to Muslims and flagrantly violates America's longstanding, values-driven commitment to serving as a safe haven for refugees.

The **Unitarian Universalist Association** (UUA) comprises more than 1,000 Unitarian Universalist congregations nationwide and is dedicated to the principle of freedom of religion for all people and to freedom from oppression. The UUA has joined the amicus brief because it believes that the Executive

Order is unconstitutional and undermines the UUA's core principles.

The **Unitarian Universalist Service Committee** is a non-sectarian human-rights organization powered by grassroots collaboration. UUSC began its work in 1939 when Rev. Waitstill and Martha Sharp took the extraordinary risk of traveling to Europe to help refugees escape Nazi persecution. A moral commitment to protecting the rights and dignity of persons, particularly those seeking refuge from violence, discrimination, persecution, and natural disasters, has been at the center of our organization's mission for more than 75 years. Given our history, we seek to promote a well-functioning, just immigration system–including refugee resettlement processes–and sizeable entrant numbers consistent with our nation's moral, legal, and political obligations as a member of the world community. We also provide financial assistance to grassroots groups that help refugees resettle in the United States, including many from majority-Muslim nations.

UNITED SIKHS is a U.N.-affiliated, international nonprofit, non-governmental, humanitarian-relief, human-development and advocacy organization that aims at empowering those in need, especially disadvantaged and minority communities across the world. Our mission is to transform, alleviate, educate and protect the lives of underprivileged individuals and minority communities impacted by disasters, natural or man-made, and who suffer from hunger, illiteracy, diseases, or from violation of civil and human rights. By fostering sustainable programs, we help communities to become informed and vibrant members of society. We join the many organizations as signatories in this amicus brief to lend support to refugee families and individuals who are affected and endangered by the Executive Order.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, who represent members of a wide range of faiths, sects, and interreligious groups, are acutely aware that when the U.S. government carries out official acts that are motivated by religious animus, it harms people of all faiths. Executive Order 13,780 is such an act—the result of the President's long-stated objective to exclude (at least temporarily) Muslims from entering this Nation. The Order offends the very notion of the United States "as a refuge of religious tolerance" for people of all faiths. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153 (10th Cir. 2013) (Gorsuch, J., concurring), *aff'd*, 134 S. Ct. 2751 (2014). The Establishment Clause's central purpose is to protect religious liberty by prohibiting the government from picking and choosing among faiths, or from singling out any one faith for disfavor. The Order contravenes that purpose. It directly harms Muslims not only by restricting travel rights but also by singling out Muslims as a disfavored group. In so doing, the Order harms members of all faiths as beneficiaries of this Nation's commitment to religious free exercise.

The Order further targets refugees—the most vulnerable and oppressed populations in the world. We are in the midst of the largest refugee crisis of our time. More than 21 million refugees have fled war, persecution, terrorism, enslavement, and other horrific abuses. Amici's faiths compel them to aid refugees in crisis. Yet the Order precludes people of all faiths from fulfilling their moral and religious obligations toward refugees in desperate need of assistance. It already has had a devastating impact on faith-based refugee-assistance programs, and it will continue to do so unless enjoined.

The decisions of the courts of appeals affirming the injunctions of the travel and refugee bans should be affirmed.

ARGUMENT

I. THE EXECUTIVE ORDER DISCRIMINATES AGAINST MUSLIMS AND HARMS MEMBERS OF ALL FAITHS

Amici are united in their embrace of the Nation's fundamental constitutional commitments to religious freedom and non-discrimination. Amici believe the Executive Order contravenes those basic principles. The Order was intended to target Muslims—it has resulted in the vilification of Muslims, and it has obstructed Muslims in the practice of their faith. By undermining the constitutional guarantees of free exercise and non-discrimination, the Order harms not only Muslims but members of all faiths, who rely on those basic constitutional rights to freely practice their religions.

A. The Executive Order Is Intended To Target Muslims

The Executive Order is clearly intended to do what the Establishment Clause of the First Amendment forbids: target members of one faith, Islam.

The Nation's commitment to religious freedom and non-discrimination is firmly woven into our national fabric and our constitutional system. The government is prohibited from favoring a particular religion over others and from singling out any religion for censure. The Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). This Court has long recognized that efforts by the government to favor one religion "inevitabl[y] result" in incurring "the hatred, disrespect and even contempt of those who h[o]ld contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Such acts send messages to members of minority faiths "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

Amici, both as faith and interfaith leaders and as members of faiths that have experienced religious persecution, are unfortunately familiar with the history of religious minorities who have faced discrimination and exclusion from the United States based on stereotypes and stigma. One of the most infamous instances occurred in 1939, when a ship carrying more than 900 Jewish men, women, and children fleeing Nazi Germany was turned away from U.S. shores. Many in the United States suspected that these Jewish refugees were threats to national security. The ship was forced to return to Europe, and more than a quarter of its passengers perished in the Holocaust. *See* Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies*, Smithsonian.com (Nov. 18, 2015).[2]

Our history shows that laws that are written to appear neutral on the basis of religion may actually have been designed as tools of religious persecution. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 223 (1993). For example, the large influx of Roman Catholic immigrants in the mid-nineteenth century led to anti-Catholic riots, burnings of Catholic churches, beatings of Catholic students who refused to use the King James Bible, and the rise of nativist political movements that campaigned to restrict immigration by Catholics. *See* Michael W. McConnell, *Is There Still a "Catholic Question" in America? Reflections on John F. Kennedy's Speech to the Houston Ministerial Association*, 86 NOTRE DAME L. REV. 1635, 1639 (2011). Amidst the furor, the Ku Klux Klan and other nativist groups secured the enactment of a law requiring all children to attend public schools, effectively shuttering Catholic schools. Laycock, 1993 BYU L. REV. at

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[2] http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/.

223-24. Similarly, Mormons were persecuted in the nineteenth century as they were driven off their lands and forced to flee across the country. *Id.* at 223. Among the tools of persecution were neutral-sounding laws enacted to target Mormons, which required voters to take anti-polygamy oaths as a condition of their right to vote. *Id.* at 223-24.

The Executive Order here was similarly couched in neutral-sounding terms, imposing a categorical ban on nationals from six enumerated countries. Yet amici understand it for what it is: an official act of discrimination on the basis of religion. As the Fourth Circuit concluded, the Order's primary purpose is to discriminate against Muslims. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594-601 (4th Cir. 2017). All six countries included in the ban have predominantly Muslim populations. The Order is consistent with President Trump's call as a candidate for "a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." *Id.* at 594. This call for a "Muslim ban" was repeated throughout the 2016 Presidential campaign, accompanied by further statements from then-candidate Trump that "Islam hates us" and that "we're having problems with the Muslims." *Ibid.* The proposed "Muslim ban" later morphed into a plan to "call it territories" and impose nationality-based travel restrictions. *See ibid.* The President, upon signing the predecessor version of the Order, stated that it was meant to protect the Nation from entry by foreign terrorists—and then added, "We all know what that means." *Ibid.* Indeed, as recently as September 15, 2017, the President stated: "The travel ban into the United States should be far larger, tougher and *more specific*–but stupidly, that would not be politically correct!" Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 15, 2017, 3:54 a.m.)[3] (emphasis added). It is plain to members of the faith community that a desire to exclude Muslims motivated the issuance of this Order.[4]

Were the Court to reverse the courts of appeals' judgments, despite such overwhelming evidence of animus, it would send a message that religious-based discrimination is tolerable so long as it is framed in a way that appears superficially neutral toward religion. It would provide an Establishment Clause-evading roadmap for governments at all levels that wish to enact policies disfavoring Muslims (or adherents of any faith that is not in or falls out of favor). And it also would have the potential to further fan the flames of anti-Muslim sentiment, signaling to the public that anti-Muslim hatred is not only tolerated but sanctioned by the government. *Cf.* Laycock, 1993 BYU L. REV. at 223 (describing outburst of private violence against Jehovah's Witnesses after this Court's decision upholding a flag-salute requirement).

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[3] https://twitter.com/realDonaldTrump/status/908645126146265090.

[4] Indeed, the Order is not even neutral on its face. It invokes the specter of "honor killings," which is a coded term that reinforces the stigmatization of Muslims as violent and backward. *Int'l Refugee Assistance Project*, 857 F.3d at 596 n.17.

B. The Executive Order Harms Muslims

The Order is also directly harmful to Muslims who are constitutionally entitled to freely practice their faith in the United States. The Order and its predecessor have disrupted the lives of Muslim Americans who fear that they are being targeted for exclusion and could face separation from their families. *See, e.g.*, Neil Munshi, *Muslim Americans Express Anxiety Over Trump Travel Ban*, FINANCIAL TIMES (Feb. 2, 2017);[5] *see also* Faiyaz Jaffer, *The Travel Ban Has Been Particularly Harsh on Shiite Muslims*, GAZETTE (May 26, 2017) (describing the story of a college student who feared that, if he went to say his final goodbyes to a dying relative in Iran, he might be unable to return to the United States to study).[6]

The two Orders have separated couples engaged to be married and caused family members to miss weddings of their loved ones, as well as births and deaths—key moments in the personal and religious life of a faith community. *See* Jack Healy & Anemona Hartocollis, *Love, Interrupted: A Travel Ban Separates Couples*, N.Y. TIMES (Feb. 8, 2017);[7] Ed Pilkington, *Trump Travel Ban Crackdown Turns Wedding Celebration Into a Family Separation*,

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[5] https://www.ft.com/content/ba9f2d88-e905-11e6-893c-082c54a7f539?mhq5j=e2.

[6] http://gazette.com/the-travel-ban-has-been-particularly-harsh-on-shiite-muslims/article/1603972.

[7] https://www.nytimes.com/2017/02/08/us/love-interrupted-a-travel-ban-separates-couples.html.

GUARDIAN (Apr. 14, 2017).[8] The Order's predecessor interfered with religious practice and community by barring prominent Muslims with citizenship or dual citizenship in the affected countries from fulfilling long-planned speaking engagements at conferences, religious services, festivals, and universities in the United States. *E.g.*, *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *2 (E.D. Va. Feb. 13, 2017).

The Order also has harmed all American Muslims at a profoundly deeper level. It has ostracized those who simply want to practice their faith freely and live peacefully as neighbors, students, colleagues, families, and members of their communities. It has contributed to an environment in which Muslims are increasingly subject to violence, harassment, and discrimination because of their faith. This is borne out by recent hate crimes that have been perpetrated against Muslims[9]—or people *perceived* to be Muslims.[10] As amicus Islamic Relief USA recounts:

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[8] https://www.theguardian.com/us-news/2017/apr/14/trump-travel-ban-visa-iran-wedding.

[9] *See* Nancy Coleman , *Mosques Targeted in 2017*, CNN.com, available at http://www.cnn.com/2017/03/20/us/mosques-targeted-2017-trnd/index.html (last visited September 12, 2017). The map, which contains data from January through July 2017, describes 63 reported incidents of attacks against mosques, including suspected arson and spray-painting of anti-Muslim epithets. *See also, e.g.*, Bill Lindelof, *Two Suspected Hate Crimes in Less Than Two Weeks at Davis, Roseville Mosques*, SACRAMENTO BEE (Feb. 1, 2017), http://www.sacbee.com/news/local/crime/article130135154.html.

[10] *See* Daniel Victor, *Three Men Stood Up to Anti-Muslim Attack. Two Paid With Their Lives*, N.Y. TIMES (May 28, 2017)

(Footnote continued on following page)

> Singling out Muslims in this manner creates fear that additional fundamental freedoms are also under threat. We know of a family that came to the United States because their lives were threatened by ISIS after they helped U.S. troops in Iraq. They now fear that their citizenship applications will be jeopardized. A non-Muslim donor called us weeping after a family member was denied access to a grocery store because she was wearing a head scarf. A wife was afraid she wouldn't be reunited with her husband. A mother fears she will be separated from her child because she wears the hijab. Their fears and experiences demonstrate the underlying intent to target and discriminate against Muslims, whether framed as a regional travel ban or something more explicit.

That the Order's proffered justification was based on the threat of terrorism makes the Order all the more pernicious. Conflating "Muslims" with "terrorists" obscures the fact that most victims of terrorism are themselves Muslims. National Counterterrorism Center, 2011 Report on Terrorism at 14.[11] Attempts to justify the Order based on the threat of terrorism—and to treat populations of entire Muslim-

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(describing stabbing victims' efforts to intervene when a man shouted anti-Muslim insults at two women in Portland, Oregon, and noting that one of the women is not Muslim), https://www.nytimes.com/2017/05/28/us/portland-stabbing-victims.html.

[11] https://fas.org/irp/threat/nctc2011.pdf.

majority countries as potential terrorists—only compound anti-Muslim vilification.

These harms would be revisited if the judgments of the courts of appeals were to be reversed. Muslims living in the United States would be subjected anew to what they and many others rightly view as official condemnation of their faith.

C. Singling Out Members Of One Faith Erodes Core Constitutional Principles Critical To The Free Exercise Of All Faiths

In contrast with many other countries, where religious conflict has at times led to upheaval and suffering, the United States has generally strived for peaceful co-existence among religions. "It was in large part to get completely away from * * * religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion." *Engel* 370 U.S. at 433. As a result of those guarantees, the United States today is a country of vibrant religious beliefs, practices, and communities in which faith continues to play an important role in most Americans' lives.

Thus, the harm caused by singling out members of one religious faith is not restricted to the disfavored sect; it harms all religious groups by eroding core principles that have allowed a multitude of faiths to coexist and to thrive. Protections for the free exercise of religion are critical to "vindicat[e] this nation's long-held aspiration to serve as a refuge of religious tolerance." *Hobby Lobby Stores*, 723 F.3d at 1153 (Gorsuch, J., concurring); *see Town of Greece v. Gal-*

loway, 134 S. Ct. 1811, 1823 (2014) (official efforts to "denigrate * * * religious minorities" violate the Establishment Clause). By both protecting the free exercise of religion and prohibiting the government from favoring or disfavoring any one religion, the First Amendment "seek[s] to avoid * * * divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

Affirming the judgments below is essential to not only protect Muslims from discrimination but to ensure religious liberties for members of all faiths.

II. THE EXECUTIVE ORDER DEVASTATES REFUGEES AND PRECLUDES FAITH-BASED ASSISTANCE TO THEM

A. Refugees Are the Most Vulnerable of the Vulnerable: Victims of War, Persecution, and Terrorism

The Executive Order curtails the United States Refugee Admissions Program at a time when that program is more essential than ever. As former United Nations Secretary-General Ban Ki-moon (himself once an internally displaced person) stated: "We are facing the biggest refugee and displacement crisis of our time." Press Release, Secretary-General, Refugee Crisis about Solidarity, Not Just Numbers, Secretary-General Says at Event on Global Displacement Challenge, U.N. Press Release

SG/SM/17670-REF/1228 (Apr. 15, 2016).[12] More than 65 million individuals have been forcibly displaced from their homes as a result of conflict or persecution, including 22.5 million individuals who meet the definition of "refugee." U.N. High Comm'r for Refugees (UNHCR), *Figures at a Glance.*[13] The number of displaced persons today is the highest it has been since the period immediately following World War II. UNHCR, *Global Trends: Forced Displacement in 2015* at 5.[14]

Refugees are among the most vulnerable people in the world: they have been forced to flee their homes because of persecution or conflict and need sanctuary because they do not have the protection of their own governments. U.N. General Assembly, *Convention Relating to the Status of Refugees*, art. 1A(2), 28 July 1951, United Nations, Treaty Series, vol. 189, at pp. 153-54. By definition, refugees are not criminals or terrorists; individuals who have committed serious, non-political crimes, crimes against peace, war crimes, or crimes against humanity are *excluded* from refugee status. *Id.*, art. 1F(a)-(c), at p. 156.

Refugees who are eligible for admission to the United States are among the most persecuted of all. The majority of refugees admitted to the United States have been identified by the United Nations High Commissioner for Refugees as those most in need of resettlement to a third country. U.S. Dep't of

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[12] http://www.un.org/press/en/2016/sgsm17670.doc.htm.

[13] http://www.unhcr.org/en-us/figures-at-a-glance.html.

[14] http://www.unhcr.org/576408cd7.

State, Bureau of Population, Refugees, and Migration, Fact Sheet: U.S. Refugee Admissions Program FAQs (Jan. 20, 2017).[15] To qualify, refugees must generally be survivors of torture or violence, or face threats of arbitrary arrest, detention, or imprisonment, or be at risk of sexual violence, physical abuse, and other exploitation. UNHCR, *UNHCR Resettlement Handbook: Chapter 6-UNHCR Resettlement Submission Categories*, July 2011;[16] 8 U.S.C. § 1101(a)(42) (to qualify for refugee resettlement in the United States, a person must have a well-founded fear of persecution based on one of five protected grounds: race, religion, political opinion, nationality, or membership in a particular social group).

Conditions in refugees' countries of origin are exceedingly dangerous, including in the countries with the highest number of refugees resettling in the United States last year.[17] The Democratic Republic of the Congo (DRC), has been engulfed in various ongoing armed conflicts for the last two decades, causing an estimated 5.4 million deaths since 1998. Centers for Disease Control and Prevention (CDC), Congolese Refugee Health Profile at 3 (Mar. 1,

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[15] https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm.

[16] http://www.unhcr.org/3d464e842.html.

[17] Those countries are the Democratic Republic of the Congo, Syria, Burma, Iraq and Somalia. Ruth Igielnik and Jens Manuel Krogstad, *Where Refugees to the U.S. Come From*, Pew Research Center (Feb. 3, 2017), http://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/.

2016);[18] International Rescue Committee, *Democratic Republic of Congo.*[19] "The conflict in eastern DRC has been marked by numerous human rights abuses, including sexual and gender-based violence (SGBV). Reports include gang rapes, sexual slavery, purposeful mutilation of women's genitalia, and killing of rape victims. One study estimated that 48 women are raped every hour in DRC, which is a little over 1,150 women a day." CDC, Congolese Refugee Health Profile, *supra*, at 11. Children in the DRC are forced into various forms of child labor, including mining of precious metals and minerals, and "child soldiers" are forcibly recruited into armed conflict. U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, *Child Labor and Forced Labor Reports: Democratic Republic of the Congo;*[20] Free the Slaves, *The Congo Report: Slavery in Conflict Minerals* at 20-22 (June 2011).[21]

In Syria (whose residents are doubly barred by the travel ban and refugee ban), the civil war has displaced more than half of the pre-conflict population—an estimated 12.5 million people—which is "unprecedented in recent history for a single country." Phillip Connor & Jens Manuel Krogstad, *About Six-In-Ten Syrians Are Now Displaced From Their Homes*, Pew Research Center (June 13, 2016).[22] Even before the April 2017 chemical weapons attacks attributed to the Syrian government, the situation was exceedingly grim. Human-rights groups have documented the Syrian government's detention of tens of thousands of people, many of whom have been subjected to torture, inadequate access to food and medical treatment, and death. Human Rights Watch, *If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities* (Dec. 16, 2015).[23] The United States has now accused the Syrian government of using a crematory to hide mass executions at a prison. Gardiner Harris, et al., *Syrian Cemetery Is Hiding Mass Killings Of Prisoners, U.S. Says*, N.Y. TIMES (May 15, 2017).[24] Recalling Nazi Germany, the U.S. Ambassador to the United Nations stated: "'The attempt to cover up mass murders in the Assad crematorium is reminiscent of the 20th century's worst offenses against humanity." *Ibid.*

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[18] https://www.cdc.gov/immigrantrefugeehealth/pdf/congolese-health-profile.pdf.

[19] https://www.rescue.org/country/democratic-republic-congo#what-caused-the-current-crisis-in-congo.

[20] https://www.dol.gov/agencies/ilab/resources/reports/child-labor/congo-democratic-republic.

[21] https://www.freetheslaves.net/wp-content/uploads/2015/03/The-Congo-Report-English.pdf.

In Somalia (another country whose residents have been doubly targeted by the travel and refugee bans), decades of conflict, including ongoing attacks by al-Shabaab, have displaced more than 1 million people. International Crisis Group, *What's Driving the Glob-*

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[22] http://www.pewresearch.org/fact-tank/2016/06/13/about-six-in-ten-syrians-are-now-displaced-from-their-homes/.

[23] https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities.

[24] https://www.nytimes.com/2017/05/15/world/middleeast/syria-assad-prison-crematory.html.

al Refugee Crisis? (Sept. 15, 2016).[25] The State Department has documented "grave abuses" by al-Shabaab, including extrajudicial killings, disappearances, compulsory marriages, rape, blocking humanitarian assistance, and conscripting child soldiers. U.S. Dep't of State, Bureau of Democracy, H.R and Lab., Somalia 2016 Human Rights Report at 1, 2, 13, 35.[26] Al-Shabaab raids schools and mosques to recruit and force children to participate in hostilities—including forcing children to punish and execute other children and to engage in conflict as human shields and suicide bombers. *Id.* at 14.

In response to the ongoing refugee crisis, the United States committed to increasing its admission of the world's refugees. In Fiscal Year 2016 (October 2015 to September 2016), Americans welcomed 84,995 refugees. U.S. Dep't of State, Bureau of Population, Refugees, and Migration, Fact Sheet: Fiscal Year 2016 Refugee Admissions (Jan. 20, 2017).[27] For Fiscal Year 2017 (October 2016 to September 2017), the United States authorized the admission of 110,000 refugees. U.S. Dep't of State, U.S. Dep't of Homeland Security, and U.S. Dep't of Health and Human Services, *Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress* 5.[28] While this number accounted for only a tiny fraction of the need, the increase over the prior year signaled that our Nation recognized its moral obligation toward these victimized children, women and men.

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[25] https://www.crisisgroup.org/global/what-s-driving-global-refugee-crisis.

[26] https://www.state.gov/documents/organization/265512.pdf.

[27] https://www.state.gov/j/prm/releases/factsheets/2017/266365.htm.

[28] http://www.state.gov/documents/organization/262168.pdf.

The Executive Order was an about-face. It suspended the admission of refugees altogether and cut by more than half—from 110,000 to just 50,000—the target for the number of refugees to arrive in the United States during Fiscal Year 2017. Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order 13,780, § 6 (a)-(b), 82 Fed. Reg. 13,209, 13,215-16 (Mar. 9, 2017). Refugee admissions plummeted from 9,945 in October 2016, the first month of the fiscal year, to just 913 in August 2017. U.S. Dep't of State, Bureau of Population, Refugees, and Migration, Refugee Arrivals by Placement State and Nationality, Oct. 1, 2016 through August 31, 2017.[29] Only 51,392 refugees have been admitted to the United States during the first eleven months of the fiscal year. *Ibid.*

When the Order was announced, refugees who had passed four to six years of background checks and were about to leave for the United States were instead sent to rejoin the hundreds of thousands of their fellows consigned to life in squalid refugee camps. Jeffrey Gettleman, *For Stranded Somali Refugees, 'Friend of America' Is a Deadly Label*, N.Y. TIMES, Feb. 3, 2017, at A18. The Order removes any hope that these people or countless others in similar circumstances around the world may find refuge in the United States in the near future.

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[29] Available at http://www.wrapsnet.org/admissions-and-arrivals/.

B. The Executive Order Precludes Amici's Efforts To Fulfill Their Moral And Religious Obligations To Aid Refugees

The Order conflicts with faith-based organizations' missions to assist those in need. Amici's faiths teach that one must not forsake people in their time of crisis, as the following excerpts from sacred texts show:

- Christianity: "And God will say to the righteous: 'For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.' Then the righteous will answer him, 'Lord, when did we see you hungry and feed you, or thirsty and give you something to drink? When did we see you a stranger and invite you in, or needing clothes and clothe you? When did we see you sick or in prison and go to visit you?' The King will reply, 'Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.'" Matthew 25:35-40.

- Islam: "Be kind to parents, and the near kinsman, and to orphans, and to the needy, and to the neighbor who is of kin, and to the neighbor who is a stranger, and to the companion at your side, and to the traveler, and to that your right hands own." Qur'an 4.36-37.

- Judaism: "When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt." Leviticus 19:33-34. "Defend the weak and the fatherless; uphold the cause of the poor and the oppressed. Rescue the weak and the needy; deliver them from the hand of the wicked." Psalm 82:3-4.

- Sikhism: "None is our enemy, none is stranger to us, we are in accord with one and all * * * ." Sri Guru Granth Sahib, page 1299, Full Shabad.

Many amici and their members thus actively participate in aiding refugees, including refugees who adhere to different faiths. Amici assist refugees who are resettling in the United States and work with congregations to provide refugees with practical, emotional, and spiritual support as they build new lives. Indeed, of the nine agencies currently responsible for refugee resettlement on behalf of the United States, six are faith based.

Amicus Church World Service exemplifies the crucial role these agencies play. It alone has assisted more than 850,000 refugees since its founding in 1946. Amicus Disciples Home Missions of the Christian Church (Disciples of Christ) has resettled more than 38,000 refugees since 1949 and provided legal assistance to countless immigrants, and it actively engages its congregations and church members to support immigrants and refugees. Lutheran Immigration and Refugee Services, which is supported by amicus the Evangelical Lutheran Church in America and other Lutheran denominations, has been welcoming, supporting, and resettling immigrants and refugees since 1939 when it was created by Lutheran congregations in the United States. Some Roman Catholic religious orders, including ones represented here through the Leadership Conference of Women Religious, trace their very existence in the United States to religious sisters who migrated here specifically to work with immigrants.

Because closing the door on refugees and imposing religion-based restrictions on entry to the United States are fundamentally at odds with their deeply held values, a remarkable coalition of religious leaders has joined together to speak out against the Executive Order. More than 5,000 religious leaders have endorsed an open letter to the President opposing the exclusion of refugees as incompatible with "sacred texts and faith traditions to love our neighbor, accompany the vulnerable, and welcome the sojourner." Interfaith Immigration Coalition, *More than 5,000 Religious Leaders Sign Letter Supporting Refugee Resettlement* (Mar. 10, 2017).[30] These leaders emphasize the "urgent moral responsibility to receive refugees and asylum seekers." *Ibid.* As amicus the Evangelical Lutheran Church in America notes, the sharp reduction in refugee admissions in the current year is "not only a tragedy for those who wait to come here, but also forces an abrupt and arbitrary limitation on an established ministry and area of services that we Lutherans understand as core to our identity, theology and call."

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[30] http://www.interfaithimmigration.org/5000religiousleader letter/.

The Order has devastated faith-based refugee organizations' ability to maintain operations and services moving forward, thereby crippling the nation's ability to respond to future humanitarian crises. Episcopal Migration Ministries announced in early April 2017 that cutbacks forced by the Order have resulted in reductions of more than 20% in its national staff and in its affiliate network, cuts that will hamper assistance to refugees already resettled as well. Mary Frances Schjonberg, *Trump's Immigration Policies Force Reduction of Episcopal Church's Refugee Resettlement Network*, EPISCOPAL NEWS SERVICE (Apr. 4, 2017).[31] World Relief announced in February 2017 that, as a direct result of the Order's reduction in future refugee admissions, it is closing five offices and laying off 140 staff members. Press Release, World Relief, World Relief Announces the Layoff of 140+ Staff and Closure of Five Local Offices Due to the Trump Administration's Reduction in Refugee Resettlements in the U.S. (Feb. 15, 2017);[32]

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[31] http://episcopaldigitalnetwork.com/ens/2017/04/04/trumps-immigration-policies-force-reduction-of-episcopal-churchs-refugee-resettlement-network/.

[32] https://www.worldrelief.org/press-releases/world-relief-announces-the-layoff-of-140-staff-and-closure-of-five-local-
(Footnote continued on following page)

see Dan Barry, *A Resettlement Mission Upended by the Sweep of a President's Pen*, N.Y. TIMES (Feb. 5, 2017).[33] Amicus Islamic Relief USA, which in 2016 assisted refugees and displaced people in thirteen countries, including the United States, has put on hold its plans to request certification as one of the principal refugee-resettlement organizations in the United States in part because of the policy stance the Executive Order represents.

The Executive Order thus not only harms the refugees who would be denied entry but also saps the vitality of the many faith-based efforts to assist them.

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offices-due-to-the-trump-administrations-reduction-in-refugee-resettlements-in-the-us.

[33] https://www.nytimes.com/2017/02/05/us/lancaster-refugees-trump-travel-ban.html.

CONCLUSION

The judgments of the Fourth and Ninth Circuits should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS,
v.
INTERNATIONAL REFUGEE ASSISTANCE
PROJECT, ET AL., RESPONDENTS.

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS,
v.
STATE OF HAWAII, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF INTERNATIONAL LABOR ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

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STATEMENTS OF INTEREST

Amici curiae are the Service Employees International Union (SEIU); American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME); American Federation of Teachers (AFT); Communications Workers of America, AFL-CIO (CWA); International Union of Painters and Allied Trades (IUPAT); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW); United Farm Workers of America (UFW); United Food and Commercial Workers (UFCW); and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW).

Service Employees International Union (SEIU) is a labor organization of approximately two million working men and women in the United States and Canada.[1] SEIU's members include foreign-born U.S. citizens, lawful permanent residents, and immigrants authorized to work in the United States. Many of SEIU's members have mixed-status families. As described below, SEIU members are directly affected by the challenged Executive Order.

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the amici and their attorneys have paid for the filing and submission of this brief. All parties have consented to the filing of this brief.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of over 12 million working men and women. The AFL-CIO has long been concerned with federal immigration matters as they affect the many members of its affiliated unions who are immigrants to this nation and their families, as well as the rights of immigrant workers more generally.

American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), is a union of 1.6 million members in the United States and Puerto Rico, both in the public and private sectors, who share a commitment to service. AFSCME is participating in this case to advance its mission of helping all working people, including immigrants and people of color, achieve the American dream regardless of their identity. AFSCME is proud to represent members who have immigrated from the six countries targeted by the illegal ban at issue, and/or who have family members who currently live in those countries, and staunchly opposes their being unconstitutionally subjected to the harms detailed in this brief. The public servants of AFSCME, and indeed all Americans, deserve better.

The American Federation of Teachers (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members who are employed across the nation in K-12 and higher education, public employment, and healthcare. The AFT has a longstanding history of supporting and advocating for the civil rights of our members and the communities they serve. AFT members at a variety of institutions provide essential and necessary services, such as healthcare and education, to the public. Many of these members, especially those at institutions of higher education, are involved in global collaborations and in teaching and research duties that are being disrupted and threatened by the Executive Order. Additionally, a significant number of AFT members were born in, or have friends or family members in, the six countries named in the Executive Order. These members are directly impacted by the travel restrictions, which have affected their ability to work, travel, connect with, and care for their communities.

The Communications Workers of America, AFL-CIO (CWA), is an international labor union representing more than 700,000 workers in the telecommunications, media, manufacturing, airlines, and health care industries and in a wide variety of public sector positions in the United States, Canada, and Puerto Rico. CWA represents and advocates on behalf of workers of all creeds in the United States and abroad with respect to workplace rights and broader political and civil rights. In light of recent developments in U.S. domestic politics and federal policy that have targeted people of Islamic faith with discrimination, including those who may be members of the union or family members thereof, the CWA Convention resolved this year to continue the union's "fight against discrimination in all its forms, including the targeting of people of the Islamic faith," and to "act in defense of and solidarity with those targeted by Islamophobia in our union, our workplaces, and our communities."

The International Union of Painters and Allied Trades (IUPAT) is a labor organization comprised of approximately 140,000 members. Our members work as commercial and industrial painters, glaziers, drywall finishers, floor coverers, trade show workers and in many other occupations. IUPAT welcomes any person who does the work we do. Our members are of many races, practice many religions, were born in many countries, speak many languages and have different political views. To be effective, our membership must stand together as one despite these differences. By discriminating against individuals from certain majority-Muslim countries, the Executive Order harms our members. It most directly harms our members who come from, or have family in, one of the targeted majority-Muslim countries.

Beyond that, such State-sponsored discrimination runs counter to a core principle for which IUPAT advocates, equal treatment of all.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), an affiliate of the AFL-CIO, has nearly one million active and retired members throughout the United States, Canada, and Puerto Rico. Since its founding in 1935, the UAW's membership has included immigrants from around the globe, and the UAW opposes any policies that discriminate against immigrants and non-immigrants alike based on their religion or national origin.

The UAW and its affiliated Local Unions represent workers in diverse sectors, including over 40,000 academic student employees and post-doctoral researchers at universities in the United States. Many of these workers are foreign-born nationals of the six Muslim-majority countries targeted by the Executive Order and are naturalized U.S. citizens or hold valid visas permitting them to study, live, and work in the United States. The Executive Order has disrupted their ability to travel freely into and outside of the country to visit family and loved ones and to conduct research related to their university employment and course of study, and prevented their family members from traveling to the United States.

United Farm Workers of America (UFW) represents thousands of migrant and seasonal farmworkers in various agricultural occupations throughout the country and has members of diverse racial, ethnic, and immigration backgrounds throughout the United States. UFW seeks to improve the lives, wages, and working conditions of agricultural workers and their families through collective bargaining, worker education, state and federal legislation, and through public campaigns. Since its founding in 1962 by Cesar Chavez, UFW has been dedicated to the cause of eliminating discrimination against farmworkers, Latinos, and any other groups that have been the target of unfair or unlawful treatment. UFW members, their families, and other farmworkers represented by UFW are directly affected by the challenged Executive Order.

United Food and Commercial Workers International Union (UFCW) is a labor organization which represents working men and women across the United States. UFCW's 1.3 million members work in a range of industries, with the majority working in retail food, poultry and meatpacking, food processing and manufacturing, and non-food retail. UFCW's objective is the elevation of its members through first-class wages, hours, benefits, and working conditions. And that objective extends to the uplift of the families of its members.

UFCW and its predecessor unions have represented immigrants from around the world since the beginning of the last century, particularly workers in the packinghouses and stockyards. Immigrant workers continue to form a vital part of these and other workforces that UFCW represents. UFCW has members from the nations whose citizens are banned by the Executive Order. UFCW is aware that many of these workers experienced wrenching separation from their homelands due to war and famine. Accordingly, UFCW opposes religious and national origin discrimination and forced family separation.

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW), is the largest industrial union in the United States and also represents tens of thousands of workers in health care and other service sectors. USW is deeply concerned with American immigration policy, both as it affects our members who are immigrants and other immigrants.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether the President's Executive Order that singles out six predominantly Muslim countries—following presidential campaign promises and post-election assurances of a "Muslim ban"—violates the Constitution or immigration laws of the United States.

Amici submit this brief to demonstrate the devastating consequences of the President's actions for individuals in the United States. The challenged Executive Order 13780, 82 Federal Register 13209 (2017), separates families and has already been associated with increased anti-Muslim discrimination and violence. Myriad studies show that such family separation and religious intolerance have concrete, negative effects on the physical and psychiatric well-being of targeted groups. The stories of individual union members recounted below confirm and illustrate that research, demonstrating the concrete effects, trauma, and stigma inflicted by the Executive Order on U.S. citizens and persons lawfully present in the United States.

To be sure, some members of our society harbored anti-Muslim animus before President Trump issued Executive Order 13780. But that makes the harm done by the Order all the more consequential. Instead of redressing or ameliorating the threat to Muslims and their families in the United States, the President's action exacerbates that threat by giving discrimination and intolerance the official imprimatur of the most important elected official in our democracy.

ARGUMENT

I. The Challenged Executive Order Causes Irreparable Harm by Separating Citizens and Immigrants from Family Members Abroad.

The negative physical and mental health consequences of compelled family separation are both obvious and well-documented. Numerous studies and reports document the harm of such separation.

Studies of transnational families, for example, document and explain how separation negatively affects parents and children as individuals and the bond between them. *See, e.g.*, Sarah Horton, *A Mother's Heart Is Weighed Down with Stones: A Phenomenological Approach to the Experience of Transnational Motherhood*, 33 Culture, Med., & Psychiatry 21, 21–40 (2009). The limits on physical interaction imposed by geographic separation make intimate relations between parents and children challenging and, consequently, the parent-child bond suffers. *See* Karlijn Haagsman et al., *Transnational Families and the Subjective Well-Being of Migrant Parents: Angolan and Nigerian Parents in the Netherlands*, 38:15 Ethnic & Racial Stud. 2652, 2653–54 (2015).

"This loss of intimacy and frustrated efforts to maintain close bonds . . . can cause severe emotional distress for both parents and children who feel that the bond is deteriorating." *Id.* at 2654.

For parents, the pain of separation is often accompanied by feelings of guilt. *See id.* And because norms of "good mothering" frequently assume that women are primary caregivers and responsible for reproductive care work, women especially tend to be emotionally affected by family separation. *Id.* Geographic distance prevents women from fulfilling expected roles, and, as a result, "women feel guilty, ashamed and stigmatized." *Id.*

The pain of separation is long-lasting for parents. One study found that parents recalled the circumstances of their family's migration process and "emotionally laden details of their family separations" even after living in the United States for ten years or more. Dana Rusch & Karina Reyes, *Examining the Effects of Mexican Serial Migration and Family Separations on Acculturative Stress, Depression, and Family Functioning*, 35(2) Hispanic J. Behav. Sci. 139, 151 (2012).

Not surprisingly, family separation inflicts serious harm on children as well. One 14-year-old girl described her experience this way: "The day I left my mother I felt like my heart was staying behind." Carola Suárez-Orozco et al., *I Felt Like My Heart Was Staying Behind:*

Psychological Implications of Family Separations & Reunifications for Immigrant Youth, 26(2) J. of Adolescent Res. 222, 240 (2010). The separation is damaging even though parents may try to maintain contact through letters, phone calls, and contributions to their children's material well-being. *Id.* And children face difficult experiences not only when they are first separated from their parents but also at reunification, when children can feel disoriented, estranged from their parents, mistrustful, and uncomfortable in their new family dynamic (sometimes including new siblings). *Id.* at 242–45. Children also experience a sense of loss all over again as they are separated from interim caretakers. *Id.*

Studies show that family separation has meaningful physiological consequences as well. Family separation is almost inevitably accompanied by "[p]rolonged exposure to serious stress—known as toxic stress," which the American Academy of Pediatrics has warned "can harm the developing brain and negatively impact short- and long-term health." Sara Reardon, *Health Toll of Immigration Policies Begins To Emerge*, 544 Nature 148 (Apr. 13, 2017).

Furthermore, "[a] number of clinical studies . . . show that there are substantial negative psychological repercussions for immigrant children and youth who have been separated from their parents." Suárez-Orozco, *supra*, at

227. Children who feel abandoned by their parents may respond with despair and detachment, *id.*, and separated children are more likely to report symptoms of anxiety and depression in the initial years after migration than children who were not separated from their parents. *Id.* at 222; *see also* Jeanne Miranda et al., *Depression Among Latina Immigrant Mothers Separated from their Children*, 56(6) Psychiatric Servs. 717, 720 (2005) (finding that immigrant Latinas separated from their children are at greater odds for depression than women not separated).

Family separation has particularly severe consequences for those fleeing trauma who are admitted to the United States as refugees. Data indicate that "the family plays a central role in modulating the processes that influence the aftermath of trauma." Cecile Rousseau et al., *Trauma and Extended Separation from Family among Latin American and African Refugees in Montreal*, 64(1) Psychiatry 40, 57 (2001). The family is "an anchor for both emotion and identity" and aids "torture victims who often feel estranged and alienated." *Id.* For refugees able to stay together with family, the presence of close relatives can even "seem to transform adversity into a source of strength, perhaps by aiding in the rebuilding of a meaningful universe." *Id.*

By contrast, refugees separated from their loved ones feel "more disoriented than those living with at least part of their families" and "seem more overwhelmed by unspeakably painful memories." *Id.* at 56. They are also "tormented daily by worry about what will become of the family members still overseas," *id.* at 49, and feel significant guilt about having left their families behind with threats of reprisals looming over them, *id.* at 41. "For refugees who have had traumatic experiences, extended separation from family members may serve as a continuing link to an unbearable past . . . ." *Id.* at 41.

II. The Executive Order Promotes Anti-Muslim Hostility, Discrimination, and Stigma.

In addition to causing harm via forced family separation, the challenged Executive Order promotes stigma and encourages anti-Muslim hostility and violence.

A persistent theme in anti-Muslim discrimination is the allegation and assumption that Muslims are not "real" Americans—and are perpetual outsiders and aliens in their own land, despite viewing themselves as completely American. *See, e.g.*, Kevin L. Nadal et al., *Subtle and Overt Forms of Islamophobia*, VI(2) J. of Muslim Mental Health 15, 22, 27–28 (2012). The anti-Muslim rhetoric used by President Trump before and after his election has encouraged such erroneous claims, and the singling out of predominantly Muslim countries for disfavored treatment furthers and deepens the sense of Muslims as unwelcome outsiders.

Indeed, the announcement of the Executive Order is seen by many as encouraging the false and dangerous equating of Islam, one of the world's great religions and the faith tradition of 23% of the world's population,[2] with violence and terrorism. *See generally* Rebecca A. Clay, *Islamophobia: Psychologists Are Studying the Impact of Anti-Muslim Sentiment and Exploring Ways To Prevent It*, 48(4) Monitor on Psychol. 34 (Apr. 2017). President Trump himself cited the September 11 attacks as justification for the Order, even though none of the men behind those attacks (or any subsequent, fatal terrorist attack in the United States) hailed from the targeted countries. *See id.* The reference to September 11 thus makes sense *only* if one links Muslims generally with terrorism.

Having that link drawn from the White House and embodied in official policy gives people tending toward Islamophobia the permission to act on their biases. A quarterly report by the Council on American-Islamic Relations (CAIR) shows that the number of anti-Muslim hate crimes in the first half of 2017 spiked 91% as compared to the same period in 2016. *See 2017 on Track to Becoming One of the Worst Years Ever for Anti-Muslim Hate Crimes*, CAIR, http://islamophobia.org/158-key-issues-in-islamophobia/209-2017-on-track-to-becoming-one-of-the-worst-years-ever-for-anti-muslim-hate-crimes.html (last updated July 19, 2017). Disturbingly, the Southern Poverty Law Center found that post-election incidents of harassment and intimidation were most commonly reported in K-12 schools. *See* David R. Williams, Ph.D., et al., *Health Effects of Dramatic Social Events—Ramifications of the Recent Presidential Election*, 376(23) New Eng. J. of Med. 2295, 2296 (June 8, 2017).

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[2] Pew Research Ctr., The Future of World Religions: Population Growth Projections, 2010-2050, at 6 (Apr. 2, 2015), http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/.

There has also been a noticeable escalation in violence, as reflected in the very recent incident of fires, Nazi graffiti, and broken glass at an Iraqi-American business in downtown Flagstaff, Arizona, which followed the ripping up of copies of the Quran at a Tucson mosque in March, which followed broken windows at a Middle Eastern bakery in Phoenix shortly before that. *See CAIR-AZ Calls for Hate Crime Probe for Iraqi-American Business Vandalized with Nazi Symbol*, CAIR, https://www.cair.com/ (last updated Sept. 5, 2017).

The hostility and discrimination encouraged by the Executive Order's singling out of predominantly Muslim countries has negative physical and mental health consequences as well for those who feel targeted. As explained recently in the New England Journal of Medicine, "communities who feel vulnerable because they belong to a stigmatized, marginalized, or targeted group" can experience negative health effects as a result. Williams, *supra*, at 2295. With respect to people of Middle Eastern descent, in particular, a post-September 11 study conducted in the Detroit area "found that experiences of discrimination and abuse . . . were positively associated with physiological distress . . . ." *Id.* at 2296. Another study found that Arab-American women in California experienced increased risk of low-birth-weight babies or pre-term births in the six months after September 11; women in other racial and ethnic groups did not experience any similar effects. *Id.*

Additional research has found an association between religious discrimination and depression in American Muslim women. *See* Dena Hassouneh, Ph.D., *Anti-Muslim Racism and Women's Health*, 26(5) J. of Women's Health 401 (2017). And another study of Muslim Americans found that those who reported experiencing discrimination were more likely to distrust, display negative attitudes, and display avoidant behaviors toward majority group members. *See* Muniba Saleem & Srividya Ramasubramanian, *Muslim Americans' Responses to Social Identity Threats: Effects of Media Representations and Experiences of Discrimination*, Media Psychol. (Apr. 4 2017), http://www.tandfonline.com/doi/full/10.1080/15213269.2017.1302345.

Research also shows the negative health effects of discrimination more generally. One 2015 study found an elevated risk of death among adults residing in communities where levels of racial prejudice were high, Williams, *supra*, at 2296, and immigrant children exposed to discrimination have been found to suffer adverse psychological consequences, David K. Androff et al., *U.S. Immigration Policy and Immigrant Children's Well-being: The Impact of Policy Shifts*, 38(1) J. of Soc. & Welfare 77, 90 (2011). Everyday experiences of discrimination have also been associated with coronary artery calcification, high blood pressure, poor sleep, and depression, distress, and anxiety. Goleen Samari, *Islamophobia and Public Health in the United States*, 106(11) Persp. from the Soc. Sci. 1920, 1921 (Nov. 2016). Moreover, research indicates that associated stress adversely affects health not only through actual experiences but also because of rumination, vigilance, and worry over potential exposure. *See* Williams, *supra*, at 2297.

III. Union Members and Their Families Have Been Harmed by the Executive Order.

Millions of employees nationwide are united in the amici unions, and many union members and their families have been harmed by the travel-ban Order. The experiences of individual union members confirm and illustrate the social science data cited above.[3]

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[3] The individuals whose stories are told below all consented to having their experiences recounted here,

Footnote continued on next page

Abu Talib Ali

Abu Talib Ali is a 58-year-old wheelchair agent at Minneapolis-St. Paul International Airport who has lived in the United States since 2010 when he arrived from his native Sudan and was granted asylum. Abu Talib's wife, Maha, and his three children followed in 2013.

In Sudan, Abu Talib was a lawyer and involved in politics, in addition to being president of his local soccer club in the city of Shendi. As a politician in his city, Abu Talib opposed the Muslim Brotherhood's imposition of religious law. As a result, the government imprisoned and tortured him for a year during which time he lost 33 pounds.

Looking back on that period, Abu Talib describes a "very bad feeling — very sad — because I was human. They beat us like animals. . . . It was very terrible. Every second, every hour you think they are going to take you out for torture. Abu Talib this is your turn . . . ." Bart Jansen, *Minnesota Airport Worker from Sudan Fights Travel Ban*, USA Today, Apr. 21, 2017, https://www.usatoday.com/story/news/2017/04/21/travel-ban-abu-talib-ali-fights-

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Footnote continued from previous page

and records of the interviews conducted with them are on file with undersigned counsel. Some participants chose to maintain a measure of anonymity by using first names or initials only.

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Abu Talib was eventually able to come to the United States with the help of an American law professor who learned of his case while she was working at the University of Khartoum.

Now, Abu Talib, his wife (who also works at the airport), and two of his children are legal permanent residents with green cards. Two of Mr. Ali's children live with him in Minneapolis: Sadam, who is 24 and working while attending Normandale Community College, and Sajda, who is 18 and will graduate from Kennedy High School soon. Both children hope to apply for citizenship next year.

Another daughter, Maab, returned to Sudan to study medicine at the University of Khartoum before obtaining her green card, and Abu Talib is afraid that because of the Executive Order he will not be able to visit his daughter and she will not be able to return to the United States. He fears that if he visits Sudan as a legal permanent resident of the United States, he will not be allowed to return.

Abu Talib has eight brothers and sisters in Sudan. He says, "My sisters cry for me to visit them, but I am afraid to leave now." *Id.* Abu Talib would also like to return to Sudan in order to sell some of his family's property, including a farm and some houses, so that he can bring the money here to start a business in his community in Minnesota. He says: "My life is very good here in Minnesota. I just want to be able to put my old life behind me, and focus on the future here. It's important to be able to bring my family together." *Id.*

Dr. K.Z.

Dr. K.Z. is an internal medicine resident at a New York teaching hospital in Brooklyn, New York, and a member of SEIU's Committee of Interns and Residents (CIR). In 1998, Dr. K.Z. and his family fled persecution in Iran and entered the United States with refugee status. Although born in Iran, Dr. K.Z. became a naturalized U.S. citizen more than a decade ago.

Two months ago, Dr. K.Z. married Dr. N.N., a gastroenterology fellow who works at the same hospital and is also a CIR member. Dr. N.N. is a legal resident and citizen of Iran. As the couple planned their wedding, they did everything in their power to ensure that Dr. N.N's Iranian father would be able to come to the United States and participate in the wedding ceremony.

After issuance of the Executive Order, Dr. N.N's father was denied permission to enter the United States. The couple sought and received the assistance of their congressional representative, but even that did not help, and Dr. N.N's father was unable to give his daughter away during the wedding ceremony.

Dr. K.Z. says that his "wife was heart-broken that her father, the parent who had raised her, could not attend our wedding or participate in the wedding rituals that meant so much to her. Her father's absence tainted what was to be one of the best days of our lives."

Dr. K.Z., while respectful of his Iranian heritage, feels completely Americanized. He completed his undergraduate work at the University of California, Los Angeles, and graduated from the University of California's Davis School of Medicine. Dr. K.Z.'s hospital serves low-income patients from diverse backgrounds, including Orthodox Jews and people of Arab, Chinese, Latin, Russian, Caribbean, and South and Southeast Asian descent. When Dr. K.Z. completes his residency, he intends to continue working in a U.S. hospital with a diverse group of patients providing critical care and treatment to patients suffering from cancer.

Dr. K.Z. was deeply disturbed and shaken by his personal experience with President Trump's Executive Order. "The United States welcomed and encouraged me and I truly believed that the words on the Statute of Liberty were meant for me." But "[i]t has been a crushing personal disappointment to learn that the citizens of certain countries, people like my father-in-law, were no longer welcome. President Trump's Executive Order changed all that."

Sadia

Sadia is an airport worker and participant in SEIU 32BJ's airport workers organizing campaign. She is employed at Logan

International Airport in Boston, Massachusetts, and is a naturalized U.S. citizen born in Sudan. A widow and a single parent, Sadia lives in Chelsea, Massachusetts, with her six children, aged 26, 24, 17, 16, 12, and 8. She and her children came to the United States as refugees in January 2008.

In 2001, Sadia fled Sudan with her husband and children to escape political persecution by the Sudanese government. The family lived in Cameroon for almost one year before traveling to Ghana. For six years, the family lived in Ghana while their applications for refugee status in the United States were being processed. Sadia's husband died during that time in Ghana.

Sadia's eldest son currently has refugee status and is awaiting approval of his application for legal residency. Sadia's adult daughter is a legal resident, and her four minor children are U.S. citizens. But all of Sadia's remaining family—her parents, sisters, brothers and extended family—live in Sudan. Her 80-year-old father has not seen Sadia's children for more than 15 years and has never met three of them.

Sadia knows that under the Executive Order it will be impossible for her to petition for her father to immigrate to the United States or even to invite him to visit. It is Sadia's deepest wish that her father travel to the United States and come to know her children. She says: "I worry that my children are isolated from my heritage and my family. We have no one in the United States. I can't afford the cost of visiting Sudan with my six children. But I dream of my children meeting my father before he dies."

While working at the airport, Sadia has been taunted and verbally abused because she wears a hijab, even though she is a loyal American. One man shouted at her to "get out of our country." Sadia believes that the Executive Order has increased the level of hostility against Muslims in the United States. "I think it shouldn't be important what religion you are. It was very painful to me to experience this treatment."

Abdi

Abdi is 32 years old and has worked for the past nine years at Minneapolis-St. Paul International Airport. He is a naturalized American citizen who was born in Somalia.

Before coming to the United States, Abdi spent several years in refugee camps with his mother and siblings. While Abdi lived in the camps, his education was interrupted several times. But once Abdi arrived in the United States at the age of 18, he completed high school and earned a bachelor's degree at Metropolitan State University in Minneapolis. Abdi was then able to bring his wife and one of his three children to the United States.

Unfortunately, visas for Abdi's two older children, aged nine and seven, were not granted when his wife's was. As a result, Abdi's two older children still live in Somalia with his mother, who cares for them even though she is in her sixties. Abdi sends money but he fears they will not be able to travel to the United States to reunite with him if the Executive Order is upheld. He says, "I can't stop thinking about them. I have to be able to do this."

Abdi also worries about his and other relatives' ability to travel as Somali-born citizens. One of his aunts, an American citizen, wants to travel home to visit a sick uncle but worries about being detained on her way back. He says, "What kind of American value is this, to keep families apart?"

A.F.

A.F. is an Iranian citizen and member of the UAW and its Local 5810 who came to the United States for graduate studies in 2011. A.F. obtained his Ph.D. in chemical engineering in 2016 from a prestigious American university, and he currently works as a postdoctoral researcher at the University of California's Lawrence Berkeley National Laboratory (LBNL). After being offered the position at LBNL, A.F. underwent an extensive, nine-month-long background check conducted by the Department of Energy.

Since the signing of the Executive Order, A.F. has suffered from chronic stress and has felt unwelcome in the country where he has successfully lived, worked, studied, and paid taxes for six years. A.F. has applied for a green card under a national interest waiver, but his application has been pending for more than 15 months. A.F. currently holds a single-entry visa and fears that if he leaves the United States he will not be permitted to reenter. Prior to the Executive Order, A.F.'s parents visited him in the United States, but now A.F. fears it is impossible for them or other members of his family to obtain a visa to visit the United States. In addition, A.F.'s work is impacted because he is unable to attend annual conferences, including the International Conference on Thermoelectrics, which are crucial for scientists in his field. Because of the Executive Order, A.F. fears that Iranian nationals like him are "doomed" to live in limbo.

A.T.

A.T. is an Iranian citizen enrolled in a Ph.D. program at the University of Washington. A.T. holds a single-entry F-1 visa. A.T. has been studying in the United States for the last four years and also works as an academic student employee. He is a member of the UAW and its Local 4121.

A.T. was in Iran visiting family in January 2017 when the first Executive Order was issued. A.T. was initially unable to secure a visa to return to his home and studies in the United States. He contacted UAW Local 4121, which worked to assist him in getting back into the country. As a result of assistance from

Washington State's governor, one of its senators, and a congressional representative, A.T. was lucky to be able to reenter the United States and resume his Ph.D. program while the first Executive Order was enjoined. However, due to the second Executive Order, he is currently unable to leave the United States again while he completes his studies; he has no family in the United States, and his parents, who are elderly and live in Iran, are unable to visit him here. A.T. is also deeply concerned that his inability to travel will inhibit his ability to complete his Ph.D. in a timely manner and begin his professional career.

Safyia Yonis

Safyia Yonis is a 46-year-old American citizen who was born in Somalia. She has lived in Minneapolis for the last 20 years, where she works as a janitor in a government building. Safyia and her husband, who was also born in Somalia, have seven children born in the United States, aged 3 to 16.

When civil war broke out in Somalia in 1991, Safyia fled to Kenya where she lived in a refugee camp. She says that life there was "very, very difficult," with no access to education or healthcare. When Safyia arrived in the United States two years later, she felt safe and grateful she could go to see the doctor, to school, and work.

Since the Muslim ban was announced, Safyia has felt increasingly afraid of violence and harassment. Her sister and brother-in-law attend the mosque that was bombed on August 5 in the suburb of Bloomington.

Safyia worries in particular that her daughter, who is in high school and wears a hijab, could be a target for harassment. Safyia feels her daughter should not have to live in fear: "She is an innocent; she has done nothing wrong."

Mohammad Al Zayed

Mohammad Al Zayed is a 50-year-old Syrian refugee who arrived with his family in the United States in September 2016. Mohammad works at O'Hare International Airport as a janitor and lives on the far North Side of Chicago with his wife and three children. His two sons are 21 and 8, and his daughter is 19.

Before fleeing Syria, Mohammad and his family lived in a suburb outside Damascus. When unrest began to approach their community, the family fled into the capital. Eventually, the textile factory where Mohammad worked was destroyed in the fighting, and his children could no longer go to school because of the danger. Once the war reached Damascus, the family left Syria for Jordan to escape the violence and bombings.

"We can't even explain it," Mohammad said of the violence and destruction he and his family witnessed in Syria. "Shelling. Killing. Street fighting. Nobody knows who's fighting who, but everybody dying is innocent people."

Conditions improved for the family in Jordan but they still faced hardship. Mohammad's children were able to attend school, but he could not work because he could not get a work permit given his refugee status. As a result, the family could not afford healthcare. As Syrians, Mohammad and his family also experienced discrimination in Jordan.

Mohammad was relieved when he arrived with his family in the United States, where he hoped there would be more opportunity for his children. His 8-year-old son is in school, already speaks English, and claims math as his favorite subject. Mohammad's 19-year-old daughter is finishing high school this year. His 21-year-old son has joined him in working at O'Hare. Mohammad feels fortunate to work alongside colleagues at O'Hare who represent over 100 nationalities. He says it is "very nice" to be in a welcoming environment where he can even observe his religion, as he did during the month of Ramadan.

However, Mohammad worries about relatives left behind and about whether he will see them again. Mohammad's two brothers, father, and stepmother remain in Syria, and he has not seen them since 2012. His father is 85 years old and has health problems. If the Muslim travel ban is upheld, Mohammad may never see his father again. Mohammad's wife also has 11 sisters and

4 brothers, some of whom are in Syria and Jordan. And Mohammad's daughter married a Jordanian citizen last year, and she worries that if her new husband is not able to come to the United States, she may have to consider returning to Jordan and being barred from reentering the country.

For Mohammad, the Trump Administration's proposed travel ban "is not right." Refugees are simply seeking a better life. He says: "It's very sad. Who would want to leave their home if they don't have to? People are running for their lives."

Marwan

Marwan is a senior organizer for SEIU, where has worked for the past thirteen years. Marwan is 43 years old and is a Yemen-born, naturalized U.S. citizen.

The first person in Marwan's family to arrive in the United States was his father. Marwan's father reunited the family by bringing his brothers, Marwan, Marwan's mother, and his siblings one by one to the Detroit area over the course of several decades. Marwan came to the United States in 1989 from Yemen and became a citizen in 1991. He is married with five children, aged 18, 13, 9, 6, and 3.

Many members of Marwan's and his wife's extended families remain in Yemen, where a civil war is raging. One of Marwan's brothers returned to Yemen before becoming an American citizen and lives in the capital of Sana'a with his wife and five children. Approximately six months ago an airstrike hit a military compound 200 yards from that brother's house, shattering all the windows in the neighborhood. Marwan's nephew's arm was injured in the blast. Marwan's family's ancestral village has also been the target of rebel activity and air strikes. Nine relatives, including two of his cousins, have been killed in the last three years.

Marwan's wife's three brothers and three sisters also all live in Yemen. An elderly aunt in her eighties, who helped raise Marwan as his father worked to bring him to the United States, remains there as well and requires care. Marwan worries for the safety of all his and his wife's extended family members. He says: "I think about this every day and ask myself, 'How do I bring them here?'"

The challenged Executive Order will make it impossible for Marwan to reunite his family the way his father did in the past. "If my dad hadn't come to the United States, I would be there right now and living under terror. I would be stuck." And now Marwan worries that more of his family members, for whom he feels responsible, will be hurt or harassed by the warring factions in his home country.

Marwan currently works to help airport employees at O'Hare International Airport. As a union organizer who interacts every day with employees who came to the United States as immigrants and refugees, he knows many other families are in the same situation. As he says: "This won't make America safe, only tear families apart."

Majd

Majd is a homecare worker, member of SEIU Local 2015, and naturalized U.S. citizen. Majd lives in San Jose, California, with her husband, her two children (aged 22 and 19), and her 90-year-old mother, all of whom are also U.S. citizens. Majd was born and educated in Syria, where she worked as an agricultural engineer until she came to the United States 25 years ago.

Most of Majd's extended family emigrated from Syria to the United States, with the exception of a nephew who is in the midst of processing his application for legal permanent residency. Majd's nephew lives alone in Damascus where he fears leaving his home. Although he is not affiliated with any political organizations, he has been arrested twice and was interrogated and jailed for several weeks by Syrian government agents. That experience, combined with Syria's brutal civil war and the departure of all of his family members, has plunged him into a severe depression.

Majd and her elderly mother, her nephew's grandmother, are desperate for her nephew to join them in the United States. Majd's mother suffers from diabetes, high blood pressure, heart problems, and arthritis. She fears that the

Executive Order will prevent her grandson from traveling to the United States before she dies. Majd worries about both her nephew and the effect on her mother of his inability to travel to the United States.

Edvin

Edvin, a member of SEIU United Healthcare Workers West, is a 41-year-old Kaiser employee who has been a chief union steward for 17 years. Edvin was born in Iran and came to the United States as a 9-year-old refugee 32 years ago. Edvin is a U.S. citizen and lives in Glendale, California.

When Edvin and his parents fled Iran in the 1980s, they left several family members behind. One of Edvin's cousins, a 27-year-old woman, came to the United States eight months ago as a refugee from Iran. She was granted refugee status after having lived alone in Austria for eight months while she waited for the United States to process her case. Prior to leaving Iran, she had always lived with her parents. Although she is grateful to be safe in the United States, she misses her parents terribly and had assumed they would be able to come visit her, since they had traveled to the United States several times in the past.

Edvin has provided support to his cousin during her transition to life in the United States. He would like for her to get the emotional support that a visit from her parents would provide, and he is saddened that the Executive

Order will prevent families from seeing each other: "I always believed that the United States was a place that valued family relationships and encouraged loved ones to be together. Now it seems like if you're from a Muslim-majority country, your family doesn't matter and you're treated as if you're a terrorist, no matter what your beliefs are."

K.K.

K.K. is an Iranian citizen and F-1 visa holder currently working in the United States as a postdoctoral researcher. In January 2017, K.K. was working at a prestigious American university where postdocs are currently organizing to form a union. After the first Executive Order was issued, K.K. was suddenly dismissed from her appointment. She had never received any negative performance reviews or feedback, and she was previously provided with a letter promising funding for her position through at least May 31, 2017. K.K.'s supervisor told her that the funding on the grant she was working on had dried up, but a colleague told K.K. that the supervisor confided the real reason for her dismissal was that the supervisor was concerned about having an Iranian citizen working on the research project after the issuance of the Executive Order.

Following her dismissal from the university, K.K. was able to secure a new position at a university in another state. However, she lost several months of work, which, in addition to causing financial strain, delayed her ability to complete her research. K.K. also had to move to another state, and she estimates that moving to another university and another state cost her around $5,000 in out-of-pocket expenses.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decisions below.

Respectfully submitted,

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In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

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RULE 29 STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Amici* are eighty-five international law scholars and several nongovernmental organizations. *See* Appendix A (listing all *Amici*). The international law scholars include practitioners and tenured faculty members at law schools in the United States who have devoted extensive efforts to the study and practice of international law. They research, teach, speak, and publish widely on international law issues, and they routinely advise and practice in matters addressing such issues before American courts. They include members of the International Human Rights Committee of the International Law Association, American Branch,[1] as well as university professors and practicing lawyers with expertise in these subjects. The nongovernmental organizations are experts in civil rights law, immigration law, and international human rights law.

Amici submit this brief to vindicate the public interest in ensuring a proper understanding and application of the international human rights law relevant to this case. As scholars and practitioners in the area, the *Amici* have a strong interest in ensuring that the Court reaches a decision that conforms to the existing body of international law binding on the United States. The *Amici* support the Respondents in this matter and urge affirmance of the decision below.

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[1] Petitioners have filed blanket letters of consent to the filing of amicus briefs with the Clerk of the Court, and Respondents have consented in writing to the filing of this brief in accordance with Supreme Court Rule 37.3. Pursuant to Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

I. SUMMARY OF THE ARGUMENT

The purpose of this brief is to bring to the Court's attention U.S. treaty provisions and customary international law principles that bear on the legality of Executive Order 13780 of March 6, 2017 ("EO"), which replaces the now-rescinded Executive Order No. 13769 of January 27, 2017.

The United States government is bound by the international treaties it ratifies as well as by customary international law under the Supremacy Clause of the Constitution and U.S. Supreme Court jurisprudence. These treaties and customary international law must be faithfully executed by the President and enforced by U.S. courts except when clearly inconsistent with the U.S. Constitution or subsequent acts of Congress.

The United States is a party to and bound by several international human rights treaties relevant to the subject matter of the EO. Those treaties, most notably the International Covenant on Civil and Political Rights ("CCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), prohibit distinctions based on either religion or national origin, except when necessary and proportionate to a legitimate aim of the state. Such distinctions violate international human rights law binding on the United States whenever they have either the purpose or effect of disadvantaging a group on the prohibited grounds.

The EO makes a prohibited distinction in immigration policy based on national origin on its face. The government has offered no coherent rationale for the distinction between the countries subject to the immigration suspension and other countries. As such, the EO violates the human right to freedom from discrimination based on national origin under the CCPR, CERD, and customary international law.

In addition, the EO has both the purpose and effect of establishing a discriminatory immigration policy based on religion, as statements made by the President before, during, and after the adoption of the EO make plain. A state measure motivated by religious animus violates U.S. obligations under the CCPR and customary international law, regardless of any discriminatory effect vel non. Moreover, a measure that has the effect of discriminating based on religion violates these obligations regardless of its motivation. The EO has a discriminatory effect because, although not all persons from predominantly Muslim countries are disadvantaged by it, only persons from predominantly Muslim countries are disadvantaged.

This Court should continue to construe the relevant provisions of the U.S. Constitution and applicable statutes in a manner that does not put the United States in violation of obligations under international human rights law and, as such, consider U.S. obligations under international law, which forms part of U.S. law, in evaluating the legality of the EO.

II. ARGUMENT

A. International Law Is Relevant to Assessing the Legality of the Executive Order

International law is relevant to this case because the U.S. Constitution makes treaties part of U.S. law. Customary international law is also part of U.S. law and is enforceable by U.S. courts. Under the Supremacy Clause of the Constitution, "treaties made . . . under the authority of the United States, shall be the supreme law of the land, and judges of every state shall be bound thereby."[2] Although the Constitution does not require legislation prior to treaties taking legal effect, the Supreme Court distinguishes between self-executing and non-self-executing treaties.[3] The Senate or the President has declared that the relevant human rights treaties to which the United States is a party are non-self-executing.[4] Nevertheless, by ratifying those treaties, the United States bound itself to provide judicial or other remedies for violations of treaty obligations.[5] Thus, even if the treaty provisions themselves are not directly enforceable in U.S. courts, the rights they grant should be protected by courts through their interpretation of constitutional provisions and statutes addressing the same or similar subject matter.

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[2] U.S. Const. art. VI, cl. 2.

[3] *See* Restatement (Third) of Foreign Relations Law § 111(3)-(4) (1987).

[4] *See, e.g.*, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992) (International Covenant on Civil and Political Rights); Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990), at II(2) (Convention Against Torture).

[5] *See, e.g.*, International Covenant on Civil and Political Rights art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter "CCPR"].

This is consistent with the positions taken by both the Executive Branch and Congress in those cases in which Congress has not passed implementing legislation.[6] When submitting human rights treaties to the Senate for its advice and consent, both Presidents George H.W. Bush and William Clinton assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law.[7] Courts generally

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[6] *See, e.g.*, U.N. Doc. CAT/C/28/Add.5, paras. 58-60 ("Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.").

[7] During Senate hearings on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), June 26, 1987, 1465 U.N.T.S. 113, the State Department Legal Advisor told the Senate: "Any public official in the United States, at any level of government, who inflicts torture . . . would be subject to an effective system of control and punishment in the U.S. legal system." Hearing Before the Comm. on Foreign Relations, U.S. Senate, 101st Cong. (1990), at 8.

Similarly, with respect to the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), Dec. 21, 1965, G.A. Res. 2106 (XX), Annex, 660 U.N.T.S. 195, the Clinton Administration told the Senate: "As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present construe federal constitutional and statutory law to be consistent with human rights treaties in part because the Senate has relied on such assurances as a basis for its consent to ratification.[8] The United States acknowledged this principle in its comments to the U.N. Committee Against Torture: "Even where a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives thereof, as well as to the stated policy reasons for ratification."[9] "Taking notice" of treaty obligations comports with a core principle of statutory construction announced by the Supreme Court in *Murray v. The Charming Betsy*: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[10] That doctrine has been consistently and recently reaffirmed by the Supreme Court.[11]

Convention." Senate Comm. on Foreign Relations, Report on International Convention on the Elimination of All Forms of Racial Discrimination, S. Exec. Rep. No. 103-29, at 25-26 (1994).

[8] *See, e.g.*, *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 426 (1984).

[9] State Reports—Convention Against Torture—U.S.A., U.N. Doc. CAT/C/28/Add.5, para. 57 (Feb. 9, 2000) (citing *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1994)).

[10] 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

[11] *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

Moreover, in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit observed that a treaty that is not self-executing may provide evidence of customary international law.[12] Customary international law must be enforced in U.S. courts even in the absence of implementing legislation, regardless of whether customary rules appear in a treaty.[13] In *The Paquete Habana*, the Supreme Court held that customary international law "is part of our law" and directly enforceable in courts when no conflicting treaty, legislative act, or judicial decision controls.[14] As discussed below, several human rights treaty rules applicable in this case are also customary international law.

The President is also obligated to respect international law pursuant to his constitutional duty to faithfully execute the law.[15] Because Article VI of the Constitution makes treaties the supreme law of the land, the President is constitutionally required to comply with U.S. treaty obligations as well as with customary international law. This was the intent of the

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[12] 630 F.2d 876, 882 n.9 (2d Cir. 1980).

[13] Restatement (Third) of the Foreign Relations Law of the United States § 111(3).

[14] 175 U.S. 677, 700 (1900); *see also Filartiga*, 603 F.2d at 886 ("Appellees . . . advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified by any act of Congress.").

[15] U.S. Const. art. II, sec. 3.

Framers.[16] Courts therefore have a duty to restrain federal executive action that conflicts with a duly ratified treaty. As the Supreme Court wrote in ordering the President to restore a French merchant ship to its owner pursuant to a treaty obligation: "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted."[17]

Even if the President were not directly bound by international law, however, he is still obligated to comply with the Constitution itself and all applicable legislation enacted by Congress within its authority, which (as noted) must be interpreted in a manner consistent with international law whenever possible.

The following sections identify the treaties and customary international law relevant to the legality of the EO.

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[16] Alexander Hamilton, Pacificus No. 1 (June 29, 1793), reprinted in 15 The Papers of Alexander Hamilton 33, 33-43 (Harold C. Syrett ed. 1969).

[17] *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

B. International Law Regarding Discrimination on the Basis of Religion and National Origin

1. The International Covenant on Civil and Political Rights

Discrimination based on religion or national origin is prohibited by the International Covenant on Civil and Political Rights ("CCPR"). The United States ratified the CCPR in 1992.[18]

Article 2 of the CCPR states in relevant part:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, . . . religion, . . . national or social origin, . . . or other status.
>
> ***
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined

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[18] 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

> by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The United Nations Human Rights Committee ("HRC") is charged by the CCPR to monitor implementation by state parties and to issue guidance on its proper interpretation. The HRC interprets article 2 to prohibit "any distinction, exclusion, restriction or preference" based on a prohibited ground, and which has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of human rights and fundamental freedoms" protected by the treaty.[19] To justify a derogation from the nondiscrimination (or any other human rights) duty, a measure must pursue a legitimate aim and be proportionate to that aim.[20] A "proportionate" measure is one effective at achieving the aim and narrowly tailored (or "necessary") to it.[21]

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[19] Human Rights Committee, General Comment No. 18, para. 6, U.N. Doc. HRI/GEN/1Rev.1 at 26 (1994).

[20] Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, para. 4, 64th Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

[21] *See* Aaron Xavier Fellmeth, Paradigms of International Human Rights Law 119-21 (2016).

The substantive rights guaranteed by the CCPR, which must be protected without discrimination based on religion or national origin under article 2, include the protection of the family. Article 23 provides in relevant part: "The family is the natural and fundamental group of society and is entitled to protection by society and the State."[22] The HRC has interpreted this right to include living together, which in turn obligates the state to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[23]

Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2. The HRC has explained that, although the CCPR does not generally

> recognize the right of aliens to enter or reside in the territory of a State party . . . , in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[24]

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[22] CCPR, *supra* note 6, art. 22(1).

[23] Human Rights Committee, General Comment No. 19, para. 5 (1990), U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994).

[24] Human Rights Committee, General Comment No. 15, para. 5 (1986), U.N. Doc. HRI/GEN/1/Rev.1 at 19 (1994).

Thus, the right of entry is not beyond the scope of the CCPR. On the contrary, the CCPR's nondiscrimination principles and protections for family life should be considered by courts in interpreting government measures affecting family unification. This treaty-based protection for family life is consistent with Supreme Court jurisprudence respecting the role of due process of law in governmental decisions affecting family unity.[25]

More generally, article 26 of the CCPR prohibits discrimination in any government measure, regardless of whether the measure violates a Covenant right:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As interpreted by the HRC and consistent with its wording, this provision "prohibits discrimination in law or fact in *any field* regulated" by the government.[26] Notably, unlike CCPR article 2, the equal protection provisions of CCPR article 26 lack article 2's limitation to "all individuals within [the state party's] territory and subject to its jurisdiction."

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[25] *See Landon v. Plasencia*, 459 U.S. 21, 34, 37 (1982); *Kerry v. Din*, __ U.S. __, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).

[26] Human Rights Committee, General Comment No. 18, *supra* note 19, para. 12 (emphasis added).

The nondiscrimination provisions of the CCPR are also customary international law binding on the United States, forming part of U.S. law unless contrary to the Constitution or a statute. The Universal Declaration of Human Rights, which the United States approved in 1948, mandates nondiscrimination in religion and national origin, equal protection of the law, and protection from arbitrary interference in family life.[27] The American Declaration of the Rights and Duties of Man, which the United States approved when it signed and ratified the Charter of the Organization of American States the same year, has similar provisions in articles 6 and 17.[28] These nondiscrimination principles and the right to family unity have become sufficiently widespread and accepted by the international community that they have entered into customary international law in the present day.[29]

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[27] Universal Declaration of Human Rights, arts. 2, 7, 12, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948).

[28] O.A.S. Res. XXX (1948), Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev. 13, at 13 (2010).

[29] *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287, 329 (1995/96).

2. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") also bars discrimination based on national origin. The United States has been a party to the CERD since 1994.[30] Under article 2, paragraph (1)(a), each state party commits to refraining from and prohibiting all forms of racial discrimination, and each further undertakes "to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national or local, shall act in conformity with this obligation." CERD defines "racial discrimination" to include distinctions and restrictions based on national origin.[31] With regard to immigration practices, CERD makes clear that states are free to adopt only such "nationality, citizenship or naturalization" policies that "do not discriminate against any particular nationality."[32] Like the nondiscrimination provisions of CCPR article 26, CERD article 2 does not limit its application to citizens or resident noncitizens. While CERD does not speak specifically to restrictions on entry of nonresident aliens, the general language of CERD expresses a clear intention to eliminate discrimination based on race or national origin from all areas of government activity: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms . . . without distinction as to race, colour, or national or ethnic origin . . . ."[33]

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[30] *See* 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

[31] *Id.* art. 1(1).

[32] *Id.* art. 1(3).

Article 4 of CERD further provides that state parties "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination," which (as noted) includes discrimination based on national origin. The Committee on the Elimination of Racial Discrimination, the body of independent experts appointed to monitor CERD's implementation, interprets article 4 to require states to combat speech stigmatizing or stereotyping non-citizens generally, immigrants, refugees, and asylum seekers,[34] with statements by high-ranking officials causing "particular concern."[35] In *TBB-Turkish Union in Berlin/ Brandenburg v. Germany*, for example, the Committee specifically determined that Germany violated the Convention when it failed to discipline or punish a minor government official who had *inter alia* drawn attention to low employment rates of Turkish and Arab populations in Germany, suggested their unwillingness to integrate into German society, and proposed that their immigration should be discouraged.[36] These statements, the Committee determined, implied "generalized negative characteristics of the Turkish population" and incited racial discrimination.[37]

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[33] *Id.* art. 5.

[34] Committee on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, para. 6, U.N. Doc. CERD/C/OC/35 (2013).

[35] *Id.* para. 22.

The legality of the EO in this case, and the proper interpretation of the statutes and constitutional provisions cited by the parties, should be assessed with those proscriptions in mind. Those international law principles require courts to reject any attempt by the President to define classes based on national origin or religion, and then to impose on those classes disparate treatment, except to the extent necessary to achieve a legitimate government purpose.

C. Relevant Provisions of the Executive Order

Section 2 of the EO categorically suspends immigration from six specified countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen, and imposes special requirements on immigrants from Iraq. Section 2(a), moreover, authorizes the Secretary of Homeland Security to demand "certain information" from "particular countries even if it is not needed from every country."

The EO thus makes an explicit distinction based on national origin that, unless necessary and narrowly tailored to achieve a legitimate government aim, would violate U.S. obligations under international law. In effect, the EO also makes a distinction based on religion, as Respondents have argued. Notably, every one of the designated countries has a population that is overwhelmingly Muslim,[38] and the EO does not suspend immigration from any state with a non-Muslim majority.

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[36] Comm. on the Elimination of Racial Discrim., Commun. No. 48/2010 (Feb. 26, 2013), U.N. Doc. CERD/C/82/D/48/2010.

[37] *Id.* para. 12.6.

International law is also relevant to Section 11 of the EO, which requires the Secretary of Homeland Security to "collect and make publicly available" certain information relating *inter alia* to convictions of terrorism-related offenses, government charges of terrorism, and "gender-based violence against women" by foreign nationals. The EO requires no publication of similar information relating to U.S. nationals. By mandating that the Secretary publish pejorative information about noncitizens without publishing comparable information about U.S. citizens, Section 11 makes a suspect distinction based on national origin. While Section 11 has not been challenged specifically by the Respondents, it may bear on the intent to discriminate, because the decision to publish derogatory information about noncitizens alone is stigmatizing, and appears to be motivated by a desire misleadingly to characterize noncitizens as more prone to terrorism or gender-based violence than U.S. citizens. Apart from what it may indicate with respect to intent, a measure designed to stigmatize noncitizens cannot be proportionate and thus violates article 26 of the CCPR and articles 2 and 4 of the CERD.

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[38] *See* Central Intelligence Agency, World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html.

III. CONCLUSION

For the foregoing reasons, *amici* request that the Court consider U.S. obligations under international law, which forms part of U.S. law, in evaluating the legality of the EO.

Respectfully submitted.

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APPENDIX A

The amici are nongovernmental organizations and legal scholars specializing in public international law and international human rights law. They have substantial expertise in issues directly affecting the outcome of this case. These amici are identified below.

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International Center for Advocates Against Discrimination

International Justice Project

International Justice Resource Center

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ACRONYMS AND ABBREVIATIONS

ADRDM	American Declaration on the Rights and Duties of Man
Am.J.Int'l L.	American Journal of International Law
Co.	Company
Comm.	Communication
Dall.	Dallas
Doc.	Document
ed.	Edition
Fed. Reg.	Federal Regulation
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
Mfg.	Manufacturing
No.	number
O.A.S.	Organization of American States
page	Page
para.	Paragraph
Pet.	Peters
Pub. L.	Public Law
Res.	Resolution
S. Ct.	Supreme Court Reporter
Ser.	Series
U.S.	United States
U.N.	United Nations

U.N.G.A.	United Nations General Assembly
U.N.T.S.	United Nations Treaty Series
Vol.	Volume
Wall.	Wallace

INTEREST OF *AMICUS CURIAE*

The *amicus*, International Lawyers for International Law, are lawyers and law professors from the United States of America and from outside the United States of America who are experts in international law. They are Mr. Inder Comar, Member of the bars of California and New York; Dr. Margreet Wewerinke-Singh, Professor of Law, University of the South Pacific; Mr. Arno Develay, Member of the bars of Paris (France) and the State of Washington; and Professor Curtis F.J. Doebbler, Member of the bars of the Supreme Court of the United States and the District of Columbia; Research Professor of Law, University of Makeni.

This brief is submitted by *amicus* in the public interest of ensuring the proper understanding and application of the international law relevant to this case.[1]

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[1] Petitioner granted blanket consent for the filing of amicus curiae in this matter. *Amicus curiae* sought consent from Respondents, and received consent from the Respondents' counsel of record. Pursuant to Rule 37(a), *amicus* provided 10-days' notice of its intent to file this *amicus curiae* brief to all counsel. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the International Lawyers for International Law, made a monetary contribution to the preparation or submission of this *amici curiae* brief.

SUMMARY OF ARGUMENT

This *Amicus Curiae* brief argues that this Court should apply applicable international law to determine whether Executive Order No. 13,780, 82 Fed. Reg. 13209 of 6 March 2017 (hereinafter Executive Order) is consistent with the United States' legal obligations.

This Court and all United States courts should apply international law, including treaties ratified by the United States and customary international law.

Treaties are legally binding on the United States as part of U.S. law.

Customary international law, although different in character from treaties, is also legally binding on the United States as part of U.S. law. Both sources of international law are relevant to the matter before the Court and should be applied by the Court.

The President of the United States is bound by international law in accordance with the intention of the Framers of the Constitution and its interpretation by this Court.

International law prohibits insidious discrimination. This prohibition is found in treaties and customary international law that is legally binding on the U.S. President and the Executive.

Discrimination based on national origin is prohibited by treaties and customary international law that are legally binding on the U.S. President and the Executive.

Discrimination based on religion is prohibited by treaties and customary international law that are legally binding on the U.S. President and the Executive.

Differentiations based on religion require rational justifications that must be closely scrutinized to ensure that they are based on reliable evidence.

The Court should apply the prohibition of discrimination that is found in international law applicable to the United States in evaluating the legality of the Executive Order.

ARGUMENTS

I. THE COURT SHOULD APPLY INTERNATIONAL LAW

This Court should apply international law as part of its obligation to uphold the rule of law and to preserve the system of constitutional democracy of the United States.

First, the Constitution of the United States and the precedents of this Court interpreting the U.S. Constitution indicate that international law—both treaties and customary international law—are part of United States law. The U.S. Constitution expressly declares treaties to be part of U.S. law and this Court has repeatedly recognized that customary international law is part of the laws of the United States that must be applied by the courts. When international law is overlooked, relevant law is not applied to decide a case at law. In this case, international law is relevant law that should be applied.

Second, the United States has represented to its own people that it will respect international law by ratifying treaties in which it undertakes to guarantee certain rights to all individuals under its jurisdiction, such as the rights to be free from discrimination based on nationality and religion. This is an essential ingredient of the trust of the American people in their government. It is incumbent that the United States President uphold such representations to the American people for the proper functioning of the government as envisioned by the U.S. Constitution. The Court should ensure this crucial trust is maintained.

Third, the United States has represented to its own people that it will respect international law by enacting laws expressly recognized the prohibitions under international law against discrimination based on religion and national origin. The prohibition of discrimination based on religion found in the U.S. Constitution's First Amendment is the basis of The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), which prohibits discrimination based on religion except where the government is acting to secure a compelling interest in the least restrictive manner possible. *Id.* § 3, (a) and (b). The Religious Freedom Restoration Act, id., is based on the Congressional finding that "the framers of the Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the Constitution." Id. at § 2(a)(1). This Court's protection of religious freedom has an extensive history and has been established in light of the understanding that the United States' very existence owes much to people fleeing religious persecution. Discrimination based on national origin is prohibited by Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352, 78 Stat. 241, enacted July 2, 1964). The Guidelines on Discrimination Because of National Origin, Pt. 1606, 45 FR 85635, Dec. 29, 1980, implementing Title VII, provide that this provision of law "protects individuals against employment discrimination ... on the basis of ... national origin ...

[including that the] . . . principles of disparate treatment and adverse impact equally apply to national origin discrimination." *Id.* at § 1606.2. Thus, consistent with international law as described below, this Court has recognized that U.S. law "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U. S. 424, 431 (1971). This Court has also held in Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973), that discrimination on national origin may be found even where a different ground it expressed in the law. In these holdings, the Court has applied the prohibition of discrimination on the basis of national origin in a manner that is consistent with international law.

Fourth, respect for international law is essential to the United States good reputation in the international community. By ratifying treaties and participating in international affairs the United States represents to the international community that it will respect international law. As Professor Louis Henkin wrote almost forty years ago, and is still true today, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Henkin, L., How Nations Behave: Law and Foreign Policy 47 (2d ed., 1979). Nations that do not respect international law open themselves to ridicule, or expose themselves to the charge that they are rogue States. The failure of the United States to respect international law harms the United States and is inconsistent with the consensus of States expressed in the text of the Vienna Convention on the Law of

Treaties, 1155 U.N.T.S. 331 (1980), which although only signed and not ratified by the United States, expresses a widely accepted rule of customary international law in its article 27 that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Id. Article 26 of the Vienna Convention, id., furthermore declares that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Id. Finally, the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987), notes that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights." Id. at § 702. A note to this provision of the Restatement notes that "the obligations of the customary law of human rights are erga omnes," thus obligation owed to all states and in which all States have an interest of enforcement. When the United States ignores international law its reputation in the international community can potentially suffer in the eyes of all States; embarrass American citizens; and fuels the arguments of those States and non-State actors who seek to use extra-legal means to influence the actions of the United States. It also subjects the U.S. to the possibility of being found responsible for an internationally wrongful act by international bodies such as United Nations special mandate holders or the Inter-American Commission on Human Rights. This is the case because as the Restatement, id., notes, failure to apply a rule of international law in a domestic context "does not relieve the United States of its international obligation or of the consequences of a violation of that obligation." Id. at § 115. As the final arbiter of the extent to which international law should apply in the U.S. courts, this Court should safeguard the reputation of the United States by ensuring the application of international law, including the prohibitions of discrimination based on religion and national origin.

Fifth, disrespect for international law imposes significant restrictions on the ability of future administrations to be able to conduct international affairs in the best interest of the American people. Regardless of domestic law, the United States may face the consequences of having committed an internationally wrongful act. These consequences or reparations for injuries are summarized in the International Law Commission's Draft Articles on State Responsibility, annexed to U.N.G.A. Res. 56/83 of December 12, 2001, and corrected by U.N. Doc. A/56/49(Vol. I)/Corr. 4., as including restitution, compensation, satisfaction, and interest on any principal sum due. Id. at arts 35-38. Moreover, if the internationally wrongful acts are serious, as systematic acts of discrimination based on religion or national origin and targeting many people are likely to be, all States in the international community "shall cooperate to bring to an end through lawful means any serious breach." Id. at art. 41. These negative consequences are likely to affect the foreign relations of the U.S. government for many years. They are also reasons why this Court should, whenever possible, as in this case, ensure respect for international law.

A. THE COURT SHOULD APPLY TREATIES APPLICABLE TO THE UNITED STATES

Treaties are expressly made part of U.S. law by Article IV, Clause 2, of the U.S. Constitution that states "all Treaties" made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

During the founding of the United States, two of the most prominent founders, Alexander Hamilton and John Jay expressed the opinion that treaties were binding and should be applied by U.S. courts. The Federalist No. 22 at 197 (Hamilton); No. 80 at 501-503 (Hamilton); and No. 64 423-424 (Jay). This Court has recognized that treaties are part of U.S. law that must be applied by the Court in numerous cases. See, e.g., Missouri v. Holland, 252 U.S. 416 (1920); Cook v. United States, 288 U.S. 102 (1933); Kolovrat v. Oregon, 366 U.S. 187 (1961); and Water Splash, Inc. v. Menon, 581 U.S. ___ (2017), 137 S. Ct. 1504 (2017). This is especially the case where application of the treaty carries significance for the United States in international affairs. As Justice James Iredell stated long ago, and is equally valid today,

> a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the legislative, executive, and judicial departments . . . as on every individual of the nation, unconnected officially with either,

> because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for noncompliance, the public faith is violated. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272 (1796).

Treaties which the United States have ratified must be applied by the U.S. courts because Article II of the U.S. Constitution makes them applicable both in and of themselves and as part of U.S. law and because the Court itself has affirmed the application of treaties to relevant disputes. The foregoing reasons the Court should take cognizance of the treaties that the United States has ratified as part of U.S. law in reviewing the actions of the Executive.

B. THE COURT SHOULD APPLY CUSTOMARY INTERNATIONAL LAW APPLICABLE TO THE UNITED STATES

The international law applicable to the United States includes customary international law, which according to Article III of the U.S. Constitution must be applied as "Laws of the United States." Id. at § 2, cl. 1. The Court has repeatedly and consistently over time recognized that customary international law is part of U.S. law that it will apply. This Court has stated that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations [i.e. customary international law]." Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). Indeed, the first Chief Justice of this Court, Chief Justice John Jay, expressly charged Grand Juries "that the laws of nations make part of the laws of this and of every other civilized nation. They consist of those rules for regulating the conduct of nations towards each other; which, resulting from right reason, receive their obligations from that principle and from general assent and practice." John Jay, C.J., Charge to Grand Juries: The Charges of Chief Justice Jay to the Grand Junes on the Eastern circuit at the circuit Courts held in the Districts of New York on the 4th. of Connecticut on the 22d days of April, of Massachusetts on the 4th, and of New Hampshire on the 20th days of May, 1790 in The Correspondence and Public Papers of John Jay, Vol. III, 387, 393 (Henry P. Johnston, ed., 1891). Justice Gray, writing the opinion for the Court expressly agreed stated that "[t]he most certain guide . . . [to the applicable international law] is a treaty or a statute . . . when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . ." Hilton v. Guyot, 159 U.S. 113, 163 (1895). The opinion of this Court in Hilton v. Guyot, id, states that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination." Id. In The Paquete Habana, 175 U.S. 677 (1900), Justice Gray again writing the opinion for the Court where states that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." Id. at 700. Justice Gray further clarified that "[t]his rule of international law is one which . . . [this Court] . . . administering the law of nations are bound to take judicial notice of, and to give effect to . . . ." Id. at 708. This Court has again recently recognized that customary international law is part of U.S. law that must be applied by the U.S. courts. Bolivarian Republic of Venezuela, et al., v. Helmerich & Payne International Drilling Co., et al., 581 U. S. ____ (2017), 137 S. Ct. 348 (2017). This view is shared by the Restatement (Third) of the Foreign Relations Law of the United States (1987), that reads "[i]nternational law and international agreements of the United States are law of the United States . . . [c]ases arising under international law or international agreements of the United States are within the Judicial Power of the United States . . . ." Id. at § 111.

Moreover, customary international law cannot be derogated from by later legislation. Unlike treaty law that is created at a fixed time—i.e. when the United States becomes a party to a treaty that it has ratified—and which this Court has determined can be superseded by later in time legislation, customary international law remains in force at all times. As this Court stated, in its Opinion written by Justice William Strong, customary international law

> is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force not because it was prescribed by any superior power, but because it has been generally

> accepted as a rule of conduct. The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871), quoted with approval by the Court in The Paquete Habana, op cite at 711.

It is law that once created, functions as ongoing process whereby its validity is renewed according the continuing opinio juris and practice of States. It would be inconsistent with this understanding to allow the rules of customary international law prohibiting discrimination to be derogated from by later-in-time legislation. As rule of customary international law exists with the full force of its creation at all times that it remains a rule of customary international law. Even good faith efforts by States to change a rule, are violations of the rule of customary international law until that rule has been changed the consensus of States expressed through their opinio juris and practice.

In accordance with its longstanding precedents the Court take cognizance of the United States' legal obligations under customary international law in reviewing Executive Order for consistency with the laws of the United States.

II. INTERNATIONAL LAW PROVIDES FOR LIMITS ON THE AUTHORITY OF THE PRESIDENT

International law does not distinguish among actors who lawfully represent a State. All actors are effectively bound by international law and may incur the responsibility of a State for an internationally wrongful act. This is certainly true for the U.S.

President, who is the most senior official representing the United States in the international community. As such the President is subject to international law.

This basic understanding of international law—that all state actors are bound to obey it—has been reiterated time and time again throughout the history of international law. Hugo Grotius, the famed Dutch legal scholar who is often referred to as a founder of modern international law, opined in Book III, Chapter XVIII, Part VI, of De Jure Belli ac Pacis (1625) that international law governs the relation between State and individuals and even those between citizens of different States. The Restatement (Third) of the Foreign Relations Law of the United States (1986), op cite, in its Introduction states unambiguously that "[i]n conducting the foreign relations of the United States, [officials of the United States] are not at large in a political process; they are under law." Id. at 5.

The President is bound by treaties that have received the advice and consent of the United States Senate as the U.S. Constitution expressly states that the President of the United States "shall take Care that the Laws be faithfully executed," including as indicated above international law. U.S. Const. art. II, § 3. These treaties should be applied by the Court whenever an exercise of Executive authority raises an issue of consistency with the United States' treaty obligations. Indeed, this Court has frequently reviewed executive power based on treaties. Justice John McLean in Worcester v. Georgia, 31 U.S. (6

Pet.) 515 (1932), found that treaties with native American Nations are treaties that "must be respected and enforced by the appropriate organs of the Federal Government." Id. at 594. In Dooley v. United States, 182 U.S. 222 (1901), Justice Henry Billings Brown cited with approval the seminal work of American General Henry Wager Halleck, a jurist and expert in international law, that states that the "[t]he stipulations of treaties ... are obligatory upon the nations that have entered into to them... and therefore the Executive is bound by the laws of war that are international law. Id. at 231-232 (citing Bart, S.H., Halleck's International Law, Vol. II,_ 433 (1878). Recently in Hamdan v. Rumsfeld, 548 U. S. 557 (2006), this Court applied international law to an armed conflict involving the United States and held that ". . . the Executive is bound to comply with the rule of law . . . " including international law. Id. at 635.

Similarly, customary international law should be applied by the Court because it is part of U.S. law according to the Constitution and the holdings of this Court. In reviewing the constitutional history of Presidential authority in light of international law, Professor Jordan Paust, a foremost authority on international law in the U.S. courts, concludes that the U.S. Constitution

> documents an early expectation that international law is part of the supreme federal law to be applied at least by the Executive and the judiciary. It also documents broader legal policies at stake, all of which make it quite evident that if the President violates

constitutionally based international law, he violates not only his constitutional oath and duty, but also the expectations of the Framers -- still generally shared -- about authority, delegated powers and democratic government. Paust, J., May the President Violate Customary International Law? (Cont'd): The President is Bound by International Law, 81 Am. J. Int'l L. 377, 378 (April 1987).

This expectation has been reiterated by this Court in The Paquete Habana, op cite, where the Court found that while Congress may authorize action contrary to the mere "usage" of the international community of States "by direction of the Executive, without express authority from Congress," Id. at 711, therefore by rational implication, no such authority could be granted to violate a rule of international law.

The matter before the Court implicates the discretion of the President to act in a manner that is contrary to rules of international law. Such authority generally does not exist under U.S. law. This Court should ensure the President's adherence to international law in the matter before the Court.

III. INTERNATIONAL LAW APPLICABLE TO THE UNITED STATES PROHIBITS DISCRIMINATION

The prohibition of insidious forms of discrimination is one of the most widely held principles of international law. It is expressly stated in treaties that the United States has ratified as well as customary international law.

Article 1, paragraph 2 of the Charter of the United Nations, 1 U.N.T.S. XVI (1945) states that a purpose of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Id. Furthermore, almost every major human rights treaty prohibits insidious forms of discrimination, including those that have been ratified by the United States. For example, article 26 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), 993 U.N.T.S. 3 (1976), that repeats the obligation in the Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (10 December 1948), this time as a legal obligation, obliging the United States and other State Parties to ensure that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination . . . ." Id. The United Nations Human Rights Committee, which is created in the ICCPR as the authoritative body for the interpretation of the ICCPR, has expressed in its General Comment No. 18 on Non-Discrimination, reprinted in U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), that "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights." Id. at 212. The Committee continued, explaining that "Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground." Id. By ratifying the ICCPR the United States expressly "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ." ICCPR, op cite, art. 2(1). The Human Rights Committee, which is created by this treaty, in Broeks v. the Netherlands, Comm. 172/1984, U.N. Doc. A/42/40, at 139 (1987), has held that article 2, paragraph 1, of the ICCPR prohibits insidious discrimination in the enjoyment of any individual rights. Id. paras. 12.3 to 12.5. It is noteworthy that the U.N. Human Rights Committee in Broeks v. the Netherlands, id., also recognized that "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." Id. at para. 13. Thus the prohibition of discrimination does not proport to make illegal all distinctions made by the government, but merely those which are not reasonable. Despite the fact that the United States has not agreed to allow aggrieved persons to bring communications to the Human Rights Committee concerning violations of their right not to be discriminated against, the United States is nevertheless fully bound by the international legal obligation to ensure that no person under its jurisdiction suffers insidious discrimination, including discrimination based on their national origin or religion.

Several non-legally-binding, but authoritative, international instruments also reiterate the international consensus against insidious forms of discrimination. For example, Article 1 of the Universal Declaration of Human Rights, op cite, states that "[a]ll human beings are born free and equal in dignity and rights" and article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind . . . ." Similarly, the American Declaration of the Rights and Duties of Man (hereinafter "ADRDM"), O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) and reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), states that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration." Id. Although the United States is not legally bound by these two instruments, both have been widely recognized as reflecting customary international law in their statement of the principle of non-discrimination, respectively in the international community as a whole and in the Americas.

The Inter-American Commission on Human Rights (IACHR) has the "principal function shall be to promote the observance and protection of human rights." Art. 112 of the Protocol of Amendment to the Charter of the Organization of American States (hereinafter "Buenos Aires Protocol"), O.A.S. Treaty Series No. 1-A, ratified by the United States on April 23, 1968 and entered into force on March 12, 1970. The United States is party to the Charter of the Organization of American States, 119 U.N.T.S. 3 (1951) that created the IACHR. The IACHR has held that the provisions of the ADRDM are incorporated into the text of the Charter because they reflect customary international law. The IACHR reaffirmed the customary international nature of the ADRDM, in its opinions in The Baby Boy Case, Res. No. 23/81, Case No. 2141 (March 6, 1981) concerning abortion in the United States and in the case of Roach and Pinkerton v. United States, Resolution No. 3/87, Case No. 9647, O.A.S. Doc. OEA/ser.IJVII.71, doc. 9 rev. 1 (1987), in which it found the provisions of the ADRDM are part of international law applicable to the United States. Id. at paras. 45-48. And in Gonzales v. Cuba, Report No. 67/06; Case No. 12,476 decided during its 126th Regular Session (16 – 27 October 2006), the IACHR, relying on the ADRDM as concerns Cuba, who like the United States has not ratified the American Convention on Human Rights, determined that there is an "international consensus regarding the States' prohibition of any discriminatory treatment." Id. at para. 228. Similarly, the Inter-American Court of Human Rights in its Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, No. OC-18/03, Ser. A, No. 18 (September

17, 2003), stated that the prohibition of discrimination

> it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person ... is unacceptable. This principle (equality and nondiscrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and nondiscrimination has entered the realm of jus cogens." Id. at para. 101.

The prohibition discrimination, as one of the foundational principles of human rights contained in the ADRDM, is therefore part of the law that is legally binding on the United States. The customary international law nature of the general prohibition of insidious discrimination is confirmed by the International Court of Justice in the Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5), where it found the principle of equality and the prohibition of discrimination to be "imperative rules of [international] law." Id. at p. 304.

This Court should recognize the prohibition of insidious forms of discrimination as a rule of customary international law, both in its general form, and as argued below, in respect to discrimination based on national origin and religion.

A. DISCRIMINATION BASED ON NATIONAL ORIGIN IS PROHIBITED BY APPLICABLE INTERNATIONAL LAW

Discrimination based on national origin is prohibited by international law in the ICCPR, op cite, which the United States has ratified. Article 26 unequivocally declares "[a]ll persons are equal before the law and . . . entitled without any discrimination to the equal protection of the law . . . [including the obligation that] . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . national . . . origin." Id. Article 2, paragraph 1, of the ICCPR, id., repeats the prohibition of discrimination in respect of the rights in the treaty stating "[t]hat Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . national . . . origin . . . ." Id. The ICCPR, id., includes the right to be free from arbitrary detention (art. 9), the right to liberty of movement (art. 12), the right of aliens lawfully within the territory of a States to a fair trial in expulsion proceedings (art. 13), the general right to fair trial (art. 14), the right to recognition before the law (art. 16), the right to privacy and family life (art. 17), the right to freedom of religion (art. 18), the right to freedom of expression (art. 19), as well as the general prohibition of discrimination in article 26. Discriminatory treatment in the enjoyment of any of these rights or any other right provided by U.S. law is prohibited. Broeks v. the Netherlands, op cite, at paras. 12.3-12.5.

The Committee has interpreted "other status" in the second sentence of article 26 of the ICCPR, op cite, as prohibiting discrimination based on national origin. Ibrahima Gueye, et al. v. France, Comm. No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989) at para. 9.4. The Committee takes into account, as it did in F. H. Zwaan-de Vries v. The Netherlands, Comm. No. 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990), that "the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." Id. at para. 13.

Customary international law also prohibits discrimination based on national origin. This is the opinion of the prominent legal scholars David Weissbrodt, Joan Fitzpatrick, Fionnuala Ní Aoláin, and Frank C. Newman, International Human Rights: Law, Policy, and Process (4th ed. 2007), who after evaluating a significant number of United Nations and other international instruments conclude that there is "an international legal consensus against discrimination based that national origin." Id. 878.

While this Court has held that distinctions based on national origin are inherently suspect and therefore subject to struct scrutiny. McLaughlin v. Florida, 379 U.S. 184, 192 (1964), applying this test may not be sufficient to meet the United States international obligations unless the above noted provisions of international law are taken into account. The Court should apply the standards of international law that prohibit discrimination based on national origin in considering the legality of the Executive Order.

B. DISCRIMINATION BASED ON RELIGION IS PROHIBITED BY APPLICABLE INTERNATIONAL LAW

Discrimination based on religion is prohibited by international law applicable to the United States under both treaties and customary international law.

The ICCPR, op cite, article 26, already noted above, declares "[a]ll persons are equal before the law and . . . entitled without any discrimination to the equal protection of the law . . . [including the obligation that] . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as religion." Article 2, paragraph 1 of the ICCPR, also noted above, obliges States not to discriminate based on an individual's right to religion, which is secured in article 18 of the ICCPR. The combined effect of the prohibition of discrimination in article 2, paragraph 1, and the right to religion in article 18 is that States cannot make distinctions based on the religion of a person when the distinction reasonably may or does disadvantage the person. In Joseph v. Sri Lanka, Comm. 1249/2004, U.N. Doc. A/61/40, Vol. II, at 347 (HRC 2005), the U.N. Human Rights Committee found the failure to treat different religious groups similarly constituted prohibited discrimination.

The customary international law character of the prohibition of religious discrimination is reflected not only in the consensus of the 169 States who have ratified the in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N.G.A. Res. 36/55 (25 November 1981), adopted by the U.N. General Assembly by consensus, that declares that "[d]iscrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations." Id. at art. 3. This Declaration reiterates that "[n]o one shall be subject to discrimination by any State, institution, group of persons or person on grounds of religion or belief." Id. art. 2(1). Furthermore, article 2, paragraph 2, of the Declaration provides guidance as to what type of discrimination is prohibited stating that "the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis." Id. This broad definition prohibits

Executive action, even if the distinctions are ostensibly for reasons other than religion, if there is evidence to the contrary.

C. DIFFERENTIATIONS BASED ON NATIONAL ORIGIN OR RELIGION REQUIRE JUSTIFICATIONS

Article 26 of the ICCPR does not include any express justification of discrimination. According to the clear words of the article no discrimination is possible in any circumstance. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by a meeting of experts on September 28, 1984, U.N. Doc. E/CN.4/1984/4, also takes the view that "[n]o limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself." Id. at para. I(a)(1).

Nevertheless, with due respect for the sovereign authority of States, the U.N. Human Rights Committee has interpreted the article to allow for very limited exceptions. International law prescribes these exceptions narrowly to ensure that they are not merely used to interfere with the legitimate enjoyment of individuals' rights. The Committee requires States seeking to justify any form of differentiation based on grounds such as national origin and religion.

Applying article 26 of the ICCPR to review different treatment based on religion, the U.N. Human Rights Committee stated that there must be a "reasonable and objective distinction to avoid a finding of discrimination." Joseph v. Sri Lanka, op cite, at para. 7.4. Moreover, the Committee determined that the interference was discriminatory because the State entity had "failed to provide any evidentiary or factual foundation" for its action that differentiated between groups based on religion. Id. at para. 7.3. To justify actions that differentiate based on religion, a State must demonstrate that its restrictions are necessary for a legitimate purpose, supporting its claims with adequate evidence. For example, a detention of a migrant that continues beyond a period that is necessary and is supported by sufficient evidence will be arbitrary. A v. Australia, Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) at para. 9.4. Similarly, in a matter involving a French law that required Sikh's to remove their turbans for identification card photographs the U.N. Human Rights Committee noted that the State had a legitimate interest in ensuring "for the purposes of public safety and order, that the person appearing in the photograph on a residence permit is in fact the rightful holder of that document," but that the State had "not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded." Id. at para. 8.4. The Committee consequently found a violation of the right to religion in article 18 of the ICCPR based on the unjustified treatment the claimant received. Id. In Mohammed Alzery v. Sweden, U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006), the U.N. Human Rights Committee found that Sweden's reliance on representations by the Egyptian government was not sufficient to justify its returning an asylum-seeker to Egypt where he was subsequently subjected to torture. Id. para. 11.5. The Committee opined that the Sweden should have verified the information it had been given to ensure that it was reliable. Id.

While limited justifications for discrimination may be relied upon it is incumbent upon States to justify their interests and to provide reliable evidence that their acts of discrimination are necessary. Where a State and its officials fail to meet this significant burden of proof, the result must be that the State or its officials are acting in violation of the law. In such a situation, this Court should act to ensure respect for the law, including international law prohibiting discrimination in the exercise of any individual right that is recognized by U.S. law.

CONCLUSION

For the foregoing reasons, this Court should apply international law when determining whether the Executive Order is inconsistent with United States law, including the prohibitions of discrimination based on national origin and religion that are part of under international law.

Respectfully submitted,

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Supreme Court of the United States

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DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

◆

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Fourth And Ninth Circuits

◆

BRIEF OF *AMICUS CURIAE* THE JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Japanese American Citizens League ("JACL") is a nonprofit organization whose mission is to secure and safeguard the civil and human rights of Asian and Pacific Islander Americans and all communities affected by injustice and bigotry.[1]

In 1943 and 1944, JACL urged this Court to declare unconstitutional the incarceration of nearly 120,000 Japanese Americans pursuant to Executive Order No. 9066. Emphasizing the overwhelming loyalty of the Japanese American community and its "confidence in American justice," JACL's filings in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), asked this Court to look behind the government's specious invocation of "military necessity" and instead stand as a bulwark "[a]gainst this dangerous drift and tide, this loss of manpower, this senseless gift to enemy propagandists, this prodigal waste of goodwill and unity at home, this opportunistic drive of groups long organized for hate to inflate their fanatic grudge into a national and international issue[.]" Brief for JACL as *Amicus Curiae* in *Hirabayashi* ("JACL *Hirabayashi* Br."). JACL "look[ed] to this Court, as the guardians of the liberties of all the people of the United States – of which Japanese Americans are a living and integral part – with confidence to protect them from such discrimination as this, which is so alien to the American way of life, not for their sake alone, but also for the sake of every minority racial group in American life." *Id.*

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Counsel for Respondents have consented to the filing of this brief.

JACL's confidence was misplaced. The Court accepted the government's national security claims, clearing the way for tragedy and a lasting scar on American virtue. Immediately, scholars argued that "the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal" of these judicial "disasters," *see* Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 Yale L.J. 489 (1945), but as a Congressional Commission noted in 1982, the country has "not been so unfortunate that a repetition of the facts has occurred to give the Court that opportunity," U.S. Comm'n on the Wartime Relocation and Internment of Civilians, 96th Cong., *Report: Personal Justice Denied* ("CWRIC Report"), at 239 (1982).

Until now. Executive Order No. 13780 (the "Travel Ban Order") – and the flimsy, illogical, and trumped-up national security rationale upon which it rests – is such a repetition. Once again, the Government insists that this Court must accept its talismanic incantation of "national security" and shirk its core responsibility to take a hard look at arbitrary, discriminatory, and harmful treatment of a disfavored group.

In its 1943 "Statement of Interest" in *Hirabayashi*, JACL explained that its concern was:

> not alone for its members, [but] for all the minority racial groups in this country who may be the next victims of similar discrimination resulting from war or other prejudices and hysterias, and for the preservation of civil rights for all[.]

JACL *Hirabayashi* Br. 9.

These same concerns compel JACL to write today.

◆

SUMMARY OF ARGUMENT

History teaches the virtues of caution and skepticism when weighing the validity of vast, unprecedented exclusionary measures that target disfavored classes in the name of national security. Though *Hirabayashi* and *Korematsu* have been largely repudiated, *see, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("I am optimistic enough to believe that, one day, [this opinion] will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*."), the deferential approach demonstrated by the Court during World War II left behind "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need," *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). The striking parallels between the Japanese Wartime Cases and the present case should inform the Court's analysis.

A finding that improper animus motivated Executive Order No. 13780, however, is not necessary to declare the President's action unlawful. Congress delegated authority to the President to exclude entire classes upon a "find[ing]" that the aliens' entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Meaningful scrutiny of the executive's finding of harm to United States interests can have a powerful preventative effect and will often be sufficient to guard against the use of racial, national or religious animus in the case of sweeping exclusions. Identifying the lack of any reasonable national security basis obviates the need for making an affirmative determination that the executive acted upon any improper motive. By making it clear that the Court will search for a meaningful basis for the challenged action, the Court can ensure that there is not yet another "repetition [that] imbeds that principle [of invidious discrimination] more deeply in our law and thinking and expands it to new purposes." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). The Travel Ban Order cannot withstand such scrutiny.

◆

ARGUMENT

I. HISTORICAL PARALLELS BETWEEN EXECUTIVE ORDER NO. 9066 AND THE TRAVEL BAN ORDER SHOULD INFORM THE COURT'S ANALYSIS

It is often so that "a page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349

(1921) (Holmes, J.). In this spirit, JACL respectfully urges that this Court's analysis should be informed by the striking parallels between the arguments and circumstances involved in this matter and those at issue in the Japanese Wartime Cases.

A. Then, as now, the Government pursued a mass exclusionary measure of sweeping and senseless scope.

Executive Order No. 9066, signed ten weeks after the attack on Pearl Harbor, empowered the Secretary of War and his military commanders to exclude from designated areas "any and all persons" if "necessary or desirable." The Order itself contained no direct reference to race, ethnicity, or nationality, but military authorities soon ordered the "evacuation" of nearly 120,000 persons of Japanese descent from the Pacific Coast. CWRIC Report, at 157. These men, women, and children – mostly American citizens – were torn from their homes, farms, businesses, and schools and sent to far-flung facilities, "to be held in camps behind barbed wire and released only with government approval." *Id.* at 10.

The scope of the effort was unprecedented and cruel. Those incarcerated included thousands of members of the JACL, who had signed special oaths of allegiance to the United States; Japanese Americans who served the United States with distinction in World War I; and thousands more who would later fight for the

United States in the Pacific Theater. *See* JACL *Hirabayashi* Br. 1, 91-92; CWRIC Report, at 253-60. It included persons "with as little as one-sixteenth Japanese blood [and] others who, prior to evacuation, were unaware of their Japanese ancestry." Lt. Gen. J. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942 ("DeWitt Report"), at 145 (1943). Over one hundred Japanese American children were plucked from orphanages and incarcerated at the Manzanar War Relocation Center. Robert L. Brown and Ralph P. Merritt, Final Report, Manzanar Relocation Center (1946); *see also* Renee Tawa, *Childhood Lost: the Orphans of Manzanar*, L.A. Times, March 11, 1999. Foster children in the custody of Caucasian foster parents were removed and incarcerated. Paul R. Spickard, *Injustice Compounded: Amerasians and Non-Japanese Americans in World War II Concentration Camps*, 5 J. of Am. Ethnic History 5, 12-14 (1986). The camps also held over 2,000 Latin Americans of Japanese descent, many of whom were not Japanese citizens and had never stepped foot in Japan. CWRIC Report, at 303-14; Edward N. Barnhart, *Japanese Internees from Peru*, 31 Pac. Historical Rev. 169 (1962).

Government lawyers defending the program repeatedly told the Court that it was simply impossible to distinguish loyal Japanese Americans – concededly the vast majority of those evacuated and incarcerated – from those who might commit terrorist acts. An individualized approach to "prevent[ing] acts of espionage" was "fraught with extreme difficulty, if not wholly impossible," and only a blanket exclusion could "remove the danger [of a possible terrorist attack] during all hours." Brief for the United States, *Korematsu* ("Gov't Br. in *Korematsu*") 22-23. Reliable information was difficult to ascertain because the Japanese constituted an "unassimilated, tightly knit racial group." DeWitt Report, at vii. Even with extreme vetting, it would be difficult for government officials "to look deep into the mind of a particular Japanese and determine whether his allegiance to the United States was so dominant within him as to overcome the ties of kinship or other intangible forces which might bind him to the members of an invading Japanese army." Gov't Br. in *Korematsu* 62-63. This Court accepted these arguments, credulously reasoning that "[a]t a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern . . . [w]hatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry [as a whole]." *Korematsu*, 320 U.S. at 96, 99.

The Travel Ban Order – which excludes 180 million men, women, and children from the United States from six countries, and all refugees – is likewise striking in its breadth and cruelty. Because the Order excludes on the basis of nationality, it targets many with only tenuous, if any, connection to the Designated Countries. The policy bars those who have not visited their birth-country in decades, and even those – like the *Nisei* (second generation) and *Sansei* (third generation) Japanese Americans incarcerated during World War II – who have never stepped foot in their "home" countries. Thousands of European-born children (*e.g.*, a toddler born in Sweden to Iranian parents or an infant born in Spain to Libyan parents) are subject to the ban,[2] but a British citizen who makes repeated trips to conflict areas in Syria or a Belgian citizen who becomes a terrorist in Yemen remain eligible for entry.

Just as Executive Order No. 9066's blanket approach led to the incarceration of many of the Japanese Empire's most zealous opponents,[3] the Travel Ban Order's abandonment of individualized assessments results in the exclusion of even the avowed and proven opponents of the terrorist groups against which the action purportedly shields. Yet because the President states he has studied the situation and "determined that the Refugee Program is a means of entry would-be terrorists *may* seek to exploit," Gov't Br. 26 (emphasis added), those who are most vulnerable to such violence must suffer.

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[2] *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws* 17-35 in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES (2001) (discussing citizenship laws of European nations); Brownwen Manby, *Citizenship Law in Africa: A Comparative Study* (3d ed. 2016) (discussing citizenship laws of African nations) 55; Civil Code of Iran, art. 976(2) (providing automatic Iranian citizenship at birth to those born to Iranian fathers).

[3] Indeed, JACL leadership faced criticism from some within the community for the zeal with which the organization collaborated with American law enforcement and intelligence officials during World War II. *See* Cherstin M. Lyon, *Prisons and Patriots: Japanese American Wartime Citizenship, Civil Disobedience, and Historical Memory* (2011).

The predictable result of this dragnet approach, as in World War II, is a propaganda coup for America's enemies. *Compare Saboteur Ruling Assailed by Rome*, N.Y. Times, Aug. 4, 1942, at 8 (noting Axis propaganda exploiting incarceration of 100,000 Japanese Americans) *with* Amarnath Amarasingam, *What ISIS Fighters Think of Trump*, POLITICO.com, Mar. 1, 2017, goo.gl/bSsBZH (last visited Sept. 13, 2017) (noting "[t]he President has given terrorist groups a propaganda victory beyond their wildest dreams").

B. Then, as now, the exclusion's underinclusivity casts additional doubts on the proffered justification.

The Government defended Executive Order No. 9066 on the ground that it was necessary to guard against "fifth column" activity by Axis Powers, yet comparable mass exclusion and incarceration efforts were never undertaken against German Americans and Italian Americans. As Justice Jackson pointed out, "[h]ad [Fred] Korematsu been one of four – the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole – only Korematsu's presence [in California] would have violated the order." 323 U.S. at 243 (Jackson, J., dissenting). The Government dismissed these concerns as "without substance," urging the Court not to second-guess military determinations that the Pacific Coast presence of the Japanese was "[t]he principal danger to be apprehended." Brief for the United States, *Hirabayashi* ("Gov't Br. in *Hirabayashi*") 65; *but see* CWRIC Report, at 283-93 (identifying a host of ulterior reasons for lack of similar action against German Americans).

The underinclusivity of the Travel Ban Order, in light of its stated rationale, raises similar concerns. According to a thorough study published in 2016, out of 154 foreign-born terrorists who committed or were convicted of attempting to commit a terrorist attack in the United States between 1975-2016, only 15 were from the six countries named in the Travel Ban Order; by comparison, 64 were from the five leading countries (Saudi Arabia (19), Pakistan (14), Egypt (11), Cuba (11), Croatia (11)), none of which are subject to the Travel Ban Order. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO AT LIBERTY, Jan. 26, 2017, goo.gl/rQ916v (last visited Sept. 13, 2017). Attacks attributable to foreign-born terrorists resulted in some 3,024 deaths, but none of these attackers (who were born in 13 different countries) were from the six countries listed in the Travel Ban Order. *Id.* Even assuming that nationals of the six Designated Countries did pose a heightened danger, the Travel Ban Order has no effect on many nationals of those countries, "when the individual is traveling on a passport by a non-designated country." Travel Ban Order, Sec. 3(b)(4).

Echoing its position during World War II, the Government here dispenses with these concerns in a footnote. *See* Gov't Br. 49 n.16. But the point is not that this underinclusivity itself renders the Order unlawful. Rather, the gross mismatch between the Order's scope and its stated rationale counsels care in examining the Order's purported purpose, rationality, and justification.

C. Then, as now, the Government invoked the specter of an ill-defined threat to national security to justify the exclusion.

Executive Order No. 9066 invoked the necessity of "protection against espionage and against sabotage [for] national-defense" as its purpose and justification. In the wake of the attack on Pearl Harbor – which "crippled a major portion of the Pacific Fleet and exposed the West Coast to an attack which could not have been defensively impeded" – extraordinary precautions were required, according to the Government. DeWitt Report, at vii. As argued in the authoritative military account of the project, Lt. Gen. John L. DeWitt's "Final Report: Japanese Evacuation from the West Coast, 1942," the mass race-based incarceration "was impelled by military necessity." *Id.*

Government lawyers hammered this point in *Hirabayashi* and *Korematsu*. "[T]he military situation was so grave, the danger of an enemy attack was so far within the realm of probability, and the peril to be apprehended from treacherous assistance to the enemy . . . was so substantial," the Solicitor General urged, that "it was a matter of high military necessity to take prompt and adequate precautionary steps." Gov't Br. in *Hirabayashi* 60-61. The Court's interference with such measures "might spell the difference between the success or failure of any attempted invasion." *Id.* at 61.

Despite the absence of a comparable existential danger to the United States today, the Government again invokes the specter of an ill-defined threat to national security to justify the President's Travel Ban Order. The chance of erroneously admitting "terrorist operatives or sympathizers" of Iranian, Libyan, Somali, Sudanese, Syrian, and Yemeni extraction, the Order asserts, is now "unacceptably high." Travel Ban Order, Sec. 1(f). Echoing the Government's justifications from 1943 and 1944, the Government again points to a (possible) dearth of reliable information about the broad class of individuals the Government excludes: Because there are "serious concerns" that these countries "*may* be unable or unwilling to provide needed information," the blanket exclusionary policy is warranted. Gov't Br. 45 (emphasis added).

D. Then, as now, the purported threat to national security was illusory.

In 1980, in response to a growing redress movement, Congress established the Commission on Wartime Relocation and Internment of Civilians. Peter Irons, *Justice at War: The Story of the Japanese Internment Cases* 348 (1993). Tasked with "review[ing] the facts and circumstances surrounding Executive Order

[No.] 9066," the Commission carefully studied government records and received testimony from more than 750 evacuees, former government officials, public figures, and historians. CWRIC Report, at 1. When completed in December 1982, the Commission's unanimous 467-page Final Report concluded: "Executive Order 9066 was not justified by military necessity, and the decisions which followed from it – detention, ending detention and ending exclusion – were not driven by analysis of military conditions." *Id.* at 18. While military commanders bore much of the responsibility, the Commission also faulted President Roosevelt, who signed the Order "without raising the question to the level of Cabinet discussion or requiring any careful thorough review of the situation." *Id.* at 9. Congress largely adopted these findings when it passed the Civil Liberties Act of 1988, Pub. L. No. 100-383, acknowledging that the "internment of civilians [was] carried out without adequate security reasons . . . and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 U.S.C. § 4202.

This conclusion vindicated the position JACL had urged this Court to adopt in 1943 and 1944. The Court did not "need to speculate concerning the nature of the alleged 'military necessity,'" JACL wrote, because documents that were already publicly available (including military memoranda and official reports) belied the Government's claims. JACL *Hirabayashi* Br. 40. At length, JACL demonstrated how each of the government's "considerations" were "[if] not preposterous and false . . . at the very least exaggerated and distorted." JACL *Korematsu* Br. 14-15. JACL beseeched the Court to take a hard (or even cursory) look at military officials' logic, such as the paradoxical claim: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that action will be taken." *Id.* at 12. Presciently, JACL warned that the Government's misleading arguments "in creating an impression of 'military necessity' are particularly reprehensible and dangerous, for, if they are allowed to go unchallenged they may become the means by which any group can be similarly victimized." *Id.* at 22.

The Government offers up a similarly puzzling justification for the Travel Ban Order here. Mirroring the logic of military officials in 1942, the Travel Ban Order rests on the conclusion that the "*unrestricted* entry" of nationals of the six Designated Countries poses a significant danger, Travel Ban Order, Sec. 2(c) (emphasis added); of course, there is nothing "unrestricted" about the current visa issuance process, because Congress and the prior Administration already withdrew the participation of these countries in the Visa Waiver Program in favor of restricted entry through individual vetting. The Order implies that terrorists may seek to "infiltrate" the United States as refugees, *id.*, Sec. 1(b)(iii), but given the arduous and multiple vettings that refugees receive, the inevitable delays in entry, and the fact that UNHCR-approved refugees cannot pick their destination country, this suggestion strains credulity.[4] And, as noted previously, not a single person has been killed in a terrorist attack on U.S. soil by a national from any of the six Designated Countries since 1975. Nowrasteh, *Guide to Trump's Executive Order*.

This data is, once again, evocative of the objective information the Court confronted in 1942. There, as Justice Murphy noted in dissent in *Korematsu*, there was no dispute that, despite lengthy Government recitations of the danger posed by Japanese Americans, "not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils." *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting). As in the 1940s, JACL urges the Court to carefully weigh the Government's "solemn recitation of facts and figures about one group" that misleadingly imply the dangerousness of such persons, and respectfully urges that "[i]f there is any doubt of the artificiality of the [sabotage/terrorism] argument, [the Government's] attempt to inflate the seriousness of the [danger posed by immigrants from the Designated Countries and refugees] should remove it." JACL *Korematsu* Br. 57.

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[4] Indeed, based on historical data the likelihood that terrorist attacks will be committed by admitted refugees is absolutely infinitesimal. From 1975 to the end of 2015, approximately 3.3 million refugees have been admitted to the United States. Alex Nowrasteh, Terrorism and Immigration: A Risk Analysis, 798 CATO INSTITUTE POLICY ANALYSIS 1, 23 (Sept. 13, 2016), goo.gl/p6ERih (last visited Sept. 13, 2017). During this period, only three have killed people in terrorist attacks on U.S. soil by refugees, all by Cuban nationals in the 1970s (before Cuba was designated a State Sponsor of Terrorism). *Id.* Thus, "[t]he chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 *billion* per year[.]" *Id.* at 1 (emphasis in original).

E. Then, as now, the Government was unwilling to reveal its own intelligence agencies' views of the purported threat.

Since 1943-44, additional evidence has come to light – concealed by the Solicitor General over the written objection of Department of Justice lawyers – that would have further undercut the United States' claim of "military necessity." As the Acting Solicitor General formally acknowledged in a "Confession of Error" in 2011:

> By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle Report, from the Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court "might approximate the suppression of

> evidence." Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC.

Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), goo.gl/YJKarv (last visited Sept. 13, 2017); *see also* CWRIC Report, at 51 (noting FBI and Naval Intelligence "saw only a very limited security risk from the ethnic Japanese; none recommended a mass exclusion or detention of all people of Japanese ancestry"); Peter Irons, *Justice at War* (1983) (identifying additional concealment and misrepresentations by Government officials). This lack of candor served as the basis for successful *coram nobis* petitions brought by Korematsu and Hirabayashi nearly half a century after their wrongful convictions. *See Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *affirmed in part, reversed in part*, 828 F.2d 591 (9th Cir. 1987).

Troubling echoes of this deception have already surfaced in relation to the Travel Ban Order. For example, in February 2017, newspapers reported the existence of a leaked Department of Homeland Security assessment that concluded citizenship is an "unreliable" threat indicator and that "citizens of countries affected by [an earlier iteration of the Travel Ban Order are] rarely implicated in US-Based Terrorism." *See* Ron Nixon, *Homeland Security Report Undercuts Travel-Ban Logic*, N.Y. Times, Feb. 26, 2017, at A20. Before this Court, the Solicitor General now refers to the study as a "*purported* leaked 'draft DHS report,'" Gov't Br. 48 (emphasis added), apparently seeking to cast doubt on its authenticity. Such obfuscation is worrisome given that the White House and the Department of Homeland Security have publicly confirmed the report's authenticity. *See* Nixon, *Homeland Security Report*.

F. Then, as now, the vast weight of evidence strongly suggests that intolerance and bigotry, not a genuine concern for national security, animated the sweeping exclusion.

Rather than "military necessity," the Congressional Commission concluded in 1982, "race prejudice, war hysteria and a failure of political leadership" produced "a policy conceived in haste and executed in an atmosphere of fear and anger." CWRIC Report, at 18; *accord* 50 U.S.C. § 4202.

This, too, was plain at the time the Court heard the Japanese Wartime Cases. In a critical February 14, 1942 memorandum recommending evacuation, for example, Gen. DeWitt explained, "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many [are second- and third-generation U.S.-born citizens] the racial strains are undiluted." JACL *Korematsu* Br. 11 (quoting DeWitt Report, at 34). A year later, Gen. DeWitt testified before Congress: "The danger of the Japanese was . . . espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese." Testimony before House Naval Affairs Subcommittee, Apr. 13, 1943 (quoted in CWRIC Report, at 66). He repeated the remarks to journalists, in more concise form, the following day: "[A] Jap is a Jap." CWRIC Report, at 66; JACL *Korematsu* Br. 154 ("We know [Gen. DeWitt's] opinion of Americans of Japanese descent."). In upholding the evacuation and incarceration of Japanese Americans, the *Korematsu* majority assiduously avoided the broader context of anti-Japanese prejudice that helped produce Executive Order No. 9066. *See* 323 U.S. at 223 ("To cast this case into outlines of racial prejudice . . . merely confuses the issue."); *but see* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion . . . falls into the ugly abyss of racism.").

The toxic combination that allowed the mass incarceration of Japanese Americans during World War II – a collective mistrust among large segments of the general population, and individual animus on the part of officials – resurfaces with the promulgation of the Travel Ban Order. As with the abundant record of Lt. Gen. DeWitt's racist declarations, the record in this case contains unavoidable evidence of President

Trump's anti-Muslim prejudice and bigotry. As Judge Watson found below:

> The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." Govt. Opp'n at 40 (citing McCreary, 545 U.S. at 862, 125 S.Ct. 2722). The Government need not fear. The remarkable facts at issue here require no such impermissible inquiry. For instance, there is nothing "veiled" about this press release . . . Nor is there anything "secret" about the Executive's motive specific to the issuance of the Executive Order. . . .

Hawai'i v. Trump, No. 17-050, 2017 WL 1011673, at *13 (D. Haw., Mar. 15, 2017). After reciting several incendiary and bigoted statements, Judge Watson continued: "There are many more." *Id.*

G. Then, as now, the Government insisted that the Court abdicate its core responsibilities and do no more than accept at face value the Government's naked, pro forma invocation of national security.

The core of the Government's message some seventy years ago was straightforward: in times of great danger, the Court should not cripple the Executive Branch's "power to wage war successfully" by second-guessing the judgment of "those whose duty it was to protect the Pacific Coast against attack." Gov't Br. in *Hirabayashi* 47, 60. National security judgments often turn on "tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than . . . objectively ascertainable facts." Gov't Br. in *Korematsu* 57. Rather than wade into such fraught terrain, the Court should defer to the military commanders "defending our shores." *Id.*

Once again, the Government insists that the Court must afford the "utmost deference" to the President. Gov't Br. at 48. Repeatedly invoking the threat of terrorism, the Government cautions against any "interferences with the President's conduct of foreign affairs." *Id.* at 22. But "[n]ational security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under § 1182(f)." *Hawaii v. Trump*, 859 F.3d 741, 774 (9th Cir. 2017); *accord Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting) ("My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's . . . program was a reasonable military necessity. . . . But I do not think [the courts] may be asked to execute a military expedient that has no place in law under the Constitution.").

II. ESPECIALLY IN THIS HISTORICAL CONTEXT, ANY MEASURE OF MEANINGFUL SCRUTINY SHOULD LEAD THE COURT TO CONCLUDE THAT THE PRESIDENT FAILED TO FULFILL THE STATUTORY REQUIREMENT TO "FIND" THAT ADMISSION OF A CLASS OF ALIENS "WOULD BE DETRIMENTAL TO THE INTERESTS OF THE UNITED STATES."

A. Unlike with Executive Order No. 9066, the Court must meaningfully review whether the Travel Ban Order complies with statutory constraints on the President's authority.

One significant difference between the Travel Ban Order and Executive Order No. 9066 is the authority upon which they rest. Executive Order No. 9066 was an emergency wartime measure, promulgated soon after the attack on Pearl Harbor, and Congress expressly ratified President Roosevelt's action through legislation establishing criminal penalties for those who "remain[ed] in . . . [a] military zone prescribed, under the authority of an Executive order of the President[.]" *See* Act of Congress, Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173. These factors were critical to the Court's legal analysis, which emphasized that the Court was not addressing "whether the President, acting alone, could lawfully have made the curfew order in question," or whether he could have done so in times of peace. *Hirabayashi*, 320 U.S. at 92. Rather, the Court simply held that it was "unable to conclude that it was beyond the war power of Congress and the Executive [acting in concert] to exclude those of Japanese ancestry from the West Coast war area at the time they did." *Korematsu*, 323 U.S. at 218-19.

The Travel Ban Order is not an emergency wartime measure done in concert with or ratified by Congress. Instead, President Trump has acted under a delegation of Congress's authority over immigration. *See Arizona v. United States*, 567 U.S. 387, 409 (2012) (power to make immigration laws is "entrusted exclusively to Congress") (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization"); *see also INS v. Chadha*, 462 U.S. 919, 959 (1983) (noting that the Framers "consciously" chose to place immigration policy in the hands of a "deliberate and deliberative" body); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (noting "the particular classes of aliens that shall be denied entry altogether [and] the basis for determining such classification" are matters "solely for the responsibility of the Congress . . . to control").

Congress gives a broad but not unlimited authority to the President to suspend entry of a "class of aliens into the United States" only if the "President finds that the entry . . . would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Accordingly, the Court must determine whether the President has actually made such a finding that the entry "would be detrimental to the interests of the United States."

Compare 8 U.S.C. § 1182(f) *with* 8 U.S.C. § 1201(i) ("After the issuance of a visa . . . the Secretary of State may at any time, in his discretion, revoke such visa. . . . There shall be no means of judicial review . . . of a revocation under this section.").

Treating seriously this requirement is one of the best ways to guard against unlawfully discriminatory use of executive power without inquiring into personal motivations.

Although the JACL does not intend to repeat Respondents' arguments regarding the effect of Section 1182(f), the Court's inquiry must involve meaningful review of the President's actions. *See* Gov. Br. 43 (arguing that Section 1182(f) does not "subject the President's assessment . . . to judicial review"). Far from "turning the statute on its head," *id.* at 41, a meaningful review of whether there has been an actual finding that entry into the United States "would" – not "could," not "might" – harm legitimate governmental interests mitigates the risk of repeating the kind of abusive and shameful treatment of classes of people that is the legacy of Executive Order 9066.

The President's mere assertion of a finding cannot be "the end of the matter," Gov. Br. at 44, without disregarding the lessons learned from Executive Order 9066 or the wishes of Congress. Indeed, since the enactment of 1182(f) in 1952, Congress has enacted a number of provisions bearing directly on the use of sweeping class discriminations in evaluating visa applications. Most important, in 1965 Congress explicitly prohibited discrimination in the issuance of immigrant visas on the basis of "nationality, place of birth, or place of residence" as part of comprehensive reform of U.S. immigration law and policy. 8 U.S.C. § 1152(a)(1)(A). This provision was not an incidental feature of the reform measure, one of the important civil rights acts of the 1960s, but a core of Congress's decision to repudiate nearly a century of immigration policy based in significant part on bigotry and racial hostility. More recently Congress has debated and enacted provisions detailing statutory vetting criteria for individualized review of aliens who might pose a terrorism risk, *see* 8 U.S.C. § 1182(a)(3)(B), and has focused specifically on how to treat applicants who have recently visited countries with terrorist activity. *See* 8 U.S.C. § 1187.

Congress has thus clearly acted to put "guardrails" on the President's exercise of authority in this area. For example, Congress did not authorize the President to exclude a class of aliens upon a finding that their entry would be detrimental to the interests of his political party or reelection campaign, but not detrimental to the interests of the United States. This is hardly speculation or histrionics: It was just such capitulation to nativist fears and "failure of political leadership" (rather than a focus on what law enforcement and military intelligence deemed "detrimental to the interests of the United States") that gave rise to Executive Order No. 9066. *See* CWRIC Report, 36-46, 67-72 (discussing effect of growing "clamor for exclusion fired by race hatred and war hysteria" on government officials).

In sum, Congress intended to cabin and restrict the authority granted to the President in 1952, and has reinforced that intention since then. It required, prior to the President barring whole classes of aliens, a legitimate factual basis to support a finding that an actual (not speculative or improper) "national interest" harm would occur absent suspension. Meaningful review – scrutiny that is deferential, but not supine – is necessary to ensure that the Travel Ban Order is consistent with the authority the Congress has delegated.

B. Under any measure of meaningful scrutiny, the President has failed to comply with the law in enacting the Travel Ban Order and excluding whole classes of aliens.

No legitimate national security purpose is served by the Travel Ban Order's blanket bar on entry from any nationals of Syria, Sudan, Somalia, Libya, Iran and Yemen. Every available set of facts contradicts or undermines the purported rationale for the Order.

The parallels between the naked assertions of national security made by the Government in the Japanese incarceration cases and those advanced to justify the Travel Ban Order here are striking, as outlined in Part I, *supra*. The breathtaking scope of the exclusion, the vast overinclusivity and underinclusivity of the prohibition, the absence of meaningful connection between the purported danger and the operation of the exclusion, the illusory nature of the alleged threat, evidence that the Government's own specialists reject the value and efficacy of the measures, and the strong circumstantial evidence of ulterior (impermissible) purpose are all factors this Court has seen before. And here, as in World War II, they all point toward the unlawfulness of the Government's action, notwithstanding the Government's insistence that this Court again refrain from engaging in meaningful scrutiny of the President's Order.

◆

CONCLUSION

The President failed to make an adequate "finding" that entry of the men, women, and children targeted by the Travel Ban Order "would," in fact, be "detrimental to the interests of the United States." To so hold, this Court need not determine that President Trump acted with improper racial or religious animus (or ascribe any motivation in particular to his actions); nor is this a case where the Court is called upon to "override" the judgment of the Executive Branch. Rather – mindful of this country's tragic failure to vindicate the rights of Japanese Americans during World War II and the specific guardrails Congress established when conferring authority to the Executive Branch – this Court need only conduct a meaningful inquiry into the basis for the President's actions and their propriety under the plain language of the statute.

Justice Jackson compared the Court's opinion in *Korematsu* to "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). Engaging in a meaningful assessment of the basis for Executive action is the most effective way to place a trigger-lock on that gun. Rather than repeat the tragic errors of World War II, this Court should affirm the decisions of the Fourth and Ninth Circuits.

Dated: September 14, 2017

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et al., *Respondents*.

DONALD J. TRUMP, *et al.*, *Petitioners*,
v.
HAWAII, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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INTEREST OF AMICUS CURIAE

KARAMAH is a non-profit organization that derives its name from the Arabic term for "dignity." Through education, legal outreach, and advocacy, KARAMAH promotes human rights worldwide, particularly the rights of Muslim women and girls in Islamic and civil law. KARAMAH aims to create a global network of advocates for the rights of Muslim women, educate the public with respect to the gender-equitable principles of Islam, and advance the cause of Muslim women's rights in legal and social environments.

KARAMAH submits this brief to assist the Court in understanding the severe and detrimental impact of Executive Order 13,780 on women and children, who make up the majority of affected immigrants and refugees seeking to enter the United States.[1]

As an organization advocating for the rights of Muslim women and children for nearly twenty-five years, including immigrants and refugees from the countries singled out by the Executive Order, KARAMAH has a direct and substantial interest in the outcome of this case. KARAMAH is therefore qualified to inform the Court of the devastating impact on Muslim women and children if the Court were to uphold Executive Order 13,780.

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[1] No person other than KARAMAH and its counsel authored any part of this brief or made a financial contribution to the brief. Petitioners have filed a blanket letter of consent. Consent from Respondents has been provided to the Clerk's office.

SUMMARY OF ARGUMENT

The majority of immigrants and refugees affected by Executive Order 13,780 are women and children fleeing conflict, gender-based violence and terrorism. If implemented, it would mean turning our back to these most vulnerable populations. America's security is undisputedly vital, and governmental action to protect national security is often entitled to deference. But when such action is neither constitutional, rational, nor humane, that deference must be set aside in favor of judicial review. Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "Executive Order" or "Order") is exactly the kind of unsupported and unsupportable order for which this judicial power must be exercised.

Indeed, the Order, which suspends (i) the entry into the United States of all individuals from six Muslim-majority countries: Iran, Libya, Sudan, Somalia, Syria and Yemen (the "Designated Countries"), and (ii) the entire U.S. refugee program, most gravely harms women and children who are seeking safety from conflict, gender-based violence, and terrorism. The majority of refugees worldwide, including those fleeing the Designated Countries, are women and children. As such, implementation of the Order would result in our country's turning away the most vulnerable segments of society, who often are desperately seeking to escape some of the world's most dangerous conditions.

The impact of the Order on women and children demonstrates why the Order violates the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101 *et seq.* The Order exceeds the authority granted to the Executive in the INA because the President has not shown any, let alone sufficient, harm to the national interest in denying entry to the people most likely to need protection from the very dangers the Order seeks to address. Indeed, it makes no sense for the government to argue that the entry to the United States of women and children fleeing conflict, gender-based violence, and terrorism, would be detrimental to the national security interests of our country. Furthermore, because the Order has a disparate impact on women, it violates the INA's explicit gender protections.

Not only has the President failed to show how the entry of affected immigrants and refugees is detrimental to our country's interests, his Order fundamentally harms long-established U.S. national security and foreign policy interests. For decades, the empowerment and protection from gender-based violence and other human rights abuses of women and girls have been the subject of Executive Orders and programs by Executive agencies, which explicitly recognize the protection of women in danger as national security and foreign policy interests. By turning a blind eye to the vast numbers of persecuted women and children fleeing violence and abuse, the Order undermines these important policy objectives and, at the same time, permanently damages our country's long-standing commitment to aiding the most vulnerable.

RELEVANT FACTUAL BACKGROUND

A. The Majority of Migrants from the Designated Countries and Refugees Are Women and Children, Who Are Often Fleeing Distinctive Forms of Violence and Abuse.

It is well known that wars, warlike conditions, and weakened human rights protections, such as those that exist in the Designated Countries, give rise to horrific abuses of women and children in particular. Around the world, women and children are often victims of many forms of abuse and gender-based violence, including rape, beatings, forced marriage, and human trafficking. As a result of dangers in the Designated Countries (detailed below) and similar patterns elsewhere, tens of millions of women and children worldwide have fled their homes in search of refuge. In 2016, almost half of the refugees worldwide were women, and fifty-one percent were minors under eighteen.[2]

Iran. In Iran, a combination of economic stagnation and state and popular opposition to women's equal employment push disproportionate numbers of women into "informal" or "fragile" economies, where legal protections are minimal and labor conditions and compensation practices are often grossly exploitative.[3]

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[2] UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, at 2, 54–55 (2017), http://www.unhcr.org/5943e8a34.

[3] *See* HUMAN RIGHTS WATCH, IT'S A MEN'S CLUB: DISCRIMINATION AGAINST WOMEN IN IRAN'S JOB MARKET, at 20–22 (2017), https://www.hrw.org/sites/default/files/report_pdf/iran0517_web_1.pdf.

Libya. UNICEF reports that over three quarters of children fleeing through and from Libya as refugees have suffered violence, harassment, and aggression, and over half of fleeing women experienced sexual violence or abuse.[4] Because of the proximity of Libya to Italy, compared to other Mediterranean Sea crossings, women and children undertaking this journey and facing these distinct depredations include nationals not only of Libya itself (the site of a bitter, years-long internal armed conflict[5]) but also of Somalia and Sudan.[6] The treacherous migrations of these women and children are partly fueled by patterns of gender-based mistreatment and abuse, which are exacerbated by deep and lasting material deprivations in those Designated Countries.

Somalia. Somali children face severe malnutrition from intense drought and famine, leaving internally displaced children especially vulnerable to deadly diseases that thrive in the close quarters of emergency settlements.[7] Of the hundreds of thousands of people who died under famine conditions in Somalia, half were under five years old.[8]

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[4] UNICEF, A DEADLY JOURNEY FOR CHILDREN: THE CENTRAL MEDITERRANEAN MIGRATION ROUTE, at 4 (2017), https://www.unicef.org/publications/files/EN_UNICEF_Central_Mediterranean_Migration.pdf

[5] Chris Stephen, *Five years after Gaddafi, Libya torn by civil war and battles with Isis*, THE GUARDIAN (Feb. 16, 2016, 1:43 PM), https://www.theguardian.com/world/2016/feb/16/libya-gaddafi-arab-spring-civil-war-islamic-state.

[6] *See* UNICEF, A DEADLY JOURNEY FOR CHILDREN: THE CENTRAL MEDITERRANEAN MIGRATION ROUTE, at 2 (highlighting Somalia and Sudan as two of the "[m]ain countries of origin" of refugees traveling the Central Mediterranean migration routes).

[7] Stephanie Nebehay, *Acute malnutrition surges in Somali children: UNICEF*, REUTERS (May 2, 2017), https://www.reuters.com/article/us-malnutrition-somalia/acute-

Syria. As of August 2017, over 5 million Syrian nationals had registered as refugees living outside Syria—over forty-seven percent of whom were under eighteen years old.[9] An additional 2.8 million children are estimated to have been displaced from their homes but remained in Syria.[10] According to the U.S. Department of State, forced recruitment of children into combat roles was already "commonplace" among many factions in the Syrian conflicts as of 2015, and has only increased, affecting children as young as six.[11] Violence against Syrian women refugees living in makeshift camps outside their home country, including in Lebanon, has also increased.[12]

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malnutrition-surges-in-somali-children-unicef-idUSKBN17Y0WH.

[8] UNICEF, *The Situation of Women and Children in Somalia* (last visited Sept.7, 2017), https://www.unicef.org/somalia/children.html.

[9] *See* UNHCR, OPERATIONS PORTAL REFUGEE SITUATIONS, http://data.unhcr.org/syrianrefugees/regional.php (click "Syria Regional Refugee Response") (last updated Jul. 27, 2017).

[10] Dan Nolan, *Children of Syria by the Numbers*, FRONTLINE (Apr. 19 2016), http://www.pbs.org/wgbh/frontline/article/children-of-syria-by-the-numbers/.

[11] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, at 381 (June 2017), https://www.state.gov/documents/organization/271339.pdf.

[12] Global Fund for Women, *Women and the Refugee Crisis: A News Update from Lebanon*, https://www.globalfundforwomen.org/news-update-refugee-crisis/#.Wa3YvHaGOUk (last visited Sept. 7, 2017).

Sudan. Sudanese women, especially politically active women, face documented patterns of sexual violence, disparate enforcement of morality laws, and social and reputational attack campaigns.[13] These domestic harms are in addition to massive displacement of refugees from neighboring South Sudan, where a long-running famine has had drastic negative health effects on children in particular.[14]

Yemen. Years of war and famine in Yemen have worsened already high rates of abuse targeting women and girls, and have led to widespread malnutrition and a breakdown in access to medical care that particularly imperils women in childbirth and children in development.[15] The United Nations Population Fund reports that increasing numbers of desperate Yemeni families are also resorting to arranged marriages for their very young daughters, perhaps hoping to place them in protective environments or increase their own slim chances of security, but tragically resulting in the girls' extreme vulnerability to abuse.[16]

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[13] *See generally* HUMAN RIGHTS WATCH, GOOD GIRLS DON'T PROTEST: REPRESSION AND ABUSE OF WOMEN HUMAN RIGHTS DEFENDERS, ACTIVISTS, AND PROTESTERS IN SUDAN (2016), https://www.hrw.org/sites/default/files/report_pdf/sudan0316web.pdf.

[14] *See* UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, SUDAN HUMANITARIAN REPORT (June 12, 2016), http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_Sudan_Weekly_Humanitarian_Bulletin_Issue_24_%286_-_12_June_2016%29.pdf.

[15] *See* UNITED NATIONS POPULATION FUND, *At two-year mark, Yemen's conflict takes heavy toll on women and girls* (Mar. 23, 2017), http://www.unfpa.org/news/two-year-mark-yemens-conflict-takes-heavy-toll-women-and-girls ("Yemen already has one of the highest maternal death rates in the Arab region. But food scarcity is putting the lives of 352,000 pregnant women at risk, and it could harm the health of 2.2 million women of childbearing age.").

The Executive Order keeps these women and children in peril. In 2015, over 33,000 women and girls entered the United States as refugees, comprising nearly forty-eight percent of all new U.S. refugees.[17] In 2016, 15,507 women and girls entered the United States as refugees *from the Designated Countries alone.*[18] The Executive Order would block these women and girls who, in significant part because of their gender and/or age, desperately require refuge.

B. Women Bear the Added Burden of Being the Primary Guardians for Migrating Children.

Because women disproportionately bear responsibility for the many children who are victims of violence, abuse, and conflict in the Designated Countries, they are often twice victimized: once by the gendered forms of direct violence and oppression detailed herein, and again by various heightened harms to and needs of children in their care. The fate of many women is inextricably bound to the fate of their children.

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[16] UNITED NATIONS POPULATION FUND, *Families increasingly resort to child marriage as Yemen's conflict grinds on* (Nov. 16, 2016), http://www.unfpa.org/news/families-increasingly-resort-child-marriage-yemen%E2%80%99s-conflict-grinds (noting that nearly one third of young women are married before age 18).

[17] U.S. DEP'TS OF STATE, HOMELAND SECURITY, AND HEALTH AND HUMAN SERVICES, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2017, at 65 (2016), https://www.state.gov/documents/organization/262168.pdf.

[18] *See Interactive Reporting*, REFUGEE PROCESSING CTR., http://ireports.wrapsnet.org/ (click "MX - Arrivals for a Demographic Profile"; then select Year Type "Calendar Year" and enter date range 1/1/2016 – 12/31/2016; then select each Designated Nation and click "View Report").

The conflict in Syria has pushed many women into serving as sole heads of their households for the first time. In 2014, the U.N. High Commissioner for Human Rights (UNHCR) reported that over a quarter of Syrian refugee households are headed by women.[19] This phenomenon has only intensified. CARE found last year, based on self-reports from mostly Syrian refugees traveling through Greece, that roughly *half* of the households surveyed were headed by women.[20]

Women single-handedly caring for large numbers of children (both their own and those of relatives) have also been observed to account for "most" of the Somali refugee households sheltering in parts of Ethiopia.[21] And UNHCR has found that internally displaced Yemeni "women are subject to particular protection problems, especially given the large number of single-female-headed households."[22]

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[19] UNHCR, WOMAN ALONE: THE FIGHT FOR SURVIVAL BY SYRIA'S REFUGEE WOMEN, at 8 (2014), https://s3.amazonaws.com/unhcrsharedmedia/2014-syria-woman-alone report/Woman_Alone_ENG_2_July_2014.pdf.

[20] *On Her Own: How women forced to flee from Syria are shouldering increased responsibility as they struggle to survive*, CARE (Sept. 2016), http://www.care.org/sites/default/files/documents/care_on-her-own_refugee-media-report_sept-2016.pdf; *see also* Melody Rowell, *Inside the Harrowing Journeys of Refugee Mothers*, NAT'L GEOGRAPHIC (Jan. 10, 2017), http://www.nationalgeographic.com/photography/proof/2017/01/syria-greece-refugees-mothers-pregnancy/ ("As [photojournalist Myrto Papadopoulos] spent time in refugee camps in Greece, she noticed that women would often be left behind with the children while their husbands forged ahead to find new lives for them in Europe.").

The consequences of growing up as a refugee are profound and permanent. In addition to the many health and welfare issues affecting refugee children described above, the psychological effects on children raised in the midst of bitter conflict are likely to be devastating.[23] As a result of their roles as the lone heads of displaced households, many women must find ways to grapple not only with their own traumas, but with these brutal effects on children under their care.

In short, Muslim women and children from the Designated Countries are the most likely to seek, and be entitled to, safety and security in the United States because they are often fleeing conflict, gender-based violence, and terrorism. Nonetheless, the Order seeks to bar them from seeking the safety of the United

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[21] UNHCR, *Children Bear Brunt of Somali Refugee Crisis* (Sept. 6, 2011), http://www.unhcr.org/en-us/news/briefing/2011/9/4e65edec9/children-bear-brunt-somali-refugee-crisis.html.

[22] *See* UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, at 31 (2016), http://www.unhcr.org/en-us/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

[23] *See, e.g.*, Somini Sengupta and Hwaida Saad, *New Dangers Stalk Syrian Children Still Haunted by Horrors Under ISIS*, N.Y. TIMES (July 31, 2017), https://www.nytimes.com/2017/07/31/world/middleeast/syria-raqqa-children-islamic-state-isis.html ("Save the Children found that nearly half the adult respondents said they had seen children who had lost the ability to speak or had developed speech impediments since the start of the war.").

States, citing the very conditions from which they are often fleeing.

ARGUMENT

I. THE EXECUTIVE ORDER VIOLATES THE INA.

The Order violates the INA for two reasons. First, the INA specifically requires the President to make a finding that the entry of certain aliens would be "detrimental" to our Nation's interests—which he has not. Second, the Order disparately impacts women, in violation of the sex discrimination provisions of the INA.

A. The President Cannot Demonstrate How the Entry of Women and Children Is Detrimental to Our Nation's Interests.

In the Order, the President relied on 8 U.S.C. § 1182(f) to restrict entry of individuals from the Designated Countries. *See* 82 Fed. Reg. 13,213. Section 1182(f) states: "Whenever the President *finds* that the entry of any aliens or of any class of aliens into the United States *would be detrimental* to the interests of the United States, he may . . . suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." (emphasis added). Though Section 1182(f) affords the President broad discretion to suspend the entry of aliens, that discretion is not unlimited.[24] Rather,

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[24] Ironically, while the government argues the President is entitled to "expansive discretion" to suspend entry of aliens abroad, *see, e.g.*, Brief for the Pet'rs at 41 (Aug. 10, 2017), the President has meanwhile ordered an end to the Deferred Action for Childhood Arrivals program, stating it was "an unconstitutional exercise of discretion by the executive branch,"

Section 1182(f) requires the President to make a finding of detriment. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 451 (2002) (stating that a court must first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case").

The Order, however, fails to make any finding that entry of citizens of the Designated Countries—let alone the women and children—would be detrimental to our nation's interests. Rather, the Order recites only that the governments of the Designated Countries either are unstable, are state sponsors of terrorism, or maintain insecure borders which enable terrorists to freely operate. *See* 82 Fed. Reg. at 13,210–11. The Order states no more than that these country conditions "demonstrate why their nationals continue to present heightened risks." *Id.* at 13,210.

Press Release, The White House, Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law.

In other words, the government is effectively saying federal immigration law entitles the President to maximum discretion to restrict entry of individuals (including women and children), but at the same time constrains his prosecutorial discretion on whether to deport individuals. The government's test for the legitimacy of executive action is nothing more than what is politically expedient. Where the President favors executive action, the government argues his discretion is unfettered. But where the President disfavors an executive action, the government simply labels it unconstitutional. Surely, there must be some more principled criteria for the lawfulness of executive action than Presidential whim.

Critically, however, the Order undeniably makes no finding that the entry of individuals or a class of individuals from the Designated Countries would be detrimental to the United States, nor could it. Most of those individuals are likely to be vulnerable women and children who are themselves fleeing persecution, and already undergoing thorough vetting if they seek admission into the United States. Indeed, refugees are one of the most heavily scrutinized demographics of immigrants to the United States.[25] Refugees must endure an exhaustive two-year-long process spanning twenty steps of checks and balances before arriving in the United States. But the Order demonizes refugees, including innocent children and women, for the acts of the very extremists they are trying to escape.[26] Further, no fatal attack has ever been executed on U.S. soil by a refugee.[27] This inconsistency illustrates the vivid contrast between what the Order claims to do—namely, protect Americans from potential terrorists—and the reality that the Order disproportionately targets and harms women and children. *Cf. Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (discussing the "humane purpose" of the INA); H.R. Rep. No. 85-1199, pt. 2 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 2016, 2012 (observing that the "legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children").

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[25] Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Already Face a Rigorous Vetting Process*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/us/refugee-vetting-process.html.

[26] Peter Kessler, ed. Fernando del Mundo, *Replace vilification with refugee protection, says Lubbers*, UNHCR (Oct. 3, 2003), http://www.unhcr.org/cgibin/texis/vtx/search?page=search&skip=594&docid=3f7d9ac57&query=persecution.

[27] Eric Levenson, *How many fatal terror attacks have refugees carried out in the US? None*, CNN (Jan. 29, 2017), http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/.

And as was the case with the original Executive Order listing seven Muslim-majority nations, none of the now six Designated Countries[28] in the Order has ever produced an individual who committed an act of terrorism resulting in any fatality in the United States. The Order attempts to refute this fact by citing an example of two Iraqi refugees convicted of terrorism. But, in this revised Order, Iraq is no longer on the list. That the only two examples offered in support of the Order come from a country that is not on the list underscores the absence of any finding to support the current version of the Order, and this additional paradox is yet another example that shows the Order is, in fact, disingenuous.

While the President baldly concludes that the "unrestricted entry . . . of nationals" from the Designated Countries "would be detrimental to the interests of the United States," that is not how Section 1182(f), by its plain language, operates. Rather a "finding" is required. The data, however, simply does not support a conclusion that allowing mostly women and children from the Designated Countries entry into the United States would be detrimental to the interests of our nation. The failure to demonstrate otherwise means the President has exceeded his authority under the INA.

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[28] The Order excluded Iraq for national security considerations relating to the presence of American forces in that country. *See* 82 Fed. Reg. at 13,211–12.

B. The Order Discriminates Against Women, in Violation of the INA.

Because of the predictably disparate impact of the Order on women, the Order discriminates against women in violation of the INA.[29] Section 1152(a)(1)(A) of the INA requires that, except as provided in other provisions of the Act, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, *sex*, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A) (emphasis added). Here, the Order violates Section 1152(a)(1)(A)'s sex discrimination provision because it imposes a disparate impact on women.

The government has previously granted roughly as many immigrant visas to women and girls as to men and boys from each of the Designated Countries.[30] As detailed above, however, women and children attempting to flee from a Designated Country to the United States are more likely to encounter devastating violence, oppression, and/or material deprivation than similarly-situated adult men. Moreover, two other circumstances make clear that women in particular will unequally bear the burden of a blanket refusal to issue visas to people from the

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[29] We agree with Respondents that the Order explicitly discriminates on the basis of nationality and religion in violation of the INA. We add for the Court's consideration that the Order also discriminates on the basis of sex in violation of the INA.

[30] *See Interactive Reporting*, REFUGEE PROCESSING CTR.

Designated Countries: children are over-represented in the refugee population, and women shoulder most of the burden for their care.

The Order imposes burdens on women *as women* in entirely predictable and unlawful ways. As a result, the Order's disparate impact on women constitutes a discriminatory practice in violation of Section 1152(a)(1)(A). *Cf., e.g., Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507, 2518–19 (2015) (holding discriminatory intent is not required to be pled in cases alleging disparate-impact under the Fair Housing Act). By either refusing or simply neglecting to grapple with these significant, predictable gendered effects of the Order, the President has further violated Section 1152(a)(1)(A) of the INA.

II. THE ORDER HARMS OUR NATIONAL SECURITY INTERESTS AND FOREIGN POLICY PRIORITIES OF PROMOTING HUMAN RIGHTS, GENDER EQUALITY, AND PROTECTION OF AT-RISK CHILDREN.

Not only has the President failed to show how the entry of mostly women and children from the Designated Countries and refugee population will detrimentally harm our nation, his Order affirmatively harms our nation's interests. As explained above, Executive Order 13,780 would severely impact women and children fleeing some of the world's most repressive and dangerous areas. In each of the six Muslim-majority countries named in the Order, women and children consistently face actual or threatened displacement and gender-based violence, including early and forced marriage, sexual abuse, kidnapping, human-trafficking, and other human rights violations.[31] As is true globally, one in three women in the Designated Countries experiences gender-based violence in her lifetime. Yet the Order would effectively shut the door on these women and children. This result is at odds with the Order's purported national security rationale.[32] Instead, the Order contravenes and severely damages this country's long-term national security and foreign policy interests.[33]

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[31] HUMAN RIGHTS WATCH, WORLD REPORT, at 338 (discussing Iran), 407–09 (discussing Libya), 537–39 (discussing Somalia), 561-66 (discussing Sudan), 572–77 (discussing Syria), 678–80 (discussing Yemen) (2017), https://www.hrw.org/sites/default /files/world_report_download/wr2017-web.pdf.

[32] The rationale behind the Order is further belied by the President's subsequent statements on national security. For example, in a primetime speech to the country, the President said that "20 U.S.-designated foreign terrorist organizations are active in Afghanistan and Pakistan — the highest concentration in any region anywhere in the world" and that "Pakistan often gives safe haven to agents of chaos, violence, and terror." Remarks by President Trump on the Strategy in Afghanistan and South Asia, The White House, Office of the Press Secretary, (Aug. 21, 2017, 9:02 PM), https://www.whitehouse.gov/the-press-office/2017/08/21/remarks-president-trump-strategy-afghanistan-and-south-asia.

Tellingly, neither Afghanistan nor Pakistan is included as a Designated Country by the Order.

[33] Although the judiciary is "reluctant" to intrude upon the authority of the executive branch on national security affairs, *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)), the Executive may only exercise that authority within the confines of the law, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645–46, 654–55 (1952) (Jackson, J., concurring).

A. The Order's Impact on Women and Children Harms Our National Security Interests.

The White House and several Executive agencies have "long recognized" and sought to stem an "increased prevalence and risk of gender-based violence, particularly targeted at women and girls."[34] Indeed, the latest Presidential National Security Strategy report, which is intended to be a "comprehensive description" of the foreign policy and "worldwide interests, goals, and objectives of the United States that are vital to the national security of the United States,"[35] identifies ensuring that women are "protected from gender-based violence" as a "national security interest."[36] *See also* U.S. Dep't of State, Bur. Population, Refugees, and Migration, *Addressing Gender-Based Violence in Emergencies* ("protection of women and girls has been a central part of U.S. . . . national security").

For these reasons, several Executive Orders currently in effect direct federal efforts to provide protection for women and children facing humanitarian emergencies. For example, Executive Order 13,623, "Preventing and Responding to

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[34] U.S. DEP'T OF STATE, BUR. POPULATION, REFUGEES, AND MIGRATION, *Addressing Gender-Based Violence in Emergencies,* https://www.state.gov/j/prm/policyissues/issues/c62377.htm (last visited Sept. 7, 2017).

[35] 50 U.S.C. § 3043(a) & (b). President Donald Trump's administration has not yet produced or published an updated National Security Strategy.

[36] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY, at 11 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf.

Violence Against Women and Girls Globally," 77 Fed. Reg. 49,345 (Aug. 10, 2012), created an interagency working group to implement "a comprehensive, multisector approach to prevent and respond to gender-based violence" and "ensure that agencies prioritize this issue in their implementation of U.S. foreign policy."[37] Section 1 of Executive Order 13,623 states: "Recognizing that gender-based violence undermines not only the safety, dignity, and human rights of the millions of individuals who experience it, ***but also the public health, economic stability, and security of nations***, it is the policy and practice of the executive branch of the United States Government to have a multi-year strategy that will more effectively prevent and respond to gender-based violence globally." 77 Fed. Reg. 49,345 (emphasis added).[38]

Similarly, Executive Order 13,595, "Instituting a National Action Plan On Women, Peace, And Security," orders the U.S. government to "strengthen its efforts to prevent—and protect women and children from—harm, exploitation, discrimination, and abuse, including sexual and gender-based violence and trafficking in persons." Exec. Order No., 13,595, § 2(c), 76 Fed. Reg. 80,205 (Dec. 19, 2011). Notably, Section 2(e) requires the federal government "to respond to the distinct needs of women and children in conflict-affected disasters and crises." *Id.* § 2(e). In pursuit of that goal, the White House's National Action Plan designated the Department of Homeland Security to "[p]rovide humanitarian protection *through the administration of immigration benefits programs and other immigration mechanisms, as appropriate, to eligible individuals, including women and girls, in need of relief from persecution or urgent circumstances.*"[39]

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[37] Press Release, The White House, Office of the Press Secretary, Fact Sheet: Preventing and Responding to Violence Against Women and Girls Globally (Aug. 10, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/08/10/fact-sheet-preventing-and-responding-violence-against-women-and-girls-gl.

[38] The interagency working group created by Executive Order 13,623 is co-chaired by the Secretary of State and the USAID Administrator and includes representatives from the Department of Treasury, Department of Defense, Department of justice, Department of Labor, Department of Health and Human Services, Department of Homeland Security, Office of Management and Budget, the National Security Staff, and the Office of the Vice President. Exec. Order No. 13,623, § 2(a), 77 Fed. Reg. 49,345–46.

Executive Order 13,595 and Executive Order 13,623 remain in effect. Yet the Order would undermine these Executive directives without providing any justification. *See supra* Section I.A.[40]

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[39] THE WHITE HOUSE, UNITED STATES ACTION PLAN ON WOMEN, PEACE, AND SECURITY, at 30 (2016), https://www.usaid.gov/sites/default/files/documents/1868/National%20Action%20Plan%20on%20Women%2C%20Peace%2C%20and%20Security.pdf (emphasis added).

[40] Although Section 11(iii) of the Order directs Secretary of Homeland Security to collect data regarding gender-based violence, the that Section is limited to data collection on foreign nationals already in the United States. Moreover, by only naming "honor killings," the Order advances a common stereotype of Muslim attitudes toward women, supporting the notion that the Order is directly motivated by animus toward the Islamic faith.

B. The Order's Impact on Women and Children Harms Our Foreign Policy.

Implementation of the Order would also damage the stated foreign policy initiatives of the U.S. Department of State and the U.S. Agency for International Development ("USAID"). The State Department's website unequivocally states that "promoting gender equality and addressing gender-based violence is essential" and "protection of women and girls has been a central part of U.S. foreign policy and national security."[41] Since 2000, the U.S. Department of State's Bureau of Population, Refugees, and Migration ("PRM") has allocated targeted funding to combat gender-based violence and protect refugees and conflict victims from human rights violations such as child, early, and forced marriage.[42] Indeed, the State Department has an entire office devoted to women's issues—the Secretary's Office of Global Women's Issues—which, since 1995, has pursued a "mandate to promote the rights and empowerment of women and girls through U.S. foreign policy."[43]

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[41] U.S. DEP'T OF STATE, BUR. POPULATION, REFUGEES, AND MIGRATION, *Addressing Gender-Based Violence in Emergencies*.

[42] U.S. DEP'T OF STATE, BUR. POPULATION, REFUGEES, AND MIGRATION, *Addressing Gender-Based Violence in Emergencies*; U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION - DEPARTMENT OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS, FISCAL YEAR 2018, at 135, 305 (2017), https://www.state.gov/documents/organization/271013.pdf.

[43] U.S. DEP'T OF STATE, Overview of the Office of Global Women's Issues, https://www.state.gov/s/gwi/ (last visited Sept. 7, 2017).

USAID shares the State Department's recognition of a deep American interest in protecting children and gender-based violence victims, and sees such violence as a "global phenomenon preventing people, especially women and girls, of their right to a life free from violence."[44] The agency has gender programs in more than eighty countries (including many of the Designated Countries), focused specifically on reducing gender-based violence, human trafficking, and child, early and forced marriage.[45] USAID also explicitly emphasizes that the impact of such abuse on women and children "cuts across ethnicity, race, class, religion, education level, and international borders."[46] According to USAID, empowerment of women and children is "critical" to "ending extreme poverty and promoting resilient, democratic societies while advancing our security and prosperity."[47]

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[44] *Reducing Gender-Based Violence*, USAID, https://www.usaid.gov/what-we-do/gender-equality-and-womens-empowerment/reducing-gender-based-violence (last updated Feb. 3, 2017).

[45] *Gender Equality and Women's Empowerment*, USAID, https://www.usaid.gov/what-we-do/gender-equality-and-womens-empowerment (last updated Jul. 26, 2017); *Preventing and Responding to Gender-Based Violence*, USAID, https://www.usaid.gov/gbv (last updated Dec. 8, 2016).

[46] *Preventing and Responding to Gender-Based Violence*, USAID, https://www.usaid.gov/gbv.

[47] USAID, EVALUATION OF IMPLEMENTATION OF THE UNITED STATES STRATEGY TO PREVENT AND RESPOND TO GENDER-BASED VIOLENCE GLOBALLY: AUGUST 2012 THROUGH JULY 2015, at 1 (2015), https://www.usaid.gov/sites/default/files/documents/1865/GBV-Exec-Summary-Nov-2015.pdf (emphasis added).

Finally, the State Department's Fiscal Year 2018 Budget request also reflects national policy to protect —not abandon—women and children who are vulnerable to gender-based and other forms of violence.[48] For example, the Budget Request seeks $2.7 billion for migration and refugee assistance programs, to "save lives and ease suffering, uphold human dignity, and play a critical role in helping to mitigate and resolve major conflicts and crises in ... Somalia, South Sudan, Syria, Yemen, and elsewhere. PRM's humanitarian assistance, coupled with diplomacy, forms an essential component of U.S. foreign policy."[49]

The budget also includes (i) $30.3 million to "support[] the U.S. government objectives of protecting and assisting asylum seekers and other vulnerable migrants, advancing regular, orderly and humane migration policies, enhancing security and stability, and promoting respect for the human rights and fundamental freedoms of migrants,"[50] (ii) $188.6 million to "create opportunities for women while responding to harmful tradition practices, such as child, early, and forced marriage and female genital mutilation/cutting and gender-based violence,"[51] and (iii) $78.7 million into "democracy, conflict, and humanitarian assistance" programs to "protect women and girls affected by crisis, conflict, or extremism from gender based violence . . . and other forms of exploitation or abuse (e.g., trafficking in persons)."[52] Success in such efforts would "strengthen[] U.S. national security by creating environments conducive to economic growth and fair trade, addressing problems that are drivers of radicalization and instability, and improving the sustainability of development programs."[53] And, the State Department has requested $8.3 million to "support activities that prevent and respond to gender-based violence and will address the challenges adolescent girls around the world face . . . ."[54]

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[48] *See generally* U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION.

[49] *Id.* at 305.

[50] *Id.* at 307.

[51] *Id.* at 289.

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In sum, while offering protection to the world's most vulnerable populations is central to U.S. national security and foreign policy objectives, Executive Order 13,780 turns away vast numbers of women and children, many of whom are survivors of gender-based violence and other forms of abuse in their home countries. The Order does so in contravention of the President's statutory authority, Constitutional constraints, and existing national security policy. And it unnecessarily and unwisely invites questions about our government's commitment to our fundamental, founding values as a nation of immigrants.

The life-altering impacts of the Order are catastrophic for many women and children seeking refuge from danger and persecution, and as such, are corrosive of our nation's values and interests.

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[52] *Id.* at 288.

[53] *Id.*

[54] *Id.* at 290.

CONCLUSION

For the reasons set forth above and those discussed in the briefs of the Respondents, *amicus* KARAMAH respectfully requests the Court affirm the decisions of the Fourth and Ninth Circuits.

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DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICUS CURIAE* KHIZR KHAN IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

On October 3, 1965, at the foot of the Statue of Liberty, President Lyndon B. Johnson commemorated the abolition of discrimination from the Immigration and Nationality Act ("INA"). Saluting those who have been "brave enough to die for liberty," President Johnson remarked:

> Neither the enemy who killed them nor the people whose independence they have fought to save ever asked them where they or their parents came from. They were all Americans. It was for free men and for America that they gave their all, they gave their lives and selves. By eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation.

Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965).

On June 8, 2004, at an Army base in Iraq, Captain Humayun Khan joined the hallowed company of those who have sacrificed everything for this country. Captain Khan died stopping a car full of explosives before it could reach hundreds of other American soldiers. He was one of thousands of Muslims who have served in the United States armed forces since the terrorist attacks of September 11, 2001. It is now the sacred duty of this Court to ensure that we remain worthy of those men and women, and worthy of our traditions as a Nation—including the Constitution itself, which Captain Khan gave his life to defend.[1]

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[1] No part of this brief was authored or funded by anyone other than *amicus curiae* Khizr Khan and his counsel. Mr. Khan has respondents' written consent to file this brief, and petitioners have filed a blanket consent.

II. INTEREST OF *AMICUS CURIAE* KHIZR KHAN

Amicus curiae Khizr Khan is the father of Captain Humayun Khan, and has an interest in this case because Executive Order No. 13,780 ("the Executive Order") desecrates his son's service and sacrifice as a Muslim-American officer in the United States Army, and also violates Mr. Khan's own constitutional rights.

A. Out of the melting pot and into the fire

Mr. Khan is originally from Pakistan. He met his wife, Ghazala, at the University of Punjab, where she studied Persian and he studied law. After they married, they moved to the United Arab Emirates, where their son Humayun was born on September 9, 1976. In 1980, the Khans came to the United States, originally settling in Houston, Texas. Once they had saved enough money, Mr. Khan enrolled at Harvard Law School, graduating with a master of laws (LL.M.) degree in 1986. The Khans moved to Silver Spring, Maryland, where Humayun and his two brothers grew up—all of them having become United States citizens.

Thomas Jefferson has long been one of Mr. Khan's heroes, and he liked to take the boys to the Jefferson Memorial and have them read the inscription under the dome: "I have sworn upon the altar of god eternal hostility against every form of tyranny over the mind of man." Years later, when Humayun applied to the University of Virginia, he invoked the spirit of Jefferson, writing that "liberty requires vigilance and sacrifice," and that those who are "beneficiaries of liberty must always bear this in mind, and keep it safe from attacks." Putting those ideals into practice, Humayun enrolled in the Army Reserve Officers' Training Corps (ROTC).

Humayun graduated in 2000 and was commissioned as an Army officer, eventually attaining the rank of Captain. After he was called to serve in Iraq, he reminded his father of his college application essay about defending liberty. "I meant it," he said. He was stationed at Camp Warhorse near Baqubah, Iraq—about fifty miles northeast of Baghdad—leading the Force Protection Team of the 201st Support Battalion, First Infantry Division.

As Captain Khan's commanding officer later wrote, Captain Khan's unit was the most motivated and combat-oriented logistics unit he had ever seen. *See* Dana J.H. Pittard, *I was Capt. Khan's commander in Iraq. The Khan family is our family*, WASH. POST, Aug. 3, 2016. As a Muslim, Captain Khan was particularly able to foster warm relationships with local Iraqis. He started a program to hire locals to work on the base as a way of trying to improve relations between the soldiers and the town. And he was determined to break the cycle of violence by preventing unnecessary deaths and injuries at the gates, where several innocent Iraqi drivers had been wounded or killed because they failed to heed or did not understand the soldiers' instructions. The terrible irony is that Captain Khan's remarkable success in winning local Iraqi hearts and minds may have been what provoked the suicide bombing that took his life.

B. Captain Khan's sacrifice

On the morning of June 8, 2004, Captain Khan was supervising a checkpoint outside of Camp Warhorse. A taxi was approaching the gates. Captain Khan could have ordered his soldiers to put a .50 caliber shell through the windshield, but perhaps this driver, like others before, was just confused. Ordering his soldiers to hit the dirt, Captain Khan moved forward to stop the taxi before it could reach the gates or the mess hall beyond, where hundreds of soldiers were eating breakfast. Captain Khan was killed when the suicide bombers in the taxi detonated their explosives.

Captain Khan was posthumously awarded a Bronze Star and a Purple Heart. The Army named the 201st Battalion headquarters at Camp Warhorse the Khan Building in his honor. The University of Virginia's ROTC center has a Khan Room dedicated to his memory. In July 2016, a regiment of ROTC cadets at Fort Knox honored Captain Khan at their graduation. Earlier this year, the University of Virginia honored Captain Khan with a memorial plaque on the University's Rotunda. But the soldier who dropped Captain Khan off at the gates that fateful morning honored him in the terms he might have appreciated most: "I read where someone called him a soldier's officer," Sergeant Crystal Selby said. "To me, he was a human's human." N.R. Kleinfield, Richard A. Oppel, Jr. & Melissa Eddy, *Moment in Convention Glare Shakes Up Khans' American Life*, N.Y. TIMES, Aug. 5, 2016.

After Captain Khan's death, Mr. and Mrs. Khan moved to Charlottesville, Virginia, to be near their two remaining sons. The Khans also have become an integral part of the University of Virginia's Army ROTC program. Since 2005, the Khans and the ROTC have given the CPT Humayun S.M. Khan Memorial Award to the fourth year cadet who best exemplifies Captain Khan's qualities of courage, dedication, leadership, and selfless service. At the commissioning ceremonies, Mr. Khan gives the new officers pocket-sized copies of the Constitution. He reminds them to think hard about their oath to "defend the Constitution of the United States against all enemies, foreign and domestic." 10 U.S.C. § 502. No oath is more solemn, he tells them: "My son died for that document."

C. The Muslim Ban

On December 7, 2015, then-candidate Donald J. Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." When asked how this Muslim Ban would be enforced, Mr. Trump said that customs agents would ask, "Are you Muslim?" and ban people who answered "yes." Maya Rhodan, *Here's How Donald Trump Says His Muslim Ban Would Work*, TIME, Dec. 8, 2015. The Executive Order seeks to accomplish the same unconstitutional result, merely changing the question to, in effect, "Are you from one of these Muslim-majority countries?" But in 1965, Congress and President Johnson abolished such questions as unworthy of the sacrifices of soldiers like Captain Khan. *See* Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965).[2]

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[2] Since 1965, Congress has repeatedly reaffirmed the nondiscrimination principles that President Johnson emphasized. For example, the Refugee Act of 1980 prohibits discrimination based on "race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). Congress intended that "the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States." H.R. Rep. No. 96-608, at 13 (1979).

Mr. Khan was asked to speak about his son's sacrifice at the Democratic National Convention on July 28, 2016. During that speech, Mr. Khan held up his copy of the Constitution—the pocket-sized kind he has been giving to newly-commissioned Army officers and others for years—and asked if Mr. Trump had ever read it, offering to lend him one. Mr. Khan also urged Mr. Trump to go to Arlington National Cemetery, where Captain Khan is buried, to look at the graves of brave patriots—of all faiths, genders and ethnicities—who died defending the United States. Mr. Trump responded by disparaging the Khans and their plea to respect the Constitution and those who have died defending it.

After candidate Trump became President Trump, he lost no time in implementing his unconstitutional Muslim Ban. President Trump asked his advisors to find a way to do so "legally," but they failed, and the initial executive order was enjoined. Yet the current Executive Order, as President Trump himself has publicly stated, is simply a watered-down version of the first one. Donald J. Trump, *Remarks by the President at Make America Great Again Rally*, Mar. 15, 2017. The taint of discrimination has not been washed away.

Indeed, the underlying message of the Executive Order is the same as that of the original Muslim Ban. The message is that Muslims are unwelcome outsiders. And that message has been received loud and clear—not only by Muslims like Mr. Khan, but by those who have been denigrating and attacking Muslims with increasing frequency and vehemence since President Trump called for a Muslim Ban and then issued his unconstitutional Executive Order.

III. SUMMARY OF THE ARGUMENT

A. As President Johnson stated when he signed the INA, neither the enemies who killed soldiers like Captain Khan "nor the people whose independence they have fought to save ever asked them where they or their parents came from," and by "eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation." Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965). President Johnson was right to give credit to *Congress*, *id.*, because the principle "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Even more deeply embedded is the first principle of our Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. The Executive Order at issue here violates the separation of powers because it "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

B. Moreover, not even Congress may make a law that sends a message to Muslims "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Yet that is precisely what the Executive Order does. Thus, the Executive Order violates the Religion Clauses of the First Amendment. *See id.*; U.S. CONST. amend. I.

For both of these reasons, *amicus curiae* Khizr Khan urges this Court to affirm the decisions below and strike down the unconstitutional Executive Order.

IV. ARGUMENT

A. The Executive Order violates the separation of powers.

As discussed further below, the Executive Order violates the Religion Clauses of the First Amendment because it sends an undeniably discriminatory message to Muslims. But this Court need not reach that issue because, even if the President issued the Executive Order with pure intentions, "to accomplish desirable objectives," the Executive Order is unconstitutional because it violates the separation of powers. *See INS v. Chadha*, 462 U.S. 919, 951 (1983). This Court "has long recognized that under the Constitution 'congress cannot delegate legislative power to the president' and that this 'principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.'" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

As this Court stated in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the formulation of immigration policy "is entrusted exclusively to Congress," whereas the

President's role is "the enforcement of these policies," respecting "the procedural safeguards of due process." *Id.* at 767 (quoting *Galvan*, 347 U.S. at 531). Yet the Executive Order here "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown*, 343 U.S. at 588. Like a statute, the Executive Order "sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Id.*

The Constitution, however, entrusts "the law making power to the Congress alone in both good and bad times." *Id.* at 589. Concerns about terrorism, therefore, are no excuse for blurring the separation of powers. Congress and the President must "engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism," and this Court's "'insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so.'" *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

None of the authorities on which petitioners rely support their assertion of unilateral authority to promulgate new immigration policies at odds with those already established by Congress. For example, petitioners rely on *Fiallo v. Bell*, 430 U.S. 787 (1977), but the Court in *Fiallo* afforded "judicial deference to *congressional* policy choices in the immigration context." *Id.* at 793 (emphasis added). Likewise, in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court deferred to an Act of Congress, not a unilateral executive order. *See id.* at 590. And in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), although the Court initially blurred the lines between legislative and executive power in the context of World War II, the Court went on to clarify that "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," and that, even during war, any delegation of power to the executive is constrained by "congressional intent." *Id.* at 543.[3] "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)).

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[3] Petitioners contend that the power to establish rules for excluding aliens is both legislative and executive in nature. *See, e.g.* Pet. Br. 4, 40. As Justice Thomas stated in *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015), however, the "Constitution does not vest the Federal Government with an undifferentiated 'governmental power,'" but instead identifies three types of governmental power—legislative, executive, and judicial—which may only be exercised by "the vested recipient of that power." *Id.* at 1240-41 (Thomas, J., concurring in the judgment); *see also, e.g.*, *Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted," and, although the powers delegated to each branch are not "hermetically" sealed from one another, they are "functionally identifiable."). Establishing immigration policy and law are quintessentially legislative powers. *See* U.S. CONST. art. 1, § 8, cl. 4 & 18.

Nevertheless, petitioners contend that the President has essentially *unlimited* power to unilaterally enact "federal law," Pet. Br. 72—a power that, according to petitioners, is "parallel to Congress's" own legislative power, *id.* at 64, but actually *exceeds* Congress's power because it eschews bicameral passage. *Cf. Chadha*, 462 U.S. at 954-55. Petitioners argue that Congress granted the President these legislative powers in 8 U.S.C. §§ 1182(f) and 1185(a)(1). According to petitioners, those provisions do "not *constrain* the President's authority," and place "**no restrictions**" on that purported authority other than the requirement to make findings under Section 1182(f), which "does not impose any further requirements on how the President articulates such findings," and, indeed, does not specify "*any* particular factual predicates." Pet. Br. 41, 68 (italics in original, boldface added).

This Court rejected a similarly overbroad interpretation of Section 1185 in *Kent v. Dulles*, 357 U.S. 116 (1958). Section 1185(b) makes it unlawful for a citizen to depart from or enter the United States without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe." *Id.* at 122 n.4. Those "broad terms"—which are the same as in Section 1185(a)(1), on which petitioners rely—did not delegate the "pervasive power" to deny passports based on "beliefs or associations." *Id.* at 127-30. Even in the context of "foreign relations," a statute cannot "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). On the contrary, a seemingly broad grant of authority "must take its content from history," authorizing only those "refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" *Id.* at 17-18 (quoting *Kent*, 357 U.S. at 128). Without that limiting construction, the statute would "constitute an invalid delegation." *Id.* at 18.

Similarly, President Truman's Commission on the INA warned that Section 1182(f), in the absence of a limiting construction, would be impermissibly "vague." Commission on Immigration and Naturalization, WHOM WE SHALL WELCOME 178 (1953). Although "**latitude in administrative action is frequently a desirable objective . . . such discretionary authority should not be nebulous and undefined but rather should contain some standards controlling the administrative action.**" *Id.* (emphasis in original). From Truman's time until now, executive orders under Section 1182(f) have "typically" applied to "individuals"; have sometimes been "based on affiliation"; and otherwise have suspended entry "based on objectionable conduct." 9 *Foreign Affairs Manual* § 302.14-3(B)(1) (2016), https://fam.state.gov/FAM/09FAM/09FAM030214.html.

Thus, petitioners' interpretation of Section 1182(f) as a grant of sweeping legislative authority is inconsistent with "prior administrative practice." *Kent*, 357 U.S. at 128. In any case, past practice "does not, by itself, create power." *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (quoting *Medellín v. Texas*, 552 U.S. 491, 532 (2008)). "Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'" *Youngstown*, 343 U.S. at 588-89 (quoting U.S. CONST. art. I, § 8, cl. 18).

Congress has given the President authority to address exigent circumstances, but has not given and cannot give him the legislative power to amend Congress's "specific criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment). Nor may the President disregard Congress's command that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Nor may the President unilaterally suspend the entire refugee program, or halve the number of potential refugees—much less do so without "appropriate consultation" with Congress. 8 U.S.C. § 1157. Sections 1182(f) and 1185(a)(1) may be "broad grants of authority," but they "cannot reasonably be construed as assigning decisions of [such] vast economic and political significance." *Texas*, 809 F.3d at 183 (internal quotation marks omitted).

Petitioners' contrary interpretation would make Sections 1182(f) and 1185(a)(1) the immigration equivalents of the line-item veto, which this Court ruled unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). The Constitution denies the President the power to unilaterally suspend, amend, repeal, or enact statutes, in whole or in part, even if Congress purports to grant the President such power. *See id.* at 438-45. Such changes to the INA can be accomplished "in only one way; bicameral passage followed by presentment to the President." *Chadha*, 462 U.S. at 954-55. This may "often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 959.

In 1965, Congress rejected the arguments underlying the Executive Order—namely, that we should put America "first" by refusing to admit "greater numbers of persons of different cultures and with different values who may come to add to our own very real and growing social upheavals," or engage in "subversion." S. Rep. No. 89-748, at 3347-48 (1965). Such fearful prejudice is "un-American in the highest sense," and unworthy of Captain Khan's sacrifice. *See* Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1038 (Oct. 3, 1965). The United States has "flourished because it was fed from so many sources, because it was nourished by so many cultures and traditions and peoples." *Id.* at 1039. President Trump cannot overturn half a century of congressional policy—much less the Constitution itself—with the mere stroke of his pen.

B. The Executive Order violates the First Amendment's Religion Clauses.

The First Amendment prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Establishment and Free Exercise Clauses are "inextricably connected." *Larson v. Valente*, 456 U.S. 228, 245 (1982). They must be "read together" in light of their joint purpose "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *accord Larson*, 456 U.S. at 246.

Determining whether the Religion Clauses have been violated "requires an equal protection mode of analysis." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970)). Lawmakers "are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. When they fail to do so, the Court must "apply strict scrutiny." *Id.* at 246. The challenged law must advance "interests of the highest order," and be narrowly tailored to those interests; it "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546 (citation omitted).

The protection of the Religion Clauses, moreover, "extends beyond facial discrimination" to forbid "subtle departures from neutrality and covert suppression of particular religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534 (citations and internal quotation marks omitted). Accordingly, courts look to "both direct and circumstantial evidence," including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. "Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed," so the question is not what is expressly decreed, but what an "objective observer" would perceive. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860-62 (2005) (quoting *Santa Fe*, 530 U.S. at 308).

Here, the evidence of discriminatory intent is overwhelming. That evidence is discussed in the decisions below and in respondents' briefs, and need not be addressed further here. Instead, Mr. Khan asks this Court to consider the message of the Executive Order from the perspective of those on the receiving end of it. Petitioners ignore that perspective, contending that only "official statements" matter. Pet. Br. 76. But this Court rejected that argument in *Santa Fe*, holding that school prayers violated the Establishment Clause—even though they were offered by students, rather than school officials—because a student "will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Santa Fe*, 530 U.S. at 308. "Most striking" to this Court was the "evolution" of the school's policy from "the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. Although the school later removed the word "prayer" from the regulation, the "history indicates that the District intended to preserve the practice of prayer before football games." *Id.*

As in *Santa Fe*, the "evolution" from what candidate Trump candidly called a "Muslim Ban," to what President Trump *still* candidly calls a "watered-down version," shows that, although the form of the executive order has changed, the underlying message has not. The message is that Muslims are unwelcome outsiders, regardless of the depth of their devotion to the Constitution, and despite paying the ultimate price to defend it. That message is painfully clear to Mr. Khan, and also would be clear to an objective observer, who is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

Contrary to petitioners' assertions, no psychoanalysis is necessary to perceive the Executive Order's discriminatory message. As Justice Stephen J. Field stated—riding circuit before anyone had even heard of psychoanalysis—"we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879). Likewise, this Court's "precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315). Any objective observer familiar with the Executive Order's origins in President Trump's proposed Muslim Ban would perceive all too clearly the message that Muslims "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). Thus, the Executive Order violates the Religion Clauses of the First Amendment.

CONCLUSION

Accordingly, Mr. Khan respectfully urges this Court to affirm the decisions below and strike down the unconstitutional Executive Order.

Respectfully submitted,

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*ON WRITS OF CERTIORARI
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FOR THE FOURTH AND NINTH CIRCUITS*

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INTERESTS OF *AMICI CURIAE*[1]

Karen Korematsu, Jay Hirabayashi, and Holly Yasui, the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, come forward as *amici curiae* because they see the disturbing relevance of this Court's decisions in their fathers' infamous cases challenging the mass removal and incarceration of Japanese Americans during World War II to the serious questions raised by Executive Order 13780.

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[1] This brief is filed with the consent of all parties through letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission.

Minoru Yasui was a 25-year-old attorney in Portland, Oregon, when, on March 28, 1942, he intentionally defied the government's first actionable order imposing a curfew on persons of Japanese ancestry in order to bring a test case challenging its constitutionality. *See Yasui v. United States*, 320 U.S. 115 (1943). Gordon Hirabayashi was a 24-year-old college senior in Seattle, Washington, when he similarly chose to defy the government's curfew and removal orders on May 16, 1942. *See Hirabayashi v. United States*, 320 U.S. 81 (1943). Fred Korematsu was a 22-year-old welder in Oakland, California, when, on May 30, 1942, he was arrested for refusing to report for removal. *See Korematsu v. United States*, 323 U.S. 214 (1944).

All three men brought their constitutional challenges to this Court. Deferring to the government's claim that the orders were justified by military necessity, the Court affirmed their convictions. Our Nation has since recognized that the mass removal and incarceration of Japanese Americans was wrong; the three cases have been widely condemned; and all three men have been recognized with the Presidential Medal of Freedom for their wartime courage and lifetime work advancing civil and human rights.

Their children have sought to carry forward their fathers' legacy, educating the public and, as appropriate, reminding the courts of the harm wrought by governmental actions, carried out in the name of national security, that impact men, women, and children belonging to disfavored minority groups—both the human toll and the danger of sacrificing our country's fundamental values. Guilt, loyalty, and threat are individual attributes. Courts must be vigilant when these attributes are imputed to entire racial, religious, and/or ethnic groups. The *Hirabayashi*, *Yasui*, and *Korematsu* cases stand as important symbols of the need for courts—and especially this Court—to fulfill their essential role in our democracy by checking unfounded exercises of executive power.

The Korematsu, Hirabayashi, and Yasui families are proud to stand with the following public interest organizations:

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, the Korematsu Center works to advance justice for all through research, advocacy, and education. The Korematsu Center has a special interest in addressing government action targeting classes of persons based on race, nationality, or religion and in seeking to ensure that courts understand the historical—and, at times, profoundly unjust—underpinnings of arguments asserted to support the exercise of such unchecked executive power. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Asian Americans Advancing Justice ("Advancing Justice") is the national affiliation of five nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC; Asian Americans Advancing Justice – Asian Law Caucus; Asian Americans Advancing Justice – Atlanta; Asian Americans Advancing Justice – Chicago; and Asian Americans Advancing Justice – Los Angeles. Through direct services, impact litigation, *amicus* briefs, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander, and other underserved communities, including immigrant members of those communities.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. In 1982, AALDEF supported reparations for Japanese Americans forcibly relocated and imprisoned during World War II. After 9/11, AALDEF represented more than 800 individuals from Muslim-majority countries who were called in to report to immigration authorities under the Special Registration program. AALDEF is currently providing community education and legal counseling to Asian Americans affected by the challenged Executive Order.

The Hispanic National Bar Association ("HNBA") is comprised of thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance, including immigration and protection of refugees, to the 53 million people of Hispanic heritage living in the United States.

The Japanese American Citizens League of Hawaii, Honolulu Chapter ("JACL Honolulu") draws upon Hawaii's rich, multiethnic society and strong cultural values, but has a broad focus on addressing discrimination and intolerance towards all people victimized by injustice and prejudice. JACL Honolulu has supported redress for Japanese Americans incarcerated during World War II and sponsors annual events to educate the public regarding that unjust incarceration, one of the core reasons for the founding of the JACL Honolulu chapter.

LatinoJustice PRLDEF, Inc. ("LatinoJustice") is a national civil rights legal defense fund that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting, and voting rights. During its 45-year history, LatinoJustice has litigated numerous cases in both state and federal courts challenging multiple forms of racial discrimination by government actors.

The National Bar Association ("NBA") is the largest and oldest association of predominantly African-American attorneys and judges in the United States. The NBA was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association, did not admit African-American attorneys. Throughout its history, the NBA consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession. The NBA has a network of approximately 66,000 lawyers, judges, law professors, and law students, and it has over 75 affiliate chapters.

The South Asian Bar Association of North America ("SABA") is the umbrella organization for 26 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. SABA provides a vital link for the South Asian community to the law and the legal system. Within the United States, SABA takes an active interest in the legal rights of South Asian and other minority communities. Members of SABA include immigration lawyers and others who represent persons that have been and will be affected by the Executive Order.

INTRODUCTION AND SUMMARY OF ARGUMENT

> *"Often the question has been raised whether this country could wage a new war without the loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too."*

Gordon Hirabayashi made that plea to the Court in 1943, as he appealed his conviction for violating military orders issued three months after the Japanese attack on Pearl Harbor. Authorized by Executive Order No. 9066, those orders led to the forced removal and incarceration of over 120,000 men, women, and children of Japanese descent.

Mr. Hirabayashi did not stand alone before this Court. Minoru Yasui likewise invoked our Nation's ideals in casting his separate but related appeal as "the case of all whose parents came to our shores for a haven of refuge" and insisting that the country should respond to war and strife "in the American way and not by *** acts of injustice." Appellant Br. 55-56, *Yasui v. United States*, No. 871 (U.S. Apr. 30, 1943). The Court denied the appeals of both men. *See Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

The following year, this Court revisited the mass removal and incarceration of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu,* the Court again failed to stand as a bulwark against governmental action that undermines core constitutional principles. By refusing to scrutinize the government's claim that its abhorrent treatment of Japanese Americans was justified by military necessity, the Court enabled the government to cover its racially discriminatory policies in the cloak of national security.

In this case, the Court is once again asked to abdicate its critical role in safeguarding fundamental freedoms. Invoking national security, the government seeks near complete deference to the President's decision to deny visas and suspend the entry of refugees from six Muslim-majority nations. Although the government claims it is merely asking for the application of established legal principles, the extreme deference it seeks is not rooted in sound constitutional tradition. Rather, it rests on doctrinal tenets infected with long-repudiated racial and nativist precepts. In support of the sweeping proposition that the President's authority to exclude aliens is unbounded, the government previously invoked the so-called "plenary power" doctrine—a doctrine that derives from decisions such as *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), which relied on pejorative racial stereotypes to eschew judicial scrutiny in upholding a law that prohibited Chinese laborers from returning to the United States after travel abroad. *Id.* at 595.

In its briefs before this Court, the government has changed its words but not its message nor its impact. While no longer invoking the term "plenary power," the government continues to assert that "federal courts may not second-guess the political branches' decisions to exclude aliens abroad," including, as here, entire classes of aliens. Gov't Br.

20. As the Ninth Circuit observed, the numbing judicial passivity the government demands "runs contrary to the fundamental structure of our constitutional democracy" in which "it is the role of the judiciary to interpret the law, a duty that will sometimes require the '[r]esolution of litigation challenging the constitutional authority of one of the three branches.'" *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (alteration in original) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

Even more than the early "plenary power" decisions, the shades of *Korematsu*, *Hirabayashi*, and *Yasui* lurking in the government's argument should give this Court pause. As here, the government there denied that its policies were grounded in "invidious *** discrimination" and asked the Court to take it at its word that "the security of the nation" justified blanket action against an "entire group *** at once." Gov't Br. 35, *Hirabayashi v. United States*, No. 870 (U.S. May 8, 1943).

This Court agreed, employing a double negative to conclude that, even though racial distinctions are "odious to a free people," it "[could] []not reject as unfounded the judgment" of the government. *Hirabayashi*, 320 U.S. at 99-100. Going further in *Korematsu*, the Court denied that race played any role in the government's decisions: "cast[ing] this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue." 323 U.S. at 223. Accepting the government's assurance, the Court went on to find that "Korematsu was not excluded from the [West Coast] because of hostility to him or his race, he was excluded because *** the properly constituted military authorities *** decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated *** temporarily." *Id.*

Not all members of the Court were convinced, however. Three Justices dissented, including Justice Murphy, who declared that the exclusion of Japanese Americans from the West Coast "falls into the ugly abyss of racism," *Korematsu*, 323 U.S. at 233, and Justice Jackson, who pointed out that the Court "had no real evidence" to support the government's assertions of military necessity. Moreover, Justice Jackson warned, the Court had created "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 246.

As history has made us acutely aware, the dissenters' doubts as to the veracity of the government's assertion of military necessity were well-founded, and their recognition of the gravity of the Court's decision was prophetic. Four decades later, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu successfully sought vacatur of their convictions in unprecedented *coram nobis* proceedings. Evidence presented in those cases showed that the "military urgency" on which this Court predicated its decision was nothing more than a smokescreen: the real reason for the government's deplorable treatment of Japanese Americans was not acts of espionage (as the government maintained) but rather a baseless perception of disloyalty grounded in racial stereotypes. In 2011, in an extraordinary "confession of error," the Acting Solicitor General acknowledged the government's role in the miscarriage of justice found by the *coram nobis* courts: before *Hirabayashi*, *Yasui*, and *Korematsu* first reached the Court, the government had known that its own intelligence "undermined the rationale" behind the mass removal and incarceration program, and relied for its defense of those policies on "gross generalizations about Japanese Americans, such as that they were disloyal and motivated by 'racial solidarity.'" U.S. Dep't of Justice, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

Korematsu, and by inference *Hirabayashi* and *Yasui*, "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees" and "national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Put simply, those cases "illustrated that it can be highly destructive of civil liberties to understand the Constitution as giving the President a blank check." STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 84 (2015).

Korematsu, *Hirabayashi*, and *Yasui* are as wrong today as they were on the day they were decided. If it were to accept the government's invitation here to abdicate its judicial responsibility, the Court would repeat its failures in those widely condemned cases. The Court should instead take this opportunity to acknowledge the historic wrong in *Korematsu*, *Hirabayashi*, and *Yasui*, and to repudiate its refusal to scrutinize the government's claim of necessity and its consequent failure to recognize the military orders' racist underpinnings. Heeding the lessons of history, the Court should subject Executive Order 13780 to meaningful judicial scrutiny and affirm the Founders' visionary principle that an independent and vigilant judiciary is a foundational element of a healthy democracy.

ARGUMENT

I. THE GOVERNMENT'S CONCEPTION OF PLENARY POWER DERIVES FROM CASES INFECTED WITH RACIST AND XENOPHOBIC PREJUDICES.

The government predicated its defense of the original Executive Order on the argument that the "political branches[] [have] plenary constitutional authority over foreign affairs, national security, and immigration." Gov't Emergency Mot. 15-16, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). In light of that "plenary authority," the government asserted, "[j]udicial second-guessing of the President's determination that a temporary suspension of entry of certain classes of aliens was necessary *** to protect national security *** constitute[s] an impermissible intrusion." *Id.* at 15.

Despite shedding the "plenary power" label before this Court, the government's central argument remains unchanged: The political branches' "power to *** exclude aliens" is "largely immune from judicial control." Gov't Br. 23 (ellipsis in original) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). This Court, however, has never recognized an unbridled "plenary" power in the immigration realm that would preclude judicial review. And to the extent that it has shown excessive deference to the political branches in some cases, those precedents are linked to racist attitudes from a past era that have long since fallen out of favor.

1. In *Chae Chan Ping v. United States*, known as *The Chinese Exclusion Case*, the Court upheld a statute preventing the return of Chinese laborers who had departed the United States prior to its passage. 130 U.S. at 581-582. Describing the reasons underlying the law's enactment, the Court characterized Chinese laborers as "content with the simplest fare, such as would not suffice for our laborers and artisans," and observed that they remained "strangers in the land, residing apart by themselves, *** adhering to the customs and usages of their own country," and unable "to assimilate with our people." *Id.* at 595. "The differences of race added greatly to the difficulties of the situation." *Id.* Residents of the West Coast, the Court explained, warned of an "Oriental invasion" and "saw or believed they saw *** great danger that at no distant day *** [the West] would be overrun by them, unless prompt action was taken to restrict their immigration." *Id.*

Far from applying a skeptical eye to the law in light of the clear animus motivating its passage, the Court found that "[i]f *** the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security *** its determination is conclusive upon the judiciary." *The Chinese Exclusion Case*, 130 U.S. at 606; *see also* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 15 (2003). In reality, the "right of self-preservation" that the Court validated as justification for the government's unbounded power to exclude immigrants was ethnic and racial self-preservation, not the preservation of borders or national security. 130 U.S. at 608; *see id.* at 606 ("It matters not in what form *** aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.").

Similar racist and xenophobic attitudes are evident in decisions following *The Chinese Exclusion Case*. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 729-730 (1893) (upholding requirement that Chinese resident aliens offer "at least one credible white witness" in order to remain in the country); *id.* at 730 (noting Congress's belief that testimony from Chinese witnesses could not be credited because of "the loose notions entertained by the witnesses of the obligation of an oath" (quoting *The Chinese Exclusion Case*, 130 U.S. at 598)).

2. Even in its early plenary power decisions, however, the Court recognized that the government's sovereign authority is subject to constitutional limitations. *See The Chinese Exclusion Case*, 130 U.S. at 604 ("[S]overeign powers *** [are] restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."). Indeed, from the doctrine's inception, the Court divided over the reach of the government's power in light of those limitations.

Fong Yue Ting, which upheld a law requiring Chinese laborers residing in the United States to obtain a special certificate of residence to avoid deportation, generated three dissenting opinions. *See* 149 U.S. at 738 (Brewer, J., dissenting) ("I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens."); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, J., dissenting). Even Justice Field, who authored the Court's opinion in *The Chinese Exclusion Case*, sought to limit the plenary power doctrine's application with regard to alien residents:

> As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is *** to ignore the teachings of our history *** and the language of our constitution.

Id. at 754.

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted—and proliferated. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court, relying on *Korematsu* (*see* note 2, *infra*), upheld a provision permitting the deportation of resident aliens who were members of the Communist Party. In dissent, Justice Douglas quoted Justice Brewer's words in *Fong Yue Ting*, observing that they "grow[] in power with the passing years":

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. *** The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

Id. at 599-600.

In another McCarthy-era precedent, four Justices advocated for limitations on the plenary power doctrine. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court rejected any constitutional challenge to the exclusion of an alien who had previously resided in the United States, despite his resulting indefinite detention at Ellis Island. In dissent, Justice Black, joined by Justice Douglas, reasoned that "[n]o society is free where government makes one person's liberty depend upon the arbitrary will of another." *Id.* at 217. "Dictatorships," he observed, "have done this since time immemorial. They do now." *Id.* Justice Jackson, joined by Justice Frankfurter, added that such aliens must be "accorded procedural due process of law." *Id.* at 224.

3. Perhaps reflecting the shift away from the xenophobic and race-based characterizations prevalent in its early plenary power precedents, the Court in recent years has been more willing to enforce constitutional limitations on the government's authority over immigration matters.

In *Reno v. Flores*, 507 U.S. 292 (1993), for example, the Court held that INS regulations must at least "rationally advanc[e] some legitimate governmental purpose." *Id.* at 306. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court affirmed that a resident alien returning from a brief trip abroad must be afforded due process in an exclusion proceeding. *Id.* at 33. And in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in response to the government's contention that "Congress has 'plenary power' to create immigration law, and *** the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area," the Court observed that such "power is subject to important constitutional limitations." *Id.* at 695 (citations omitted). "[F]ocus[ing] upon those limitations," *id.*, the Court determined that the indefinite detention of aliens deemed removable would raise "serious constitutional concerns" and accordingly construed the statute at issue to avoid those problems, *id.* at

682. *See generally Washington*, 847 F.3d at 1162-1163 (collecting cases demonstrating reviewability of federal government action in immigration and national security matters).

The Court's most recent decision in this area provides further support for the conclusion that, after more than a century of erosion, the notion of plenary power over immigration is little more than a relic.

In *Kerry v. Din*, 135 S. Ct. 2128 (2015), this Court considered a due process claim arising from the denial without adequate explanation of a spouse's visa application. Although it described the power of the political branches over immigration as "plenary," Justice Kennedy's concurring opinion in *Din* made clear that courts may review an exercise of that power. *Id.* at 2139-2140. Justice Kennedy acknowledged that the Court in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), had declined to balance the constitutional rights of American citizens injured by a visa denial against "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Din*, 135 S. Ct. at 2139 (quoting *Mandel*, 408 U.S. at 766). But he explained that the Court did inquire "whether the Government had provided a 'facially legitimate and bona fide' reason for its action." *Id.* at 2140 (quoting *Mandel*, 408 U.S. at 770). And while as a general matter courts are not to "look behind" the government's asserted reason, courts should do so if the challenger has made "an affirmative showing of bad faith." *Id.* at 2141.

To be sure, Justice Kennedy's opinion in *Din* acknowledged that the political branches are entitled to wide latitude and deference in immigration matters. For that reason, the government relies heavily on *Din* and *Mandel* to argue that its assertion of a national security rationale is sufficient to justify the Executive Order and to preclude further judicial scrutiny. But, as the courts of appeals recognized, *Din* (and *Mandel* before it) concerned an *individual* visa denial on the facts of that case. By contrast, the Executive Order sets a nationwide immigration policy, presumptively suspending entry and foreclosing visa adjudications for virtually all aliens of certain nationalities. While it may be sensible for courts ordinarily to defer to the judgment of the political branches when considering the application of immigration law to a particular alien, the President's decision to issue a broadly-applicable immigration *policy*—especially one aimed at nationals of particular countries likely to share a common religion—is properly the subject of more searching judicial review.

All told, modern judicial precedent supports the notion that courts have both the power and the responsibility to review Executive Order 13780. Where, as here, the Court is asked to review a far-reaching program—promulgated at the highest level of the Executive Branch and targeting aliens based on nationality and religion—precedent and common sense demand more than an assessment of whether the government has offered a "facially legitimate and bona fide" rationale for its policy. Rather, this Executive Order, both on its face and in light of the glaring clues as to its motivations, cries out for careful judicial scrutiny.

II. *KOREMATSU*, *HIRABAYASHI*, AND *YASUI* STAND AS STARK REMINDERS OF THE NEED FOR SEARCHING JUDICIAL REVIEW OF GOVERNMENTAL ACTION TARGETING DISFAVORED MINORITIES IN THE NAME OF NATIONAL SECURITY.

This Court need not look far for a reminder of the constitutional costs and human suffering that flow from the Judiciary's failure to rein in sweeping governmental action against disfavored minorities. And it need not look far for a reminder of the Executive Branch's use of national security as a pretext to discriminate against such groups. The Court need look only to its own precedents—its all but universally condemned wartime decisions in *Korematsu*, *Hirabayashi*, and *Yasui*.

1. On February 19, 1942, President Roosevelt issued Executive Order No. 9066, authorizing the Secretary of War to designate "military areas" from which "any or all persons" could be excluded and "with respect to which, the right of any person to enter, remain in, or leave" would be subject to "whatever restrictions the Secretary of War or the appropriate Military Commander may impose." Exec. Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942). Adding its imprimatur to the Executive Order, Congress made violation of any restrictions issued thereunder a federal offense. An Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

Lieutenant General John L. DeWitt, head of the Western Defense Command, used that authority to issue a series of proclamations that led to the removal and incarceration of all individuals of Japanese ancestry living in "Military Area No. 1"—an exclusion area covering the entire Pacific Coast. *Hirabayashi*, 320 U.S. at 89. A curfew order came first. Soon after, Japanese Americans were ordered to abandon their homes and communities on the West Coast for tarpaper barracks (euphemistically called "relocation centers") surrounded by barbed wire and machine gun towers in desolate areas inland. *Id.* at 90.

For different individual reasons, but sharing a deep sense of justice, Minoru Yasui, Gordon Hirabayashi, and Fred Korematsu refused to comply with General DeWitt's orders. Yasui, a young lawyer, regarded the curfew as an affront to American constitutional values. "To make it a crime for me to do the same thing as any non-Japanese person *** solely on the basis of ancestry," he explained, "was, in my opinion, an absolutely abominable concept and wholly unacceptable." Testimony of Minoru Yasui, Nat'l Comm. for Redress, Japanese Am. Citizens League 9, *Comm'n on Wartime Relocation and Internment of Civilians* (1981). "Our law and our basic concept of justice had always been founded upon the fundamental principle that no person should be punished but for that individual's act, and not because of one's ancestry." *Id.* at 10. Convinced of the curfew's illegality, Yasui immediately defied it in order to initiate a constitutional challenge.

Hirabayashi, a student at the University of Washington, also defied the orders so that he could challenge their constitutionality, saying that he "considered it [his] duty to maintain the democratic standards for which this nation lives." PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 88 (1984). Korematsu, a welder living in Oakland, CA, refused to obey the removal orders so that he could remain with his fiancée who was not subject to removal because she was not Japanese American. The last of the three to face arrest and prosecution, Korematsu "shared with Yasui and Hirabayashi an equal devotion to constitutional principle" and believed that the statute under which he was convicted was wrong. *Id.* at 98.

2. The constitutional challenges Yasui, Hirabayashi, and Korematsu made to the military orders soon made their way to this Court. But far from fulfilling its essential role in the constitutional structure that entrusts the Judiciary with the protection of fundamental rights, the Court set upon a path of judicial abdication that today serves as a cautionary tale.

In Hirabayashi's case, the Court elected to consider only his conviction for violating the curfew order, leaving unanswered his challenge to his conviction for failing to report to a Civil Control Station—a precursor to removal from his home in Seattle. *Hirabayashi*, 320 U.S. at 85. Harkening back to *The Chinese Exclusion Case*, the Court repeated the government's claim that "social, economic and political conditions" "intensified the[] solidarity" of Japanese Americans and "prevented their assimilation as an integral part of the white population." *Id.* at 96. Betraying no skepticism of these premises, the Court found that, in view of these and other attributes of the "isolation" of Japanese Americans and their "relatively little social intercourse *** [with] the white population," "Congress and the Executive could reasonably have concluded that these conditions *** encouraged the continued attachment of members of this group to Japan and Japanese institutions." *Id.* at 98. "Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry," the Court continued, "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained." *Id.* at 99.

Having upheld the curfew in *Hirabayashi*, the Court issued only a short opinion remanding Yasui's case to the Ninth Circuit. *Yasui*, 320 U.S. at 115. Because the district court had imposed a sentence based on its determination that Yasui had renounced his American citizenship, and the government did not defend that finding, the Court remanded the matter for resentencing. *Id.* at 117. The Court thereby avoided addressing the lower court's conclusion, supported by extensive analysis, that the military orders were unconstitutional as applied to citizens. *See United States v. Yasui*, 48 F. Supp. 40, 44-54 (D. Or. 1942).

The Court's third opportunity to confront the mass removal and incarceration program came a year-and-a-half later, in Korematsu's case. The

Court again narrowed the issues before it, rejecting Korematsu's argument that the removal order could not be extricated from the incarceration he would inevitably face if he complied with that order. 323 U.S. at 216. Then, despite affirming that racial distinctions are "immediately suspect" and "must [be] subject *** to the most rigid scrutiny," *id.*, the Court denied, without probing examination, that the military orders were driven by racial hostility. The Court reiterated its conclusion from *Hirabayashi* that it would not substitute its judgment for that of the military authorities. There was evidence of disloyalty on the part of some," the Court reasoned, and "the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." *Id.* at 223-224.

When the Court decided *Korematsu*, however, three members rejected the government's arguments. In vigorous dissents, Justices Murphy and Jackson sharply questioned the validity of the military justification the government advanced. Although acknowledging that the discretion of those entrusted with national security matters "must, as a matter of *** common sense, be wide," Justice Murphy declared that "it is essential that there be definite limits to military discretion" and that individuals not be "left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." 323 U.S. at 234. In his view, the exclusion order "clearly d[id] not meet th[is] test" as it relied "for its reasonableness upon the *assumption* that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage." *Id.* at 234-235 (emphasis added). In fact, as Justice Murphy noted, intelligence investigations found no evidence of Japanese American sabotage or espionage. *Id.* at 241. And even if "there were some disloyal persons of Japanese descent on the Pacific Coast," Justice Murphy reasoned, "to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group" is nothing more than "th[e] legalization of racism." *Id.* at 240-241, 242.

Justice Jackson was equally skeptical of the factual basis for the government's claim that General DeWitt's orders were justified. "How does the Court know that these orders have a reasonable basis in necessity?" 323 U.S. at 245. Pointing out that "[n]o evidence whatever on that subject ha[d] been taken by this or any other court" and that General DeWitt's "Final Report" on which the government relied was the subject of "sharp controversy as to [its] credibility," Justice Jackson observed that the Court had "no real evidence before it." *Id.* Accordingly, the Court "ha[d] no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." *Id.*

Justice Jackson saw grave dangers in the Court's opinion. While an unconstitutional military order is short lived, he observed, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." 323 U.S. at 246. With that, Justice Jackson issued a prophetic warning: By "validat[ing] the principle of racial discrimination in criminal procedure and of transplanting American citizens," the Court had created "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.*[2]

3. The dissenters' fears proved to be well-founded. Decades after this Court's decisions in *Hirabayashi*, *Yasui*, and *Korematsu*, newly discovered government records revealed not only that intelligence reports and data contradicted the claim that the mass removal and incarceration program was justified by military necessity, but also that the government knew as much when it convinced the Court to affirm the defendants' convictions.[3]

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[2] Justice Jackson's usage of *Korematsu* and *Hirabayashi* as precedent in *Harisiades* (*see* p. 16, *supra*), on which the government relies (Gov't Br. 23), brought this warning to life. In *Harisiades*, a noncitizen claimed that due process protected his liberties in the same way it does the rights of citizens. But *Korematsu* and *Hirabayashi*, Justice Jackson wrote, show that even citizens are unprotected from far-reaching government claims of national security. *Harisiades*, 342 U.S. at 591 & n.17 ("When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention."). Constrained by *stare decisis*, Justice Jackson applied *Korematsu* as standing precedent to reject Harisiades' constitutional claim. That application to the specific facts in *Harisiades* extended *Korematsu's* principle of extreme deference to "new purposes"—precisely the danger Justice Jackson predicted in his "loaded weapon" warning. 323 U.S. at 246.

In 1983, armed with those newly discovered records, Yasui, Hirabayashi, and Korematsu filed *coram nobis* petitions seeking to vacate their convictions. As the court found in the *Hirabayashi* case, government records showed that General DeWitt's Final Report had been materially altered in order to fabricate an acceptable factual justification for the mass removal and incarceration program. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1456-1457 (W.D. Wash. 1986). Although the version of the report presented to this Court stated that it was impossible to identify potentially disloyal Japanese Americans in the time available, a prior printed version—submitted to the War Department while the government's briefs in *Hirabayashi* and *Yasui* were being finalized—made clear that the decision to issue the challenged orders had nothing to do with urgency. Rather, General Dewitt's decision turned on his view that Japanese Americans were inherently disloyal on account of their "ties of race, intense feeling of filial piety and *** strong bonds of common tradition, culture and customs." *Id.* at 1449. "It was not that there was insufficient time in which to make such a determination" the original report stated; "a positive determination could not be made [because] an exact separation of the 'sheep and the goats' was unfeasible." *Id.* (quoting Lieutenant

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[3] Those records are discussed at length in *Justice at War: The Story of the Japanese American Internment Cases* by Peter Irons, who, along with Aiko Herzig-Yoshinaga, unearthed them.

General John L. DeWitt, *Final Report: Japanese Evacuation from the West Coast* ch. 2 (1942)).

Beyond exposing the racist underpinnings of General DeWitt's orders (as well as the pretextual nature of the claim of urgency), the *coram nobis* cases revealed that the government had information rebutting the assertion in the DeWitt Report that Japanese Americans were involved in sabotage and espionage. *Hirabayashi v. United States*, 828 F.2d 591, 601 (9th Cir. 1987). The Office of Naval Intelligence ("ONI"), which the President charged with monitoring West Coast Japanese American communities, had determined in its official report that Japanese Americans were overwhelmingly loyal and posed no security risk. ONI thus recommended handling any potential disloyalty on an individual, not group, basis. ONI found, contrary to the government's representation to this Court, that mass incarceration was unnecessary, as "individual determinations *could* be made expeditiously." *Id.* at 602 n.11 (emphasis added); *see also* IRONS, *supra*, at 203. In addition, reports from the Federal Bureau of Investigation ("FBI") and Federal Communications Commission ("FCC") directly refuted claims in the DeWitt Report that Japanese Americans were engaged in shore-to-ship signaling, intimating Japanese American espionage. *Korematsu*, 584 F. Supp. at 1417. Indeed, FBI Director Hoover wrote to Attorney General Biddle shortly before President Roosevelt issued Executive Order 9066 that the push for mass racial handling was based on politics rather than facts. Memorandum from J. Edgar Hoover, Dir. FBI to Francis Biddle, Att'y Gen. (Feb. 2, 1942).

Department of Justice attorney John Burling, co-author of the government's brief, sought to alert the Court of the FBI and FCC intelligence that directly refuted the DeWitt Report. Burling included in his brief a crucial footnote that read: "The recital [in General DeWitt's report] of the circumstances justifying the evacuation as a matter of military necessity *** is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice." *Korematsu*, 584 F. Supp. at 1417 (emphasis and citation omitted). But high-level Justice Department lawyers stopped the brief's printing. Despite Burling's vociferous protest about the DeWitt Report's "intentional falsehoods," the footnote was diluted to near incoherence, even implying the opposite of Burling's intended message. As revised, the footnote stated:

> [The DeWitt Report] is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Gov't Br. 11 n.2, *Korematsu v. United States*, No. 22 (U.S. Oct. 5, 1944). Notwithstanding an earlier warning from Justice Department lawyer Edward Ennis that failing to alert the Court to the contrary intelligence in DOJ's possession "might approximate the suppression of evidence," *Hirabayashi*, 828 F.2d at 602 n.11 (citation omitted), the Justice Department concealed from the Court this crucial evidence on military necessity.

In light of the evidence presented, the courts hearing Fred Korematsu and Gordon Hirabayashi's *coram nobis* cases concluded that the government's misconduct had effected "a manifest injustice" and that the mass removal and incarceration program had been validated based on unfounded charges of treason. *Korematsu*, 584 F. Supp. at 1417; *Hirabayashi*, 627 F. Supp. at 1447.[4] In granting Korematsu's *coram nobis* petition, Judge Patel articulated the modern significance of the wartime cases:

> *Korematsu* *** stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions,

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[4] In Minoru Yasui's *coram nobis* case, the court acceded to the government's request to vacate his conviction and dismiss his petition for relief without making any determinations regarding government misconduct—and without acknowledging the injustice he suffered.

> legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu, 584 F. Supp. at 1420.

In vacating Korematsu, Yasui, and Hirabayashi's convictions, the *coram nobis* courts joined other institutions of government in recognizing the wrongs committed against Japanese Americans during World War II. In 1976, on behalf of the Executive Branch, President Ford officially rescinded Executive Order 9066, explaining that "[w]e now know what we should have known then—not only was *** evacuation wrong, but Japanese-Americans were and are loyal Americans." Presidential Proclamation 4417, "An American Promise," 41 Fed. Reg. 7714 (Feb. 19, 1976). The Executive Branch also recognized the contributions of the three men who challenged the military orders. Each one received the Presidential Medal of Freedom, the nation's highest civilian honor: Fred Korematsu in 1998, Gordon Hirabayashi in 2012, and Minoru Yasui in 2015.

In 1983, after extensive hearings and research, the congressionally-authorized Commission on Wartime Relocation and Internment of Civilians (CWRIC) issued a report concluding that it was not "military necessity" that underpinned the program of removal and incarceration, but rather "race prejudice, war hysteria and a failure of political leadership." REPORT OF CWRIC, PERSONAL JUSTICE DENIED 459 (The Civil Liberties Public Education Fund & University of Washington Press, 1997). Five years later, Congress passed (and President Reagan signed) the Civil Liberties Act of 1988, which, on the CWRIC's recommendations, acknowledged the injustice of the removal and incarceration program, issued an official apology, and conferred symbolic reparations to the survivors of the incarceration centers.

Most recently, in 2011, the Acting Solicitor General confirmed what the *coram nobis* cases had established decades earlier: this Court's decisions in the wartime cases were predicated on lies. "By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, [DOJ] had learned of a key intelligence report that undermined the rationale behind the internment. *** But the Solicitor General did not inform the Court of the report despite warnings *** that failing to alert the Court 'might approximate the suppression of evidence.' Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones." *Confession of Error*, *supra*.

* * *

During World War II, this Court's refusal to probe the government's claim that military necessity justified the mass removal and incarceration of Japanese Americans made it unwittingly complicit in the government's deception. The Court's blank-check treatment of the Executive Branch's wartime policies—underscored by its repeated refusal to confront the most grievous aspects of those policies or to acknowledge their racist underpinnings—allowed the wrongs inflicted on Japanese Americans to continue unabated for years, and allowed the government to avoid accountability for its egregious misconduct for decades.

Hirabayashi, *Yasui*, and *Korematsu* are powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of the courts as a check on abuses of government power, especially during times of national and international stress. Rather than repeat the failures of the past, this Court should repudiate them and affirm the greater legacy of those cases: Blind deference to the Executive Branch, even in areas in which decision-makers must wield wide discretion, is incompatible with the protection of fundamental freedoms. Meaningful judicial review is an essential element of a healthy democracy.

Consistent with those principles, this Court should reject the government's invitation to abdicate its critical role in our constitutional system, subject Executive Order 13780 to searching judicial scrutiny, and stand—as Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu did—as a bulwark against governmental action that undermines core constitutional values.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

ON WRIT CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF MASSACHUSETTS TECHNOLOGY LEADERSHIP COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN AFFIRMANCE OF THE DECISIONS BELOW

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae is the Massachusetts Technology Leadership Council, Inc. ("MassTLC"), a not-for-profit association of companies that collectively employ more than 170,000 people in the Massachusetts technology industry. MassTLC represents a vibrant and growing community of innovators in fields including software, computers, robotics, and security products. MassTLC therefore closely follows issues — including immigration policy — that may affect the ability of its members to build value, attract talent, and compete in the diverse global marketplace.

CORPORATE DISCLOSURE STATEMENT

Massachusetts Technology Leadership Council, Inc. is a not-for-profit organization based in Burlington, Massachusetts. It has no parent company, and no publicly traded organization owns 10% or more of its stock.

INTRODUCTION

MassTLC writes in support of the Respondents in opposing the Trump Administration's ("Administration") effort to overturn nationwide injunctions restraining the execution of President Donald Trump's Executive Order dated March 6, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Revised Travel Ban").[2] As the Court is aware, the Revised Travel Ban was issued to voluntarily narrow an identically titled Executive Order issued January 27, 2017 (the "Original Travel Ban").[3]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner's Letter of Consent to the filing of all amicus briefs in this matter was lodged with the Clerk of Court pursuant to Rule 37.3(a) on July 17, 2017. Counsel for Respondents provided written consent to the filing of this brief pursuant to Rule 37.3(a) on September 6, 2017.

The Revised Travel Ban is arbitrary, illegal, and does not serve the public interest. This is fundamentally the same discriminatory "Muslim Ban" that has been repeatedly enjoined over the last seven months.[4] Cosmetic changes — such as the *post hoc* addition of purported security justifications — do not alter the fact that this policy still proceeds from the same irrational and unconstitutional religious animus. Indeed, the President's own Senior Policy Advisor admits that it is intended to achieve the "same basic policy outcome" as its patently illegal predecessor.[5]

MassTLC writes principally to further support the Respondents' arguments that the Revised Travel Ban does not serve the public interest. Rather, the public interest demands an immigration system that does not discriminate against any religion, and that is fair, orderly, and predictable. In particular, technology companies in Massachusetts require such a system in order to recruit innovators from around the world to build businesses here at home, and to sell their products back out into the global marketplace. President Trump's attempt to ban the entry of entire nationalities — even when the person seeking entry clearly poses no risk — is antithetical to the public interest and undermines America's innovation economy and its fundamental values.

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[2] 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[3] 82 Fed. Reg. 8,977 (Jan. 27, 2017).

[4] *See, e.g., Washington v. Trump*, No. 17-35105, 2017 U.S. App. LEXIS 2369, at *3-7 (9th Cir. Feb. 9, 2017); *Aziz v. Trump*, No. 17-116, 2017 U.S. Dist. LEXIS 20889, at *9-13, 27 (E.D. Va. Feb. 13, 2017); *Hawai'i v. Trump*, No. 17-361, 2017 U.S. Dist. LEXIS 36935, at *33-45 (D. Haw. Mar. 15, 2017).

[5] *See Trump Advisor Says New Travel Ban Will Have 'Same Basic Policy Outcome,'* FoxNews.com, Feb. 21, 2017, *available at* http://www.foxnews.com/politics/2017/02/21/trump-adviser-says-new-travel-ban-will-have-same-basic-policy-outcome.html.

ARGUMENT

I. THE NEW TRAVEL BAN IS MERELY A CONTINUATION OF THE PRESIDENT'S UNCONSTITUTIONAL ANTI-MUSLIM POLICIES.

A. The President Banned Muslims.

During his recent election campaign, President Trump repeatedly promised to ban Muslims from entering the United States.[6] As one court has explained, "[t]he 'Muslim ban' was a centerpiece of the president's campaign for months, and the press release calling for it was still available on his website as of [Feb. 13, 2017]."[7]

Within days of taking office, President Trump issued the Original Travel Ban. Section 3(c) of that order immediately prohibited all people from seven predominantly Muslim countries from entering the United States, even including returning permanent residents and visa-holders residing in the United States.[8] The President ordered that this exclusion continue for 90 days, during which time federal agencies would purportedly review their immigration security procedures.[9] To implement this order, the Department of State "provisionally revoke[d] all valid nonimmigrant and immigrant visas of nationals" of those seven countries without any due process or advance notice.[10]

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[6] *See Aziz*, 2017 U.S. Dist. LEXIS 20889, at *9-13.

[7] *See id.*

Notably, the Original Travel Ban contained provisions to add additional countries to the "banned" list, and also to extend the ban indefinitely beyond the initial 90-day period.[11] Thus, with the stroke of a pen, President Trump suddenly excluded a vast number of Muslims from the United States, stripped legal status from many already residing here, and created well-founded fear that more nationalities would find themselves banned without warning.

B. The Federal Courts Ordered The President To Cease Implementing The Ban.

The Original Travel Ban was rapidly enjoined by numerous federal courts. Most broadly, Judge

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[8] *See Washington*, 2017 U.S. App. LEXIS 2369, at *3-7. Notably, the order included a safety valve to permit "religious minorities."

[9] 82 Fed. Reg. 8977, 8977-78.

[10] *See* January 27, 2016 Letter of Edward J. Ramotowski, Deputy Ass't of State, Bureau of Consular Affairs, Department of State. This letter made a small number of exceptions for military and diplomatic visas, or case-by-case determinations "in the national interest."

[11] 82 Fed. Reg. 8977, 8978.

James Robart of the U.S. District Court for the Western District of Washington issued an order that the federal government was "ENJOINED and RESTRAINED from . . . [e]nforcing Section 3(c)" of the Original Travel Ban on a nationwide basis based on the finding that the Original Travel Ban caused "significant and ongoing harm" to plaintiff States (Washington and Minnesota) and their residents.[12] The federal government appealed this order, but ultimately dismissed the appeal after the 9th Circuit construed the order as a preliminary injunction and refused to stay its operation.[13]

Notably, at least one court enjoined the Original Travel Ban based on the strong likelihood that it would be proved to be an exercise in religious discrimination. Judge Brinkema of the U.S. District Court for the Eastern District of Virginia concluded, based in large part on the President's own statements, that the Commonwealth of Virginia had established such a strong likelihood of success on its Establishment Clause claim that the Original Travel Ban should be enjoined on that basis alone.[14]

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[12] *Washington*, No. 17-141, 2017 U.S. Dist. LEXIS 16012, at *7-8 (W.D. Wash. Feb. 3, 2017).

[13] *See Washington*, 2017 U.S. App. LEXIS 2369, at *34 (stay of preliminary injunction denied); Order, *Washington*, No. 17-35105 (9th Cir. Mar. 8, 2017) (granting federal government's motion to voluntarily dismiss appeal of preliminary injunction, including payment of State of Washington's costs).

[14] *Aziz*, 2017 U.S. Dist. LEXIS 20889, at *28 n.11.

C. The Revised Travel Ban Is A Continuation Of The Original And Is Equally, If Not More, Flawed.

On March 6, 2017, President Trump signed the Revised Travel Ban, which purports to revoke and replace his earlier order. Unchanged, however, is the ban's basic function: to prohibit people from predominantly Muslim countries from entering the United States based solely on their national origin.[15]

The Revised Travel Ban will last through at least late September,[16] again purportedly to permit a review of immigration security procedures, again subject to indefinite extension, and again subject to the addition of new "banned" countries. Such extension is highly probable, given that the President tweeted on September 15, 2017, that the "travel ban into the United States" should be "far larger" and "tougher."[17]

To be sure, while the Revised Travel Ban is somewhat narrower than its predecessor, it nevertheless still achieves (in the words of President Trump's own senior advisor) the "same basic policy outcome."[18] For example, although the revised order exempts permanent residents and aliens already issued visas, the residents of six Muslim-majority countries still cannot obtain new visas. Inevitably, travel from those countries will be incrementally extinguished as existing visas expire.

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[15] This is prohibited discrimination even if the ban does not restrict travel from *every* predominantly Muslim country. *See id.* at *26-27 ("The major premise of that argument—that one can only demonstrate animus toward a group of people by targeting all of them at once — is flawed.").

[16] In fact, as the Government admits in its brief, the Administration unilaterally extended for itself the time at which the clock would begin to run on implementation of Section 2(c) of the Revised Travel Ban. During the pendency of this litigation, on June 14, 2017, the President issued a memorandum providing that the effective date would be keyed to the lifting or staying of the injunction at issue here. Br. at 37.

[17] *See* September 15, 2017 Tweet from Donald J. Trump, *available at* https://twitter.com/realDonaldTrump/status/908645126146265090

Further, although the Revised Travel Ban now contains purported security justifications for restricting travel from the six remaining countries, it is telling that these justifications were not proffered until after the Original Travel Ban had been enjoined.[19] Asserted now — in the teeth of numerous adverse rulings — these *post hoc* rationalizations are entitled to little weight.[20]

The Revised Travel Ban was also enjoined. On appeal, the Court largely declined to stay the injunction, opting only to modify it slightly to permit the Government to deny visas to a small subset of potential immigrants from the banned countries that have no business or personal relationship with the U.S.[21] The Administration's interpretation of the Court's order – excluding non-nuclear family members from the injunction – prompted the

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[18] *See Trump Advisor Says New Travel Ban Will Have 'Same Basic Policy Outcome,'* n.4, *supra.*

[19] *Washington*, 2017 U.S. App. LEXIS 2369, at *32 & n.8.

[20] *Aziz*, 2017 U.S. Dist. LEXIS 20889, at *24 n.10 (citing *Peacock v. Duval*, 694 F.2d 644, 646 (9th Cir. 1982)); *Hawai'i*, 2017 U.S. Dist. LEXIS 36935 at *39-40, n. 15 (citing *Aziz*).

[21] *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088-2089 (2017).

Hawai'i District Court to step in to yet again prevent executive overreach.[22] The Ninth Circuit affirmed.[23]

The Revised Travel Ban has the purpose and effect of banning Muslims from the United States, as is evident from the overwhelming record of the President's statements targeting Muslims. The Revised Travel Ban also violates the Immigration and Nationality Act.[24] For all of these reasons, as well as for those set forth in Respondents' Brief, the Revised Travel Ban is illegal.

II. THE REVISED TRAVEL BAN IS NOT ONLY ILLEGAL, BUT IT WILL OPERATE AGAINST THE PUBLIC INTEREST, INCLUDING AGAINST THE INTERESTS OF THE TECHNOLOGY SECTOR.

Although the Revised Travel Ban is contrary to the public interest in many ways, MassTLC writes to explain one particular facet of that harm: the ban's profoundly disruptive effect on the technology sector, including in Massachusetts.

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[22] *Hawai'i*, 2017 U.S. Dist. LEXIS 109034 (D. Haw. July 13, 2017).

[23] *Hawai'i*, 2017 U.S. App. LEXIS 17340, at *39 (9th Cir. Sep. 7, 2017).

[24] 8 U.S.C. §§ 1101 *et seq.*

A. The Domestic Technology Industry Benefits From Immigration.

1. Immigration Supports The Innovation Economy.

The technology industry is a critical driver of the Massachusetts economy. Nearly 400,000 people in Massachusetts work in jobs that are either in the technology sector, or are in technology-related occupations in other sectors — roughly 13% of the state's total workforce.[25] This industry is a global enterprise, fueled in large part by immigration and international travel. According to one recent study, as of January 1, 2016, "[i]mmigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies."[26] More than half of Silicon Valley's corporate founders are immigrants.[27]

The integral role that immigrants play in the technology industry does not arise because "immigrants steal jobs" (as some have argued), but rather because the technology industry is growing too rapidly to be staffed through domestic labor alone. By 2020, for example, projections indicate that 1.4 million computer specialist positions will be open in the United States, but domestic universities will only produce enough graduates to fill 29% of those jobs.[28] In Massachusetts today, there are seventeen technology jobs for every person who graduates with a degree in computer science or information technology.[29] Immigrants are responsible for substantial economic growth. This is true as a general matter of the country as a whole: in 2015, immigrants contributed $2 trillion to the U.S. GDP, which represents 11% of the country's total GDP.[30] Zooming in on the Massachusetts technology sector, one study projects that, if half of Massachusetts' 3,608 advanced level graduates in science, technology, engineering, and mathematics (STEM) related fields, studying on temporary visas, remained in Massachusetts upon graduation, then 4,726 new jobs would be created for U.S.-born workers by 2021.[31]

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[25] Appendix, *The Economic Impact of Immigration on the U.S.*, June 2017 ("App."), 15-16. This Appendix is a version of a publicly-available report published by MassTLC and available on its website, http://www.masstlc.org/immigration/. The report cites original sources for the data relied on in this brief. MassTLC provides a version of the full report here as an Appendix for the Court's convenience.

[26] App. at 30.

[27] App. at 61.

As it stands, immigrant students are disproportionately more likely to get their degrees in a STEM field, and international students make up over 30% of the post-baccalaureate degrees in STEM fields.[32] Individuals from the six banned countries, moreover, are more likely to have a bachelor's degree, approximately twice as likely to have a graduate degree, and four times as likely to have a doctoral degree relative to the native-born population.[33] Quite apart from this population being a disproportionately educated and skilled one, they are also part of a population making immediate positive impacts on the U.S. economy: During the 2015-16 academic year, international students contributed $32.8 billion to the U.S. economy and supported more than 400,000 jobs.[34]

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[28] App. at 13.

[29] App. at 16.

[30] App. at 52.

[31] App. at 17.

[32] App. at 159-60.

[33] App. at 150.

2. Immigrants Are Inventors.

So too do immigrants drive the development of inventions and other useful arts. For example, in 2011, 76% of patents awarded to the Top 10 patent-producing U.S. universities had an inventor who was foreign-born.[35] In recent years, foreign nationals contributed to more than three quarters of patents in the fields of information technology, molecular and microbiology, and pharmaceuticals.[36]

The amount of invention originating from immigrants can have dramatic effects on innovation, with discernable spillover effects. One academic study noted that a 1.3 percentage point increase in the share of the overall U.S. population composed of immigrant college graduates, and a 0.7 percentage point increase in that same share composed of post-graduate immigrants, led to an increase in patenting by approximately 12 to 21%.[37] Similarly, as little as a 0.45 percentage point increase in immigrant scientists and engineers in the overall U.S. population increases patenting per capita by approximately 13 to 32%.[38] High-skilled immigration has an important and discernable impact on the innovation economy. Limiting such immigration clearly threatens future innovation.

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[34] App. at 163-64.

[35] App. at 37.

[36] App. at 38-39.

[37] App. at 41.

[38] App. at 41.

3. Immigrants Are Technology Leaders.

The highly-educated foreign-born scientists, mathematicians, and engineers also represent some of the best in the field. Forty percent of the Nobel Prizes won by Americans in Chemistry, Medicine, and Physics since 2000 were awarded to immigrants.[39] In 2016, all six American winners of the Nobel Prize in economics and scientific fields were foreign-born.[40] From 2010 to 2015, four out of eight U.S. Turing Award (for computing) recipients were first or second generation immigrants.[41] Since 1936, 63% of Fields Medal (for mathematics) recipients affiliated with a U.S. research institution have been foreign born (and *all* such recipients have been foreign-born since 2002).[42] Forty-one percent of National Medal of Science recipients in math or computer science are foreign-born.[43] In Massachusetts, 37% of Nobel Prize winners associated with MIT are foreign-born;[44] 32% of Nobel prize winners who are current faculty or alumni of Harvard University are foreign-born;[45] and 75% of Nobel Prize winners who have been affiliated with

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[39] App. at 166.

[40] App. at 166.

[41] App. at 178.

[42] App. at 176.

[43] App. at 180.

[44] App. at 168.

[45] App. at 169.

Boston University are foreign-born.[46] There is little question as to the importance of the contributions that immigrants make to STEM fields, in both the U.S. and Massachusetts.

4. Immigrants Are Business Leaders.

American companies that are household names — Microsoft, McDonald's, U.S. Steel — are led by foreign-born CEOs.[47] As of 2016, over 10% of Fortune 500 CEOs were born outside of the U.S.; the same was true for 14% of Fortune 100 CEOs.[48] In 2016, over 40% of Fortune 500 firms were founded either by an immigrant or the child of immigrants.[49]

The same holds true in Massachusetts. More than half of the Massachusetts-based Fortune 500 companies were founded by immigrants, or by children of immigrants.[50] Their impact on the Massachusetts economy has been significant, generating over $130 billion in annual revenue, and employing nearly half a million people around the world.[51] At the beginning of this decade, over 17 percent of all business owners in Massachusetts were foreign-born.[52] In 2013, the same was true of nearly 19 percent of business owners in the greater

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[46] App. at 169.

[47] App. at 29.

[48] App. at 29.

[49] App. at 29.

[50] App. at 26.

[51] App. at 26.

[52] App. at 27.

Boston area.[53] From 2006 to 2010, Massachusetts businesses owned by recent immigrants had a total net business income of $2.8 billion.[54]

Prominent American innovators, past and present, hail from countries directly targeted by the Revised Travel Ban, including Steve Jobs (the late co-founder of Apple, whose father is from Syria), Ali Hajimiri (an academic and entrepreneur who holds over 85 U.S. and European patents, who is from Iran), and Joe Kiani (founder, chairman, and CEO of Masimo, and also from Iran).[55] Iranian-Americans either founded or lead mainstays of the technology sector like Twitter, Dropbox, Oracle, and eBay.[56] Similarly, several of the top venture capitalists who fund new technology companies were born in Tehran.[57]

5. Immigrants Contribute To The Field Of Medicine.

Medicine, in particular, has benefitted greatly from immigrants. More than 25 percent of physicians practicing in the United States are foreign-born.[58] Importantly, foreign-born physicians are disproportionately represented in rural clinics and public safety-net hospitals treating isolated and vulnerable populations.[59] The simple reason for this is that the United States does not produce enough physicians to keep up with demand. According to a report published by the Association of American Medical Colleges (AAMC) in 2016, a current deficit of 11,000 physicians is expected to grow as the population grows and ages.[60] The AAMC estimates that the U.S. will face a shortage of up to 94,700 doctors by 2025.[61] Almost a third of the shortage will be primary care physicians.[62] More than 8,400 doctors working in the U.S. are from two of the countries listed in the Revised Travel Ban: Iran and Syria.[63] Specifically in Massachusetts, in 2016 almost 1 in 4 physicians graduated from a medical school outside of the United States (suggesting non-U.S. origin).[64]

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[53] App. at 27.

[54] App. at 27.

[55] App. at 32-34.

[56] App. at 32-34.

[57] App. at 14.

[58] App. at 17-18.

[59] App. at 17-18.

B. Unless It Is Enjoined, The Revised Travel Ban Will Harm The Technology Industry.

Implementation of irrational and discriminatory immigration policies, including the Revised Travel Ban, would severely harm the technology industry in the U.S. generally, and Massachusetts specifically. Indeed, Massachusetts has one of the highest numbers of applications for temporary non-agricultural work permits in the United States.[65] The impact is expected to destabilize the workforce and reduce the competitiveness of U.S. technology firms. For example, Microsoft's public securities filings explain that "[c]hanges to U.S. immigration policies that restrain the flow of technical and professional talent may inhibit our ability to adequately staff our research and development efforts."[66] In addition to stifling recruiting from the "banned" countries, the Revised Travel Ban could accelerate the rise of technology hubs abroad, making such locales as Vancouver, London, and Singapore more "attractive alternatives to existing hubs" of technology in the United States, and force companies based abroad to put off opening offices in the United States.[67] It will also likely result in the relocation of foreign-born employees from the United States to other countries where they can reside without fear of a sudden revocation of their rights to access their families and homes.

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[60] App. at 18.

[61] App. at 18.

[62] App. at 18.

[63] App. at 19.

[64] App. at 21.

[65] App. at 128.

The Massachusetts technology sector expects to feel this impact acutely.

As reported in the press, numerous Boston-based businesses have expressed grave concern regarding the Administration's travel ban and its potential expansion. As Jeff Bussgang, a general partner at the venture capital firm Flybridge and professor at Harvard Business School stated, the travel ban is "the innovation economy's worst nightmare."[68] Paul English, founder of the travel booking site Kayak and startup Lola, expressed concern about a Mexican national hired to develop an app who was worried about traveling out of the country to visit his family.[69] Leaders of Massachusetts-headquartered technology companies, from large to small — including GE, TripAdvisor, Carbonite, Brightcove, and Fuze —have expressed concern over the direct impact that implementation of the travel ban had on their businesses.[70] This anecdotal evidence is strongly supported by the empirical data noted above: a high percentage of founders, managers, and employees of Massachusetts technology companies are immigrants and potentially impacted by the Revised Travel Ban, either directly or indirectly.

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[66] App. at 21.

[67] App. at 22.

[68] Adam Vaccaro, *Boston Business Leaders Oppose Trump Immigration Order*, The Boston Globe (Jan. 29, 2017), *available at* https://www.bostonglobe.com/business/2017/01/29/chief-says-company-will-stand-with-employees-from-banned-countries/5v00oFyvZZpGPd5CxPDjfN/story.html.

It is thus clearly in the public interest — including in the interests of the Massachusetts technology industry — for the Court to restrain the operation of the Revised Travel Ban. The United States deserves fair, rational, and predictable rules to govern immigration and international travel. Such a system permits individuals and companies to reliably arrange employment and commercial relationships, without fear that those relationships will be abruptly disrupted by irrational or discriminatory policies.

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[69] *Id.*

[70] *Id.*; Zeninjor Enwemeka, ***Local Tech Companies Say Trump's Immigration Order Is Bad For Business***, WBUR (Feb. 7, 2017), available at http://www.wbur.org/bostonomix/2017/02/07/boston-business-travel-ban.

C. Unless It Is Enjoined, the Revised Travel Ban Will Undermine the Competitive Strength of the Domestic Technology Industry and Will Chill the Culture of Innovation.

The Revised Travel Ban is also contrary to the public interest because it substantially undermines the ability of the Massachusetts technology industry to compete in the international marketplace. It discourages travel to the U.S. by potential customers and investors, either because they are directly impacted by the ban, or because they are worried that the ban will be unexpectedly expanded to include additional nationalities. Indeed, this is not a theoretical concern. Flight bookings to the United States from January 28, 2017 to February 4, 2017 dropped by 6.5% overall in comparison to the previous year.[71] Bookings to the United States from the seven targeted countries in the Original Travel Ban have dropped by 80%.[72]

The Revised Travel Ban may also force companies to move jobs outside of the U.S., locating businesses where employees live rather than enticing them to come to the U.S. Similarly, the Revised Travel Ban discourages talented foreign students from attending local educational institutions, from which the technology industry hires many engineers and scientists to drive innovation in the United States. Foreign-born students already in the U.S. will be less likely to remain, as they may be unable to receive or renew a visa, or may be fearful of that possibility. The Revised Travel Ban will inevitably reduce the relative strength of domestic industry in global markets, which does nothing to make the United States more safe, prosperous, or secure.

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[71] App. at 271.

[72] App. at 271.

The technology industry, in Massachusetts as elsewhere, thrives on a culture of diversity, inclusivity, and equal opportunity. The Revised Travel Ban is antithetical to these values. It is a patently illegal and discriminatory attempt to inflict harm upon a religious minority.[73] This animus was both proven and magnified by the manner of the Original Travel Ban's implementation, which — without any notice — barred the re-entry of Muslims who have made their home in our country, separating them from their homes, families, and careers. A government that acts to hurt people based on their religion (or non-religion) undermines not only the inclusive principles of the modern technology industry, but also legal principles "rooted in the foundation soil of our Nation" and "fundamental to freedom."[74] "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men [and women]."[75]

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[73] *Aziz*, 2017 U.S. Dist. LEXIS 20889, at *9-13, 27.

[74] *Epperson v. Arkansas*, 393 U.S. 97, 103-09 (1968).

[75] *United States v. Ballard*, 322 U.S. 78, 86 (1944).

CONCLUSION

For all the foregoing reasons, MassTLC respectfully requests that this Court affirm the decisions below.

Respectfully submitted,

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Dated: September 18, 2017

APPENDIX

THE ECONOMIC IMPACT OF IMMIGRATION ON THE U.S.

June 2017

compilation of research contributes to a productive dialogue about the important role immigrants play as critical drivers of our national leadership in innovation, economic growth, and global competitiveness.

We encourage readers of this report to lend their voices to the conversation and use this research to complement personal insights and experiences about the role of immigrants. We welcome broad sharing of this report and have made it freely available for download at the following URL: www.MassTLC.org/Immigration.
Thank you,

/s/ Thomas Hopcroft
Thomas Hopcroft
President & CEO
Mass Technology
Leadership Council, Inc.

/s/ Mohamad Ali
Mohamad Ali
President & CEO
Carbonite, Inc.
Trustee, MassTLC

/s/ Steve Kaufer
Steve Kaufer
President & CEO
TripAdvisor, Inc.
Member, MassTLC

Shortage of immigrant talent threatens U.S. global leadership

U.S status as innovation leader at risk

500K

1 out of 17

Ratio of MA graduates with a computer science or IT degree for every 17 available tech jobs (MA Dept. of Higher Ed)

86

U.S. losing talent war

Other nations are welcoming tomorrow's innovators and job creators. Only 14% of U.S. green cards authorizing permanent residence—and a path to citizenship – were granted for employment purposes in 2012, compared to 62% of Canadian immigrants admitted for economic reasons.

Immigration nation

51%

52.4%

40%

Highest honors

a global hub
$2 3 Billion

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I. EXECUTIVE SUMMARY

A. The Impact of Immigration on the Tech Industry

The technology industry is a critical driver of the U.S. economy. In Massachusetts alone, nearly 400,000 people work in jobs that are either in the technology sector, or are in technology-related occupations in other sectors, together comprising about 13 percent of the state's total workforce. The tech industry is a global enterprise, fueled in large part by immigration and international travel. As of January 1, 2016, "[i]mmigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies." More than half of Silicon Valley's corporate founders are immigrants.

The integral role that immigrants play in the technology industry is one of job creation, innovation, and leadership. Far from taking jobs, immigrants are creating jobs for the native-born population and helping meet the needs of an industry constrained by a lack of skilled workers. By 2020, for example, projections indicate that 1.4 million computer specialist positions will be open in the United States, but domestic universities will only produce enough graduates to fill 29 percent of those jobs. In Massachusetts today, there are seventeen technology jobs for every person who graduates with a college degree in computer science or information technology.

Immigrants are responsible for substantial economic growth. This is true of the U.S. economy where, in

2015, immigrants contributed $2 trillion to the U.S. GDP, representing 11 percent of the country's total GDP. It is also true of the Massachusetts economy, where one study found that if half of Massachusetts' 3,608 advanced level graduates in science, technology, engineering, and mathematics (STEM) related fields, studying on temporary visas, remained in Massachusetts upon graduation, then 4,726 new jobs would be created for U.S.-born workers by 2021.

Research indicates that immigrant students are disproportionately more likely to get their degrees in a STEM field – an area of critical domestic talent shortages – and that international students make up over 30 percent of the post-baccalaureate degrees in STEM fields. Furthermore, individuals from Iran, Libya, Somalia, Sudan, Syria, and Yemen – the six countries subject to the President's revised Executive Order – are more likely to have a bachelor's degree, approximately twice as likely to have a graduate degree, and four times as likely to have a doctoral degree relative to the native-born population. In addition to this population being disproportionately educated and skilled, they are also part of a population making immediate impacts on the U.S economy. During the 2015-16 academic year alone, international students contributed $32.8 billion to the U.S. economy and supported more than 400,000 jobs.

Immigrants also drive the development of inventions and other useful arts. For example, in 2011, 76 percent of patents awarded to the Top 10 patent-producing U.S. universities had an inventor that was foreign-born. In recent years, foreign nationals contributed to more than three quarters of patents in the fields of information technology, molecular and microbiology, and pharmaceuticals. The amount of invention originating from immigrants can have dramatic effects on innovation, with discernable spillover effects. One academic study noted that a 1.3 percentage point increase in the share of the overall U.S. population composed of immigrant college graduates, and a 0.7 percentage point increase in that same share composed of post-graduate immigrants, led to an increase in patenting by approximately 12 percent to 21 percent. Similarly, as little as a 0.45 percentage point increase in immigrant scientists and engineers in the overall U.S. population increases patenting per capita by approximately 13 to 32 percent. High-skilled immigration has an important and discernable impact on patenting, a key indicator of innovation in the economy.

The highly-educated foreign-born scientists, mathematicians, and engineers also represent some of the best in the field. Forty percent of the Nobel Prizes won by Americans in Chemistry, Medicine, and Physics since 2000 were awarded to immigrants. In 2016, all six American winners of the Nobel Prize in economics and scientific fields were foreign-born. From 2010-2015, four out of eight American recipients of the Turing Award (for computing) were first or second generation immigrants. Since 1936, 63 percent of Fields Medal (for mathematics) recipients affiliated with a U.S. research institution have been foreign-born (and all such recipients have been foreign-born since 2002). Forty percent of National Medal of Science recipients in math or computer science are foreign-born. In Massachusetts, 37 percent of Nobel Prize winners associated with MIT are foreign-born; 33 percent of Nobel Prize winners who are current faculty or alumni at Harvard University are foreign-born; and 75 percent of Nobel Prize winners who have been affiliated with Boston University are foreign-born.

American companies that are household names—Microsoft, McDonald's, U.S. Steel—are led by foreign-born CEOs. As of 2016, over 10 percent of Fortune 500 CEOs were born outside of the U.S.; the same was true for 14 percent of Fortune 100 CEOs. In 2016, over 40 percent of Fortune 500 firms were founded either by an immigrant or a child of immigrants. The same holds true in Massachusetts. More than half of the Massachusetts-based Fortune 500 companies were founded by immigrants, or by children of immigrants. Their impact on the Massachusetts economy has been significant, generating over $130 billion in annual revenue, and employing nearly half a million people around the world. At the beginning of this decade, over 17 percent of all business owners in Massachusetts were foreign-born. In 2013, the same was true of nearly 19 percent of business owners in the greater Boston area.

From 2006 to 2010, Massachusetts businesses owned by new immigrants had a total net business income of $2.8 billion. Prominent American innovators, past and present, hail from countries directly targeted by the Revised Travel Ban, including Steve Jobs; the co-founder of Apple whose father is from Syria; Ali Hajimiri, an academic and entrepreneur who holds over 85 U.S. and European patents and is from Iran; and Joe Kiani, founder, chairman, and CEO of Masimo who is also from Iran. Iranian-Americans either founded or lead mainstays of the technology sector like Twitter, Dropbox, Oracle, and eBay. Similarly, several of the top venture capitalists who fund new technology companies were born in Tehran.

The field of medicine has also benefitted greatly from immigrants. More than 25 percent of physicians practicing in the United States are foreign-born. Importantly, foreign-born physicians are disproportionately represented in rural clinics and public safety-net hospitals treating isolated and vulnerable populations. The simple reason for this is that the United States does not produce enough physicians to keep up with demand. A current deficit of 11,000 physicians is expected to grow as the population grows and ages. It is estimated that U.S. will face a shortage of up to 94,700 doctors by 2025. Almost a third of the shortage will be primary care physicians. More than 8,400 doctors working in the U.S. are from Iran and Syria, two of countries listed in the Revised Travel Ban. In Massachusetts, almost 1 in 4 physicians graduated from a medical school outside of the United States, suggesting non-U.S. origin.

B. The Implications of the Travel Ban on Innovation and the Economy

Creating unnecessary barriers for foreign innovators and job creators is likely to have an adverse impact on the technology industry and threaten the innovation capacity and economic prosperity of the United States in general, and Massachusetts specifically. Indeed, Massachusetts has one of the highest numbers of applications for temporary non-agricultural work permits in the United States. A potential impact of the executive order will be the destabilization of the workforce and the reduction of U.S. competitiveness. Microsoft's public securities filings explain that "[c]hanges to U.S. immigration policies that restrain the flow of technical and professional talent may inhibit our ability to adequately staff our research and development efforts."

In addition to stifling recruiting from certain countries, the Revised Travel Ban could accelerate the rise of technology hubs abroad, making such locales as Vancouver, London, and Singapore more "attractive alternatives to existing hubs" of technology than the United States, and force companies based abroad to put off opening offices in the United States. It will also likely result in the relocation of foreign-born employees from the United States to other counties where they can reside without fear of a sudden revocation of their rights to access their families and homes.

The Massachusetts technology sector expects to feel this impact acutely. As reported in the press, numerous Boston-based businesses have expressed grave concerns regarding the Administration's travel ban and its potential expansion. As Jeff Bussgang, a general partner at the venture capital firm Flybridge and professor at Harvard Business School stated, the travel ban is "the innovation economy's worst nightmare." Paul English, founder of the travel booking site Kayak and startup Lola, expressed concern about a Mexican national hired to develop an app who was worried about traveling out of the country to visit his family. Leaders of Massachusetts-headquartered technology companies from large to small—including GE, TripAdvisor, Carbonite, Brightcove, and Fuze—have expressed concern over the direct impact that implementation of the original Travel Ban had on their businesses. This anecdotal evidence is strongly supported by the empirical data contained in this report: a high percentage of founders, managers, and employees of Massachusetts technology companies are immigrants and potentially impacted by the Revised Travel Ban, either directly or indirectly.

The impact of the Revised Travel Ban also inhibits the ability of the Massachusetts technology industry to compete in the international marketplace. It discourages travel to the U.S. by potential customers and investors, either because they are directly impacted by the ban, or out of concern that the ban could be unexpectedly expanded. Indeed, this is not a theoretical concern. Flight bookings to the United States from January 28, 2017 to February 4, 2017 dropped by 6.5 percent overall in comparison to the previous year. Bookings to the United States from the six countries targeted by the Revised Travel Ban have dropped by 80 percent. Companies are already considering moving jobs outside of the U.S., locating businesses where employees live rather than enticing them to come to the U.S. Moving these jobs out of the country reduces employment in domestic support jobs that will be hired in proximity to these workers.

Similarly, the Revised Travel Ban discourages talented foreign students from attending local educational institutions, from which the technology industry hires many engineers and scientists to drive innovation in the United States. Foreign-born students already in the U.S. will be less likely to remain, as they may be unable to receive or renew a visa, or may be fearful of that possibility. The Revised Travel Ban will inevitably reduce the relative strength of the domestic industry in global markets.

The technology industry, in Massachusetts as elsewhere, thrives on a culture of diversity, inclusivity, and equal opportunity. We hope that by compiling this research and highlighting the impact of immigration on the U.S. and Massachusetts economies, we can productively contribute to the national conversation and are able to illustrate the significant impact immigrants have on the growth and prosperity of our nation.

II. COST TO BUSINESSES IMPOSED BY THE EXECUTIVE ORDER

One of the primary contributions of immigrants[1] to the United States is as members of the workforce. From 1996 to 2010, immigrants accounted for roughly half of the U.S. labor force growth.[2] Strikingly, immigrants have also been leaders in innovation and entrepreneurship, comprising over half of Silicon Valley founders.[3] The executive order limiting work visas and immigration from select countries, however, creates significant levels of uncertainty for immigrant workers and their employers and has the potential to impose substantial costs on firms. The proposed order also increases incentives for firms to outsource their operations, reducing employment prospects in the United States generally.

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[1] Unless otherwise noted, immigrants refer to foreign-born individuals who are residents of the United States.

[2] Orrenius, Pia M. and Madeline Zavodny, "Immigrants in the U.S. Labor Market," Federal Reserve Bank of Dallas, Working Paper 1306, September 2013, *available at* https://www.dallasfed.org/assets/documents/research/papers/2013/wp1306.pdf, *accessed* March 25, 2017, p. 8 ("Although they make up only 16 percent of U.S. workforce, these immigrants account for a much larger share of its growth. Just over half of the increase in the U.S. labor force between 1996 and 2010 was the result of immigration—legal and illegal").

KEY TAKEAWAYS

- By 2020, it is estimated that 1.4 million computer specialist positions will be open. However U.S. universities will only produce enough graduates to fill 29 percent of these jobs. There are more than 500,000 open computing jobs, but less than 50,000 Americans graduate from college with computer-science degrees every year.
- The tech sector accounts for 20 percent of jobs in Massachusetts. At the same time, there is a shortage of graduates in tech-related fields; there is one graduate with degrees in computer science or information technology (IT) for every 17 technology jobs in Massachusetts.

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[3] Kerr, William, "Why These Business School Professors Oppose Trump's Executive Order on Immigration," Harvard Business School Working Knowledge, January 31, 2017, ***available at*** http://hbswk.hbs.edu/item/why-these-business-school-professors-oppose-trump-s-executive-order-on-immigration, ***accessed*** March 25, 2017.

- **In 2014, immigrants comprised 15.6 percent of the population in Massachusetts and 26.6 percent of science, technology, engineering, and mathematics ("STEM") jobs.**
- **Almost 1 in 4 physicians in Massachusetts were graduates from a foreign medical school in 2016.**
- **Almost 60 percent of Fortune 500 companies based in Massachusetts were founded by immigrants or their children[4] and almost 20 percent of business owners in the Boston metropolitan area were foreign-born.**

C. Demand for H-1B Workers

- The private sector accounts for the intensity of demand for H1-B workers:
    - Top H1-B demands are from firms such as Wal-Mart, Merrill Lynch, Credit Suisse, JPMorgan Chase & Co.[5]

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[4] "The Contributions of New Americans in Massachusetts," New American Economy, August 2016, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf, *accessed* March 25, 2017, p. 3.

[5] "The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy," American Immigration Council, April 1, 2016, *available at* https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet *accessed* March 25, 2017.

  - Nearly two thirds of requests for H1-B visas are in STEM occupations with lower percentages of workers contributing to the healthcare, business, finance, and life sciences industries.[6]
- H1-B petitions approved in 2012, by detailed industry[7] (number of petitions; percent of approved H1-B Petitions):
  - Computer Systems Design & Related Services (110,414; 42 percent)
  - Colleges, Universities, and Professional Schools (16,167; 6.2 percent)
  - Software Publishers (5,367; 2.0 percent)
  - Management, Scientific, & Technical Consulting Services (4,915; 1.9 percent)
  - General Medical and Surgical Hospitals (4,533; 1.7 percent)
- Two thirds of foreign students pursue bachelor or higher level degrees in STEM, business, management, and marketing fields

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[6] "The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy," American Immigration Council, April 1, 2016, ***available at*** https://www.americanimmigrationcouncil.org/research/h1b-[illegible], ***accessed*** March 25, 2017.

[7] "Characteristics of H1B Specialty Occupation Workers: Fiscal Year 2012 Annual Report to Congress," U.S. Citizenship and Immigration Services, June 26, 2013, ***available at*** https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-12-characteristics.pdf, ***accessed*** March 25, 2017, p. 20 and Table 13A. Percent calculated as number of petitions in industry divided by total number of petitions.

in the United States as compared to 48 percent of American-born students.[8]

i. Massachusetts-Specific Facts

- Boston is the city with the 6th highest number of H-1B visa sponsored MBAs.[9]

D. The Role of Immigrants in the Tech Industry

- The U.S. relies heavily on a steady stream of skilled engineers from other countries to help create its products, as indicated by the number of H1-B petitions approved in related sectors.[10]

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[8] Ruiz, Neil G. "The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations," Global Cities Initiative: A Joint Project of Brookings and JPMorgan Chase, August 2014, ***available at*** https://www.brookings.edu/wp-content/uploads/2014/08/Foreign_Students_Final.pdf, ***accessed*** March 25, 2017, p. 1.

[9] Allen, Nathan, "Where MBAs Are Most Likely to Get an H1B Visa," Poets & Quants, March 1, 2017, ***available at*** http://poetsandquants.com/2017/03/01/mbas-likely-get-h1b-visa/, ***accessed*** March 10, 2017. This statistic is calculated using data from the 13,000 users of the website http://www.transparentcareer.com. According to Sheryle Dirks, Associate Dean of Career Management at the Fuqua School of Business at Duke University, "Transparent's data looks entirely consistent with what we have seen and known to be true, specifically at Duke Fuqua over the past few years anecdotally, as well as talking with our other business school counterparts."

[10] Wingfield, Nick and Mike Isaac, "Tech Industry Frets over Possible Immigration Changes," The New York Times, January 27, 2017, ***available at*** https://www.nytimes.com/2017/01/27/business/technology-h-1b-visa-immigration.html, ***accessed*** March 25, 2017.

- The U.S. does not produce enough professionals to fill all open high-tech jobs:
    - There are almost five open positions for every software developer looking for work[11]
- By 2020, it is estimated that 1.4 million computer specialist positions will be open, however U.S. universities will only produce enough graduates to fill 29 percent of these jobs.[12] There are more than 500,000 open computing jobs, but less than 50,000 Americans graduate from college with computer-science degrees every year.[13]

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[11] Koetsier, John, "Hiring and Hirable in 2013: Agile Developers," VentureBeat, December 31, 2012, *available at* https://venturebeat.com/2012/12/31/hiring-and-hirable-in-2013-agile-developers/, *accessed* March 27, 2017 ("...4.59 job postings for each and every job-seeking agile developer."). The statistic is calculated by talent discovery company Yoh and jobs site CareerBuilder.

[12] Nager, Adams and Robert D. Atkinson, "The Case for Improving U.S. Computer Science Education," May 2016, *available at* http://www2.itif.org/2016-computer-science-education.pdf, *accessed* March 11, 2017, p. 3 ("In 2011, Code.org projected that the economy would add 1.4 million computing jobs by 2020, but educate just 400,000 computer science students by then"). The statistics were calculated by the authors using data from the Bureau of Labor Statistics, Code.org, Change the Equation, and the Information Technology and Innovation Foundation.

[13] "Summary of Source Data for Code.org Infographics and Stats," Code.org, 2015, *available at* https://docs.google.com/document/d/[illegible]/pub, *accessed* March 27, 2017 ("...there were 580,940 bachelor's degrees earned in STEM in 2015, and only 49,291 of those—8.48%—were in Computer Science...There are more than 500,000 open

- "Iranian-Americans founded or hold leadership positions at Twitter, Dropbox, Oracle, Expedia, eBay, and Tinder. Top venture capitalists like Shervin Pishevar, Pejman Nozad, and brothers Ali and Hadi Partovi, all of whom invest millions of dollars in technology startups, were born in Tehran."[14]
- "Immigrant founded engineering and technology firms employed approximately 560,000 workers and generated $63 billion in sales in 2012. Immigrant founders from top venture-backed firms have created an average of approximately 150 jobs per company in the United States."[15]

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computing jobs in the United States."). The number of current open computing jobs comes from the sum of the per-state jobs data from The Conference Board's Help Wanted OnLine service. The number of STEM and Computer Science graduates comes from the National Center for Education Statistics (NCES) IPEDS Completions Survey, obtained using the National Science Foundation (NSF) WebCASPAR tool.

[14] Waddell, Kaveh, "How Trump's Immigration Rules Will Hurt the U.S. Tech Sector," The Atlantic, February 1, 2017, ***available at*** https://www.theatlantic.com/technology/archive/2017/02/how-trumps-immigration-rules-will-hurt-the-us-tech-sector/515202/, ***accessed*** March 11, 2017.

[15] Stangler, Dane and Jason Wiens, "The Economic Case for Welcoming Immigrant Entrepreneurs," Kauffman Foundation, September 8, 2015, ***available at*** http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic

- "In the United States as a whole, there are almost as many immigrants in white-collar jobs (46 percent) as in all other occupations combined."
    - "In some states, more than half [of immigrants] are in white-collar jobs... the perception that nearly all immigrants work in low-wage jobs is clearly inaccurate."[16]

i. ***Massachusetts-Specific Facts***

- The tech sector is critical to the state's economy. More than 294,000 people work directly for the technology sectors in Massachusetts, which combined with over 96,000 tech occupations in other sectors and over 733,000 indirect jobs supported by the tech sector, comprise approximately 35 percent of the workforce in Massachusetts.[17]

[illegible], *accessed* March 25, 2017.

[16] Costa, Daniel, David Cooper, and Heidi Shierholz, "Facts About Immigration and the U.S. Economy," Economic Policy Institute, August 12, 2014, *available at* [illegible], *accessed* March 25, 2017.

[17] MassTLC, "The Connected Commonwealth: How the Massachusetts Tech Ecosystem is Creating New Growth Opportunities," 2016, *available at* [illegible], *accessed* April 25, 2017, p. 14.

Together, tech is responsible for 31% of Massachusetts Gross State Product.[18]

- Put together, their output was worth $160 billion in 2013, the most recent year for which statistics were available."[19]
- "In the red-hot Massachusetts technology field, meanwhile, there are 17 jobs for every one graduate with a degree in computer science or IT."[20]
- In 2014, immigrants comprised 15.6 percent of the population in

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[18] MassTLC, "The Connected Commonwealth: How the Massachusetts Tech Ecosystem is Creating New Growth Opportunities," 2016, available at *http://www.masstlc.org/2016-state-of-technology-report/*, accessed April 25, 2017, p. 15.

[19] Adams, Dan, "Mass. Tech Sector Flourishing with Challenges Ahead," Boston Globe, March [illegible], 2015, ***available at*** https://www.bostonglobe.com/business/2015/03/12/report-mass-tech-sector-flourishing-but-challenges- [illegible] story.html, ***accessed*** March 10, 2017.

[20] "The Degree Gap: Honing in on College Access, Affordability and Completion in Massachusetts," The Vision Project, June 2016, ***available at*** http://www.mass.edu/visionproject/_documents/2016%20The [illegible] %20Vision%20Project%20Annual%20Report.pdf, ***accessed*** March 25, 2017, p. 14.

Massachusetts and 26.6 percent of STEM jobs.[21]

  - "If half of Massachusetts' 3,608 advanced level STEM grads on temporary visas stayed in the state after graduation…4,726 jobs for U.S.-born workers would be created by 2021."[22]

E. The Role of Immigrants in Medicine

- More than 25 percent of physicians practicing in the United States are foreign-born.[23] Foreign-born physicians are disproportionally represented in rural clinics and public safety-net hospitals treating isolated and vulnerable populations.[24]

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[21] "The Contributions of New Americans in Massachusetts," New American Economy, August 2016, ***available at*** http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf, *accessed* March 25, 2017, p. 13.

[22] "The Contributions of New Americans in Massachusetts," New American Economy, August 2016, ***available at*** http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf, *accessed* March 11, 2017, p. 14.

[23] McCabe, Kristen, "Foreign-Born Health Care Workers in the United States," Migration Policy Institute, June 27, 2012, ***available at*** http://www.migrationpolicy.org/article/foreign-born-health-care-workers-united-states#1, *accessed* March 10, 2017 ("Of the roughly 853,000 health care professionals employed as physicians and surgeons in 2010, more than one-quarter (27 percent) were foreign born.").

- The reason such doctors are in the U.S. in the first place is that America does not produce enough physicians to keep up with demand. According to a report published by the Association of American Medical Colleges (AAMC) in 2016, a current deficit of 8,200 primary care doctors and 2,800 psychiatrists is expected to grow as the population grows and ages.[25] The AAMC estimates that the U.S. will face a shortage of up to 94,700 doctors by 2025. Almost a third of the shortage will be primary care physicians.[26]

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[24] Ross, Casey, and Max Blau, "US health care relies heavily on foreign workers. Trump's immigration ban is raising alarms," STAT, January 30, 2017, ***available at*** https://www.statnews.com/2017/01/30/trump-immigration-ban-health-workers/, ***accessed*** March 10, 2017.

[25] Dall, Tim, Terry West, Ritashree Chakrabarti, and Will Iacobucci, "The Complexities of Physician Supply and Demand: Projections from 2014 to 2025," IHS Inc. and the Association of American Medical Colleges, April 5, 2016, ***available at*** https://www.aamc.org/download/458082/data/2016_complexities_of_supply_and_demand_projections.pdf, ***accessed*** March 11, 2017, p. 36.

[26] Dall, Tim, Terry West, Ritashree Chakrabarti, and Will Iacobucci, "The Complexities of Physician Supply and Demand: Projections from 2014 to 2025," IHS Inc. and the Association of American Medical Colleges, April 5, 2016, ***available at*** https://www.aamc.org/download/458082/data/2016_complexities_of_supply_and_demand_projections.pdf, ***accessed*** March 11, 2017, p. 37, Exhibit 22.

More than 8,400 doctors working in the U.S. are from the two countries listed in the executive order – Syria and Iran.[27]

  - The share of health care workers that are foreign-born was 5 percent in the 1960s and was as high as 30 percent by the 1990s.[28]
  - Healthcare has the largest percentage of foreign-born and foreign-trained workers of any industry in the country.[29]

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[27] Yasmin, Seema, "Trump Immigration Ban Can Worsen U.S. Doctor Shortage, Hurt Hospitals," Scientific American, February 1, 2017, ***available at*** https://www.scientificamerican.com/article/trump-immigration-ban-can-worsen-u-s-doctor-shortage-hurt-hospitals/, ***accessed*** March 10, 2017 ("More than 8,400 doctors working in the U.S. are from two countries listed in the executive order—Syria and Iran—according to data from the American Medical Association.").

[28] Carnevale, Anthony P., Nicole Smith, Artem Gulish, and Bennett H. Beach, "Healthcare Executive Summary," Georgetown Public Policy Institute Center on Education and the Workforce, June 2012, ***available at*** https://cew.georgetown.edu/wp-content/uploads/2014/11/Healthcare.ExecutiveSummary.090712.pdf, ***accessed*** March 25, 2017, p. 12.

[29] Carnevale, Anthony P., Nicole Smith, Artem Gulish, and Bennett H. Beach, "Healthcare Executive Summary," Georgetown Public Policy Institute Center on Education and the Workforce, June 2012, ***available at*** https://cew.georgetown.edu/wp-content/uploads/2014/11/Healthcare.ExecutiveSummary.090712.pdf, ***accessed*** March 25, 2017, p. 12 ("Healthcare has largest proportion of foreign-born and foreign-trained

- Data on older Medicare patients admitted to hospital in the U.S. showed that patients treated by graduates of foreign medical programs had lower mortality than patients cared for by U.S. graduates.[30]

i. Massachusetts-Specific Facts

  - "This year's *Boston Business Journal* list of the 50 largest employers in Massachusetts, which excludes government jobs, totals more than 410,000 Bay State employees. Led by No. 1-ranked Partners Health Care System's 67,600 Massachusetts employees, the 13 health care companies on the list alone comprise more than 172,366 (in some cases this includes per diem and temp workers) of those employees."[31]

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workers in the country. Foreign-born workers make up nearly a quarter (22 percent) of the healthcare workforce, nearly twice the national average.").

[30] Tsugawa, Yusuke, Anupam B. Jena, E. John Orav, and Ashish K. Jha, "Quality of Care Delivered by General Internists in US Hospitals Who Graduated from Foreign versus US Medical Schools: Observational Study," *BMJ* 356:j273, February 3, 2017, ***available at*** http://www.bmj.com/content/356/bmj.j273, ***accessed*** March 25, 2017.

[31] "The List: Health Care, Higher Ed Dominate Bay State's Largest Employers," Boston Business Journal, July 8, 2016, ***available at*** http://www.bizjournals.com/boston/news/2016/07/08/the-list-health-care-higher-ed-dominate-bay-state-s.html, ***accessed*** March 25, 2017.

  - "In 2016 almost 1 in 4 physicians in Massachusetts graduated from a foreign medical school, a likely sign they were born elsewhere."[32]

F. Impact of Visa Restrictions on American Employers

i. Potential Impact of the Proposed Order on Risk and Instability of American Workforces

- According to Microsoft, "[c]hanges to U.S. immigration policies that restrain the flow of technical and professional talent may inhibit our ability to adequately staff our research and development efforts."[33]
- The Computing Research Association, a non-profit organization representing computing professionals in academia, government laboratories, and other areas, noted that the proposed order "creates uncertainty and potential hardship among current students and researchers already here making

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[32] "The Contributions of New Americans in Massachusetts," New American Economy, August 2016, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf, *accessed* March 25, 2017, p. 15.

[33] Microsoft Corporation, Form 10-Q for the Quarter Ending December 31, 2016, *available at* http://www.sec.gov/Archives/edgar/data/789019/000119312517018241/d315167d10q.htm, *accessed* April 14, 2017, p. 58.

important contributions and endangers our leadership role in a key field."[34]

ii. Potential Impact of the Proposed Order on the Competitiveness of U.S. Firms

- The proposed executive order could accelerate the rise of technology hubs abroad. Vancouver, London, and Singapore are "attractive alternatives to existing hubs in the West Coast of the United States."[35]
- Companies that are based abroad may put off opening offices in the United States:
    - "Already, the number of billion-dollar technology start-ups, commonly called 'unicorns,' that are located outside the United States has been increasing significantly. Fifteen years ago, almost all were in the United States, while today 86 of the 191 unicorns are in countries such as China and India. We can expect this trend to accelerate because the Trump administration has

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[34] Wingfield, Nick and Mike Isaac, "Tech Industry Frets Over Possible Immigration Changes," The New York Times, January 27, 2017, ***available at*** https://www.nytimes.com/2017/01/27/business/technology-h-1b-visa-immigration.html, ***accessed*** March 25, 2017.

[35] Waddell, Kaveh, "How Trump's Immigration Rules Will Hurt the U.S. Tech Sector," The Atlantic, February 1, 2017, ***available at*** https://www.theatlantic.com/technology/archive/2017/02/how-trumps-immigration-rules-will-hurt-the-us-tech-sector/515202/, ***accessed*** March 11, 2017.

just added fuel to the fire of innovation abroad and handicapped our own technology industry."[36]

- "In fiscal year 2012, fewer than 5% of those who obtained U.S. permanent resident status were professionals with advanced degrees, compared to over 9% of those granted permanent resident status in Canada...Only 14% of U.S. green cards authorizing permanent residence – and a path to citizenship – were granted for employment purposes in 2012, compared to the 62% of Canadian immigrants who were admitted for economic reasons....Immigrants want to come to the United States because they see opportunity in gaps in our economy that they have the skills to fill. Instead, many are choosing Canada."[37]

iii. Outsourcing

- Research points to an inverse relationship between temporary immigration and product outsourcing. When the number of H-1B visas issued by the U.S. government decreases, product outsourcing increases.[38]

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[36] Wadhwa, Vivek, "Why Trump's Travel Ban Is So Harmful to the Tech Economy," The Washington Post, January 30, 2017, ***available at*** https://www.washingtonpost.com/news/innovations/wp/2017/01/30/why-trumps-travel-ban-is-so-harmful-to-the-tech-economy/?utm_term=.eb1ef2a182a, ***accessed*** March 27, 2017.

[37] Furchtgott-Roth, Diana, "U.S. Loses to Canada When It Comes to Immigration," MarketWatch, October 18, 2013, ***available at*** http://www.marketwatch.com/story/immigration-us-loses-out-to-canada-2013-10-18, ***accessed*** March 25, 2017.

- Economic research on the effects of outsourcing on blue-collar and white-collar wages finds that outsourcing can decrease the wage of native-born white-collar workers when outsourcing industries are blue-collar worker intensive compared with non-outsourcing industries.[39] Using U.S. product manufacturing data, outsourcing has been found to decrease the relative wage of white-collar workers in the 1970s.[40]

iv. Impact on Massachusetts

- According to Jerry Rubin, president of the Jewish Vocational Service, many key industries in Boston, such as health care and food services, have labor shortages. "[With] the native-born population remaining relatively flat, the demand for bilingual workers soaring, and a large number of workers reaching retirement age, immigrants are essential to keep the economy from 'grinding to a screeching halt.'"[41]

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[38] Das, Simontini, Ajitava Raychaudhuri, and Saikat Sinha Roy, "Immigration versus Outsourcing: A Developing Country's View," *Journal of Economic Development*, 37:2, June 2012, ***available at*** http://www.jed.or.kr/full-text/37-2/5.pdf, ***accessed*** April 14, 2017, pp. 129-131.

[39] Hsu, Kuang-Chung, "Does Outsourcing Always Benefit Skilled Labor?" *Review of International Economics*, 19:3, August 2011, ***available at*** http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9396.2011.00961.x/epdf, ***accessed*** April 14, 2017, p. 539-554.

[40] Hsu, Kuang-Chung, and Hui-Chu Chiang, "The Impact of International Outsourcing on U.S. Workers' Wages: Rethinking the Role of Innovation," *International Journal of Economics and Finance*, 6:5, April 25, 2014, ***available at*** [illegible]19/20117, ***accessed*** April 14, 2017, p. 1.

- Immigration is a key source of growth for Boston's labor supply. Between 1980 and 2010, the number of foreign-born workers in Boston has tripled, while the number of native-born workers grew by 4 percent.[42] In 2015, 32 percent of working age people moving into the Boston area were immigrants who moved directly from abroad.[43]

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[41] Johnston, Katie. "MIT Study: Immigrants Vital to Boston's Economy," *Boston Globe*, May 17, 2017, ***available at*** https://www.bostonglobe.com/business/2017/05/17/mit-study-immigrants-vital-boston-economy/l9PezENbVRsffVWxQVolyO/story.html, ***accessed*** May 17, 2017.

[42] Johnston, Katie. "MIT Study: Immigrants Vital to Boston's Economy," *Boston Globe*, May 17, 2017, ***available at*** http://www.bostonglobe.com/business/2017/05/17/mit-study-immigrants-vital-boston-economy/l9PszENbVRsffVWxQVolyO/story.html, ***accessed*** May 17, 2017. This statistic was provided by Marilynn Johnson, author of "The New Bostonians: How Immigrants Have Transformed the Metro Area since the 1960s."

[43] Osterman, Paul, William Kimball, and Christine Riordan, "Boston's Immigrants: An Essential Component of a Strong Economy," Jewish Vocational Service, May 10, 2017, ***available at*** http [illegible] boston.org/images/pdf/Osterman%20Report%20

- "3,806 H-1B denials for tech workers in the metro area cost computer workers [in Boston in 2007 and 2008 cost] 3,176 potential new jobs and $72.9M in aggregate wage growth in the two years that followed. 964 H-1B denials for tech workers in the metro area cost computer workers [in Worcester in 2007 and 2008 cost] 761 potential new jobs and $14.7M in aggregate wage growth in the two years that followed."[44]
- "58% of Fortune 500 companies based in Massachusetts were founded by immigrants or their children. Those firms generate $136.8B in annual revenue, and employ 466,892 people globally."[45]

%20Final.pdf, *accessed* May 22, 2017, p. 7 and Table 5. This statistic was calculated using American Community Survey data.

[44] "The Contributions of New Americans in Massachusetts," New American Economy, August 2016, *available at* [illegible] nomy.org/wp-content/uploads/2017/02/[illegible] report.pdf, *accessed* March 25, 2017, p. 21.

[45] "The Contributions of New Americans in Massachusetts," New American Economy, August 2016, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2017/02/[illegible] report.pdf, *accessed* March 10, 2017, p. 3 ("58% of Fortune 500 companies based in Massachusetts were founded by immigrants or their children. Those firms generate $136.8B in annual revenue, and employ 466,892 people globally").

- In 2010, 17.9% of all business owners in Massachusetts were foreign-born.[46]
- In 2013, 18.8% of business owners in the Boston metropolitan area were foreign-born.[47]
- From 2006 to 2010, new immigrant business owners in Massachusetts had total net business income of $2.8 billion, which makes up 14% of all net business income in the state.[48]

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[46] Kallick, David Dyssegaard, "Immigrant Small Business Owners: A Significant and Growing Part of the Economy," Fiscal Policy Institute, June 2012, ***available at*** http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-20120614.pdf, ***accessed*** March 10, 2017, p. 24 and Figure 24.

[47] "Interactive: the Impact of Immigrants on Main Street Business and Population in U.S. Metro Areas," Fiscal Policy Institute and Americas Society/Council of the Americas, January 14, 2015, ***available at*** http://www.as-coa.org/articles/interactive-impact-immigrants-main-street-business-and-population-us-metro-areas, ***accessed*** March 10, 2017. The "Foreign Born Share of Business Owners" from the American Community Survey 2013 5-Year Data is 18.8% for the Boston-Cambridge-Quincy, MA-NH Metropolitan Statistical Area.

[48] Fairlie, Robert W., "Open for Business: How Immigrants are Driving Small Business Creation in the United States," Partnership for a New American Economy, August 2012, ***available at*** http://www.renewoureconomy.org/sites/all/themes/pnae/openforbusiness.pdf, ***accessed*** March 10, 2017, p. 33. This statistic was calculated using data from the American Community Survey, 2006-2010.

III.IMPACT OF IMMIGRANTS ON INNOVATION AND PRODUCTIVITY

Academic and industry research have shown that immigration has a positive impact on innovation, productivity, and leadership.

KEY TAKEAWAYS

- Many iconic American brands are led by foreign-born CEOs. As of March 1, 2016, 10.8 percent of Fortune 500 CEOs were born outside of the U.S, and 14 percent of Fortune 100 CEOs were born outside of the U.S.
- More than half of America's startup companies valued at $1 billion dollars have immigrant founders, and many key members of management or product development teams in these startups are immigrants.
- Many prominent American innovators, past and present, hail from countries directly targeted by the Executive Order. These individuals include Steve Jobs, Ali Hajimiri, and Joe Kiani.
- Academic research shows that there is a positive spillover effect of immigrant inventors and college graduates on native-born inventors, indicating that immigrants boost the rate at which native-born inventors file patents.
- Innovation from the native-born population increases with expansions of the H-1B program and the associated inflow of new workers.

- The Congressional Budget Office (CBO) estimated in 2013 that immigration reform that allows for an increase in the number of noncitizens who could lawfully enter the United States permanently or temporarily would boost real GDP by 5.4 percent by 2033, and add 9 million workers to the labor force.

A. Immigrants in Leadership Positions

- "Some of the most iconic American brands – such as Microsoft, McDonald's and U.S. Steel – are led by foreign-born CEOs."[49]
  - As of March 1, 2016, "10.8% of Fortune 500 CEOs were born outside of the U.S."[50]
  - As of March 1, 2016, "14.0% of Fortune 100 CEOs were born outside of the U.S."[51]

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[49] "Immigrant CEOs of the Fortune 500," *Boardroom Insiders*, 2016, ***available at*** [illegible], ***accessed*** February 22, 2017.

[50] "Immigrant CEOs of the Fortune 500," *Boardroom Insiders*, 2016, ***available at*** http://info.boardroominsiders.com/get-our-fortune-500-immigrant-ceo-list-for-free, ***accessed*** February 22, 2017.

[51] "Immigrant CEOs of the Fortune 500," *Boardroom Insiders*, 2016, ***available at*** http://info.boardroominsiders.com/get-our-fortune-500-immigrant-ceo-list-for-free, ***accessed*** February 22, 2017.

- "Immigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies."[52]
- Immigrants are entrepreneurial and are job creators.
    - Immigrants were nearly twice as likely to start new businesses as the native-born population as of 2015.[53]

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[52] Anderson, Stuart, "Immigrants and Billion Dollar Startups," *National Foundation for American Policy*, March 2016, ***available at*** http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf, ***accessed*** March 10, 2017, p. 1 and Appendix 5. The article examines a list of billion dollar startups tracked by ***The Wall Street Journal*** available at http://graphics.wsj.com/billion-dollar-club/. The article also uses a mixture of company-provided information, company websites, ***CrunchBase***, ***LinkedIn***, and ***The Wall Street Journal*** to calculate the percent of immigrants who are key members of management or product development teams. For more information, see Appendix 5 of the cited article.

[53] "Reason for Reform: Entrepreneurship," *New American Economy*, October 2016, ***available at*** http://www.newamericaneconomy.org/wp-content/uploads/2016/12/Entrepreneur.pdf, ***accessed*** March 10, 2017, p. 1. This study was conducted using the 2013 American Community Survey 5-year data. ***See*** Kallick, David, "Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow," ***Fiscal Policy Institute and Americas Society/Council of the Americas***, 2015, ***available at*** http://www.as

- In 2014, 20.6% of entrepreneurs in the U.S. were immigrants, while making up only 13.2% of the U.S. population.[54]
- Immigrants accounted for about a quarter of founders of new high-tech companies with at least one million dollars in sales in 2006.[55]
- In Massachusetts, 29% of new high-tech companies with at least one million dollars in sales in 2006 had at least one key founder who was foreign-born.[56]

[illegible].org/sites/default/files/ImmigrantBusinessReport.pdf, *accessed* March 21, 2017.

[54] "Reason for Reform: Entrepreneurship," *New American Economy*, October 2016, *available at* htt[illegible] [illegible]2016/12/Entrepreneur[illegible], *accessed* March 10, 2017, p. 2.

[55] Wadhwa, Vivek, et al., "America's New Immigrant Entrepreneurs: Part I," Technical Report 23, Duke Science, Technology Innovation Papers, January 2007, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=990152, *accessed* March 10, 2017, p.4. The authors used information provided by Dun & Bradstreet's Million Dollar Database, which contains information on U.S. companies with more than $1 million in sales, and 20 or more employees, and company branches with 50 or more employees.

[56] Wadhwa, Vivek, et al., "America's New Immigrant Entrepreneurs: Part I," Technical Report 23, Duke Science, Technology Innovation Papers, January 2007, *available at*

  - In 2016, 40.2% of Fortune 500 firms were founded by either an immigrant or the child of immigrants.[57]
  - Businesses owned by immigrants employed over 5.9 million workers in 2007.[58]

B. Innovators from Targeted Countries

- Many prominent American innovators hail from countries directly targeted by the Executive Order. For example,
  - Steve Jobs (Syria), whose father, Abdul Fattah Jandali, was born in Homs, Syria, and immigrated to the United

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=[illegible] 2, *accessed* March 10, 2017, p.4. The authors used information provided by Dun & Bradstreet's Million Dollar Database, which contains information on U.S. companies with more than $1 million in sales, and 20 or more employees, and company branches with 50 or more employees.

[57] "Reason for Reform: Entrepreneurship," *New American Economy*, October 2016, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2016/12/Entrepreneur.pdf, *accessed* March 10, 2017, p. 2.

[58] "Reason for Reform: Entrepreneurship," *New American Economy*, October 2016, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2016/12/Entrepreneur.pdf, *accessed* March 10, 2017, p. 2.

States to study in the 1950s.[59] Jobs is a co-founder of Apple.

- Ali Hajimiri (Iran), an academic, entrepreneur, and Fellow at the National Academy of Inventors, holds over 85 U.S. and European patents. Hajimiri is known for his research in "electronics and photonics integrated circuits, and their applications in various disciplines, including high-frequency and high-speed communications, sensing, imaging, and bio-sensing." In 2002, Hajimiri co-founded Axiom Microdevices.[60]
- Joe Kiani (Iran), who is the founder, chairman, and CEO of Masimo Corporation has more than 575 issued and pending patents worldwide. Kiani is prominent in the healthcare technology industry, especially technology relating to sensors, signal processing, and patient monitoring devices. Kiani's company Masimo Corporation pioneered products such as

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[59] Baig, Edward C, "Steve Jobs' biological father was Syrian migrant, some note," *USA Today*, November 16, 2015, ***available at*** http://www.usatoday.com/story/tech/columnist/baig/2015/11/16/steve-jobs-biological-father-syrian-migrant-some-note/75899150/, ***accessed*** March 19, 2017.

[60] "Ali Hajimiri," Caltech High-Speed Integrated Circuits, ***available at*** http://chic.caltech.edu/hajimiri/, ***accessed*** March 19, 2017.

> "Masimo Patient SafetyNet™ – the first remote monitoring and wireless clinician notification system designed to help hospitals improve patient safety and clinical outcomes by dramatically decreasing rescue events and costly ICU transfers."[61]

C. Impact of Immigrants on Patent Activity

- Immigrants have a higher patenting rate than native-born individuals.[62]
    - "Massachusetts' immigrants also contribute to the state's economic growth and competitiveness by earning patents on cutting-edge research and products. In 2011, Massachusetts Institute of Technology (MIT) earned [i.e., granted] almost 168 patents, placing it among the top 10 most productive [universities] in the country. More than 72 percent of those patents

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[61] "Company Overview of Masimo Corporation," *Bloomberg*, ***available at*** [illegible] personId=51101[illegible] 51167, *accessed* March 19, 2017.

[62] Hunt, Jennifer, and Marjolaine Gauthier-Loiselle, "How Much Does Immigration Boost Innovation?," *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, *accessed* March 5, 2017, p. 37. This is based on data from the 2003 National Survey of College Graduates.

had at least one foreign-born inventor."[63]

- At MIT, "the rate of patenting is higher for foreign-born students (34 percent) than for U.S.-born students (30 percent)."[64]
- "…immigrants comprise a large and vital component of U.S. innovation with 35.5 percent of U.S. innovators born outside the United States."[65] "Another

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[63] "The Contribution of New Americans in Massachusetts," *New American Economy*, August 2016, ***available at*** http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf, ***accessed*** March 22, 2017, p. 14. The article uses data from a publication from the same organization. *See* Patent Pending: How Immigrants are Reinventing the American Economy," ***Partnership for a New American Economy***, June 2012, ***available at*** [illegible] ent-pending.pdf.

[64] Granados, Samuel, "How Today's Visa Restrictions Might Impact Tomorrow's America," The Washington Post, February 21, 2017, ***available at*** [illegible] impact/, ***accessed*** March 10, 2017, p.11.

[65] In their study, ITIF "surveyed more than 900 people who have made meaningful, marketable contributions to technology-intensive industries as award-winning innovators and international patent applicants." Nager, Adams et al., "The Demographics of Innovation in the United States," ***Information Technology & Innovation Foundation***, February 2016, ***available at*** http://www2.itif.org/2016-demographics-of-innovation.pdf?_ga=1.211995860.1949709181.1488176922, ***accessed*** March 10, 2017, p. 5.

10 percent of innovators have at least one parent born abroad."[66]

- "Over 17 percent of innovators are not even U.S. citizens, yet are nonetheless making invaluable contributions to U.S. innovation. Immigrants born in Europe or Asia are over five times more likely to have created an innovation in America than the average native-born U.S. citizen."[67]

- "At the University of Illinois, for instance, nine out of 10 of the patents had at least one foreign national listed as an inventor, and almost 64% of patents had a foreign inventor who was not yet in a professorial role. This was despite the fact that in the fall of 2011, fewer than 47% of the graduate students studying STEM on Illinois's two patent-producing campuses were in the U.S. on temporary visas."[68]

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[66] Nager, Adams et al., "The Demographics of Innovation in the United States," Information Technology & Innovation Foundation, February 2016, *available at* http://www2.itif.org/2016-demographics-of-innovation.pdf?_ga=1.211995860.1919709181.1488176922, *accessed* March 10, 2017, pp. 1, 5. In their study, ITIF "surveyed more than 900 people who have made meaningful, marketable contributions to technology-intensive industries as award-winning innovators and international patent applicants."

[67] Nager, Adams et al., "The Demographics of Innovation in the United States," Information Technology & Innovation Foundation, February 2016, *available at* http://www2.itif.org/2016-demographics-of-innovation.pdf?_ga=1.211995860.1919709181.1488176922, *accessed* March 10, 2017, p. 5. In their study, ITIF "surveyed more than 900 people who have made meaningful, marketable contributions to technology-intensive industries as award-winning innovators and international patent applicants."

- In 2011, 76% of patents awarded to the Top 10 patent-producing U.S. universities had an inventor that was foreign-born.[69]

D. Commercial Value of Immigrant Patents

- Immigrants' contributions to innovation as measured by patent activity have also had a direct positive impact on university revenue, as demonstrated by how the top 10 U.S. patent-producing universities earned nearly $450 million in patent licensure revenue in FY 2010.[70]

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[68] "Patent Pending: How Immigrants are Reinventing the American Economy," *Partnership for a New American Economy*, June 2012, *available at* http://www.renewoureconomy.org/sites/all/themes/pnae/patent-pending.pdf, *accessed* March 10, 2017, p. 7. The study pulled data on graduate students enrolled in each major to conduct calculations. The data were obtained from University of Illinois at Chicago, Office of Institutional Research.

[69] "Patent Pending: How Immigrants are Reinventing the American Economy," Partnership for a New American Economy, June 2012, *available at* http://www.renewoureconomy.org/sites/all/themes/pnae/patent-pending.pdf, *accessed* March 10, 2017, p. 1. The study relies on data on patent assignees available from Patent Full-Text and Image Database maintained by the U.S. Patent and Trademark Office, *available at* http://patft.uspto.gov/netahtml/PTO/. In most cases, when applying for a patent, inventors submit an oath or power of attorney form on which they indicate their citizenship. The study accessed these forms through the publicly-available Patent Application Information Retrieval, *available at* http://portal.uspto.gov/pair/PublicPair.

- Patents filed by immigrants are more likely to be licensed or commercialized as compared to patents filed by native-born inventors, and patents that are licensed or commercialized are more likely to be beneficial to society.[71]

E. Immigrants Patenting by Field

- "Foreign nationals were listed as inventors on more than five out of six (84%) information-technology patents."[72]

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[70] "Patent Pending: How Immigrants are Reinventing the American Economy," *Partnership for a New American Economy*, June 2012, ***available at*** [illegible]ent-pending.pdf, ***accessed*** March 10, 2017, p. 12. These figures were calculated using the results of the annual licensing survey from the Association of University Technology Managers.

[71] Hunt, Jennifer, and Marjolaine Gauthier-Loiselle, "How Much Does Immigration Boost Innovation?," *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, ***accessed*** March 5, 2017, p. 37. This is based on data from the 2003 National Survey of College Graduates.

[72] "Patent Pending: How Immigrants are Reinventing the American Economy," *Partnership for a New American Economy*, June 2012, ***available at*** [illegible]ent-pending.pdf, ***accessed*** March 10, 2017, p. 11. This statistic is based on data from the Patent Full-Text and

- "Almost eight out of ten (79%) patents for pharmaceutical drugs or drug compounds were invented or co-invented by a scientist born abroad."[73]
- "Immigrants contributed to 75% of patents in the molecular biology and microbiology fields."[74]
- Immigrants make significant contributions to the Science, Technology, Engineering, and Mathematics ("STEM") fields.

Image Database maintained by the US Patent and Trademark Office, *available at* [illegible].

[73] "Patent Pending: How Immigrants are Reinventing the American Economy," *Partnership for a New American Economy*, June 2012, *available at* [illegible] ent-pending.pdf, *accessed* March 10, 2017, p. 11. This statistic is based on data from the Patent Full-Text and Image Database and the publically available Patent Application Information Retrieval ("PAIR") website, both of which are maintained by the US Patent and Trademark Office, *available at* [illegible], and [illegible].

[74] "Patent Pending: How Immigrants are Reinventing the American Economy," *Partnership for a New American Economy*, June 2012, *available at* [illegible] ent-pending.pdf, *accessed* March 10, 2017, p. 11. This statistic is based on data from the Patent Full-Text and Image Database maintained by the US Patent and Trademark Office, *available at* [illegible]

  - 99% of the patents from the top 10 patent-generating universities by foreign-born inventors were in STEM fields, an area that will have a shortfall of 230,000 qualified advanced-degree workers by the year 2018.[75]
  - As an added benefit, "[e]very graduate with an advanced degree working in a STEM-related field in the United States has been shown to create on average 2.62 additional jobs for native-born workers. Sending those people away doesn't protect American jobs, it jeopardizes them."[76]

F. Spillover Effects on Innovation by Immigrants

- Academic research shows that there is a positive spillover effect of immigrant inventors on native-born inventors, indicating that immigrants boost the rate at which native-born inventors file patents.[77]

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[75] "Press Release: New Study Reveals Immigrants Are Behind More Than Three-Quarters of Patents From Top Ten Patent-Producing American Universities," *New American Economy*, June 26, 2012, ***available at*** http://www.renewoureconomy.org/news/press-release-new- [illegible], ***accessed*** March 10, 2017.

[76] "Press Release: New Study Reveals Immigrants Are Behind More Than Three-Quarters of Patents From Top Ten Patent-Producing American Universities," *New American Economy*, June 26, 2012, ***available at*** http://www.renewoureconomy.org/news/press-release-new- [illegible], ***accessed*** March 10, 2017.

  - "The 1.3 percentage point increase in the share of the population composed of immigrant college graduates, and the 0.7 percentage point increase in the share of post-college immigrants," each increased patenting per capita in the U.S. by 12 to 21 percent.[78]
  - A 0.45 percentage point increase in immigrant scientists and engineers in the U.S. increased patenting per capita in the U.S. by 13 to 32 percent.[79]

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[77] Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** http://www.jstor.org/stable/25760296, *accessed* March 5, 2017, p. 51. This is based on data from the 2003 National Survey of College Graduates.

[78] Specifically, "The 1.3 percentage point increase in the share of the population composed of immigrant college graduates, and the 0.7 percentage point increase in the share of post-college immigrants, each increased patenting per capita by about 12 percent based on least squares and 21 percent based on instrumental variables." Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, ***accessed*** March 5, 2017, p. 51. This is based on data from the 2003 National Survey of College Graduates.

[79] Specifically, "The 0.45 percentage point increase in immigrant scientists and engineers increased patenting per

- "Immigration could boost innovation indirectly through positive spillovers on fellow researchers, the achievement of critical mass in specialized research areas, and the provision of complementary skills such as management and entrepreneurship."[80]
- The same positive spillover effect on patenting created through immigration may not be replicable by incentivizing the native-born population alone.[81]

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capita by about 13 percent based on least squares and 32 percent based on instrumental variables." Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, ***accessed*** March 5, 2017, p. 51. This is based on data from the 2003 National Survey of College Graduates.

[80] Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, ***accessed*** March 5, 2017, p. 31.

[81] Specifically, "One should be cautious in drawing the conclusion that innovation could be sustained by simultaneously subsidizing natives to study science and engineering and cutting immigration of scientists and engineers. The additional natives drawn into science and engineering might have lower inventive ability than the excluded immigrants, and such natives might have contributed more to the US economy outside science and engineering." Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2,

  - There is also support for small crowding-in effects on native-born patenting from immigration due to H-1B expansions.[82]

- Additionally, there is evidence that native-born inventors' patents were not displaced by immigrants that were admitted as a result of expansions in the H-1B visa program.[83]
- Moser et al conclude that German Jewish emigres who fled Nazi Germany in the 1930s

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2010, pp. 31–56, ***available at*** www.jstor.org/stable/257[illegible], *accessed* March 5, 2017, p. 52.

[82] "Overall, a 10% growth in the H-1B population corresponded with a 0.3%–0.7% increase in total invention for each standard deviation growth in city dependency [upon the H-1B program]." Kerr, William R., and William F. Lincoln. "The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention." *Journal of Labor Economics*, vol. 28, no. 3, 2010, pp. 473–508, ***available at*** www.jstor.org/stable/10.1086/651934, *accessed* March 5, 2017, p. 475. This analysis was based on data from the Current Population Survey, in addition to patent records from the U.S. Patent and Trademark Office.

[83] Kerr, William R., and William F. Lincoln. "The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention." *Journal of Labor Economics*, vol. 28, no. 3, 2010, pp. 473–508, ***available at*** www.jstor.org/stable/10.1086/651934, *accessed* March 10, 2017, p. 475. This analysis was based on data from the Current Population Survey, in addition to patent records from the U.S. Patent and Trademark Office.

and 1940s increased patenting in the United States by 31 percent.[84]

  - Inventor-level data suggest that this increase in patenting can be attributed to emigrants attracting U.S. inventors to their fields.[85]
  - Data also indicate that the number of patents filed by native-born inventors who collaborated with immigrant professors increased substantially in the 1940s and 1950s, suggesting that "emigre professors helped to increase U.S. invention in the long run, by training a new group of younger US invention in the long run, who then continued to train other scientists."[86]

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[84] Moser, Petra, et al. "German Jewish Émigrés and U.S. Invention." *The American Economic Review*, vol. 104, no. 10, 2014, pp. 3222–3255, *available at* www.jstor.org/stable/43495318, *accessed* March 5, 2017, p. 3222. This conclusion is drawn from an analysis of patent records available through Google Patents, *available at* https://patents.google.com, in addition to faculty directories at German and Austrian universities, among other sources.

[85] Moser, Petra, et al. "German Jewish Émigrés and U.S. Invention." *The American Economic Review*, vol. 104, no. 10, 2014, pp. 3222–3255, *available at* www.jstor.org/stable/43495318, *accessed* March 5, 2017, p. 3222. This conclusion is drawn from an analysis of patent records available through Google Patents, available at https://patents.google.com, in addition to faculty directories at German and Austrian universities, among other sources.

[86] Moser, Petra, et al. "German Jewish Émigrés and U.S. Invention." *The American Economic Review*, vol. 104, no.

G. Impact of Visa Restrictions on Innovation and Patenting

- Increases in high-skilled immigration due to expansions of the H-1B visa program are associated with higher levels of patent contributions from immigrants.
    - "Total [science and engineering] employment and [the number of] invention [in the U.S.] increases with higher [H-1B] admissions".[87]
    - Innovation from the native-born population also increases with expansions of the H-1B program and the associated inflow of new workers.[88]

10, 2014, pp. 3222–3255, *available at* www.jstor.org/stable/43495318, *accessed* March 5, 2017, p. 3253. This conclusion is drawn from an analysis of patent records available through Google Patents, available at https://patents.google.com, in addition to faculty directories at German and Austrian universities, among other sources.

[87] Kerr, William R., and William F. Lincoln. "The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention." *Journal of Labor Economics*, vol. 28, no. 3, 2010, pp. 473–508, *available at* www.jstor.org/stable/10.1086/[illegible], *accessed* March 5, 2017, p. 473.

[88] "Overall, a 10% growth in the H-1B population corresponded with a 0.3%–0.7% increase in total invention for each standard deviation growth in city dependency [upon the H-1B program]." Kerr, William R., and William F. Lincoln. "The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention." *Journal of Labor Economics*, vol. 28, no. 3, 2010, pp. 473–508, *available at*

  - Firms that employ H-1B workers show higher rates of innovation when the national H-1B admission levels increase.[89]
  - In Massachusetts, if all Labor Condition Applications (LCAs) for H-1B visas filed by employers in 2014 had turned into visas, H-1B workers could have created an estimated 61,256 jobs for US-born workers by the year 2020.[90]

H. Impact of Immigrant Students on Innovation and Patenting

- Increase in the share of foreign graduate students and skilled immigrants have a

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[illegible], *accessed* March 5, 2017, p. 475.

[89] Kerr, William R., and William F. Lincoln. "The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention." *Journal of Labor Economics*, vol. 28, no. 3, 2010, pp. 473–508, ***available at*** www.jstor.org/stable/10.1086/651934, *accessed* March 5, 2017, p. 503.

[90] "The Contributions of New Americans in Massachusetts," *New American Economy*, August 2016, ***available at*** [illegible], *accessed* March 24, 2017, pp. 20-21. The data on visa demand are drawn primarily from the 2014 Annual Report produced by the Office of Foreign Labor Certification within the U.S. Department of Labor. The multipliers use to produce these estimates originate in a 2011 report released by Partnership for a New American Economy and the American Enterprise Institute.

positive and strong impact on the generation of new ideas in the United States.

- *Patent quantity:* increase in the presence of foreign graduate students provides a positive and significant impact on patenting activity at both universities and private firms, thereby contributing to American innovation.[91]
- *Patent quality:* increase in the share of skilled immigrants associated with a rise in number of granted patents at universities.[92]

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[91] Chellaraj, Gnanaraj and Maskus, Keith E. and Mattoo, Aaditya, "The Contribution of Skilled Immigration and International Graduate Students to U.S. Innovation," World Bank Policy Research Working Paper No. 3588, May 2005, ***available at*** [illegible] *accessed* March 5, 2017, p. 3. This study used data from the U.S. Department of Education *Education Statistics Quarterly,* the Institute for International Education *Open Doors,* the National Science Foundation *Science and Engineering Statistics,* the U.S. Patent and Trademark Office, the U.S. Census Bureau *Statistical Abstract of the United States*, and the *Economic Report of the President.*

[92] Chellaraj, Gnanaraj and Maskus, Keith E. and Mattoo, Aaditya, "The Contribution of Skilled Immigration and International Graduate Students to U.S. Innovation," World Bank Policy Research Working Paper No. 3588, May 2005, ***available at*** https://ssrn.com/abstract=744625, *accessed* March 5, 2017, p. 3. This study used data from the U.S. Department of Education *Education Statistics Quarterly,* the Institute for International Education *Open Doors,* the National Science Foundation *Science and Engineering Statistics,* the U.S. Patent and Trademark

- Academic research found that there are significant and positive spillovers on overall patenting activity associated with an increase in the proportion of immigrant college graduates.[93]
    - A "1 percentage point increase in immigrant college graduates' population share increases patent per capita by 9-18 percent."[94]

Office, the U.S. Census Bureau *Statistical Abstract of the United States*, and the *Economic Report of the President.*

[93] "For immigrant college graduates … a 1 percentage point increase in share increases patenting per capita by 8–10 percent in least squares and 12–18 percent in instrumental variables, more than the 6 percent based on the individual-level data (statistically significantly so in the case of the highest coefficient), and therefore implying positive spillovers." Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, *accessed* March 5, 2017, p. 48. This study used data from the National Science Foundation *National Survey of College Graduates*, the U.S. Patent and Trademark Office, and the Harvard Business School *Patent Data File.*

[94] Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, *accessed* March 5, 2017, p. 31. This study used data from the National Science Foundation *National Survey of College Graduates*, the U.S. Patent and Trademark Office, and the Harvard Business School *Patent Data File.*

I. Impact of Immigrants on Firms

- Allowing for more H-1B visa holders benefits firms:
    - Research suggests that when the H-1B visa cap is increased, firms that perform large amounts of research and development experience increased productivity and profits.[95]
        - For example, an increase in the cap on H-1B visas of 110,000 visas from 85,000 to 195,000 may lead to a 16% increase in firm profits.[96]
- An increase in the supply of foreign-born workers can improve firm outcomes.
    - There is evidence that an increase in the supply of foreign-born workers in an

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[95] Ghosh, Anirban, Anna Maria Mayda, and Francese Ortega, "The Impact of Skilled Foreign Workers on Firms: an Investigation of Publicy Traded U.S. Firms," *IZA Discussion Paper* No. 8684, November 2014, pp.1-47, ***available at*** http://ftp.iza.org/dp8684.pdf, ***accessed*** March 5, 2017, p.1. This study uses data from the Foreign Labor Certification Data *Labor Condition Applications (LCAs) Records*, and Compustat.

[96] Ghosh, Anirban, Anna Maria Mayda, and Francese Ortega, "The Impact of Skilled Foreign Workers on Firms: an Investigation of Publicy Traded U.S. Firms," IZA Discussion Paper No. 8684, November 2014, pp.1-47, ***available at*** http://ftp.iza.org/dp8684.pdf, ***accessed*** March 5, 2017, p.24. This study uses data from the Foreign Labor Certification Data Labor Condition Applications (LCAs) Records, and Compustat.

area leads to increased productivity, faster growth of capital, and better export performance for firms in that area.[97]

  - These positive effects are especially potent for firms with fewer foreign-born employees prior to the increase.[98]

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[97] Mitaritonna, Cristina, Gianluca Orefice, Giovanni Peri, "Immigrants and Firms' Productivity: Evidence from France," *IZA Discussion Paper* No. 8063, March 2014, pp.1-38, ***available at*** [illegible], ***accessed*** March 5, 2017, p.1. The study uses data from the Declaration Annuelle des Donnetes Sociales (DADS) databases, the O*NET Standard Occupational Classification (SOC) system, and the Annual Business survey (EAE). *See also*, Perri, Giovanni, "The Effect of Immigration on Productivity: Evidence from U.S. States," *The Review of Economics and Statistics*, 94, No. 1, February 2012, ***available at***

[illegible]

0137#.WPBnuvnyuUk, ***accessed*** March 5, 2017, pp. 348-358.

[98] Mitaritonna, Cristina, Gianluca Orefice, Giovanni Peri, "Immigrants and Firms' Productivity: Evidence from France," IZA Discussion Paper No. 8063, March 2014, pp.1-38, available at [illegible], accessed March 5, 2017, p.1. The study uses data from the Declaration Annuelle des Donnetes Sociales (DADS) databases, the O*NET Standard Occupational Classification (SOC) system, and the Annual Business survey (EAE). *See also*, Perri, Giovanni, "The Effect of Immigration on Productivity: Evidence from U.S. States," *The Review of Economics and Statistics*, 94, No. 1, February 2012, ***available at*** http://www.mitpressjournals.org/doi/abs/10.1162/REST_a_0

- **Immigrants promote more efficient allocation of tasks within firms.**
    - **Academic literature suggests that immigrant workers lead to tasks being assigned more efficiently to both immigrant and native-born workers, increasing overall productivity.**[99]
- **"[C]ities whose employers faced large numbers of denials in the H-1B visa lotteries experienced considerably less job creation and wage growth for American-born computer workers in the two years that followed."**[100]

[illegible]. *accessed* March 5, 2017, pp. 348-358.

[99] Peri, Giovanni, "The Effect of Immigration on Productivity: Evidence From U.S. States," *The Review of Economics and Statistics*, 94, No. 1, February 2012, pp. 348-358, *available at*

[illegible], *accessed* March 5, 2017, p. 357. This study uses data from the Integrated Public Use Microdata Samples (IPUMS), the U.S. Bureau of Economic Analysis, and the National Economic Accounts. The author conjectures that "at least part of the positive productivity effects are due to an efficient specialization of immigrants and natives in manual-intensive and communication-intensive tasks, respectively (in which each group has a comparative advantage), resulting in a gain in overall efficiency" (*see* p. 357).

[100] Peri Giovanni, Shish Kevin, Chad Sparber, and Angie Marek Zeitlin, "Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession," *The Partnership for a New American Economy*, June 2014, pp. 1-36, *available at*

J. Impact of Immigrants on Productivity

- Considering earnings, patenting, commercializing and licensing patents, publishing books or papers and presenting at major conferences, immigrants on H-1B and J-1 visas outperformed native-born individuals.[101]
- In 2015, immigrants contributed $2 trillion to the U.S. gross domestic product (GDP), which represents 11 percent of its total GDP.[102]

[illegible], *accessed* March 5, 2017, p.4. The study uses data from the U.S Citizenship and Immigration Services, the U.S. Department of Labor, and the American Community Survey.

[101] Murray, Sara, "H-1B, J-1 Immigrants More Productive Than Americans, Study Says," *Wall Street Journal*, April 27, 2009, ***available at*** http://blogs.wsj.com/economics/2009/04/27/h-1b-j-1-[illegible], *accessed* March 5, 2017.

[102] "People on the Move: Global Migration's Impact and Opportunity," *McKinsey Global Institute*, December 2016, ***available at*** http://www.mckinsey.com/~/media/McKinsey/Global%20Th[illegible]2016.ashx, *accessed* March 5, 2017, p. 56. This study used data from McKinsey Global Institute, the OECD database, the U.S. Bureau of Labor Statistics, the United Nations Department of Economic and Social Affairs (UNDESA), the United Nations High Commissioner for Refugees (UNHCR), the World Bank, and others.

- The Congressional Budget Office (CBO) estimated in 2013 that a reform that seeks to "revise laws governing immigration and the enforcement of those laws, allowing for a significant increase in the number of noncitizens who could lawfully enter the United States permanently or temporarily"[103] would boost real GDP by 5.4 percent by 2033, and add 9 million workers to the labor force.[104]
    - The CBO also finds that U.S. productivity would be about 0.7 percent higher in 2023 and about 1.0 percent

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[103] "The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act," *Congressional Budget Office*, June 2013, *available at* [illegible], *accessed* March 5, 2017, p. 1. All data are from the Congressional Budget Office.

[104] The CBO calculated these numbers by comparing their economic projections under immigration reform to their baseline economic projections for FY 2013 to 2023. *See* "The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act," *Congressional Budget Office*, June 2013, *available at* [illegible], *accessed* March 5, 2017, p. 3; "The Budget and Economic Outlook: Fiscal Years 2013 to 2023," *Congressional Budget Office*, February 2013, *available at* [illegible], *accessed* March 5, 2017. Data are from the Congressional Budget Office.

higher in 2033 under a reform scenario described above.[105]

- **"The influx of immigrant college graduates in the 1990s increased U.S. GDP per capita by 1.4-2.4 percent."[106]**
- **The Bipartisan Policy Center (BPC) estimates that immigration reform that would seek to increase the growth of overall population and the workforce would increase GDP by 4.8 percent over 20 years.[107]**

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[105] "The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act," *Congressional Budget Office*, June 2013, ***available at*** [illegible] 2014/reports/44346-Immigration.pdf, ***accessed*** March 5, 2017, p. 1. All data are from the Congressional Budget Office.

[106] Hunt, Jennifer, and Marjolaine Gauthier-Loiselle. "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics*, vol. 2, no. 2, 2010, pp. 31–56, ***available at*** www.jstor.org/stable/25760296, ***accessed*** March 5, 2017, p. 52. This study used data from the National Science Foundation *National Survey of College Graduates*, the U.S. Patent and Trademark Office, and the Harvard Business School *Patent Data File*.

[107] The BPC study uses the CBO's analysis on the economic impact of immigration reform bill S. 744 as a reference case in which they construct their model on. The BPC has enlisted the help of Macroeconomic Advisers, LLC, in order to assess the economic and budgetary impact of the reference case immigration reform. A description of their methodology and assumptions can be found in Appendix A of the article. See "Immigration Reform: Implications for Growth, Budgets, and Housing," *Immigration Task Force, Bipartisan Policy Center*, October 2013, ***available at***

- Skilled immigration leads to macroeconomic benefits related to employment and wages.
  - "A one percentage point increase in the immigration share in the population increases income per person by about 6%."[108]
  - Over the long run, a 1% increase in immigration flow to a state has been associated with an up to 0.9% increase in income per worker in the state.[109]

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http://cdn.bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC_Immigration_Economic_Impact.pdf, *accessed* March 5, 2017. This study used data from the Department of Homeland Security *Yearbook of Immigration,* the U.S. Census Bureau *Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States*, the U.S. Census Bureau *National Population Projections Summary Tables*, and the National Science Foundation *Science and Engineering Indicators* and *Science and Engineering Doctorates*

[108] Ortega, Francesc and Giovanni Peri, "Openness and income: The roles of trade and migration," *Journal of International Economics*, December 2013, pp. 231-251, ***available at*** [illegible] 5/6/8/2/5682603 [illegible] 201 [illegible], *accessed* March 5, 2017, p.247 This study uses data from the NBER-UN dataset, and the International Trade database (BACI).

[109] Peri, Giovanni, "The Effect of Immigrants on U.S. Employment and Productivity," Federal Reserve Board of San Francisco Economic Letter, 2010-26, August 30, 2010, pp. 1-5, ***available at*** http://www.frbsf.org/economic-research/files/el2010-26.pdf, *accessed* March 5, 2017, p.3 . This paper summarizes research by Peri (2009) and Perri and Sparber (2009).

- **1,470 economists recently signed an open letter highlighting some of the benefits of immigration to innovation and productivity:**
    - **"Immigration brings entrepreneurs who start new businesses that hire American workers."[110]**
    - **"Immigration brings young workers who help offset the large-scale retirement of baby boomers."[111]**
    - **"Immigration brings diverse skill sets that keep our workforce flexible, help companies grow, and increase the productivity of American workers."[112]**
    - **"Immigrants are far more likely to work in innovative, job-creating fields such as science, technology, engineering, and**

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[110] "An Open Letter from 1,470 Economists on Immigration," New American Economy, April 2017, *available at* http://www.newamericaneconomy.org/wp- [illegible] 2017.pdf, *accessed* April 12, 2017.

[111] "An Open Letter from 1,470 Economists on Immigration," New American Economy, April 2017, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2017/04/NAE-Economist-Letter-April-2017.pdf, *accessed* April 12, 2017.

[112] "An Open Letter from 1,470 Economists on Immigration," New American Economy, April 2017, *available at* http://www.newamericaneconomy.org/wp-content/uploads/2017/04/NAE-Economist-Letter-April-2017.pdf, *accessed* April 12, 2017.

> math that create life-improving products and drive economic growth."[113]

IV. IMPACT OF IMMIGRANTS ON ENTREPRENEURIAL ACTIVITY

KEY TAKEAWAYS

- The literature supports the idea that immigrants are more likely to start new businesses. The rates of immigration entrepreneurship are typically higher for high-tech sectors of the economy.
- As of 2015, 14.6 percent of the Fortune 500 companies have a foreign-born CEO and 15.4 percent of the Fortune 500 Companies have a foreign-born founder. These percentages rise to 19.6 percent and 22.8 percent respectively when looking at high-tech industries.
- Data from the Survey of Business Owners show high shares of business ownerships by immigrants, especially in sectors that involve high-tech industries, and among recently-started firms.

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[113] "An Open Letter from 1,470 Economists on Immigration," New American Economy, April 2017, ***available at*** http://www.newamericaneconomy.org/wp-content/uploads/2017/04/NAE-Economist-Letter-April-2017.pdf, ***accessed*** April 12, 2017.

A. The Impact of Immigrants on New Business Starts by Sector

Immigrants are a vital part of new business growth and entrepreneurship, particularly among high-tech sectors such as engineering and technology.[114] This section provides an overview of the literature that examines the prevalence of entrepreneurship and ownership in immigrant populations. Along with the prevalence rates in the data, ownership and new business start rates are calculated using publicly available sources. These analyses are consistent with the literature and further suggest that immigrant ownership has likely been increasing over the past decade. Using these prevalence measures and characteristics of immigrant owned firms, an estimate of the aggregate impact of new businesses, particularly those in high-tech sectors, founded by immigrants is determined for the U.S. economy.

B. The Relationship between Entrepreneurship and Immigration Status, Particularly in High-Tech Sectors

i. Literature Review

The literature supports the idea that immigrants are more likely to start new businesses. The rates of immigration entrepreneurship are typically higher for high-tech sectors of the economy. There are two measures used to evaluate immigrant entrepreneurship: the share of business founders and the business formation rate.

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[114] Stangler, Dane and Jason Wiens, "The Economic Case for Welcoming Immigrant Entrepreneurs," The Kauffman Foundation, September 8, 2015, *available at* http://www.kauffman.org/what-we- [illegible], *accessed* March 7, 2017.

a. Share of Business Founders

The literature supports the idea that the immigrant share of business founders is high relative to the share of immigrants in the labor force.

- "To measure business startup activity, we use panel data created by matching consecutive months of the 2007-2011 Current Population Survey (CPS). Immigrants represent 24.9 percent of all new business owners in the United States."[115]
- "The immigrant share of new entrepreneurs rises dramatically in our sample from 16.7% in 1995 to 27.1% in 2008"[116]
- "Immigrant entrepreneurs now account for 28.5 percent of all new entrepreneurs in the United States, up from just 13.3 percent in the 1997 Index. This is close to the two-decade high of 29.5 percent in the 2011 Index, reflecting the United

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[115] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, ***available at*** https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597992, ***accessed*** March 1, 2017, p. 6.

[116] Kerr, Sari Pekkala and William R. Kerr, "Immigrant Entrepreneurship," National Bureau of Economic Research, July, 2016, ***available at*** [illegible], ***accessed*** March 1, 2017, p. 15.

> States' increasing population of immigrants but also the much higher Rate of New Entrepreneurs among immigrants."[117]

These rates of immigrant ownership reported in the literature are higher than the share of immigrants in the labor force. The Bureau of Labor Statistics reported that foreign-born workers accounted for 16.5% of the labor force in 2014.[118]

The literature also supports the idea that the rate of entrepreneurship is even higher for high-tech businesses.

- "We obtained responses from 2,054 engineering and technology companies founded in the U.S. from 1995 to 2005. Of these companies, 25.3% reported that at least one of their key founders was an immigrant."[119]

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[117] Fairlie, Robert W., Arnobio Morelix, E.J. Reedy, and Joshua Russell, "The Kauffman Index, Startup Activity National Trends," The Kauffman Foundation, August 2016, ***available at*** http://www.kauffman.org/~/media/kauffman_org/microsites/ [illegible], ***accessed*** March 9, 2017, p. 6.

[118] "Foreign-Born Workers: Labor Force Characteristics – 2014", Bureau of Labor Statistics, U.S. Department of Labor, May, 21, 2015, ***available at*** [illegible] .pdf, ***accessed*** March 10, 2017.

[119] Wadhwa, Vivek, AnnaLee Saxenian, Ben Rissing, and Gary Gereff, "America's New Immigrant Entrepreneurs," Duke Science, Technology & Innovation Paper No. 23, January 4,

- "We analyzed Silicon Valley data by selecting zip codes in the following counties: Santa Clara, Alameda, San Mateo and Santa Cruz. We received responses from 126 companies that fit these criteria. Of these, 52.4% reported that their key founders were immigrants – significantly higher than the California average of 38.8%."[120]
- "What we have found thus far suggests that immigrants make a disproportionate contribution to biotechnology entrepreneurship in Massachusetts. According to the U.S. Census, foreign-born residents of Massachusetts are 14.4 percent of the total population. But we find that 25.7 percent of biotechnology firms have foreign-born founders."[121]

2007, ***available at*** [illegible] 2, ***accessed*** March 3, 2017, p. 11.

[120] Wadhwa, Vivek, AnnaLee Saxenian, Ben Rissing, and Gary Gereff, "America's New Immigrant Entrepreneurs," Duke Science, Technology & Innovation Paper No. 23, January 4, 2007, ***available at*** [illegible] 2, ***accessed*** March 3, 2017, p. 31.

[121] Monti, Daniel J., Laurel Smith-Doerr, and James McQuaid, "Immigrant Entrepreneurs in the Massachusetts Biotechnology Industry," The Immigrant Learning Center, Inc., June, 2007, ***available at*** http://www.ilctr.org/wp-content/uploads/2011/08/immigrants_in_biotechnology-[illegible], ***accessed*** March 6, 2017, p. 12.

b. Business Formation Rate

The business formation rate is another metric to measure immigrant entrepreneurship. This is the percentage of people who become business owners from one month to the next. The literature shows that immigrants have a higher business formation rate than native-born individuals and that the rates have been increasing over time.

- "Immigrants continue to be almost twice as likely as the native-born to become entrepreneurs, with the Rate of New Entrepreneurs being 0.52 percent for immigrants, as opposed to 0.27 percent for the native-born."[122]
- "The business formation rate per month among immigrants is 0.51 percent; that is, of 100,000 nonbusiness-owning immigrants, 510 start a business each month. This rate of business formation is higher than the nonimmigrant rate of 0.28 percent, or 280 of 100,000 U.S.-born non-business owners per month."[123]

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[122] **Fairlie, Robert W., Arnobio Morelix, E.J. Reedy, and Joshua Russell, "The Kauffman Index, Startup Activity National Trends," The Kauffman Foundation, August 2016, *available at* [illegible], *accessed* March 9, 2017, p. 6.**

[123] **Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, *available at***

- "Business formation rates are even higher among immigrants than the nonimmigrant. The business formation rate per month among immigrants is 0.62 percent (or 620 out of 100,000). This monthly rate of business formation is much higher than the non-immigrant rate of 0.28 percent (or 280 of 100,000)."[124]

See **Table IV.1** for a full set of data sources relied on in the literature and **Table IV.2** for a full summary of the business formation estimates in the literature.

[illegible]
92, *accessed* March 1, 2017, p. 67.

[124] Fairlie, Robert W., "Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital," U.S. Small Business Administration, Office of Advocacy, May, 2012, *available at* [illegible], *accessed* February 27, 2017, p. ii.

Table IV.1
Summary of Data Sources

Study	Year	Author	American Community Survey	Current Population Survey	Restricted Access U.S. Census Bureau Longitudinal Data[125]	Independent Survey/ Manual Search
Immigrant Entrepreneurship[126]	2016	Kerr and Kerr			x	
The Kauffman Index – Startup Activity National Trends[127]	2015	Fairlie, Morelix, et al		x		

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[125] The Restricted Access Longitudinal Data include the Longitudinal Employer Household Dynamics database and the Longitudinal Business database.

[126] Kerr, Sari Pekkala and William R. Kerr, "Immigrant Entrepreneurship," National Bureau of Economic Research, July, 2016, ***available at***
[illegible], *accessed* March 1, 2017.

[127] Fairlie, Robert W., Arnobio Morelix, E.J. Reedy, and Joshua Russell, "The Kauffman Index, Startup Activity National Trends," The Kauffman Foundation, August 2016, ***available at***
[illegible] rtup activity national trends 2016.pdf, *accessed* March 9, 2017.

Immigration and Entrepreneurship[128]	2014	Fairlie and Lofstrom	x	x	
Immigrant Entrepreneurs and Small Business Owners[129]	2012	Fairlie		x	
High-Tech Immigrant Entrepreneurship in the United States[130]	2009	Hart, Acs, and Tracy			x
Estimating the Contribution of Immigrant Business Owners to the Economy[131]	2008	Fairlie		x	

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[128] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, ***available at*** https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597992, *accessed* March 1, 2017.

[129] Fairlie, Robert W., "Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital," U.S. Small Business Administration, Office of Advocacy, May, 2012, ***available at*** [illegible], *accessed* February 27, 2017.

[130] Hart, David M., Zoltan J. Acs, and Spencer L. Tracy, Jr., "High-tech immigrant Entrepreneurship in the United States," U.S. Small Business Association, Office of Advocacy, July, 2009, ***available at*** [illegible], *accessed* February 24, 2017.

[131] Fairlie, Robert W, "Estimating the Contribution of Immigrant Business Owners to the U.S. Economy," U.S. Small Business Association, Office of Advocacy, November, 2008, ***available at*** https://people.ucsc.edu/~rfairlie/papers/published/sba%20final%20report%20immigrant%20business.pdf, *accessed* February 24, 2017.

Study	Year	Author	American Community Survey	Current Population Survey	Restricted Access U.S. Census Bureau Longitudinal Data[132]	Independent Survey/ Manual Search
Estimating the Contribution of Immigrant Business Owners to the Economy[133]	2008	Fairlie		x		
America's New Immigrant Entrepreneurs[134]	2007	Wadhwa, Saxeian, et al.				x
Immigrant Entrepreneurs in the Massachusetts Biotechnology	2007	Monti, Smith-Doerr, McQuai				x

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[132] The Restricted Access Longitudinal Data include the Longitudinal Employer Household Dynamics database and the Longitudinal Business database.

[133] Fairlie, Robert W, "Estimating the Contribution of Immigrant Business Owners to the U.S. Economy," U.S. Small Business Association, Office of Advocacy, November, 2008, *available at* https://people.ucsc.edu/~rfairlie/papers/published/sba%20final%20report%20immigrant%20business.pdf, *accessed* February 24, 2017.

[134] Wadhwa, Vivek, AnnaLee Saxenian, Ben Rissing, and Gary Gereff, "America's New Immigrant Entrepreneurs," Duke Science, Technology & Innovation Paper No. 23, January 4, 2007, *available at* [illegible] *accessed* March 3, 2017.

Industry[135]		d				
The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness[136]	2006	Anderson and Platzer				x
Silicon Valley's New Immigrant Entrepreneurs[137]	1999	Saxeian	x			

Immigrant Entrepreneurship	2016	**Kerr and Kerr**	**2008**	**The 11 states present in the Longitudinal Employer Household Dynamics database**	**27.1%**[139]

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[135] Monti, Smith, Laurel Smith-Doerr, and James McQuaid, "Immigrant Entrepreneurs in the Massachusetts Biotechnology Industry, June 2007, *available at* [illegible], *accessed* Match 4, 2017.

[136] Anderson, Stuart and Michaela Platzer, "American Made: The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness," National Venture Capital Association, November, 2006, *available at* [illegible], *accessed* February 24, 2017.

[137] Saxeian, AnnaLee, "Silicon Valley's New Immigrant Entrepreneurs," Public Policy Institute of California, 1999, *available at* [illegible] 31, 2017.

				by 1992[138]		
The Kauffman Index – Startup Activity National Trends	2015	Fairlie, Morelix, et al.	2014	U.S.	28.5%[140]	
Immigration and Entrepreneur	2014	Fairlie and Lofstrom	2007-201	U.S.	24.9%[141]	Immigrants: 0.51%[142]

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[139] Kerr, Sari Pekkala and William R. Kerr, "Immigrant Entrepreneurship," National Bureau of Economic Research, July, 2016, *available at* [illegible], *accessed* March 1, 2017, p. 15.

[138] States include CA, CO, FL, ID, IL, LA, MD, NC, OR, WA, and WI.

[140] Fairlie, Robert W., Arnobio Morelix, E.J. Reedy, and Joshua Russell, "The Kauffman Index, Startup Activity National Trends," The Kauffman Foundation, August 2016, *available at* [illegible] rtup_activity_national_trends_2016.pdf, *accessed* March 9, 2017, p. 13.

[141] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597992, *accessed* March 1, 2017, p. 6.

[142] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, *available at*

ship			1			Native-born: 0.28%
Immigrant Entrepreneurs and Small Business Owners	2012	Fairlie	2010	Individuals ages 20-64 who do not own a business in the first survey month.		Immigrants: 0.62%[143] Native-born: 0.28%
High-Tech Immigrant Entrepreneurship in the United States	2009	Hart, Acs, and Tracy	2002-2006	"High impact" companies in the high-tech sector	16%[144]	

[illegible] 92, *accessed* March 1, 2017, p. 7.

[143] Fairlie, Robert W., "Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital," U.S. Small Business Administration, Office of Advocacy, May, 2012, *available at* [illegible], *accessed* February 27, 2017, p. ii.

[144] Hart, David M., Zoltan J. Acs, and Spencer L. Tracy, Jr., "High-tech immigrant Entrepreneurship in the United States," U.S. Small Business Association, Office of Advocacy, July, 2009, *available at* [illegible], *accessed* February 24, 2017, p. 5.

Table IV.2 (continued)
Summary of Results: Immigrant Share of Business Founders and Business Formation Rates

Study	Year	Authors	Data Range	Sample	Immigrant Share of Founders	Business Formation Rate
Estimating the Contribution of Immigrant Business Owners to the Economy	2008	Fairlie	1996-2007	U.S.	16.7%[145]	Immigrants: 0.35%[146] Native-born: 0.27%

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[145] Fairlie, Robert W, "Estimating the Contribution of Immigrant Business Owners to the U.S. Economy," U.S. Small Business Association, Office of Advocacy, November, 2008, *available at* [illegible], *accessed* February 24, 2017, p. 18.

[146] Fairlie, Robert W, "Estimating the Contribution of Immigrant Business Owners to the U.S. Economy," U.S. Small Business Association, Office of Advocacy, November, 2008, *available at* https://people.ucsc.edu/~rfairlie/papers/published/sba%20fi [illegible], *accessed* February 24, 2017, p. 19.

America's New Immigrant Entrepreneurs	2007	Wadhwa, Saxeian, et al.	1995-2005	U.S. engineering and technology companies with > $1 million in sales or > 20 employees	U.S.: 25.3%[147] Silicon Valley: 52.4%[148]
Immigrant Entrepreneurs in the Massachusetts Biotechnology Industry	2007	Monti, Smith-Doerr, McQuaid	2006	Biotechnology companies founded in New England. Excludes subsidiaries of larger companies or multi-	25.7%[149]

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[147] Wadhwa, Vivek, AnnaLee Saxenian, Ben Rissing, and Gary Gereff, "America's New Immigrant Entrepreneurs," Duke Science, Technology & Innovation Paper No. 23, January 4, 2007, ***available at*** [illegible] 2, ***accessed*** March 3, 2017, p. 11.

[148] Wadhwa, Vivek, AnnaLee Saxenian, Ben Rissing, and Gary Gereff, "America's New Immigrant Entrepreneurs," Duke Science, Technology & Innovation Paper No. 23, January 4, 2007, ***available at*** [illegible] 2, ***accessed*** March 3, 2017, p. 31.

[149] Monti, Smith, Laurel Smith-Doerr, and James McQuaid, "Immigrant Entrepreneurs in the Massachusetts Biotechnology Industry, June 2007, ***available at*** http://www.issuelab.org/resource/immigrant entrepreneurs [illegible] ***accessed*** Match 4, 2017, p. 2.

				national corporations.	
The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness	2006	Anderson and Platzer	1990-2005	U.S. venture capital-backed public companies	25%[150]
Silicon Valley's New Immigrant Entrepreneurs	1999	Saxeian	1980-1998	Percentage of technology firms started between 1980 and 1998 with Indian or Chinese immigrant CEOs	24%[151]

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[150] Anderson, Stuart and Michaela Platzer, "American Made: The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness," National Venture Capital Association, November, 2006, ***available at*** http://www.contentfirst.com/AmericanMade_study.pdf, ***accessed*** February 24, 2017, p. 13.

[151] Saxeian, AnnaLee, "Silicon Valley's New Immigrant Entrepreneurs," Public Policy Institute of California, 1999, ***available at*** http://www.ppic.org/content/pubs/report/R_699ASR.pdf, ***accessed*** March 31, 2017, p. 23.

ii. Descriptive Tables from Fortune 500 Companies

The literature has focused on all types of business, but there is also a publicly available dataset that provides ownership and founder information for Fortune 500 companies in particular. Highlighted below are statistics similar to those found in the literature, as well as some potential explanations for why the figures may be different for the Fortune 500.

- As shown in **Table IV.3**, in the 2015 list of Fortune 500 firms, 14.6 percent were headed by foreign born CEOs and 15.4 percent were founded by foreign-born individuals. Of companies in the 2015 list in high-tech industries, 19.6 percent were headed by foreign-born CEOs, and 22.8 percent were founded by foreign-born individuals.
- The percentage of Fortune 500 companies with a foreign-born founder is lower than the immigrant share of entrepreneurs reported in the literature using the recent Current Population Survey data. As shown in **Table IV.2**, estimates using Census data from the past decade range from 24.9 to 28.5 percent. However, the 15.4 percent share for Fortune 500 companies with a foreign-born founder (**Table IV.3**) is consistent with the estimates using older data. For example, data from 1996

to 2007 show immigrant entrepreneurship share of 16.7 percent[152] **(Table IV.2)**.

- In 2015, Fortune 500 companies with foreign-born CEOs generated over $1.6 trillion in revenue, and those founded by foreign-born individuals generated over $1.8 trillion in revenue.[153] These values are both larger than the entire GDP of Canada in 2015.[154] Furthermore, in 2015, Fortune 500 companies with foreign-born CEOs employed over 4 million people worldwide and Fortune 500 companies founded by foreign-born individuals employed over 3.7 million people worldwide. Both of these numbers are larger than the entire population of Connecticut in 2015.[155]

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[152] Fairlie, Robert W, "Estimating the Contribution of Immigrant Business Owners to the U.S. Economy," U.S. Small Business Association, Office of Advocacy, November, 2008, *available at* [illegible], *accessed* February 24, 2017, p. 18.

[153] Fortune, "Fortune 500," *available at* [illegible], *accessed* March 2, 2017.

[154] The World Bank, "Gross Domestic Product 2015," *available at* ht[illegible]databank.worldbank.org/data/download/GDP.pdf, *accessed* March 17, 2017.

[155] United States Census Bureau, "Annual Estimates of Resident Population," *available at* [illegible] oductview.xhtml?src=bkmkhttps://factfinder.census.gov/fac [illegible] html?s [illegible]

Table IV.3
Percent of Foreign-Born CEOs and Founders among U.S. Fortune 500 Companies
2015

	Percent of Companies with Foreign-Born CEO	Percent of Companies with Foreign-Born Founder[2]
		15.4%
		22.8%

Notes:

[1] High-tech industries include: Computers and Office Equipment, Health Care: Pharmacy and Other Services, Information Technology Services, Aerospace and Defense, Computer Software, Pharmaceuticals, Semiconductors and Other Electronic Components, Network and Other Communications Equipment, Electronics and Electrical Equipment, Computer Peripherals, Medical Products and Equipment, Scientific, Photographic and Control Equipment, Chemicals, and Energy.

[2] Information on founders was sourced from Partnership for a New American Economy's "The New American Fortune 500" and supplemented with information from online research on the country of origin for founders of companies that have been added to the list since 2010.

[illegible] 015, *accessed* March 17, 2017.

Sources:

[1] Fortune, "Fortune 500," ***available at*** http://beta.fortune.com/fortune500/2015/, ***accessed*** March 2, 2017.

[2] Partnership for a New American Economy, "The 'New American' Fortune 500," June 2011, ***available at*** http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf, ***accessed*** March 2, 2017, Appendix A.

[3] Biography, "Sergey Brin Biography," November 2, 2016, ***available at*** http://www.biography.com/people/sergey-brin-12103333, ***accessed*** March 30, 2017.

[4] Biography, "Rupert Murdoch Biography," October 17, 2016, ***available at*** http://www.biography.com/people/rupert-murdoch-9118189, ***accessed*** March 30, 2017.

[5] Viterbi, Andrew, "Reflections of an Educator, Researcher, and Entrepreneur," 2016, ***available at*** http://www.biography.com/people/sergey-brin-12103333, ***accessed*** March 30, 2017.

[6] Blagg, Deborah, "Kumar Mahadeva," September 1, 2013, ***available at*** https://www.alumni.hbs.edu/stories/Pages/story-bulletin.aspx?num=2208, ***accessed*** March 30, 2017.

[7] Swartz, Jon, "SanDisk CEO Eli Harari Proves He's No Flash in the Pan," June 28, 2010 ***available at*** http://usatoday30.usatoday.com/money/companies/management/profile/2010-06-27-sandisk-eli-harari_N.htm, ***accessed*** March 30, 2017.

[8] McFadden, Robert, "Sidney Harman, Newsweek Chairman, Is Dead at 92," April 13, 2011, ***available at***

http://www.nytimes.com/2011/01/11/business/media/14harman.html, *accessed* March 30, 2017.
[9] Business Insider, "Meet the Richest Tech Tycoon in 14 Major Countries around the World," July 19, 2014, ***available at*** http://www.businessinsider.in/small-business/tech/slidelist/38639795.cms, *accessed* March 30, 2017.

iii. Descriptive Tables from Survey of Business Owners, 2007 and 2012

Another publicly available data source cited but not used in the literature to determine foreign-born ownership rates is the Survey of Business Owners and Self-Employed Persons (SBO) conducted by the Census Bureau. This survey collects information on the characteristics of businesses and their owners. The survey defines business ownership as possessing at least 51% of a business's stock or equity, sampling 1.75 million and 2.3 million nonfarm businesses with receipts of at least $1,000 that filed Internal Revenue Service tax forms in 2012 and 2007, respectively. Respondents include firms with no paid employees, in sectors 11 through 99 according to the North American Industry Classification System (NAICS), with the exceptions of NAICS 111,112, 482, 521, 525, 813, 814, and 92. The Census Bureau does not claim the CBO data to be representative of all U.S. businesses. Data from the 2012 SBO are only provided as tabulated estimates of aggregate numbers and percentages of businesses in the United States; microdata are available only for the 2007 SBO.

It should be noted that analyses based on the SBO are not directly comparable to analyses based on datasets such as the CPS, which is employed in multiple studies on immigrant share of business founders (*see* **Table IV.1**). Major differences include: 1) business owners who are primarily wage and salary workers are included in the SBO, but excluded from the CPS; 2) the CPS data is collected at the individual level, whereas the SBO data is collected at the business level (thus multiple businesses owned by one individual count multiple times in the SBO but only once in the CPS); and 3) only the "majority owner" with at least 51% of a business is included in the SBO, while multiple "minority owners" with smaller shares of a business are included in the CPS.[156]

In 2012, approximately 14.4% of all businesses are estimated to be owned by immigrants (**Table IV.4a**); this is slightly lower than the percentage of foreign-born business owners (15.0%) reported in 2007 (**Table IV.4b**). The discrepancy may be due to a change in the immigrant-identifying question in the

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[156] U.S. Census Bureau, "Survey of Business Owners and Self-Employed Persons (SBO): Methodology," February 9, 2016, ***available at*** https://www.census.gov/programs-[illegible], *accessed* March 18, 2017; U.S. Census Bureau, "Current Population Survey (CPS): Methodology," ***available at*** [illegible], *accessed* March 30, 2017; Fairlie, Robert W. and Alicia M. Robb, "Entrepreneurship, Self-Employment and Business Data: An Introduction to Several Large, Nationally-Representative Datasets," IZA Discussion Paper Series No. 4052, ***available at*** http://ftp.iza.org/dp4052.pdf, *accessed* March 25, 2017, pp.8-10.

SBO: the 2007 survey identified foreign-born business owners, which included individuals born to Americans overseas and were hence U.S. citizens by birth; the question in the 2012 survey was modified to identify only business owners who were not U.S. citizens by birth. Both figures were higher than the percentage of foreign-born individuals[157] in the general US population (12.9% in 2012, 12.6% in 2007),[158] reflecting a higher share of business ownership among immigrants than those who are native-born.

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[157] U.S. Census Bureau, "About Foreign-Born Population", ***available at***
[illegible]
born/about.html, ***accessed*** March 18, 2017. "Foreign-born" refers to individuals who are not US citizens at birth, including naturalized US citizens, lawful permanent residents, temporary migrants, humanitarian migrants, and unauthorized migrants.

[158] U.S. Census Bureau, "Current Population Survey – March 2012 Detailed Tables", Characteristics of the Foreign-Born Population by Nativity and U.S. Citizenship Status Estimates Table 1.1, ***available at***
[illegible]
born/cps-2012.html, ***accessed*** March 18, 2017 and U.S. Census Bureau, "Current Population Survey – March 2007 Detailed Tables", Characteristics of the Foreign-Born Population by Nativity and U.S. Citizenship Status Table 1.1, ***available at***
[illegible]
born/cps-2007.html, ***accessed*** March 18, 2017. The percentage of foreign-born individuals is calculated as (Total population – Native-born population)/Total population using data tables based on the Annual Social and Economic Supplement of the Current Population Surveys in 2012 and 2007.

The shares of foreign-born business owners are often even higher in sectors which involve "high tech" industries (NAICS Code 33, 42, 44, 51,54),[159] at 18.0% and 16.4% for wholesale trade (42)[160], and 15.1% and 18.0% in retail trade (44-45) in 2012 and 2007, respectively (**Table IV.4a** and **Table IV.4b**). Pharmaceutical and medicine manufacturers are more broadly included in the manufacturing sector and biotech research is included in professional, scientific and technical services, thus it is harder to determine using these aggregate codes whether similar rates are apparent in these particular sub-sectors.

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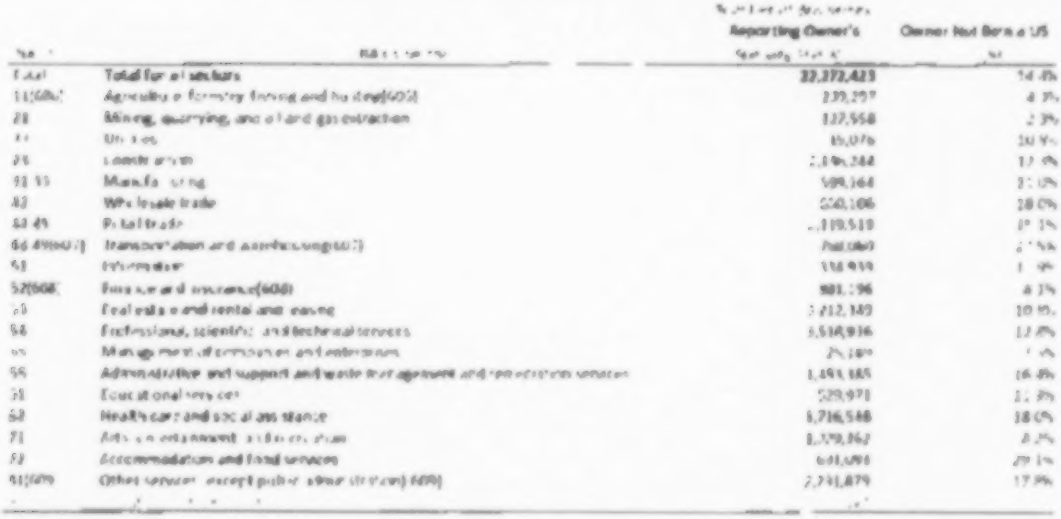
[159] U.S. Census Bureau, "Census Explorer Q&A," How do you define the "tech" jobs in the People, Education and Income Edition?, ***available at*** [illegible], ***accessed*** March 18, 2007. The page provides a hyperlink to a spreadsheet showing "list of codes used" to identify "tech" companies at [illegible], ***accessed*** March 18, 2007.

[160] Computer & peripheral equip & software wholesale (421430), Other electronic parts & equipment whsle (421690), Computer and computer peripheral equipment and software merchant wholesalers (423430),Other electronic parts and equipment merchant wholesalers (423690),Computer and software stores (443120).

Table IV.4a
Survey of Business Owners 2012 – All Sectors Percentage of Businesses with Foreign-Born Owners, by NAICS Sector



Notes:
[1] Numbers of businesses were estimates based on the sample of 1.75 million businesses that responded to the 2012 SBO. Approximately 0.8% all business owners did not report whether they were born US citizens. Business ownership is defined as having 51 percent or more of the stock or equity in the business.
[2] Percentages reported were calculated out of the number of businesses that reported the owner's nativity status.
[3] Asterisks indicate NAICS sectors that cover biotechnology, pharmaceutical, and high-technology firms.

Source: United States Census, "2012 Survey of Business Owners," ***available at*** https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, ***accessed*** March 1, 2017.

Table IV.4b
Survey of Business Owners 2007 – All Sectors Percentage of Businesses with Foreign-Born Owners, by NAICS Sector

[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

Notes:

[1] Among all 2,165,680 businesses covered by the 2007 SBO, 1,503,184 (69.4%) had a majority owner, defined as an owner with 51% or more of the stock or equity in the business. The majority owner's nativity status was reported by 847,154 (56.4%) such businesses.

[2] Percentages reported were calculated out of the number of businesses which had a majority owner and reported the owner's nativity status.

[3] Asterisks indicate NAICS sectors that cover biotechnology, pharmaceutical, and high-technology firms.

Source: United States Census, "2007 Survey of Business Owners," ***available at*** https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, ***accessed*** March 1, 2017.

The higher share of immigrants in business ownership is even more apparent when examining recently founded firms. In the 2007 SBO, over 20 percent of businesses started within the 5 years prior to the survey were owned by foreign-born individuals (**Table IV.5**). These rates were even higher for trade and retail start-ups where one-third and one-quarter were owned by foreign born individuals, respectively; high-tech industries are directly involved in both sectors. In addition, as high as 36.7 percent of recently founded accommodation and food services businesses were owned by foreign-born individuals.

Table IV.5
Survey of Business Owners 2007 – Companies Founded in or after 2003
Percentage of Businesses with Foreign-Born Owners, by NAICS Sector

NAICS Code	NAICS Sector	Number of Businesses Reporting Owners' Nativity Status [1]	Owner Not Born in the US (%) [2]
Total	Total for all sectors	[illegible]	[illegible]

Notes:

[1] Among all 1,503,184 businesses with majority owners, 932,152 (62.0%) reported the year of establishment. A total of 300,666 (32.3%) such businesses were start-ups, defined as businesses

founded within 5 years of the survey (2003 - 2007), among which 240,252 (80.0%) reported the majority owner's nativity status.

[2] Percentages reported were calculated out of the number of start-ups with a majority owner whose nativity status was reported.

[3] Asterisks indicate NAICS sectors that cover biotechnology, pharmaceutical, and high-technology firms.

Source: United States Census, "2007 Survey of Business Owners," ***available at*** https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, ***accessed*** March 1, 2017.

Similarly, when examining whether the founder of a business was foreign born, the percentage goes from 12 percent for the full sample (**Table IV.6**) to 17.3 percent for start-ups (**Table IV.7**).

Table IV.6
Survey of Business Owners 2007 – Firms Owned by Founders
Percentage of Businesses with Foreign-Born Founding-Owners, by NAICS Sector

[illegible]	NAICS [illegible]	Number of Businesses Reporting Owner's Founding and Nativity [illegible]	Founding Owner Not [illegible]
[illegible]	[illegible]	832,215	12.7%
[illegible]	[illegible]	[illegible]	[illegible]

Notes:

[1] Among all 1,503,184 businesses with majority owners, 832,215 (54.8 percent) reported both the majority owner's founder and nativity statuses.

[2] Percentages reported were calculated out of the number of businesses which had a majority owner and reported both the owner's founder and nativity statuses.

[3] Asterisks indicate NAICS sectors that cover biotechnology, pharmaceutical, and high-technology firms.

Source: United States Census, "2007 Survey of Business Owners," *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, *accessed* March 1, 2017.

Table IV.7

Survey of Business Owners 2007 – Companies Founded in or After 2003 by Current Owner Percentage of Businesses with Foreign-Born Founding-Owners, by NAICS Sector

[illegible]	[illegible]	Number of Businesses Reporting Owner's Founding and Nativity	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

Notes:

[1] Among all 1,503,184 businesses with majority owners, 932,152 (62.0 percent) reported the year of establishment. A total of 300,666 (32.3 percent) such businesses were start-ups, defined as businesses founded within 5 years of the survey (2003 - 2007), among which 173,136 (57.6 percent) reported both the majority owner's founder and nativity statuses.

[2] Percentages reported were calculated out of the number of start-ups which had a majority owner and reported both the owner's founder and nativity statuses.

[3] Asterisks indicate NAICS sectors that cover biotechnology, pharmaceutical, and high-technology firms.

Source: United States Census, "2007 Survey of Business Owners," *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, *accessed* March 1, 2017.

C. Impact of New Businesses Started by Immigrants

i. Estimates of Sales, Employment, and Payroll Generated by Immigrant-Owned Firms in 2012

Table IV.8 reports estimates of the impact of immigrant owned firms in the U.S. economy in 2012. The estimates are calculated as the product of the total value for the U.S.[161] and the immigrant owned business share.[162] For example,

Total sales generated by immigrant owned firms = total U.S. sales × percent of sales generated by immigrant owned firms

Assumptions:

- Fairlie and Loftstrom (2014) report the shares of total U.S. sales, employment, and payroll for immigrant owned firms using 2007 Survey of Business Owners data.[163] Given the limitations of the 2012 Survey of Business Owner data, these same estimates cannot be calculated for 2012. Therefore, the following calculations assume that the immigrant owned firms' shares were the same in 2012 as they were in 2007.

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[161] Total U.S. sales, employment, and payroll are from the 2012 Survey of Business Owners *available at* https://factfinder.census [illegible] xhtml?src=CF, *accessed* March 1, 2017.

[162] The immigrant owned businesses' shares of sales employment, and payroll are taken from Fairlie and Loftstrom (2014), which used 2007 Survey of Business Owner data. Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, *available at* https://papers.ssrn [illegible] 92, *accessed* March 1, 2017.

[163] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, *available at* https papers ssrn [illegible] m?abstract id 25979 92, *accessed* March 1, 2017.

- Fairlie and Loftstrom's estimates of employment, payroll, and sales use data limited to, "businesses that are classified by the IRS as sole proprietorships, partnerships, 1120 corporations, or employers, and that have sales of $1000 or more. It also excludes publicly held and other firms not classifiable by owner status."[164] The following calculations extend the analysis to all U.S. firms reported in the Survey of Business Owners. The analysis assumes that the shares are the same for Fairlie and Loftstrom's sample of businesses as for the whole population of U.S. businesses.

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[164] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, ***available at*** https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597992, ***accessed*** March 1, 2017, p. 8.

Table IV.8
Estimated Impact of Immigrant Owned Businesses on the U.S. Economy in 2012

	Measure of 2012 Economic Impact		
Metric	Sales, Receipts, or Value of Shipments (Millions)	Employment	Payroll (Millions)
Total U.S.	$33,536,848.8	115,249,007	$5,236,446.1
Immigrant Owned Business Share in 2007	10.0%	9.9%	8.8%
Estimate for Immigrant Owned Businesses	$3,353,684.8	11,409,652	$460,807.3

Sources:
[1] 2012 Survey of Business Owners.
[2] Fairlie, Robert W. and Magnus Lofstrom, "Immigration and Entrepreneurship," CESifo Working Paper Series No. 5298, April 23, 2015, ***available at*** https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597992, ***accessed*** April 4, 2017.

ii. Regional Differences

Immigrant owned firms' contributions to the economy are even higher in some regions of the country. Using data from the 2000 Census, Fairlie (2008) showed that, "The total business income generated by immigrant business owners is $67 billion, 11.6 percent of all business income in the United States. Immigrant business owners generate nearly $20 billion or one-quarter of all business income in California, and nearly one-fifth of all business income in New York, Florida, and New Jersey."[165]

V. REGIONAL IMPACT AND ECONOMIC GROWTH

KEY TAKEAWAYS

- While immigration policy may be set at the national level, its importance is not distributed equally across the United States.
- In terms of number of foreign-born individuals with graduate degrees, the top five states are California, New York, Texas, Illinois, and Pennsylvania. However, the states with the highest percentage of individuals with graduate degrees are Connecticut, Texas, Illinois, Oklahoma, and Kansas.
- States such as California, New York, Texas, Florida, and Illinois have the largest number of immigrants and immigrants from the six banned countries. States with the lowest number of immigrants are typically in the upper-plains and Appalachia regions of the United States.
- States with relatively small immigrant populations – West Virginia, North Dakota, South Dakota, Alaska, and Montana – have

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[165] Fairlie, Robert, "Estimating the Contribution of Immigrant Business Owners to the U.S. Economy," Small Business Office of Advocacy, November 2008, ***available at*** https://people.ucsc.edu/~rfairlie/papers/published/sba%20final%20report%20immigrant%20business.pdf, ***accessed*** April 14, 2017.

experienced the largest percentage increases in the share of immigrants in their population and labor force.

- Examination of labor certification and residence applications across states also reveals spatial differences.
    - In 2016, the District of Columbia, New Jersey, Delaware, Connecticut, and Massachusetts had the most applications for skilled employment visas per 1,000 persons.
    - New Jersey, Washington, California, the District of Columbia, and Delaware had the most applications for permanent residence applications per 1,000 persons in 2016.
    - The most applications for temporary agricultural work permits are made in California, Florida, Georgia, Louisiana, North Carolina, and Washington.
    - The most applications for temporary non-agricultural work permits are made in Colorado, Florida, Louisiana, Massachusetts, Pennsylvania, and Texas.
- Finally, there are state-level differences in the fiscal effects of immigrants. Between 2011 and 2013, Alaska, the District of Columbia, Wyoming, New York, and California had the highest state and local expenditures per immigrant independent person.

A. State-by-State Facts from the American Immigration Council

Table V.1 presents data for each state on the percentage of the population that is foreign-born in 2013, the percentage of businesses owned by foreign-born individuals in 2010, and net business income from immigrant businesses in 2010. **Tables V.2** to **V.4** present data on each of these measures, respectively, by state ranking.

- California, New York, New Jersey, Florida, and Nevada were the states with the highest percentage of foreign-born individuals in 2013.
- In 2010, the states with the highest percent of businesses owned by foreign-born individuals were California, New York, New Jersey, Florida, and Hawaii.
- The net business income from foreign-born-owned businesses is highest in California by a substantial margin, followed by Florida, Texas, New Jersey, and Illinois.

Table V.1
State-by-State Facts from American Immigration Council

Rank	State	Percent foreign-born[1]	Percent business owners that	Net business income from
1	Alabama	3.4%	4.3%	$337,000,000
2	Alaska	7.1%	9.8%	$160,000,000
3	Arizona	13.5%	14.8%	$2,200,000,000
4	Arkansas	4.5%	4.2%	$287,000,000
5	California	26.9%	36.6%	$34,300,000,000
6	Colorado	9.5%	9.2%	$1,200,000,000
7	Connecticut	13.9%	16.0%	$2,100,000,000
8	Delaware	8.3%	10.6%	$261,000,000
9	District of Columbia	14.4%	18.2%	$242,000,000
10	Florida	19.4%	26.1%	$13,300,000,000
11	Georgia	9.7%	14.8%	$2,900,000,000
12	Hawaii	17.6%	22.5%	$772,000,000
13	Idaho	5.9%	5.1%	$192,000,000
14	Illinois	14.0%	21.8%	$5,400,000,000
15	Indiana	4.8%	5.1%	$722,000,000
16	Iowa	4.8%	2.9%	$216,000,000
17	Kansas	6.8%	5.3%	$351,000,000
18	Kentucky	3.4%	4.6%	$451,000,000
19	Louisiana	3.9%	7.6%	$691,000,000
20	Maine	3.4%	3.2%	$120,000,000
21	Maryland	14.2%	20.9%	$2,800,000,000
22	Massachusetts	15.6%	17.9%	$2,800,000,000
23	Michigan	6.2%	10.4%	$1,800,000,000
24	Minnesota	7.4%	6.0%	$772,000,000
25	Mississippi	2.1%	4.5%	$181,000,000
26	Missouri	3.9%	5.8%	$650,000,000
27	Montana	2.0%	1.7%	$44,000,000
28	Nebraska	6.6%	3.8%	$126,000,000
29	Nevada	19.0%	20.2%	$1,100,000,000
30	New Hampshire	5.7%	7.7%	$252,000,000
31	New Jersey	21.6%	28.0%	$6,700,000,000
32	New Mexico	10.1%	8.4%	$189,000,000
33	New York	22.3%	29.4%	$20,600,000
34	North Carolina	7.6%	8.6%	$1,700,000,000
35	North Dakota	2.7%	1.8%	$20,400,000
36	Ohio	4.1%	6.7%	$1,300,000,000
37	Oklahoma	5.7%	5.6%	$447,000,000
38	Oregon	10.0%	9.2%	$1,100,000,000
39	Pennsylvania	6.2%	9.1%	$2,200,000,000
40	Rhode Island	12.9%	12.9%	$360,000,000
41	South Carolina	4.8%	6.0%	$522,000,000
42	South Dakota	2.8%	1.1%	$13,000,000
43	Tennessee	4.7%	7.2%	$851,000,000
44	Texas	16.5%	20.3%	$10,000,000,000
45	Utah	8.2%	6.9%	$188,000,000
46	Vermont	4.2%	4.2%	$84,000,000
47	Virginia	14.5%	17.1%	$3,000,000,000
48	Washington	13.5%	15.0%	$2,400,000,000
49	West Virginia	1.5%	4.0%	$139,000,000
50	Wisconsin	4.8%	4.7%	$589,000,000
	Wyoming	3.5%	2.9%	$59,600,000

Notes:
[1] These figures are reported by the U.S. Census Bureau for the year 2013.
[2] These figures are reported by the Fiscal Policy Institute and Americas Society/Council of the Americas for the year 2010.
[3] These figures represent total net business income of new immigrant business owners according to Robert Fairlie of the University of California, Santa Cruz for the year 2010.

Source: American Immigration Council, State Fact Sheets, *available at* [illegible], *accessed* April 12, 2017.

Table V.2
States by Percent Foreign-Born

Rank	State	Percent foreign-born
	California	26.9%
	New York	22.3%
	New Jersey	21.6%
	Florida	19.4%
	Nevada	19.0%
	Hawaii	17.6%
	Texas	16.5%
	Massachusetts	15.6%
	Virginia	14.5%
	District of Columbia	14.4%
	Maryland	14.2%
	Illinois	14.0%
	Connecticut	13.9%
	Arizona	13.5%
	Washington	13.5%
	Rhode Island	12.9%
	New Mexico	10.1%
	Oregon	10.0%
	Georgia	9.7%
	Colorado	9.5%
	Delaware	8.3%
	Utah	8.2%
	North Carolina	7.6%
	Minnesota	7.4%
	Alaska	7.1%
	Kansas	6.8%
	Nebraska	6.6%
	Pennsylvania	6.2%
	Michigan	6.2%
	Idaho	5.9%
	New Hampshire	5.7%
	Oklahoma	5.7%
	Indiana	4.8%
	Iowa	4.8%
	South Carolina	4.8%
	Wisconsin	4.8%
	Tennessee	4.7%
	Arkansas	4.5%
	Vermont	4.2%
	Ohio	4.1%
	Louisiana	3.9%
	Missouri	3.9%
	Wyoming	3.5%
	Alabama	3.4%
	Kentucky	3.4%
	Maine	3.4%
	South Dakota	2.8%
	North Dakota	2.7%
	Mississippi	2.1%
	Montana	2.0%
	West Virginia	1.5%

Note: These figures are reported by the U.S. Census Bureau for the year 2013.

Source: American Immigration Council, State Fact Sheets, *available at* https://www.americanimmigrationcouncil.org/topics/state-by-state, *accessed* April 12, 2017.

Table V.3
States by Percent of Foreign-Born Business Owners

Rank	State	Percent of business owners that are foreign-born
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
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[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

Note: These figures are reported by the Fiscal Policy Institute and Americas Society/Council of the Americas for the year 2010.

Source: American Immigration Council, State Fact Sheets, ***available at*** https://www.americanimmigrationcouncil.org/topics/state-by-state, *accessed* April 12, 2017.

Table V.4
States by Income from Immigrant Businesses

Rank	State	Net business income from immigrant businesses
[illegible]	[illegible]	[illegible]

Note: These figures represent total net business income of new immigrant business owners according to Robert Fairlie of the University of California, Santa Cruz for the year 2010.

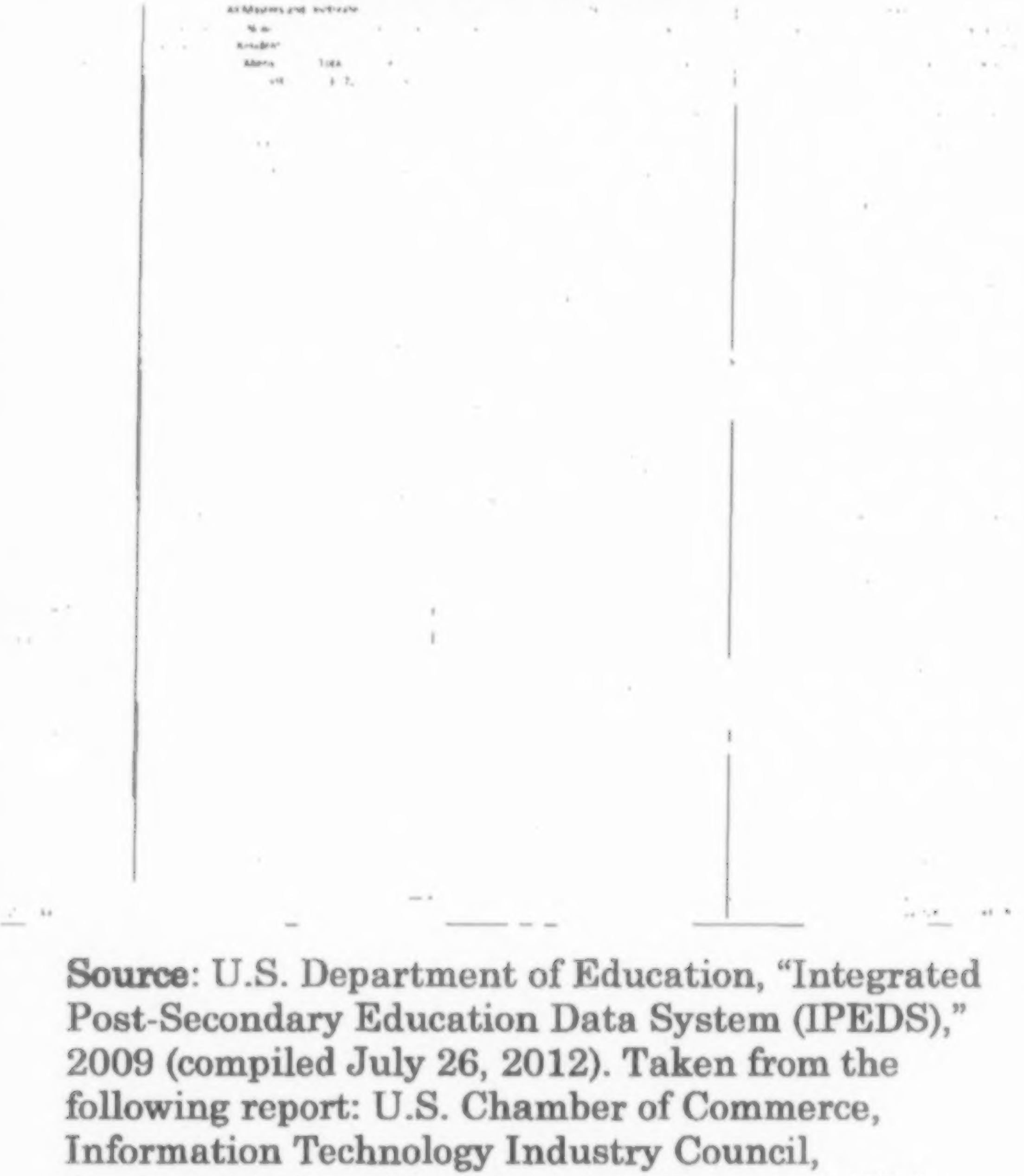
Source: American Immigration Council, State Fact Sheets, ***available at*** https://www.americanimmigrationcouncil.org/topics/state-by-state, *accessed* April 12, 2017.

B. STEM Post-Baccalaureate Degrees by State and Student U.S. Residency Status

Table V.5 reports statistics from the U.S. Department of Education, National Center for Education Statistics on STEM post-baccalaureate degrees awarded by each state in 2009 by nationality.

- The states with the highest percentage of individuals with graduate degrees are Connecticut, Texas, Illinois, Oklahoma, and Kansas.
- The states with the highest percentage of foreign-born individuals with graduate degrees are California, New York, Texas, Illinois, and Pennsylvania.

Table V.5
STEM Post-Baccalaureate Degrees by State and Student U.S. Residency Status



Source: U.S. Department of Education, "Integrated Post-Secondary Education Data System (IPEDS)," 2009 (compiled July 26, 2012). Taken from the following report: U.S. Chamber of Commerce, Information Technology Industry Council, Partnership for a New American Economy, "Help Wanted: The Role of Foreign Workers in the Innovation Economy," ***available at*** https://www.itic.org/dotAsset/31303e8c-d2be-47ca-a3db-f11649bcbb02.pdf, ***accessed*** April 4, 2017.

C. H-1B Visa and Green Card Applications by State

Table V.6 reports data on applications for skilled employment (e.g., H-1B Visas), and **Table V.7** reports data on applications for permanent residence (i.e., Green Cards). Applications for H-1B visas and Green Cards can proxy for foreign-born individuals' intent to immigrate to a specific state.

- **Skilled Employment:**
    - **Table V.6** shows that the highest percentage growth in H-1B Visa applications occurred in Montana, followed by Pennsylvania, South Carolina, Georgia, and Vermont.
    - None of these states appeared among the top five states for the metrics presented in **Tables V.1** to **V.5** above.
    - New York, California, and Massachusetts are not included among the top ten states for H-1B Visa applications.
    - In 2016, the District of Columbia, New Jersey, Delaware, Connecticut, and Massachusetts had the most applications for skilled employment visas per 1,000 persons.
- **Permanent Residence:**
    - **Table V.7** shows that the highest percentage increases in employment-based Green Card applications occurred in Washington, South Carolina, Texas, Oregon, and North Carolina.

  - With the exception of Texas, these states are not among the top five states based on the metrics presented in **Tables V.1** to **V.5** above.
  - New Jersey, Washington, California, the District of Columbia, and Delaware had the most applications for permanent residence applications per 1,000 persons in 2016.

Table V.6
Labor Condition Applications for Skilled Employment Visas (H-1B, H-1B1, E-3) by State
Fiscal Years 2010-2016

	[illegible]								[illegible]	
State	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	8.47	8.47				1	[illegible]	[illegible]
[illegible]	4.43	5.79	6.09	6.69	7.78	10.08		2	[illegible]	14
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	6.70		[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]
MA	[illegible]	4.25	4.99	[illegible]	[illegible]	7.21		5	13.0%	[illegible]
[illegible]	1.57	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		7	[illegible]	[illegible]
CA	2.60	2.39	4.10	4.46	4.84	5.69		8	13.8%	11
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]
[illegible]	1.20	[illegible]	1.66	[illegible]	[illegible]	5.28		10	[illegible]	[illegible]
[illegible]	1.54	2.25	[illegible]	[illegible]	[illegible]	[illegible]		11	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	4.17		[illegible]	[illegible]	7
VA	2.15	[illegible]	2.85	[illegible]	[illegible]	4.15		13	[illegible]	22
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	1.92	2.16	2.25	[illegible]	3.13		15	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	2.17	2.93	2.63	[illegible]		16	15.3%	8
MN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	17	[illegible]	[illegible]
[illegible]	2.34	2.05	2.79	2.86	2.33	2.09	3.15	18	3.0%	11
[illegible]	1.70	[illegible]	[illegible]	1.56	2.38	[illegible]	[illegible]	19	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MD	[illegible]	[illegible]	2.00	[illegible]	2.72	[illegible]	[illegible]	21	[illegible]	13
CO	1.52	2.02	2.35	2.60	2.46	[illegible]	2.65	22	[illegible]	32
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
AZ	1.42	1.57	1.93	1.87	2.12	3.01	[illegible]	24	11.7%	24
FL	1.57	1.43	1.56	1.41	1.59	[illegible]	[illegible]	25	[illegible]	23
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		1.03	[illegible]	1.11	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		1.07	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
TX		1.45	1.79	1.94	2.15	2.00	[illegible]	[illegible]		19
[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
IN		1.23	1.37	1.33	1.25	1.52	1.82	32		23
[illegible]		1.47	1.90	[illegible]	[illegible]	1.81	[illegible]	[illegible]		[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]	1.57	1.65	[illegible]	[illegible]	1.03	1.00	[illegible]	35	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	0.72	[illegible]	[illegible]	0.91	[illegible]	[illegible]	37	[illegible]	[illegible]
ND	[illegible]	1.02	0.95	1.06	1.08	1.57	1.03	38	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	07
[illegible]	[illegible]	[illegible]	0.99	1.27	1.22		[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]	1.01	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	1.31	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	47
[illegible]	[illegible]	0.83	0.83	[illegible]	[illegible]	0.57	0.72	[illegible]	[illegible]	[illegible]
MI	0.70	0.77	0.60	[illegible]	0.95	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	47	[illegible]	[illegible]
AL	0.42	0.51	0.47	0.42	0.59	[illegible]	0.57	48	[illegible]	32
[illegible]	[illegible]	[illegible]	0.27	0.27	0.35	0.35	0.55	[illegible]	[illegible]	37
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		0.27	[illegible]	51	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]		[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
U.S. Total	1.88	2.30	2.86	2.84	3.17	3.90	3.92		13.0%	

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.
[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popest/state-total.html, ***accessed*** April 4, 2017.

Table V.7
Labor Certification Applications for Permanent Residence Applications by State
Fiscal Years 2010-2016

[illegible]	[illegible]								[illegible]	
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]										
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		
[illegible]		[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	7		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]			[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]			[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]			[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]			[illegible]
[illegible]		[illegible]		[illegible]		[illegible]				[illegible]
[illegible]		[illegible]		[illegible]		[illegible]				[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]			[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		7		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]	[illegible]	[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
[illegible]								[illegible]		[illegible]
U.S. Total	[illegible]	0.23	0.21	0.14	[illegible]	0.28	0.30		[illegible]	

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popest/state-total.html, ***accessed*** April 4, 2017.

D. Numbers and Fraction of Immigrant Populations by U.S. State, 2010-2015

The following table and maps present statistics for each state on the number of immigrants, the number of immigrants from the six banned countries, immigrants' fraction of the population, immigrants' fraction of the labor force, and the fraction of all immigrants from the six banned countries. In general, states such as California, New York, Texas, Florida, and Illinois have the largest number of immigrants and immigrants from the six banned countries. States with the lowest number of immigrants are typically in the upper-plains and Appalachia regions of the U.S.

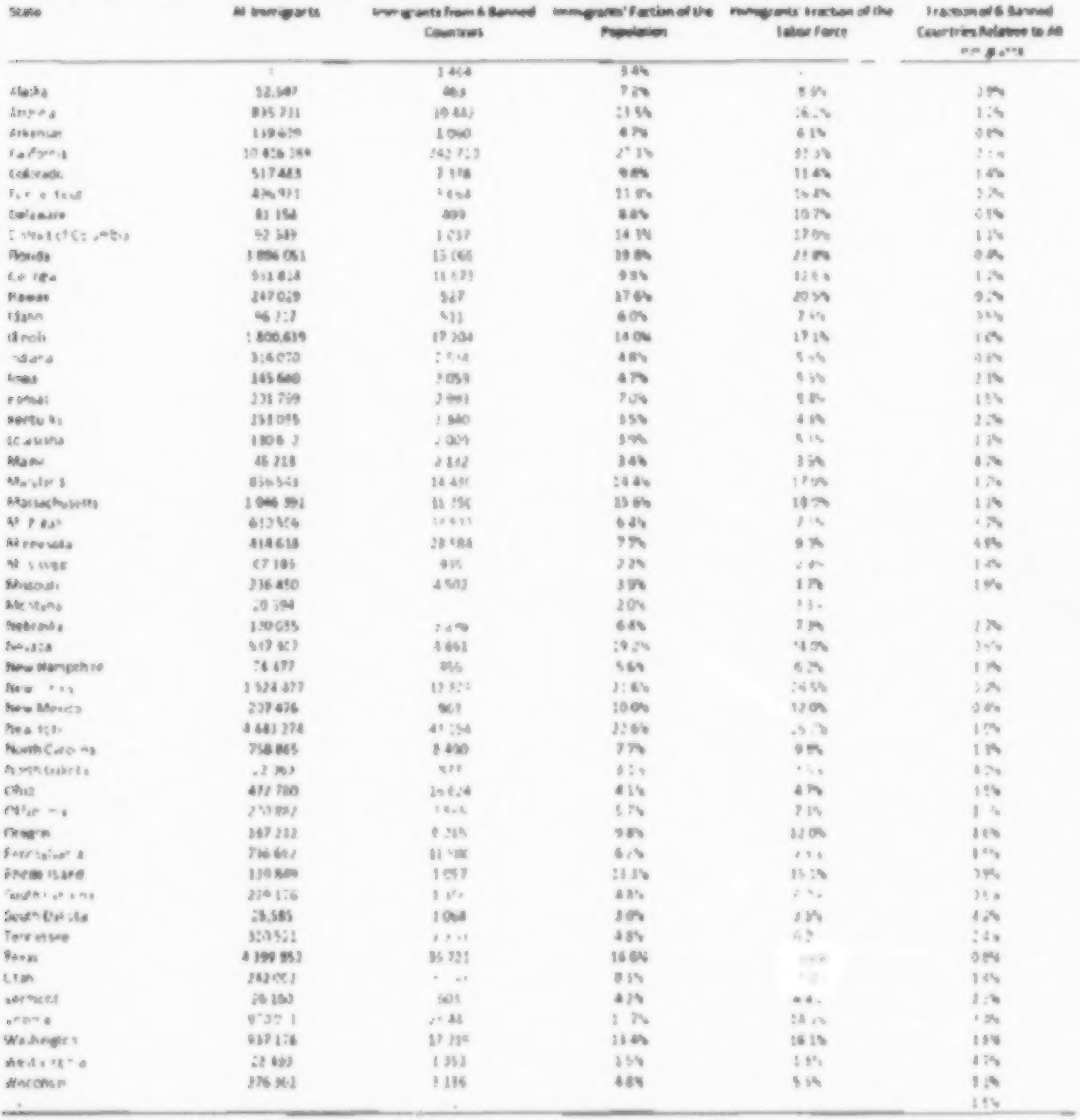
Below, we summarize our findings on the states that have the highest and the lowest values of the each of aforementioned statistics over the 2010 to 2015 time period. We also present data on the Massachusetts. **Figures V.1** to **V.5** present these statistics for 2010-2015 spatially on a map of the United States.

- **All Immigrants:**
    - Largest: California, New York, and Texas are the top 3 in terms of immigrant population.

    - Smallest: The bottom 3 are North Dakota, Montana, and Wyoming. In general, the upper-plains, parts of Appalachia, and parts of New England are towards the bottom.
    - Massachusetts: 1,046,391
- **Immigrants from Six Banned Countries:**
    - Largest: California has the largest number of immigrants from the 6 countries, by a large margin.
    - Smallest: Montana has no immigrants from the 6 countries.
    - Massachusetts: 11,350
- **Immigrants' Fraction of the Population:**
    - Largest: California, New York, and New Jersey are top the list.
    - Smallest: Parts of the upper-plains, the Midwest, and parts of Appalachia are towards the bottom.
    - Massachusetts: 15.6%
- **Immigrants' Fraction of the Labor Force:**
    - Largest: California, New York, and New Jersey top the list. Florida and Nevada are also high on this list.
    - Smallest: West Virginia, Montana, and Mississippi comprise the bottom three.
    - Massachusetts: 18.0%

- **Fraction of Six Banned Countries Relative to All Immigrants:**
    - Largest: The upper-plains and the rust belt essentially have the highest percentage of immigrants from the 6 countries. Minnesota, West Virginia, Maine, South Dakota, and North Dakota make up the top 5.
    - Smallest: New Mexico, Florida, and Hawaii are the bottom three.
    - Massachusetts: 1.1%

Table V.8
Numbers and Fractions of Immigrants, 2010-2015



Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.1
Number of Immigrants, 2010-2015

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.2
Number of Immigrants from 6 Banned Countries, 2010-2015

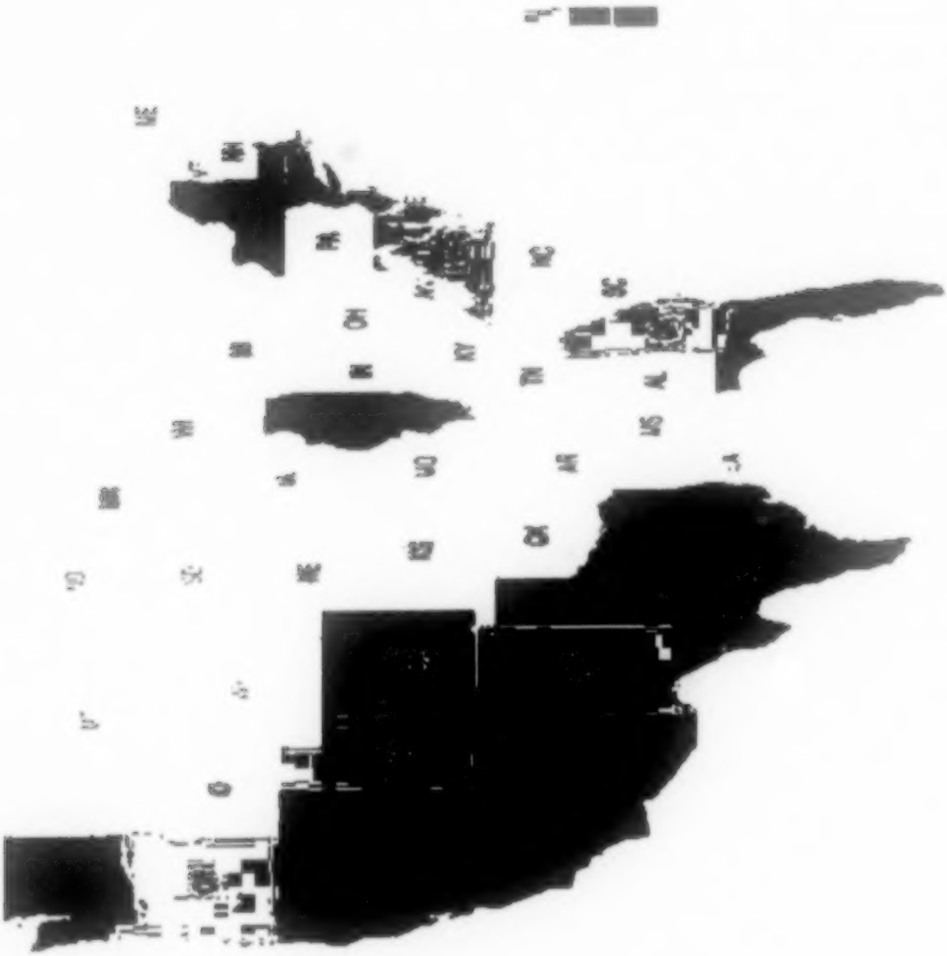
Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** http://doi.org/10.18128/D010.V6.0, ***accessed*** April 4, 2017.

Figure V.3
Immigrants' Fraction of the Population, 2010-2015

Percent Foreign Born
ME
VT
NH
PA
NC
WV
SC
OH
MI
KY
IN
TN
AL
WI
MS
MO
AR
LA
MN
IA
OK
KS
NE
ID

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.4
Immigrants' Fraction of the Labor Force, 2010-2015



Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** __ p://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.5
Fraction of 6 Banned Countries Relative to All Immigrants, 2010-2015

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

E. Percentage Changes of Immigrant Populations by State, 2005-2015

The percentage change in the "Number of Immigrants" corresponds to the percentage change in the total number of immigrants within the state over the 5 year interval (2005-2010 or 2010-2015). The percentage change in the "Number of Immigrants from the 6 Banned Countries" is calculated similarly, but only for immigrants from Syria, Iran, Libya, Sudan, Yemen, and Somalia.

The percentage change in "Immigrants' Fraction of State Population" corresponds to the percentage change in the fraction of immigrants residing in the state over the 5 year interval. Note, this is a percentage increase relative to the fraction of immigrants in the base year – it is not a percentage point increase. The percentage change in "Immigrants' Fraction of State Labor Force" is calculated similarly, but its calculations are with respect to the fraction of immigrants in the labor force. The percentage change in the "Fraction of All Immigrants that come from 6 Banned Countries" corresponds to the percentage increase in the share of immigrants that come from Syria, Iran, Libya, Sudan, Yemen, and Somalia. The fraction is calculated out of all immigrants in the state.

Tables V.9 and **V.10** present these summary statistics for each state in the periods 2005-2010 and 2010-2015. Below, we summarize our findings on the states that have the highest and the lowest values of the each of aforementioned statistics over the 2010 to 2015 time period. We also present data on the Massachusetts. **Figures V.6** to **V.10** present these statistics for 2010-2015 spatially on a map of the United States.

Percentage Changes, 2005-2010:

- **Number of Immigrants:**
    - Largest: Wyoming, Kentucky, Iowa, Alabama
    - Smallest or Most Negative: Montana, Michigan, New Hampshire
    - Massachusetts: +7.49%
- **Number of Immigrants from 6 Banned Countries:**
    - Largest: Alaska, Mississippi, Alabama, Maine, North Dakota
    - Smallest or Most Negative: Missouri, New Hampshire, Idaho
    - Massachusetts: +52.37%
- **Immigrants' Fraction of State Population:**
    - Largest: Kentucky, Iowa, Alabama, Vermont
    - Smallest or Most Negative: Colorado, Michigan, Idaho, Arizona, New Hampshire, Montana
    - Massachusetts: +1.65%
- **Immigrants' Fraction of State Labor Force:**
    - Largest: Alabama, Wyoming, Iowa, South Dakota, Louisiana, Kentucky

  - Smallest or Most Negative: Colorado, Rhode Island, New Hampshire, Arizona, West Virginia, Montana
  - Massachusetts: +3.24%
- **Fraction of All Immigrants that Come from 6 Banned Countries:**
  - Largest: Alaska, Mississippi, North Dakota, Maine, Rhode Island, Delaware
  - Smallest or Most Negative: Iowa, District of Columbia, Arkansas, Missouri, New Hampshire, Idaho
  - Massachusetts: +41.75%

Percentage Changes, 2010-2015:

- **Number of Immigrants:**
  - Largest: North Dakota, West Virginia, Alaska, South Dakota, Delaware
  - Smallest or Most Negative: Vermont, Alabama, New Mexico, Maine
  - Massachusetts: +12.76%
- **Number of Immigrants from 6 Banned Countries:**
  - Largest: West Virginia, District of Columbia, Pennsylvania, Wisconsin, Kansas, New Hampshire
  - Smallest or Most Negative: Iowa, Alaska, Oklahoma, Maine, Mississippi
  - Massachusetts: -6.39%
- **Immigrants' Fraction of State Population:**
  - Largest: West Virginia, North Dakota, Alaska, South Dakota, Delaware
  - Smallest or Most Negative: Hawaii, New Mexico, Alabama, Maine
  - Massachusetts: + 8.82%

- **Immigrants' Fraction of State Labor Force:**
    - Largest: West Virginia, North Dakota, South Dakota, Montana, Alaska
    - Smallest or Most Negative: California, Hawaii, Alabama, Mississippi
    - Massachusetts: +8.85%
- **Fraction of All Immigrants that Come from 6 Banned Countries:**
    - Largest: West Virginia, District of Columbia, Pennsylvania, Wisconsin
    - Smallest or Most Negative: Maine, North Dakota, Oklahoma, Alaska, Mississippi
    - Massachusetts: -16.98%

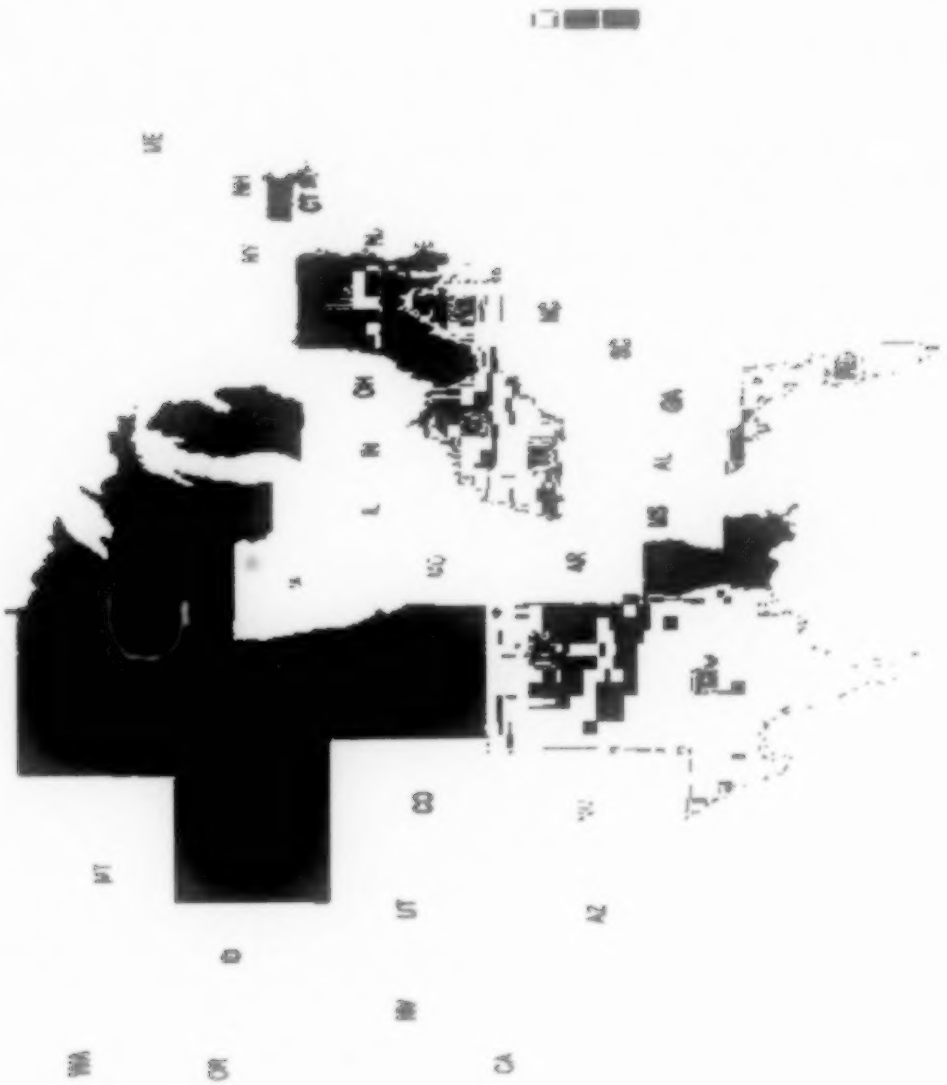
Table V.9
Percentage Change in Immigrants 2005-2010

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Table V.10
Percentage Change in Immigrants 2010-2015

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.6
Percentage Change in Number of Immigrants, 2010-2015



Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** http://doi.org/10.18128/D010.V6.0, ***accessed*** April 4, 2017.

Figure V.7
Percentage Change in Number of Immigrants from 6 Banned Countries, 2010-2015

Percentage Change
ME
VT
NY
VA
NC
SC
GA
KY
TN
MO
NE
CO
UT
NV
CA
WA
OR
ID
MT
ND
SD
IA
MN
WI
IL
MI
OH
PA

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.8
Percentage Change in Immigrants' Fraction of State Population, 2010-2015

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.9
Percentage Change in Immigrants' Fraction of State Labor Force, 2010-2015

Percentage Change
ME
NY
PA
VA
SC
GA
AL
MS
LA
FL
OH
IN
IL
IA
MO
TX
CO
NM
WY
UT
AZ
ID
NV
OR
CA

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

Figure V.10
Percentage Change in Fraction of All Immigrants that come from 6 Banned Countries, 2010-2015

Percentage Change
ME
VT
MA
RI
NY
NJ
DE
VA
NC
SC
GA
OH
KY
TN
IL
MS
MO
MN
IA
NE
SD
CO
NV
UT
ID
WY
WA
AL

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* h[illegible]i.org/10.18128/D[illegible], *accessed* April 4, 2017.

F. Levels and Percentage Changes of Petitions for Skilled Workers, 2010-2016

The demand for foreign skilled labor can be measured by examining data on Labor Condition Applications ("LCA"). Whenever a U.S. company wants to hire a foreign worker through the H-1B, E-3, or H-1B1 visa programs, the petition needs to be certified by the U.S. Department of Labor Employment and Training Administration's Office of Foreign Labor Certification ("OFLC").

- **Temporary Agricultural Work Permits:**
    - The most applications for temporary agricultural work permits are made in California, Florida, Georgia, Louisiana, North Carolina, and Washington.
- **Temporary Non-Agricultural Work Permits:**
    - The most applications for temporary non-agricultural work permits (often used in resorts, among other areas) are made in Colorado, Florida, Louisiana, Massachusetts, Pennsylvania, and Texas.

Figure V.11
Labor Condition Applications per 1000 Persons in Fiscal Year 2016

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popestotal.html, ***accessed*** April 4, 2017.

Figure V.12
Annual Growth in Labor Condition Applications, Fiscal Years 2010-2016

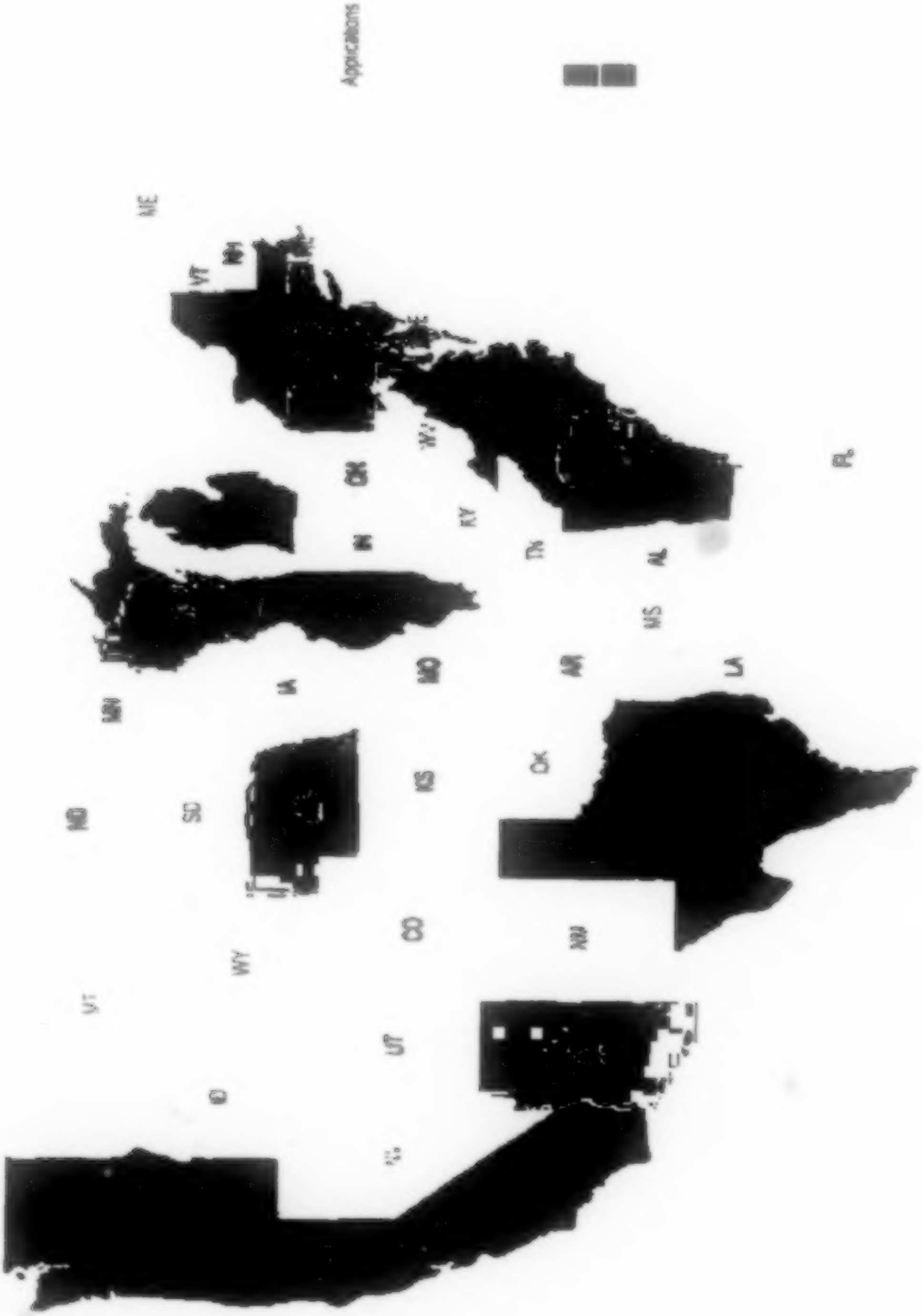
Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popest/state-total.html, ***accessed*** April 4, 2017.

Figure V.13
Employment-Based Green Card Applications per 1000 People in Fiscal Year 2016


Applications
ME
VT
NH
WV
OH
KY
IN
TN
AL
FL
MS
MO
AR
LA
MN
IA
ND
SD
KS
OK
CO
NM
WY
MT
UT
ID

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

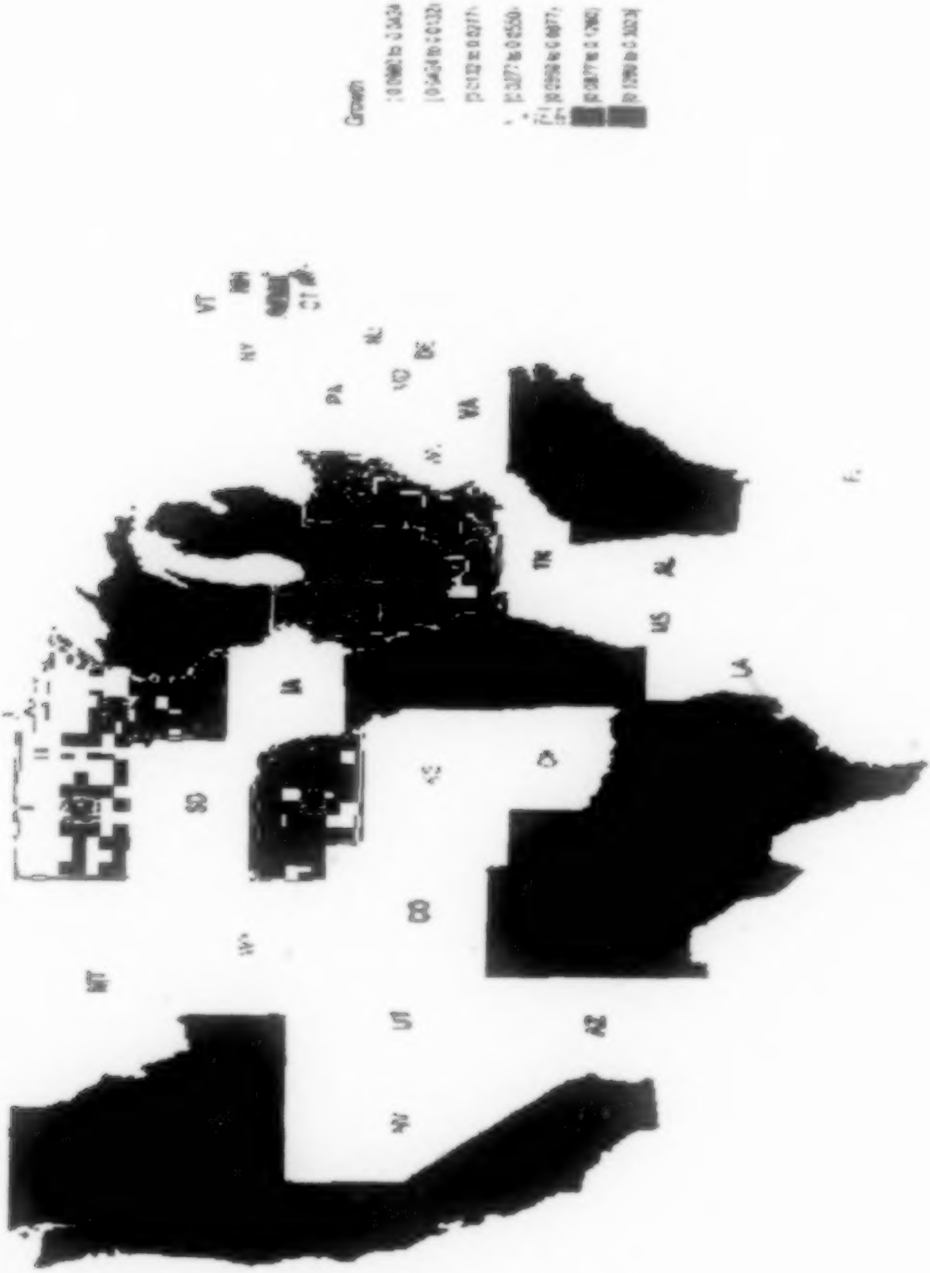
Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popest/state-total.html, ***accessed*** April 4, 2017.

Figure V.14

Annual Growth in Employment-Based Green Card Applications, Fiscal Years 2010-2016


Growth
VT
NY
PA
MD
DE
VA
TN
AL
MS
LA
IA
SD
OK
CO
WY
MT
UT
AZ
NV

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

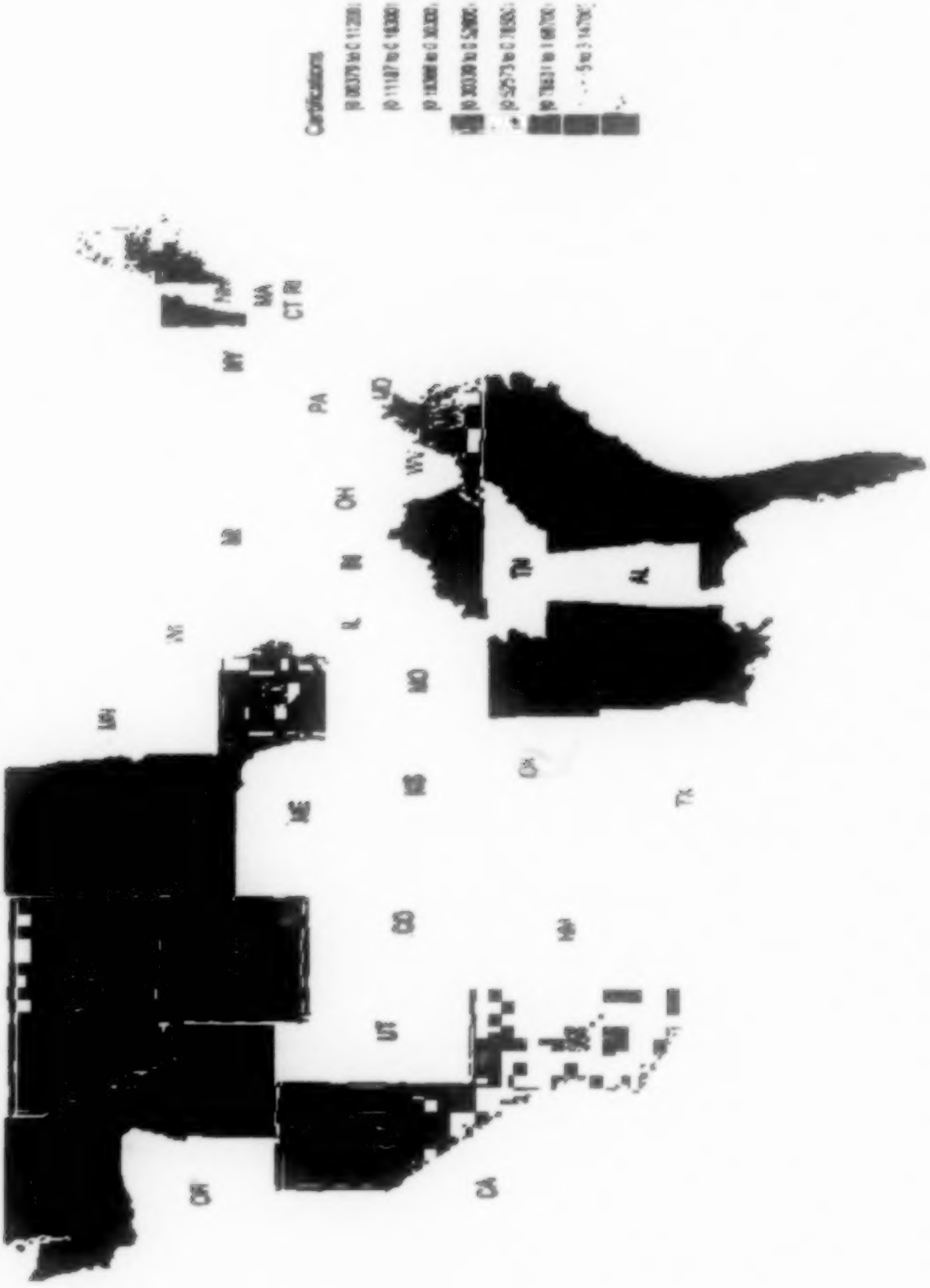
Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," *available at* [illegible] data.cfm, *accessed* April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," *available at* [illegible] t/state-total.html, *accessed* April 4, 2017.

Figure V.15

Agricultural Temporary Work Visa Certifications per 1000 Persons in FY 2016


Certifications
NH
MA
CT
RI
NY
PA
MD
WV
OH
MI
IN
IL
WI
MN
MO
TN
AL
GA
TX
KS
NE
SD
NM
UT
CA
OR

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popest/state-total.html, ***accessed*** April 4, 2017.

Figure V.16
Non-Agricultural Temporary Work Visa Certifications per 1000 Persons in FY 2016

Note: The U.S. Government's Fiscal Year starts on October 1st of the preceding calendar year and runs until September 30th.

Sources:

[1] U.S. Department of Labor, Office of Foreign Labor Certification, "Disclosure Data," ***available at*** https://www.foreignlaborcert.doleta.gov/performancedata.cfm, ***accessed*** April 4, 2017.

[2] U.S. Census Bureau, "State Population Totals Tables: 2010-2016," ***available at*** https://www.census.gov/data/tables/2016/demo/popest/state-total.html, ***accessed*** April 4, 2017.

G. Fiscal Effects of Immigrant Generation, 2011-2013

One recent study considers the fiscal effects of immigration for the period 2011-2013. The authors use the CPS Annual Social and Economic Supplement in their analysis combined with data on state government expenditures and revenues. They note the importance of accounting for second generation immigrants separately, which differentiates it from some previous analyses. When second generation immigrants are of working age and treated as independent individuals, they contribute revenues that exceed costs. The analysis is done at the level of the "independent person unit," which is defined as "one independent adult plus an assignment of any dependent children in whole or in part."[166] **Tables V.11-V.13** summarize findings from this study.

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[166] Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, ***available at*** https://www.nap.edu/read/23550/chapter/11, ***accessed*** February 20, 2017, pp. 381-442.

- For the United States as a whole, first generation independent person units cost the states on net about $1,600 each, while second generation independent person units contribute on net to state and local budgets about $1,700 each, and third-plus generation independent person units contribute on net to state and local budgets about $1,300 each.[167]
- These estimates of the fiscal impact imply that the total annual aggregate impact of the first generation and their dependents, averaged across 2011-13, is a cost of $57.4 billion, while the second and third-plus generation individuals (and their children) create benefits of $30.5 billion and $223.8

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[167] Estimates are constructed from the CPS Annual Social and Economic Supplement (ASEC). First generation immigrants: individuals who were born abroad who are noncitizens or naturalized citizens. Second generation individuals: individuals who were born in the United States with at least one foreign-born parent. Third-plus generation individuals: individuals who were born in the United States with two native-born parents. The institutional portion of Medicaid spending ($72 billion) is excluded due to missing this population in our data, which widens the gap between aggregate U.S. revenues and expenditures. After, all but two states have positive budget balances (compared with seven negative-balance states when all expenditure flows are included).

Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, *available at* http [illegible] nap.edu/read/23550/chapter/11, *accessed* February 20, 2017, pp. 381-442.

billion, respectively. Note that the surplus revenues raised the amount to $197 billion, which equals the surplus across all 50 states. (Calculated by totaling the unrounded estimates of net fiscal effects by state multiplied by the average number of independent persons in each year.)[168]

- This overall pattern is largely driven by the larger education costs for first generation independent person units, which include more children on average than units of the other two generations. By the second generation, immigrants are a net win for the states as a whole, given that they have fewer children on average than first generation units and are contributing in revenues more than they cost in expenditures.[169]
- Although per unit spending on the second generation independent person units is slightly more than it is on the third-plus generation units, the per unit net *difference* between revenues and

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[168] Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, ***available at*** [illegible], ***accessed*** February 20, 2017, pp. 381-442.

[169] Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, ***available at*** [illegible], ***accessed*** February 20, 2017, pp. 381-442.

expenditures is the most *positive* for second generation independent person units.[170]

- The relative contribution or burden of any independent person unit is driven largely by that unit's demographic and economic characteristics – most notably the number of dependents in the unit and the unit's income levels. Because first generation units tend to have less income and more dependents than units in the second or third-plus generation, they are more costly to state and local governments. However, the children of immigrants who are being educated grow up to become second generation adults, the group that, in general (but not always), contributes the most, when assessed in terms of independent person units, to a given state's fiscal health.[171]

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[170] Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, *available at* [illegible], *accessed* February 20, 2017, pp. 381-442.

[171] Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, *available at* [illegible], *accessed* February 20, 2017, pp. 381-442.

Table V.11
State and Local Revenues per Independent Person Unit, by Immigrant Generation by State
2011-2013

Rank (All)		First				Difference: First Third+
1	Alaska	$37,250	$38,700	$36,100	$36,400	$1,150
2	District of Columbia	$23,700	$28,400	$28,200	$27,600	-$4,500
3	Wyoming	$24,100	$21,950	$24,250	$24,150	-$150
4	New York	$20,200	$22,200	$23,450	$22,400	$3,250
5	North Dakota	$20,700	$17,050	$20,450	$20,300	$250
6	California	$15,600	$18,450	$19,150	$17,800	$3,550
7	Connecticut	$14,800	$15,900	$17,050	$16,550	$2,250
8	Nebraska	$15,700	$15,550	$16,400	$16,300	-$700
9	Massachusetts	$14,900	$15,300	$16,600	$16,150	$1,700
10	Delaware	$16,050	$15,300	$16,150	$16,100	-$100
11	Minnesota	$14,550	$14,400	$16,150	$15,900	-$1,600
12	New Jersey	$14,350	$15,050	$16,700	$15,850	$2,350
13	Hawaii	$14,200	$14,850	$16,400	$15,700	$2,200
14	Vermont	$15,650	$14,950	$15,650	$15,550	$0
15	Rhode Island	$14,300	$13,950	$15,900	$15,350	$1,600
16	Oregon	$16,050	$15,500	$15,150	$15,250	$950
17	New Mexico	$17,450	$15,400	$14,850	$15,200	$2,600
18	Iowa	$15,750	$15,000	$15,150	$15,200	$600
19	Washington	$14,650	$14,900	$15,250	$15,100	$600
20	Ohio	$13,450	$14,450	$14,850	$14,750	$1,350
21	Louisiana	$12,950	$14,150	$14,650	$13,550	-$1,650
22	Wisconsin	$13,850	$13,450	$14,550	$13,450	$700
23	Mississippi	$13,450	$15,050	$13,350	$13,300	$100
24	Illinois	$12,450	$13,850	$14,750	$14,300	-$2,250
25	Maryland	$13,900	$13,850	$13,350	$14,250	$500.00
26	Colorado	$12,950	$14,200	$14,250	$14,100	$1,250
27	Utah	$13,650	$14,650	$13,900	$13,850	$250
28	Kansas	$13,750	$13,200	$13,800	$13,750	$0
29	Pennsylvania	$14,050	$12,050	$13,550	$13,500	$500
30	South Dakota	$12,900	$10,550	$13,500	$13,350	-$600
31	Montana	$15,000	$10,700	$13,450	$13,350	$1,550
32	North Carolina	$12,800	$13,500	$13,250	$13,200	-$450
33	Michigan	$12,300	$12,450	$13,250	$13,100	$950
34	West Virginia	$16,100	$13,350	$12,950	$13,000	$3,100
35	South Carolina	$13,150	$14,550	$12,900	$12,950	$300
36	Oklahoma	$12,100	$14,300	$12,800	$12,950	$700
37	Virginia	$12,500	$13,500	$12,800	$12,800	$300
38	Nevada	$11,500	$12,350	$13,100	$12,650	$1,600
39	Texas	$11,950	$12,950	$12,850	$12,650	$900
40	Maine	$12,750	$12,050	$12,700	$12,650	$50
41	Missouri	$12,150	$12,800	$12,500	$12,500	$450
42	Alabama	$12,650	$12,200	$12,500	$12,500	$150
43	Tennessee	$12,000	$11,750	$12,250	$12,250	-$250
44	Indiana	$12,400	$12,350	$12,250	$12,250	$150
45	Arkansas	$11,950	$12,800	$12,200	$12,200	$300
46	Kentucky	$12,200	$13,750	$12,050	$12,100	$150
47	Arizona	$11,000	$12,100	$12,150	$11,900	$1,150
48	Georgia	$10,850	$12,200	$12,050	$11,900	$1,200
49	New Hampshire	$11,500	$11,600	$11,900	$11,850	-$400
50	Florida	$11,050	$11,550	$12,050	$11,800	-$1,000
51	Idaho	$10,400	$11,600	$11,800	$11,650	-$1,400
	Top 15 states by % in first generation	***$14,650***	***$16,200***	***$16,100***	***$15,750***	***-$1,450***
	Avg U.S	***$14,950***	***$15,900***	***$14,700***	***$14,700***	

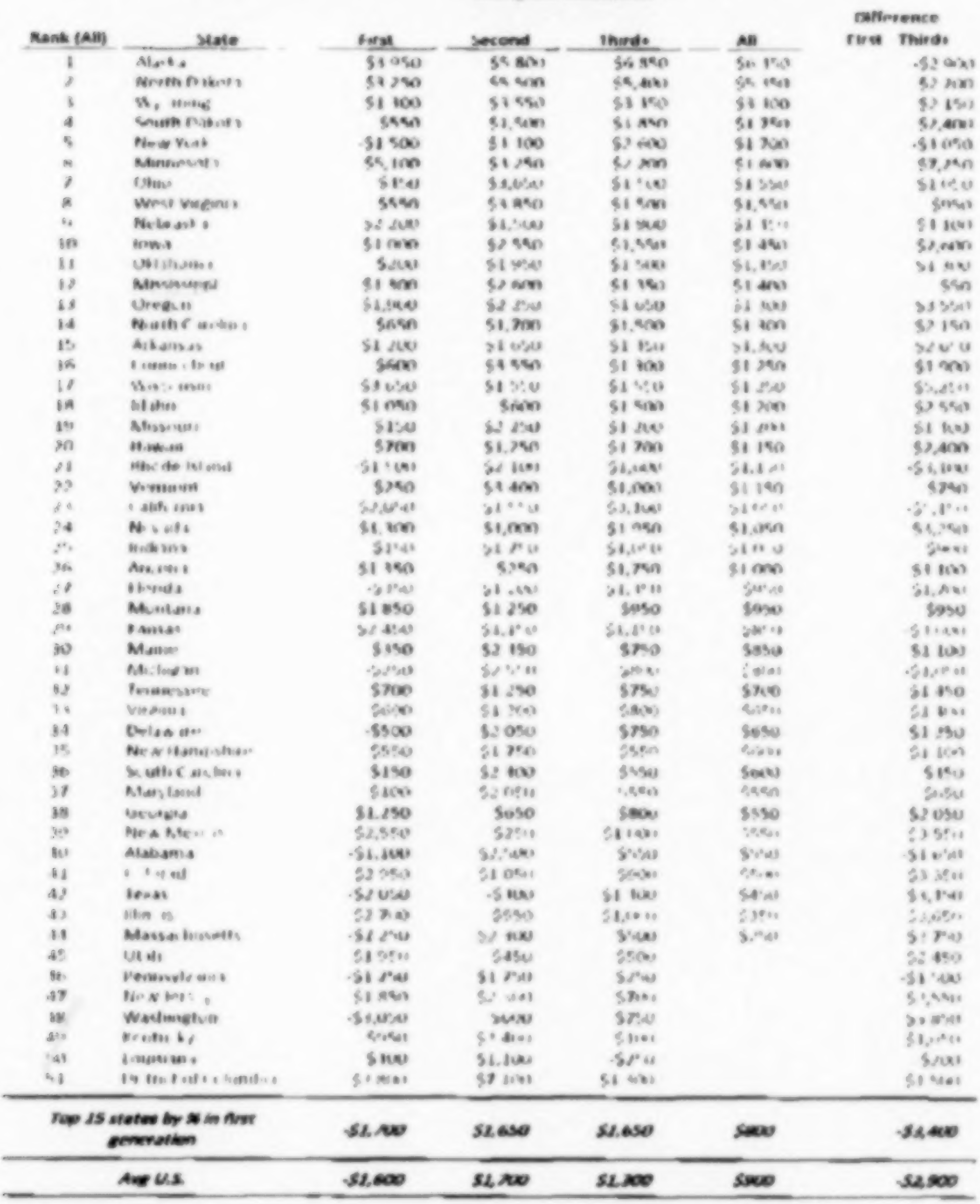
Source: Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, *available at* [illegible], *accessed* February 20, 2017, pp. 381-442.

Table V.12
State and Local Expenditures per Independent Person Unit, by Immigrant Generation by State
2011-2013

		Immigrant Generation				
Rank (All)	State	First	Second	Third+	All	Difference: First - Third+
1	Alaska	$33,300	$32,950	$29,250	$29,950	$4,050
2	District of Columbia	$27,500	$21,300	$29,500	$28,500	-$2,000
3	Wyoming	$22,800	$18,400	$20,800	$20,750	$2,000
4	New York	$21,700	$17,800	$20,850	$20,700	$800
5	California	$17,050	$16,900	$16,050	$16,750	$1,000
6	Massachusetts	$17,150	$13,000	$16,150	$15,950	$1,050
7	New Jersey	$16,200	$12,750	$16,000	$15,650	$200
8	Delaware	$16,550	$13,250	$15,450	$15,450	$1,150
9	Connecticut	$15,400	$12,300	$15,750	$15,400	$450
10	Washington	$17,750	$14,300	$14,500	$15,000	$3,250
11	North Dakota	$17,500	$11,500	$15,050	$14,950	$2,450
12	Nebraska	$17,900	$14,100	$14,500	$14,850	$3,400
13	Louisiana	$13,400	$15,550	$11,850	$14,800	$1,500
14	New Mexico	$19,950	$15,150	$13,850	$14,650	$6,150
15	Hawaii	$14,900	$13,600	$14,700	$14,600	$200
16	Vermont	$15,400	$11,550	$14,600	$14,400	$800
17	Minnesota	$19,650	$11,100	$13,950	$14,300	$5,650
18	Rhode Island	$15,800	$11,800	$14,300	$14,200	$1,500
19	Illinois	$15,150	$13,250	$13,750	$13,950	$1,400
20	Oregon	$17,950	$13,250	$13,450	$13,950	$4,500
21	Iowa	$16,800	$12,450	$13,600	$13,750	$3,200
22	Maryland	$13,950	$11,800	$13,800	$13,700	$150
23	Utah	$15,550	$14,100	$13,300	$13,650	$2,200
24	Colorado	$15,950	$13,150	$13,300	$13,600	$2,600
25	Pennsylvania	$15,300	$10,300	$13,300	$13,250	$2,000
26	Wisconsin	$17,550	$11,900	$13,000	$13,200	$4,550
27	Ohio	$13,000	$10,750	$13,150	$13,200	$300
28	Mississippi	$13,150	$12,400	$13,000	$13,000	$150
29	Kansas	$16,200	$12,050	$12,600	$12,900	$3,600
30	South Carolina	$13,000	$12,100	$12,300	$12,350	$700
31	Montana	$13,100	$9,500	$12,550	$12,350	$600
32	Michigan	$12,600	$9,900	$12,450	$12,300	$150
33	Texas	$13,000	$13,350	$11,150	$12,200	$2,500
34	Virginia	$13,050	$12,200	$11,950	$12,150	$1,100
35	Kentucky	$13,150	$11,300	$11,950	$12,000	$1,200
36	Alabama	$13,700	$9,650	$11,900	$11,950	$1,800
37	North Carolina	$13,450	$11,750	$11,750	$11,900	$1,700
38	Maine	$13,100	$9,600	$11,950	$11,800	$1,150
39	South Dakota	$13,450	$9,050	$11,650	$11,600	$1,800
40	Nevada	$12,800	$11,350	$11,150	$11,550	$1,650
41	Tennessee	$12,700	$10,500	$11,500	$11,550	$1,150
42	West Virginia	$15,550	$9,500	$11,450	$11,450	$4,100
43	Oklahoma	$11,900	$12,350	$11,350	$11,400	$600
44	Missouri	$12,350	$10,550	$11,300	$11,350	$1,050
45	Georgia	$12,100	$11,550	$11,200	$11,300	$850
46	New Hampshire	$12,050	$9,850	$11,350	$11,300	$700
47	Indiana	$12,250	$10,600	$11,200	$11,250	$1,050
48	Arizona	$12,350	$11,750	$10,400	$10,900	$1,950
49	Arkansas	$13,150	$11,150	$10,750	$10,900	$2,350
50	Florida	$11,150	$10,350	$10,700	$10,850	$700
51	Idaho	$11,450	$11,000	$10,300	$10,450	$1,150
Top 15 states by % in first generation		***$16,350***	***$14,600***	***$14,450***	***$14,950***	***$1,950***
Avg U.S.		***$15,950***	***$13,800***	***$13,400***	***$13,850***	***$2,550***

Source: Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016, ***available at*** https://www.nap.edu/read/23550/chapter/11, *accessed* February 20, 2017, pp. 381-442.

Table V.13
Net Difference between State and Local Revenues and Expenditures Independent Person Unit by Immigrant Generation by State 2011-2013



Source: Blau, Francine D., Christopher Mackie, "The Economic and Fiscal Consequences of Immigration," The National Academies Press, 2016,

available at
https://www.nap.edu/read/23550/chapter/11,
accessed February 20, 2017, pp. 381-442.

VI. HIGH-SKILLED IMMIGRANTS

KEY TAKEAWAYS

- From 2000 to 2010, over 75,000 non-citizens enlisted in the U.S. military.
- Non-resident students earned 13.8 and 11.9 percent of the Master's and Doctor's degrees conferred in the 2013/14 school year, respectively. Furthermore, non-resident students were disproportionately more likely to get their degrees in a STEM field, with international students making up over 30 percent of the post-baccalaureate degrees in STEM fields. This finding is even more distinct when looking at degrees in mathematics and statistics, where 46.3 and 49.2 percent of Master's and Doctor's degrees, respectively, were given to non-residents.
- International students during the 2015/16 school year contributed $32.8 billion to the U.S. economy and supported more than 400,000 jobs.
- Individuals from the six banned countries are more likely to have a bachelor's degree, approximately twice as likely to have a post-baccalaureate's degree, and four times as likely to have a doctoral degree relative to the native-born population.

- **Immigrants accounted for 31 percent of physicians from 2011-2015 while only making up 20 percent of the prime-working age population (ages 25-54).**
- Among native-born individuals aged 25 to 54, 0.1 percent work in an engineering occupation with a Doctor's degree, compared to 0.5 percent of foreign-born individuals aged 25 to 54. This difference is even more pronounced when focused on the six banned countries, where 1.1 percent of 25 to 54 year olds work in engineering with a Doctor's degree.

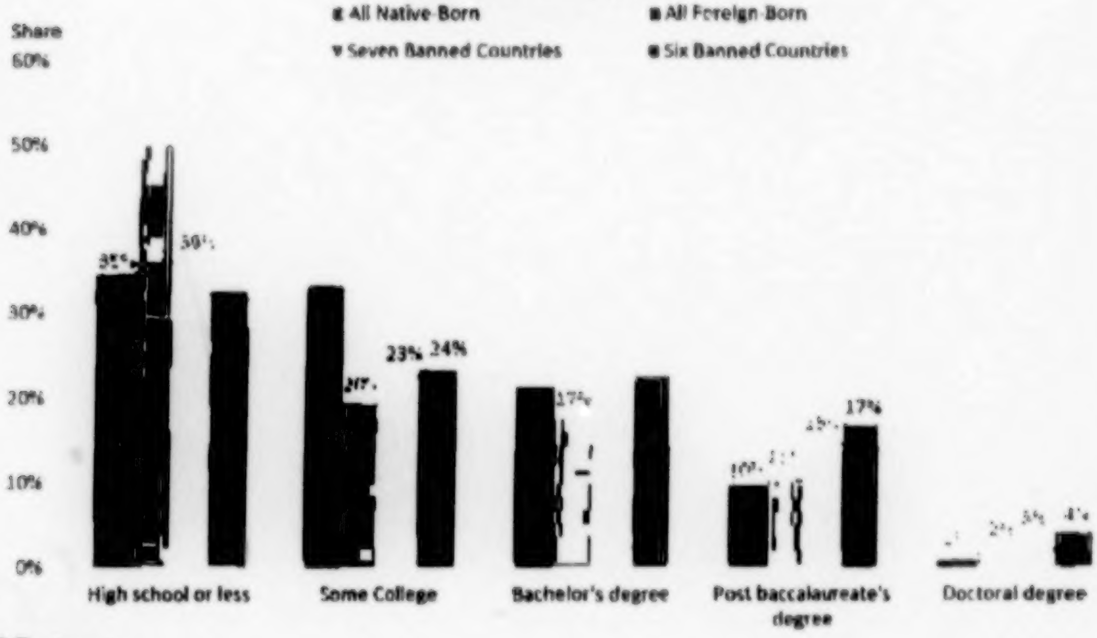
A. Characteristics of High-Skilled Immigrants

i. Education Levels

- As shown in **Figure VI.1**, while prime-working aged foreign-born individuals are more likely than native-born individuals to have a high-school degree or less, foreign-born individuals are twice as likely to have a doctoral degree. One percent of native-born individuals aged 25 to 54 have a doctoral degree whereas two percent of foreign-born individuals do.
- This difference is even more pronounced when looking at the six countries targeted by President Trump's most recent ban. Individuals from the six banned countries are more likely to have a bachelor's degree, approximately twice as likely to have a post-baccalaureate's degree, and four times as likely to have a doctoral degree, relative to the native-born population.

- A recent study focusing on the immigration population in Boston found that 41 percent of immigrants have a college degree or higher.[172] In comparison, the national average of foreign-born individuals with a college degree or higher is approximately 30 percent.

Figure VI.1
Educational Attainment of 25 to 54 Year-Olds by Nativity Status
2011-2015



Notes:

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[172] Osterman, Paul, Kimball, William, and Christine Riordan, "Boston's Immigrants: An Essential Component of a Strong Economy," JVS, May 10, 2017, *available at* https://jvs-

[illegible], *accessed* May 21, 2017, p. 4.

[1] "Some College" includes individuals that reported having attained an Associate's degree as well as individuals that reported attending college without receiving a Bachelor's degree.
[2] "Post baccalaureate's degree" includes individuals that reported having attained some sort of Master's or professional degree beyond a Bachelor's degree.

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

ii. Medical Professionals

- As shown in **Table VI.1**, immigrants accounted for 31 percent of physicians from 2011-2015 while only making up 20 percent of the prime-working age population (ages 25-54).

- While the majority of immigrants are located on the coasts of the U.S., foreign-born physicians are much more likely to locate in the center of the country. For example, only six percent of Ohio's prime working age population is foreign-born, but 29 percent of Ohio's physicians are foreign-born. Similarly, only six percent of Kentucky's prime working age population is foreign-born, but 26 percent of the state's physicians are foreign-born.

Table VI.1
Foreign-Born Share of Physicians by State
2011-2015

State	Total population	Foreign-born share	Total physicians	Foreign-born share
United States	**127,469,098**	**20%**	**639,684**	**31%**
Alabama	1,895,876	6%	7,180	21%
Alaska	**305,913**	**11%**	**1,616**	**7%**
Arizona	2,563,186	22%	11,332	31%
Arkansas	**1,141,173**	**9%**	**3,698**	**27%**
California	16,039,498	40%	69,018	41%
Colorado	**2,220,217**	**16%**	**10,408**	**15%**
Connecticut	1,442,853	21%	10,109	30%
Delaware	**362,204**	**14%**	**1,683**	**43%**
District of Columbia	313,017	21%	2,769	20%
Florida	**7,638,993**	**28%**	**35,052**	**40%**
Georgia	4,150,957	17%	14,996	28%
Hawaii	**562,328**	**24%**	**3,170**	**20%**
Idaho	610,440	10%	2,052	11%
Illinois	**5,272,370**	**21%**	**26,216**	**33%**
Indiana	2,574,882	8%	10,493	29%
Iowa	**1,171,918**	**8%**	**6,176**	**25%**
Kansas	1,108,403	13%	5,965	29%
Kentucky	**1,751,107**	**6%**	**7,616**	**26%**
Louisiana	1,848,333	7%	9,046	22%
Maine	**513,809**	**5%**	**2,762**	**20%**
Maryland	2,475,335	23%	17,173	39%
Massachusetts	**2,757,097**	**23%**	**22,263**	**34%**
Michigan	3,831,013	10%	21,494	31%
Minnesota	**2,189,280**	**13%**	**12,513**	**25%**
Mississippi	1,157,034	4%	3,645	21%
Missouri	**2,369,218**	**7%**	**12,073**	**24%**
Montana	377,554	3%	1,770	12%
Nebraska	**720,419**	**11%**	**3,262**	**20%**
Nevada	1,163,879	30%	4,244	38%
New Hampshire	**529,451**	**9%**	**2,588**	**32%**
New Jersey	3,682,345	32%	20,799	41%
New Mexico	**792,403**	**16%**	**3,101**	**20%**
New York	8,155,659	32%	56,514	42%
North Carolina	**3,956,677**	**14%**	**18,833**	**22%**
North Dakota	273,840	5%	1,081	19%
Ohio	**4,519,113**	**6%**	**26,742**	**29%**
Oklahoma	1,494,154	10%	5,213	16%
Oregon	**1,572,292**	**16%**	**8,849**	**24%**
Pennsylvania	4,989,917	10%	31,922	29%
Rhode Island	**418,151**	**19%**	**2,879**	**25%**
South Carolina	1,860,878	9%	7,174	17%
South Dakota	**316,951**	**5%**	**774**	**15%**
Tennessee	2,597,524	9%	12,338	20%
Texas	**10,908,989**	**27%**	**46,073**	**35%**
Utah	1,122,475	15%	5,109	14%
Vermont	**239,120**	**6%**	**1,610**	**22%**
Virginia	3,438,508	19%	17,475	30%
Washington	**2,875,311**	**21%**	**15,838**	**26%**
West Virginia	707,876	3%	3,722	25%
Wisconsin	**2,263,891**	**8%**	**10,372**	**25%**
Wyoming	[illegible]	[illegible]	[illegible]	11%

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

- Foreign-born individuals are also more likely to work in engineering or life sciences. 0.1 percent of native-born individuals aged 25 to 54 work in an engineering occupation with a Doctor's degree compared to 0.5 percent of foreign-born individuals aged 25 to 54. This difference is even more pronounced when focused on the six banned countries, where 1.1 percent of 25 to 54 year olds work in engineering with a Doctor's degree. Similarly, 0.4 percent of 25 to 54 year old native-born individuals work in the life sciences with a Doctor's degree in comparison to 1.6 percent of foreign-born individuals and 1.4 percent of individuals born in the six banned countries.

Table VI.2
Share of 25 to 54 Year-Olds Working in Engineering and Life Sciences
by Education and Nativity Status
2011-2015

Note: "Post baccalaureate's degree" includes individuals that reported having attained some sort of Master's or professional degree beyond a Bachelor's degree.

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* [illegible], *accessed* April 4, 2017.

B. Immigrants in the U.S. Military

Immigrants are an important part of the U.S. military and have contributed in significant ways to the safety of the American people.

- From 2000 to 2010, over 75,000 non-citizens enlisted in the U.S. military.[173]
- From 2000 to 2010, the monthly average number of non-citizen enlisted accessions to the U.S. military was 582.8 per month, compared with an average of 14,795 per month among citizens. On average, non-

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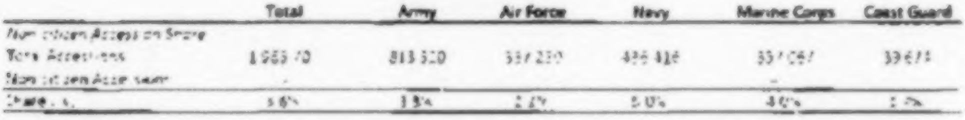
[173] Yalcinkaya, Huseyin, "The Effect of Executive Order 13269 on Noncitizen Enlisted Accessions in the U.S. Military," Dissertation at the Naval Postgraduate School, March 2013, *available at* [illegible], *accessed* April 4, 2017, p. 21.

citizen accessions comprised 3.8 percent of total accessions.[174]

- The Navy has the largest proportion of non-citizen accessions with 5 percent. The Army and Marines have 3.8 and 4 percent, respectively. Non-citizen enlisted accessions in the Air Force and Coast Guard account for 2.2 and 1.7 percent, respectively.[175]

Table VI.3
Non-citizen Accessions by Military Branch
2000-2010



	Total	Army	Air Force	Navy	Marine Corps	Coast Guard
Non-citizen Accession Share						
Total Accessions	[illegible]	813 520	[illegible]	[illegible]	[illegible]	[illegible]
Non-citizen Accessions	[illegible]				[illegible]	
Share (%)	3.8%	3.8%	2.2%	5.0%	4.0%	1.7%

Notes:
[1] Non-citizens are defined as those who are not citizens at the time of enlistment.

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[174] Yalcinkaya, Huseyin, "The Effect of Executive Order 13269 on Noncitizen Enlisted Accessions in the U.S. Military," Dissertation at the Naval Postgraduate School, March 2013, ***available at*** [illegible] r_Yalcinkaya_Can.pdf?sequence=1, ***accessed*** April 4, 2017, pp. 26-28.

[175] Yalcinkaya, Huseyin, "The Effect of Executive Order 13269 on Noncitizen Enlisted Accessions in the U.S. Military," Dissertation at the Naval Postgraduate School, March 2013, ***available at*** [illegible] r_Yalcinkaya_Can.pdf?sequence=1, ***accessed*** April 4, 2017, p. 28.

[2] Total accessions reflect the total number of accessions from FY 2000 to FY 2010.
[3] The sum of individual branches does not equal the Total for "Non-citizen Accessions" due to rounding.

Source: Yalcinkaya, Huseyin, "The Effect of Executive Order 13269 on Noncitizen Enlisted Accessions in the U.S. Military," Dissertation at the Naval Postgraduate School, March 2013, *available at* http://calhoun.nps.edu/bitstream/handle/10945/32921/13Mar_Yalcinkaya_Can.pdf?sequence=1, *accessed* April 4, 2017, p. 21-23.

- Mexico is the largest source of non-citizen accessions for every service branch except for the Navy (for which the Philippines is the largest). Other top birth countries among non-citizen accessions are Jamaica, South Korea, Dominican Republic, El Salvador, Colombia, and Haiti.[176]

Table VI.4

Top 5 Countries of Origin among Non-citizens by Military Branch

1995-2003

Total	Army	Air Force	Navy	Marine Corps
Mexico	Mexico	Mexico	Philippines	Mexico
Philippines	Jamaica	Philippines	Mexico	Philippines
Jamaica	Philippines	Jamaica	Jamaica	Jamaica
Dominican Rep	South Korea	El Salvador	Dominican Rep.	El Salvador
El Salvador	Dominican Rep.	Colombia	Haiti	Dominican Rep.

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[176] Hattiangadi, et al., "Non-citizens in Today's Military: Final Report," Center for Naval Analyses, April 2005, *available at* [illegible], *accessed* April 4, 2017, pp. 23-24.

Notes:
[1] Non-citizens are defined as those who are not citizens at the time of enlistment.
[2] Countries are listed in descending order by the number of non-citizens from each country.
[3] Data from the Coast Guard are not available.
[4] Top 5 countries constituted the following share of total non-citizen accessions in each branch:
Army - 39%; Air Force - 43%; Navy - 46%; Marine Corps - 43%.

Source: Hattiangadi, et al., "Non-citizens in Today's Military: Final Report," Center for Naval Analyses, April 2005, *available at*

[illegible]f, *accessed* April 4, 2017, pp. 23-24.

- Only U.S. citizens are eligible for security clearance in the U.S. military. Therefore, non-U.S. citizens are generally not employed in duties that may require access to classified information.[177] Furthermore, only U.S. citizens are permitted to become officers.[178] These job limitations suggest that non-citizen members may have a higher casualty rate than citizen members. Indeed, a 2005 article from USA Today found that "[s]ome 142 non-citizen troops died in Iraq and Afghanistan. Non-citizens' casualty rates represent 8% of the total despite being less than 3% of active duty military personnel."[179]

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[177] 32 C.F.R. § 154.16.c –Security Clearance, *available at* [illegible], *accessed* April 4, 2017.

[178] 10 U.S.C § 532.a.1 - Qualifications for original appointment as a commissioned officer, *available at* [illegible], *accessed* April 4, 2017.

C. Immigrants Enrolled in U.S. Higher Education Institutions

Immigrants and foreign students are vital components of U.S. institutions of higher education, especially in graduate degree programs and STEM fields.

i. Degrees Conferred in the U.S.

- As shown in **Table VI.5**, during the 2013/14 school year, nearly two million Bachelor's degrees were conferred at U.S. postsecondary institutions. Of those, only 3.7 percent were to non-residents. However, the non-residents share of mathematics and statistics degrees was nearly 3 times higher, with non-residents making up 11.6 percent of the mathematics and statistics degrees in the U.S.
- Non-resident students made up a much higher share of the Master's and Doctor's degrees conferred in 2013/14, 13.8 and 11.9 percent, respectively. Furthermore, non-resident students were disproportionately more likely to get their degrees in a STEM

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[179] "Military Recruiting Slips Among Foreign Nationals," USA Today, April 14, 2005, ***available at*** http://usatoday30.usatoday.com/news/nation/2005-04-14-foreign-recruits_x.htm, ***accessed*** April 4, 2017.

field, with international students making up over 30 percent of the post-baccalaureate degrees in STEM fields. This finding is even more notable when looking at degrees in mathematics and statistics, where 46.3 and 49.2 percent of Master's and Doctor's degrees, respectively, were earned by non-residents.

Table VI.5
Degrees Conferred by Postsecondary Institutions by Field of Study and Native Status
2013/14 School Year

	Total Number	Non-resident Share
Bachelor's Degrees		
All Fields	1,869,814	3.71%
STEM Fields[1]	577,955	4.86%
Mathematics and Statistics	20,980	11.62%
Master's Degrees		
All Fields	754,475	13.75%
STEM Fields[1]	145,561	30.64%
Mathematics and Statistics	7,273	46.32%
Doctor's Degree		
All Fields	177,580	11.94%
STEM Fields[1]	38,388	36.10%
Mathematics and Statistics	1,863	49.17%

Note: STEM fields include fields classified as biological and biomedical studies; computer and information sciences; engineering; engineering technologies and engineering-related fields; mathematics and statistics; physical science technologies; psychology; and social sciences.

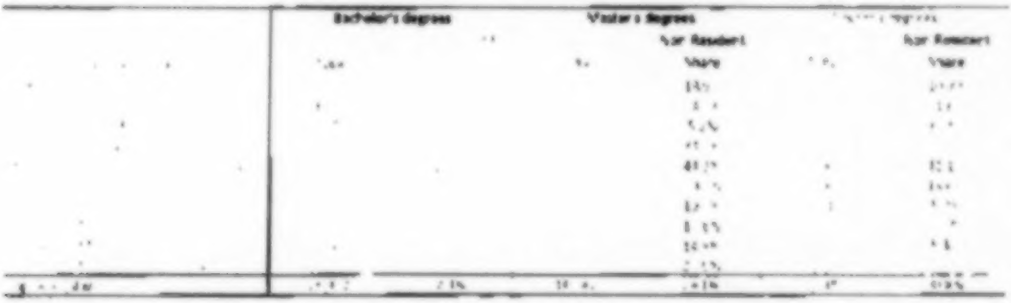
Source: U.S. Department of Education, National Center for Education Statistics, Integrated

Postsecondary Education Data System, Fall 2014, Completions component, prepared September 2015, *available at* [illegible], *accessed* April 4, 2017.

ii. Impact of Degrees Conferred in Massachusetts

- As shown in **Table VI.6**, non-residents make up an even higher share of the degrees conferred in Massachusetts. For example, 7.4 percent of Bachelor's degrees, 29.1 percent of Master's degrees, and 20.8 percent of Doctor's degrees at the ten largest four-year institutions in Massachusetts were earned by non-residents.
- The share is even more pronounced at certain institutions. For example, 44.3 percent of Master's degrees and 41.1 percent of Doctor's degrees earned from Massachusetts Institute of Technology are earned by non-residents.

Table VI.6
Degrees Conferred at Ten Largest Four-Year Institutions in Massachusetts
2014/15 School Year



Source: Institute of Education Sciences, National Center for Education Statistics, *available at* https://nces.ed.gov/ipeds/datacenter/login.aspx?gotoReportId=5, *accessed* April 4, 2017.

iii. Economic Benefits of International Students

- International students make up a significant portion of the student body at several leading universities, e.g. NYU (25%), USC (24%), Columbia (32%), Carnegie Mellon (40%), Cornell (21%), and Harvard (22%).[180] In total, 1.044 million international students were enrolled in U.S. institutions during the 2015/16 school year.[181]
- International students also bring foreign money into the United States in the form of college enrollment expenses, including tuition and living expenses. During the 2015/16 school year, of the 427,313 international undergraduate students, 81.2 percent relied primarily on personal and family funds to pay for their studies. During the same year, 57.6 percent of the

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[180] Institute of Education Sciences, National Center for Education Statistics, ***available at*** https://nces.ed.gov/ipeds/datacenter/login.aspx?gotoReportId=5, *accessed* April 4, 2017.

[181] Institute of International Education, Open Doors Data, ***available at*** https://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/Enrollment-by-Institutional-Type, *accessed* April 4, 2017.

383,935 international graduate students also relied on personal and family funds.[182]

- NAFSA, a nonprofit association dedicated to international education, estimated that international students during the 2015/16 school year contributed $32.8 billion to the U.S. economy and supported more than 400,000 jobs.[183] In Massachusetts specifically, 59,436 international students contributed $2.3 billion and supported over

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[182] Institute of International Education, Open Doors Data, *available at* [illegible] Source-of-Funding/2015-16, *accessed* April 4, 2017.

[183] NAFSA International Student Economic Value Tool, *available at* [illegible], *accessed* April 4, 2017. The economic value from international students studying in the U.S. is calculated as the expenses of enrollment (e.g., tuition and fees and room and board) plus living expenses for dependents minus any U.S. support given to the students. The number of jobs created equals the number of direct and indirect jobs created by the dollars brought into the U.S. by international students. Direct jobs are calculated as the economic value divided by the amount of dollars needed to support one U.S. job. Indirect jobs are jobs that are created and/or supported indirectly from the direct job's existence. This is a multiplier effect in which the spending from a directly-supported job will help to indirectly create and/or support other jobs in the workplace. Baumgartner, Jason, "The Economic Value of International Student Enrollment to the U.S. Economy," NAFSA, November 2016, *available at* [illegible] 2016 FINAL [illegible], *accessed* April 4, 2017.

31,500 jobs during the 2015/16 school year.[184]

VII. AWARDS

The contribution of immigrants to the American society and economic growth is significant. Through immigration, the United States has been the beneficiary of world-class talent and groundbreaking research, particularly in science, technology, engineering, and mathematics (STEM) fields. The talents and achievements of immigrants to the U.S. and the massive contributions they have made to

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[184] NAFSA International Student Economic Value Tool, *available at* [illegible], *accessed* April 4, 2017. The economic value from international students studying in the U.S. is calculated as the expenses of enrollment (e.g., tuition and fees and room and board) plus living expenses for dependents minus any U.S. support given to the students. The number of jobs created equals the number of direct and indirect jobs created by the dollars brought into the U.S. by international students. Direct jobs are calculated as the economic value divided by the amount of dollars needed to support one U.S. job. Indirect jobs are jobs that are created and/or supported indirectly from the direct job's existence. This is a multiplier effect in which the spending from a directly-supported job will help to indirectly create and/or support other jobs in the workplace. Baumgartner, Jason, "The Economic Value of International Student Enrollment to the U.S. Economy," NAFSA, November 2016, *available at* [illegible], *accessed* April 4, 2017.

America and the world are evinced in the international and national recognitions immigrants have received.

KEY TAKEAWAYS

- 40 percent of the Nobel Prizes won by Americans in Chemistry, Medicine and Physics since 2000 were awarded to immigrants. In 2016, all six American winners of the Nobel Prize in economics and scientific fields were foreign-born.
- Most Nobel Prizes earned by foreign-born scientists were awarded only after the Immigration and Nationality Act was passed in 1965, which eliminated discriminatory national origin quotas and increased employment-based green cards. Between 1901 and 1959, immigrants won 25 Nobel Prizes in Chemistry, Medicine and Physics, but won 79 prizes in these fields – more than three times as many – between 1960 and 2016.
- From 2010 to 2015, four out of eight U.S. Turing Award recipients were first or second generation immigrants.
- Since beginning in 1936, 63 percent of Fields Medal recipients affiliated with a United States research institution has been foreign born. Since 2002, *all* Fields Medal recipients affiliated with a U.S. research institution were foreign-born.
- 40 percent of National Medal of Science recipients in Mathematics or Computer Science are foreign-born.

- **42 percent of the researchers at the top seven U.S. cancer research centers are foreign-born.**
- **83 percent (33 of 40) of the finalists of the 2016 Intel Science Talent Search, the leading science competition for U.S. high school students, were the children of immigrants, and 75 percent of the finalists had parents who worked in America on H-1B visas.**

A. The Nobel Prize

> **"Immigrants have been awarded 40 percent, or 31 of 78, of the Nobel Prizes won by Americans in Chemistry, Medicine and Physics since 2000. In 2016, all 6 American winners of the Nobel Prize in economics and scientific fields were immigrants."[185]**

Table VII.1
American Nobel Prize Winners in Chemistry, Medicine and Physics by Nativity Status
2000 – 2016

Field	Foreign-Born	Native-Born	Foreign-Born %
Chemistry	1[illegible]		35.7%
Medicine	1[illegible]		43.5%
Physics	1[illegible]		40.7%
All Three Fields		47	

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[185] **National Foundation for American Policy, "Immigrants and Nobel Prizes," *NFAP Policy Brief,* October 2016, *available at* http://nfap.com/wp-content/uploads/2016/10/Immigrants- [illegible]AP-Poi[illegible] [illegible]ober-2016.pdf, *accessed* February 21, 2017.**

Source: National Foundation for American Policy, "Immigrants and Nobel Prizes", NFAP Policy Brief, October 2016, ***available at*** http://nfap.com/wp-content/uploads/2016/10/Immigrants-and-Nobel-[illegible] - NFAP-Poli[illegible] 2016 pdf, ***accessed*** March 26, 2017.

- "One can see the increasing influence and importance of immigrants on science in America over the past half century. Between 1901 and 1959, immigrants won 25 Nobel Prizes in Chemistry, Medicine and Physics, but won 79 prizes in these fields – more than three times as many – between 1960 and 2016."[186]
- "Most Nobel Prizes earned by foreign-born scientists were awarded only after the Immigration and Nationality Act was passed in 1965, which eliminated discriminatory national origin quotas and increased employment-based green cards."[187]

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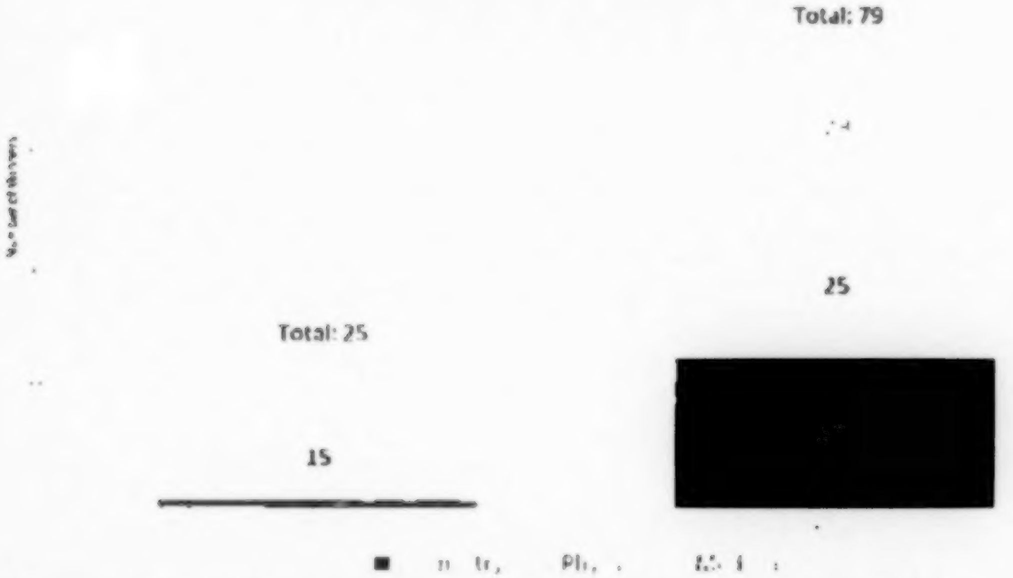
[186] National Foundation for American Policy, "Immigrants and Nobel Prizes," *NFAP Policy Brief*, October 2016, ***available at*** [illegible] p-2016 [illegible], ***accessed*** February 21, 2017.

[187] Vilcek Foundation, "Immigrant Nation, American Success: Achievements in STEM," ***available at*** http://www.vilcek.org/news/current-news/past-[illegible] stem.html, ***accessed*** February, 21, 2017.

Figure VII.1
American Foreign-Born Nobel Prize Winners in Chemistry, Medicine and Physics
1901-1959 and 1960-2016



Source: National Foundation for American Policy, "Immigrants and Nobel Prizes", NFAP Policy Brief, October 2016, ***available at*** http://nfap.com/wp-content/uploads/2016/10/Immigrants-and-Nobel-Prizes.NFAP-Policy-Brief.October-2016.pdf, ***accessed*** March 26, 2017.

i. Nobel Laureates Affiliated with Universities in Massachusetts

- 37 percent of Nobel Prize winners who have been affiliated with (i.e., current or former full-time or visiting faculty or staff and alumni) the Massachusetts Institute of Technology are foreign-born.[188]

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[188] MIT, "Nobel Prize," available at http://web.mit.edu/ir/pop/awards/nobel.html, ***accessed***

- 32 percent of Nobel Prize winners who are current faculty or alumni of Harvard University are foreign-born.[189]
- 75 percent of Nobel Prize winners who have been affiliated with Boston University are foreign-born.[190]

B. MacArthur Fellowship

- The MacArthur Fellowship is awarded to support individuals who have shown "exceptional creativity in their work and the prospect for still more in the future" across a wide range of fields, including the sciences, arts, and social sciences.[191]
- Each year, between 20 and 25 Fellows are selected to receive a $625,000 grant paid over

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March 24, 2017; place of birth from biographies at Nobelprize.org, "Nobel Prize Facts," ***available at*** https://www.nobelprize.org/nobel_prizes/facts/, ***accessed*** March 24, 2017.

[189] Harvard University, "Nobel Laureates," ***available at*** http://www.harvard.edu/about-harvard/harvard-glance/honors/nobel-laureates, ***accessed*** March 24, 2017.

[190] Boston University, "Nobel Laureates," ***available at*** https://www.bu.edu/provost/awards-publications/faculty-achievement/national-awards-and-distinctions/nobel-laureates/, ***accessed*** March 24, 2017, and "List of Nobel Laureates by University Affiliation," ***available at*** https://en.wikipedia.org/wiki/List_of_Nobel_laureates_by_university_affiliation ***accessed*** March 24, 2017.

[191] MacArthur Foundation, "MacArthur Fellows," 2017, ***available at*** https://www.macfound.org/programs/fellows/strategy/, ***accessed*** March 20, 2017.

five years, with no strings attached.[192,193] Fellows are selected on the criteria of being:

  - On the precipice of great discovery or innovation;
  - Financially limited from the fulfillment of their discovery or innovation; and
  - A resident or a citizen of the United States, not holding elective office.

- 25 percent of all MacArthur Fellows from 2000 to 2016 were foreign-born.[194] In the same period, 32 percent of the fellows working

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[192] MacArthur Foundation, "Directory of Fellows, 1981-2016," 2017, *available at* https://www.macfound.org/media/fellows_pdf/Fellows_1981-2016_Feb_2017.pdf, *accessed* March 18, 2017. The grant amount was increased from $500,000 in 2013.

[193] MacArthur Foundation, "MacArthur Fellows," 2017, *available at* [illegible], *accessed* March 18, 2017.

[194] MacArthur Foundation, "Directory of Fellows, 1981-2016," 2017, *available at* https://www.macfound.org/media/fellows_pdf/Fellows_1981-2016_Feb_2017.pdf, *accessed* March 18, 2017. Foreign-born recipients are defined as individuals who were born outside the United States and its territories to non-American parents. Recipients' birthplaces were identified through Internet research. If the birthplace could not be found, the recipient was assumed to be native-born. Source document for each foreign-born recipient's birthplace is available upon request.

in the STEM fields were foreign-born (see **Figure VII.2** below).

- Three fellows are from countries banned in the executive order:[195]
    - 2003: Nawal M. Nour (born in Sudan), obstetrician and gynecologist
    - 2013: Dina Katabi (born in Syria), computer scientist
    - 2014: Khaled Mattawa (born in Libya), a translator and poet

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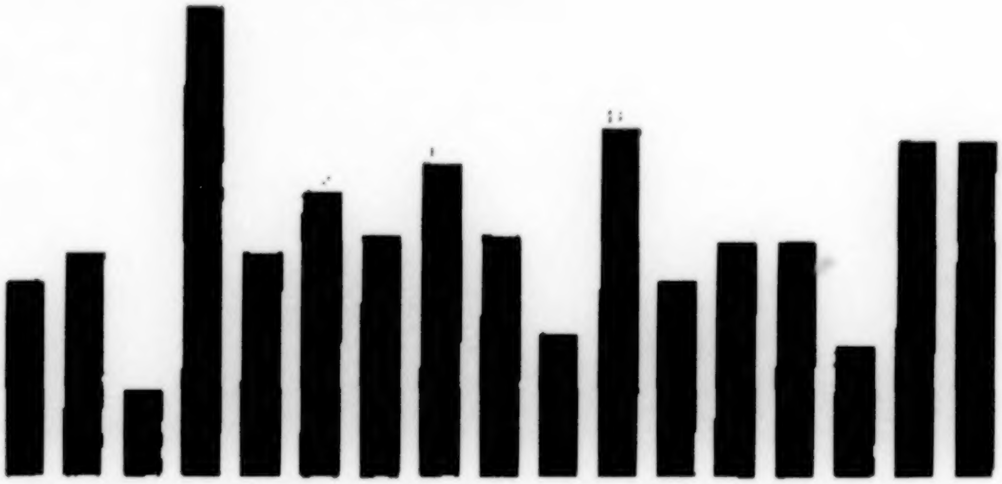
[195] MacArthur Foundation, "Creativity on the Move - International," 2016, ***available at*** [illegible], *accessed* March 20, 2017.

Figure VII.2
Share of Foreign-Born among MacArthur Fellowship Recipients in STEM Fields
2000-2016



Notes:
[1] Foreign-born recipients are defined as individuals who were born outside the United States and its territories to non-American parents.
[2] Recipients' birthplaces were identified through Internet research. If the birthplace could not be found, the recipient was assumed to be native-born.

Sources:
[1] MacArthur Foundation, "Directory of Fellows, 1981-2016," February 2017, *available at* [illegible], *accessed* March 18, 2017.
[2] Source documents for each foreign-born recipient's birthplace are available upon request.

C. Recognitions in Medicine

i. Wolf Prize in Medicine

- The aim of the Wolf Foundation is to award prizes to outstanding scientists and artists –

irrespective of nationality, race, color, religion, sex, or political views – for achievements in the interest of mankind and friendly relations among peoples.[196] Since 1978, prizes in the science field include Agriculture, Chemistry, Mathematics, Medicine, and Physics.[197]

- The Wolf Prize has been considered a significant predictor of the Nobel Prize, with more than a third of its recipients going on to win the Nobel Prize.[198]
- 36.8 percent of all U.S.-affiliated scientists to have won the Wolf Prize are foreign-born. 40 percent of all U.S.-affiliated scientists to have won the Wolf Prize in the last 16 years are foreign-born.[199]

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[196] Wolf Foundation, "About," *available at* http://www.wolffund.org.il/index.php?dir=site&page=content&cs=3000&language=eng, *accessed* March 30, 2017.

[197] Wolf Foundation, "Prizes," *available at* http://www.wolffund.org.il/index.php?dir=site&page=content&cs=3020, *accessed* March 30, 2017.

[198] Judy Siegel-Itzkovich, "Wolf Prizes in the Sciences and Arts Presented to Nine North Americans," January 29, 2015, *available at* [illegible] Americans-389466, *accessed* March 30, 2017.

[199] Wolf Foundation, "About," *available at* [illegible] t&cs=3000&language=eng, *accessed* March 30, 2017. Foreign-born recipients are defined as individuals who were born outside the United States and its territories. Recipients' birthplaces were identified through Internet research. If the birthplace could not be found, the recipient was assumed to be native-born. Source document for each

ii. Top Cancer Researchers

- "The researchers at the top 7 cancer centers come from more than 50 countries. Among the 56 countries, the leading country of origin for cancer researchers is China, followed, in order, by India, Germany, Canada, the United Kingdom, Italy, Russia, Lebanon, South Korea, France, Japan, Israel, Australia, Greece, Spain, Brazil, Taiwan and Argentina. Researchers from China account for 21 percent of the foreign-born cancer researchers at the 7 centers (and 8 percent of all cancer researchers at the 7 centers). India was the country of origin for 10 percent of the foreign-born researchers, followed by Germany and Canada at 7 percent, and the United Kingdom at 6 percent."[200]
- Overall, 42 percent of the researchers at the top 7 cancer research centers are foreign-born, whereas only 13 percent of the U.S population is foreign-born.[201]

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foreign-born recipient's birthplace is available upon request.

[200] Anderson, Stuart, "The Contributions of Immigrant to Cancer Research in America," *NFAP Policy Brief*, February 2013, ***available at*** http://www.kauffman.org/~/media/kauffman_org/research% [illegible] [illegible], *accessed* March 31, 2017.

[201] Anderson, Stuart, "Immigrant Scientists Invaluable to the United States," *Frontlines*, May/June 2015, ***available*** at [illegible] *accessed* March 31, 2017.

Table VII.2
Share of Foreign-Born Cancer Researchers at America's Top Cancer Centers
2010

Cancer Research Center	% of Cancer Researchers Who are Foreign Born
University of Texas MD Anderson Cancer Center	[illegible]
Memorial Sloan Kettering Cancer Center	[illegible]

Note: The author conducted an analysis of 1,500 biographies of cancer researchers on staff at the seven comprehensive cancer centers that received the highest amount of P30 grants from the National Cancer Institute in 2010 based on cancer center website research and direct interviews with individual researchers and cancer center staff.

Source: Anderson, Stuart, "Immigrant Scientists Invaluable to the United States," *Frontlines*, May/June 2015, ***available at***

[illegible], *accessed* March 27, 2017.

iii. Howard Hughes Investigators

- The Investigator Program at the Howard Hughes Medical Institute provides long-term funding for researchers in biomedical science. In 2015, at least 12 of the 26 appointed investigators (46 percent) were foreign-born.[202]

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[202] The Vilcek Foundation, "Immigration Nation, American Success: Achievements in Stem," ***available at***

D. Other Prizes in STEM

i. Fields Medal

- The Fields Medal is regarded as "mathematics' closest analog to the Nobel Prize."[203] It is awarded every four years by the International Mathematical Union to one to four recipients under the age of 40.[204]
- Since its inception in 1936, 63 percent of Fields Medal recipients affiliated with a United States research institution have been foreign-born.[205] Moreover, since 2002, all Fields Medal recipients affiliated with a U.S. research institution were foreign-born.[206]

[illegible] stem.html, *accessed* March 27, 2017.

[203] Wolfram MathWorld, "Fields Medal," 2017, *available at* [illegible], *accessed* March 20, 2017.

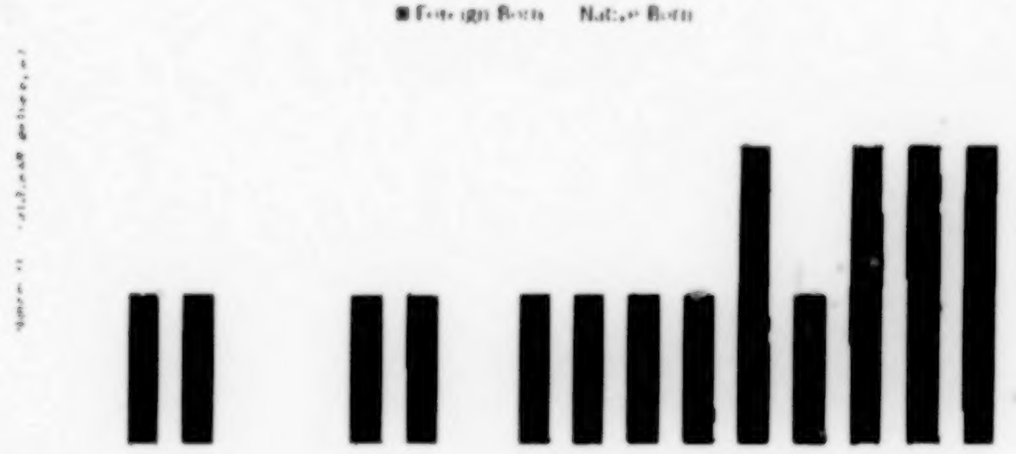
[204] Wolfram MathWorld, "Fields Medal," 2017, *available at* [illegible], *accessed* March 20, 2017.

[205] "List of Fields Medalists," Math Union, 2014, *available at* [illegible] s/, *accessed* March 20, 2017. Recipients' birthplaces were identified through Internet research. If the birthplace could not be found, the recipient was assumed to be native-born. Source document for each foreign-born recipient's birthplace is available upon request.

[206] "List of Fields Medalists," Math Union, 2014, *available at* [illegible] s/, *accessed* March 20, 2017. Recipients' birthplaces were identified through Internet research. If the birthplace could not be found, the recipient was assumed to be native-

- In 2014, Maryam Mirzakhani, born in Iran, became the first woman to be awarded the Fields Medal since its inception in 1936.[207] After two consecutive victories in the International Mathematical Olympiad, she started a Ph.D. program at Harvard University. She is currently a professor of mathematics at Stanford University.[208]

Figure VII.3
Number of Fields Medalists Affiliated with a U.S. Institution at the Time of the Award
2000-2016



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born. Source document for each foreign-born recipient's birthplace is available upon request.

[207] Carey, Bjorn, "Stanford's Maryam Mirzakhani Wins Fields Medal," August 12, 2014, *available at* [illegible], *accessed* March 20, 2017.

[208] Carey, Bjorn, "Stanford's Maryam Mirzakhani Wins Fields Medal," August 12, 2014, *available at* http://news.stanford.edu/news/2014/august/fields-medal-[illegible], *accessed* March 20, 2017.

Note: Recipients' birthplaces were identified through Internet research.

Sources:
[1] "List of Fields Medalists," Math Union, 2014, ***available at***
http://www.mathunion.org/general/prizes/fields/prizewinners, ***accessed*** March 20, 2017.
[2] Source document for each foreign-born recipient's birthplace is available upon request.

ii. Turing Award

- The A. M. Turing Award recognizes major contributions of lasting importance to computing. It is sometimes referred to as the "Nobel Prize" of Computing.[209]
  - Since the award's creation in 1966, 11 of the 51 U.S. winners (22 percent) have been immigrants, and 14 of the 51 U.S. winners (27 percent) have been first or second generation immigrants.[210]
  - From 2010 to 2015, 4 of the 8 U.S. Turing Award recipients (50%) were first or second generation immigrants.

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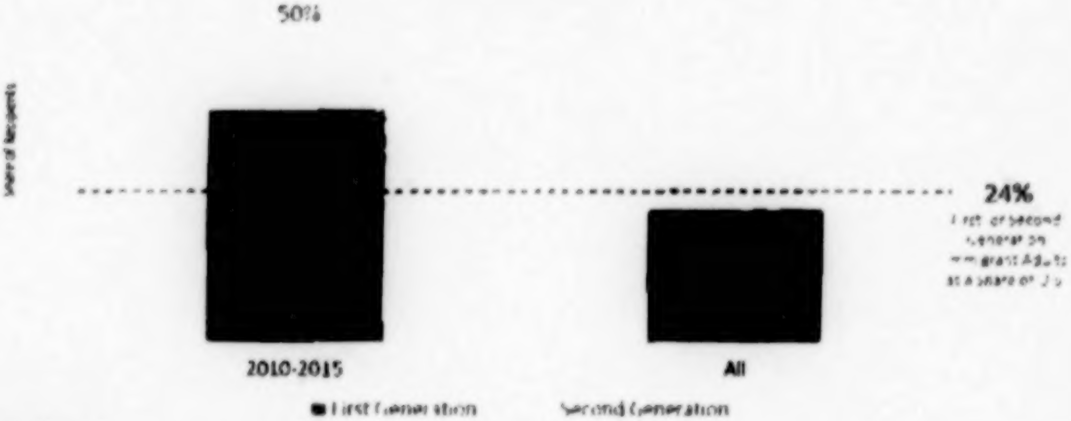
[209] Association for Computing Machinery, "A. M. Turing Award," ***available at*** http://amturing.acm.org/, ***accessed*** February 21, 2017.

[210] Complete list of Turing Award winners is ***available at*** [illegible], ***accessed*** February 21, 2017. Data on award winners' country of birth are available on each winner's Turing Award profile.

Figure VII.4
Share of Turing Award Recipients by Immigrant Generation
1966-2015



Notes:

[1] First-Generation immigrants are people born outside the United States and its surrounding territories to parents neither of whom was a U.S. citizen.

[2] Second-Generation immigrants are people born in the United States or its surrounding territories, with at least one first-generation parent.

[3] Recipients' parents whose birthplace could not be identified were assumed to have been born in the U.S.

Sources:

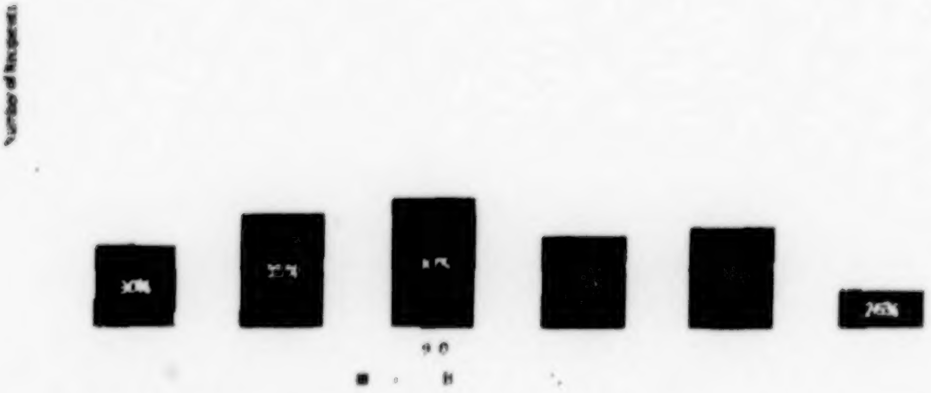
[1] A.M. Turing Award, "Alphabetical Listing of A.M. Turing Award Winners," ***available at*** http://amturing.acm.org/alphabetical.cfm, ***accessed*** March 20, 2017.

[2] A.M. Turing award winner profiles for each recipient, ***available at*** http://amturing.acm.org, ***accessed*** March 20, 2017.

iii. National Medal of Science

- The President's National Medal of Science was established in 1959 as the President's Award to individuals "deserving of special recognition by reason of their outstanding contributions to knowledge in the physical, biological, mathematical, or engineering sciences."[211] Successful candidates must be U.S. citizens or permanent residents who are applying for U.S. citizenship.[212]

Figure VII.5
National Medal of Science Recipients by Nativity Status
1962-2014



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[211] National Science Foundation, "National Medal of Science," *available at* [illegible], *accessed* March 24, 2017.

[212] National Science Foundation, "Medal of Science Fact Sheet," *available at* [illegible], *accessed* March 24, 2017.

Sources:
[1] National Science Foundation, "The President's National Medal of Science," *available at* [illegible]://www.nsf.[illegible], *accessed* March 27, 2017.
[2] Recipient birthplaces were identified from their biographies available from National Science & Technology Medals Foundation, "Laureates," *available at* [illegible]n[illegible]ona[illegible]dals.org/la[illegible], *accessed* March 27, 2017.

- Of the 506 recipients of the National Medal of Science, 28 percent were foreign-born.[213] More granularly,
    - 41 percent of recipients in Mathematics or Computer Science were foreign-born;
    - 33 percent of recipients in Physics and Engineering were foreign-born;
    - 24 percent of recipients in Biology were foreign-born;
    - 13 percent of recipients in Chemistry were foreign-born; and
    - 13 percent of recipients in Behavioral and Social Science were foreign-born.

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[213] National Science & Technology Medals Foundation, "Laureates," 2017, *available at* [illegible], *accessed* March 24, 2017.

iv. Intel Science Talent Search

- “The Intel Science Talent Search (Intel STS) is the nation’s most prestigious pre-college science competition. Intel STS alumni have made extraordinary contributions to science and hold more than 100 of the world’s most coveted science and math honors, including the Nobel Prize and the National Medal of Science. Students are selected based upon their scientific research and also on their overall potential as future leaders of the scientific community.”[214]
- Each year, Intel STS recognizes 300 students as semifinalists. From that pool, 40 finalists are invited to Washington D.C. to compete for the top prizes.[215]
- “Previously known as the Westinghouse Science Talent Search or the ‘Junior Nobel Prize,’ more than 95 percent of winners of the Intel Science Talent Search (STS) traditionally have pursued science as a career, with 70 percent earning Ph.D.’s or M.D.’s.”[216]

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[214] Student Science, “Intel STS 2016 Finalists,” 2015, ***available at*** https://student.societyforscience.org/intel-sts-2016-finalists, ***accessed*** March 20, 2017.

[215] Student Science, “Intel STS 2016 Finalists,” 2015, ***available*** [illegible] finalists, ***accessed*** March 20, 2017.

[216] Anderson, Stuart, “The Contributions of the Children of Immigrants to Science in America,” *NFAP Policy Brief*, March 2017, ***available at*** http://nfap.com/wp- [illegible]

- A review of the finalists of Intel STS shows that children of immigrants are a "vital part of America's future in science and mathematics."[217]
    - "83 percent (33 of 40) of the finalists of the 2016 Intel Science Talent Search, the leading science competition for U.S. high school students, were the children of immigrants."[218]
    - "Moreover, 75 percent – 30 out of 40 – of the finalists had parents who worked in America on H-1B visas. That compares to 7 children who had both parents born in the United States."[219]

[illegible], *accessed* March 20, 2017, p. 3.

[217] Anderson, Stuart, "The Contributions of the Children of Immigrants to Science in America," *NFAP Policy Brief*, March 2017, ***available at*** http://nfap.com/wp-content/uploads/2017/03/Children-of-Immigrants-in-[illegible], *accessed* March 20, 2017, p. 3. Research was conducted by the author through interviews with the finalists and their parents.

[218] Anderson, Stuart, "The Contributions of the Children of Immigrants to Science in America," *NFAP Policy Brief*, March 2017, ***available at*** http://nfap.com/wp-[illegible], *accessed* March 20, 2017, p. 1.

[219] Anderson, Stuart, "The Contributions of the Children of Immigrants to Science in America," *NFAP Policy Brief*, March 2017, ***available at*** http://nfap.com/wp [illegible]

- "Parents who were international students were also more likely to have a child as a finalist than native-born parents. A total of 27 of the 40 children – 68 percent – had a parent who came to America as an international student."[220]
- "At the 2016 Intel Science Talent Search, 7 of the 9 top awards were earned by the children of immigrants, including first place prizes for innovation and basic research."[221]

- The share of finalists with foreign-born parent(s) has been increasing over time. As shown in **Figure VII.6** below, in 2004, 60 percent (24 of 40) of the finalists had at least one foreign-born parent. In 2011, 70 (28 of 40) percent had at least one foreign-born parent,

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[illegible] NFAP-Policy-Brief-March-2017.pdf, *accessed* March 20, 2017, p. 1.

[220] Anderson, Stuart, "The Contributions of the Children of Immigrants to Science in America," *NFAP Policy Brief*, March 2017, *available at* http://nfap.com/wp-[illegible]-Brief-March-2017.pdf, *accessed* March 20, 2017, p. 1.

[221] Anderson, Stuart, "The Contributions of the Children of Immigrants to Science in America," *NFAP Policy Brief*, March 2017, *available at* http://nfap.com/wp-content/uploads/2017/03/Children-of-Immigrants-in-Science-NFAP-Policy-Brief-March-2017.pdf, *accessed* March 20, 2017, p. 2.

and in 2016, 83 percent (33 out of 40) of the finalists had at least one foreign-born parent.

Figure VII.6
Intel Science Talent Search Finalists by Nativity Status of Parents
2004, 2011, and 2016

16
2011
12
5
10
15
20
25
30
Number of Finalists
Finalists without a Foreign Born Parent
Finalists with a Foreign Born Parent

Notes:
[1] If a finalist had at least one parent who was born outside the U.S. and its territories, then he/she is defined as a "finalist with a foreign-born parent."
[2] The data are based on interviews with finalists and their parents by the National Foundation for American Policy.

Source: Anderson, Stuart, "The Contributions of the Children of Immigrants to Science in America," *NFAP Policy Brief*, March 2017, *available at* http://nfap.com/wp-content/uploads/2017/03/Children-of-Immigrants-in-Science.NFAP-Policy-Brief.March-2017.pdf, *accessed* March 20, 2017, p. 5.

v. Breakthrough Prize

The Breakthrough Prize was founded by Silicon Valley entrepreneurs to honor and to support "important, primarily recent, achievements in the categories of Fundamental Physics, Life Sciences, and Mathematics."[222] The first prizes were awarded in 2012 in Fundamental Physics; prizes in Life Sciences and Mathematics began in 2013 and 2015, respectively.[223] Laureates receive $3 million each in prize money.[224]

- As shown in **Figure VII.7** below, 43 percent of Breakthrough Prize winners who were affiliated with a U.S. institution at the time of the award were foreign-born. In Fundamental Physics, 60 percent of the U.S.-affiliated winners were foreign-born and in Mathematics, 67 percent of the winners were foreign-born.

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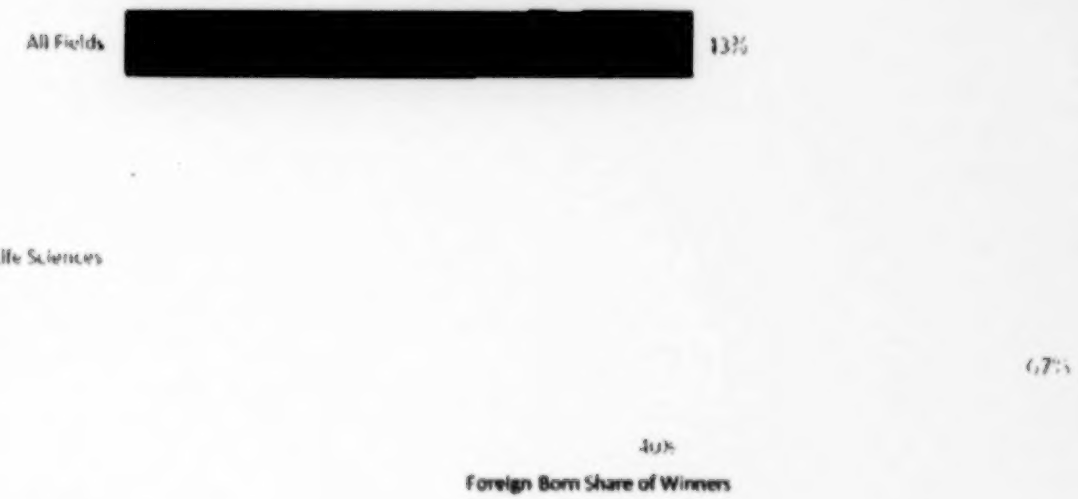
[222] "About," Breakthroughprize.org, 2017, *available at* [illegible], *accessed* March 20, 2017.

[223] "Breakthrough Prizes Laureates 2012-2017," Breakthroughprize.org, 2017, *available at*
[illegible],
[illegible],
[illegible]s/3/P1/Y2017,
[illegible],
[illegible],
[illegible],
[illegible]s/2/P1/Y2016,
[illegible]ize.org/Laureat[illegible]201[illegible],
[illegible],
[illegible]1/P[illegible],
[illegible]s/1/P1/Y201[illegible],
[illegible]1/P1/Y2015,
[illegible],
[illegible]1/P1/Y2017,
accessed March 20, 2017.

[224] "About," Breakthroughprize.org, 2017, *available at* [illegible], *accessed* March 20, 2017.

Figure VII.7
Share of Foreign-Born Breakthrough Prize Winners Affiliated with a U.S. Institution at the Time of the Award
2012-2017



Notes:
[1] Foreign-born recipients are defined as individuals who were born outside the United States and its territories to non-American parents.
[2] Recipients birthplaces were identified Internet research. If birthplace could not be found, the recipient was assumed to be native-born.

Sources:
[1] "Breakthrough Prizes Laureates 2012-2017," Breakthroughprize.org, 2017, *available at*
https://breakthroughprize.org/Laureates/3/P1/Y2015,
https://breakthroughprize.org/Laureates/3/P1/Y2016,
https://breakthroughprize.org/Laureates/3/P1/Y2017,
https://breakthroughprize.org/[illegible]/P1/Y2013,
https://breakthroughpri[illegible]/P1/Y2014,

https://breakthroughprize.org/Laureates/2/P1/Y2015,
https://breakthroughprize.org/Laureates/2/P1/Y2016,
https://breakthroughprize.org/Laureates/2/P1/Y2017,
https://breakthroughprize.org/Laureates/1/P1/Y201[illegible],
https://breakthroughprize.org/Laureates/1/P1/Y2013,
https://breakthroughprize.org/Laureates/1/P1/Y2014,
https://breakthroughprize.org/Laureates/1/P1/Y2015,
https://breakthroughprize.org/Laureates/1/P1/Y201[illegible],
https://breakthroughprize.org/Laureates/1/P1/Y2017,
accessed March 20, 2017.

[2] Source document for each foreign-born recipient's birthplace is available upon request.

vi. Simons Investigators

The Simons Foundation selects Investigators working in mathematics, physics, theoretical computer sciences, and mathematical modeling of living systems. Eleven of the sixteen Simons Investigators in 2014 were immigrants living in the U.S.[225]

vii. Blavatnik Awards

The Blavatnik Awards are given in the life sciences, physical sciences, engineering, and chemistry. One out of three winners in 2014 was foreign-born. Six of nine winners and finalists were foreign-born in 2014.[226]

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[225] The Vilcek Foundation, "Immigration Nation, American Success: Achievements in STEM," *available at* [illegible] stem.html, *accessed* March 11, 2017.

[226] The Vilcek Foundation, "Immigration Nation, American Success: Achievements in STEM," *available at*

E. Membership in the National Academy of Sciences

- "Members are elected to the National Academy of Sciences [NAS] in recognition of their distinguished and continuing achievements in original research. Membership is a widely accepted mark of excellence in science and is considered one of the highest honors that a scientist can receive. U.S. immigrants constitute 29% of current NAS members in applied mathematics, 21% in Biochemistry, 37% in engineering sciences, and 36% in mathematics."[227]

F. Medal of Freedom

- The Presidential Medal of Freedom is an award bestowed by the President of the United States that was established in 1963 by President John F. Kennedy. It replaced the Medal of Freedom previously established by President Harry S. Truman in 1945 to honor civilian service during World War II.[228]

[illegible]

[illegible] stem.html, *accessed* March 11, 2017.

[227] Hanson, Gordon, H. and Matthew J. Slaughter, "Talent, Immigration, and U.S. Economic Competitiveness," Compete America Coalition, May 2013, ***available at*** [illegible] public [illegible] immigration [illegible], *accessed* March 20, 2017, p. 14.

[228] National Archives, "Executive Order 9586 – The Medal of Freedom," ***available at*** https://www.archives.gov/federal-

- It is the nation's highest civilian honor presented to individuals who have made "especially meritorious contributions to the security or national interests of the United States, to world peace, or to cultural or other significant private endeavors."[229]

- Recipients have included individuals who have made significant contributions to wide range of areas, including the arts, business and economics, education, history, humanitarian service, law, media, military service, philanthropy, politics and government, religion, sports, and science and technology.

- As shown in **Figure VII.8** below, foreign-born recipients and second-generation immigrants accounted for 29 percent of all Presidential Medal of Freedom recipients since its inception and 28 percent of recipients in the area of science and technology.[230]

- Between 1990 and 2016, over 29 percent of the recipients in the area of science and technology were foreign-born or second-generation immigrants. As a point of

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[illegible], *accessed* March 27, 2017.

[229] Obama White House, "The Presidential Medal of Freedom," 2016, *available at*

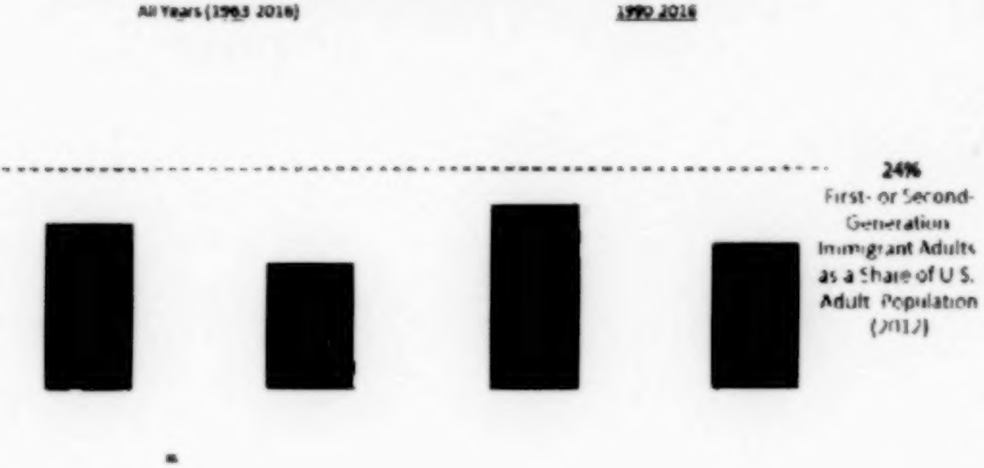
[illegible]

freedom, *accessed* March 27, 2017.

[230] Science and Technology areas are medicine, science, space exploration, and computing.

reference, in 2012, first- and second-generation immigrants accounted for about 24 percent of the U.S. adult population; this share was even lower in the previous decades in which the medal was awarded.[231]

Figure VII.8
Share of Presidential Medal of Freedom Recipients by Nativity Status
All Years (1963-2016) and 1990-2016



Notes:

[1] Foreign-born recipients are defined as individuals who were born outside the United States and its territories to non-American parents. Second-generation immigrants are defined as individuals born in the United States or its territories with at least one foreign-born parent.

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[231] Pew Research Center, "Second-Generation Americans," February 7, 2013, *available at* [illegible] generation-americans/, *accessed* March 27, 2017.

[2] Recipients birthplaces were identified Internet research. If birthplace could not be found, the recipient was assumed to be native-born.
[3] Science & technology fields are defined as medicine, science, space exploration, and computing.

Sources:
[1] United States Senate, "Presidential Medal of Freedom Recipients," *available at* https://www.senate.gov/pagelayout/reference/two_column_table/Presidential_Medal_of_Freedom_Recipients.htm, *accessed* March 27, 2017.
[2] Pew Research Center, "Second-Generation Americans," February 7, 2013, *available at* http://www.pewsocialtrends.org/2013/02/07/second-generation-americans/, *accessed* March 27, 2017.
[3] Source document for each first- and second-generation immigrant's birthplace and/or parent's birth place is available upon request.

G. The Carnegie Corporation Pride of America Honorees

- "Every July 4th, Carnegie Corporation of New York salutes the legacy of Andrew Carnegie by recognizing an inspiring group of well-known naturalized citizens from all walks of life—the 'Pride of America.'"[232]
- The 2016 honorees include:[233]

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[232] Carnegie Corporation of New York, "About," 2015, *available at* [illegible], *accessed* March 20, 2017.

[233] Carnegie Corporation of New York, "2016 Great Immigrant Honorees: The Pride of America," June 30, 2016, *available*

- The President of Johns Hopkins University, the Dean of the Stern School of Business at New York University, and the Provost and Chief Academic Officer of Carnegie Melon University.
- The CEO of Google, the Cofounder of Venmo, the Cofounder and CEO of Whatsapp, the CTO of Uber Technologies, the President and CEO of Sprint, and Chairman of the Americas of McKinsey & Company.
- A former U.S. Secretary of the Interior, a Brigadier General of the U.S. Army, a retired U.S. Army Captain, a Judge in the U.S. Court of Appeals for the 9th Circuit, and two U.S. ambassadors.
- Actors, journalists, scientists, industrialists, entrepreneurs, philanthropists, a Grammy Award-winning singer, an Olympic five-time gold medalist, an artist, a chef, a ballerina, an author, and others.

VIII. IMMIGRATION, CRIME, AND TERRORISM

Contrary to popular belief, studies generally find that immigration may reduce crime rates over time. Empirical data also suggests that immigrants are no more likely to be criminals or to be radicalized than native-born Americans. Regrettably, the prevalence

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at https://www.carnegie.org/news/articles/2016-great-immigrants-pride-america/, ***accessed*** March 20, 2017.

of this public belief makes immigrants, especially those with Islamic belief, more likely to be the victims of hate crime.

KEY TAKEAWAYS

- Studies find that immigration does not increase the crime rate. In the long run, immigration decreases the crime rate, especially the violent crime rate.
- Academic literature shows that immigrants are less likely to be criminals than U.S. native-born population.
- Investigation of the Annual Survey of Jails shows that overall, immigrants account for less than 5 percent of the total inmate population in the surveyed jail detention facilities.
- The Profiles of Individual Radicalization in the United States dataset ("PIRUS")[234] shows that

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[234] Profiles of Individual Radicalization in the United States dataset ("PIRUS") includes a sample of individuals espousing Islamist, far right, far left, or single issue ideologies who have radicalized within the United States to the point of committing ideologically motivated illegal violent or non-violent acts, joining a designated terrorist organization, or associating with an extremist organization whose leader(s) has/have been indicted of an ideologically motivated violent offense. START, "Profiles of Individual Radicalization in the United States (PIRUS)," *available at* http://www.start.umd.edu/publication/profiles-individual-

  - Among the 1,473 crimes reported in this dataset, immigrants account for less than 15 percent of the individuals that were radicalized in the United States.
  - Individuals from the six countries in the Executive Order account for only 2.3 percent of the individuals that were radicalized in the United States.
- UCR Hate Crime Data show that the percentage of total reported hate crimes that have been committed against Muslims in the United States and in Massachusetts spiked after the 9/11 terrorist attacks.

A. Public Opinion

A large portion of the American population believes that immigration increases crime across the United States. Compared to immigrants of other ethnicities, Latin American and Middle Eastern immigrants are believed to have a greater negative impact on the United States.

- Pew Research Center American Trends Panel Survey (March/April 2015)[235]

[illegible], *accessed* March 22, 2017.

[235] Pew Research Center, "Chapter 4: U.S. Public Has Mixed Views of Immigrants and Immigration," in Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065: Views of

  - 50 percent of respondents say that immigrants in the United States are making crime worse nationally. 36 percent of respondents say that immigrants in the United States are making crime worse in their local communities.
  - 34 percent of respondents say that immigrants in the United States are making social and moral values worse nationally.
  - Only 20 percent of respondents viewed the impact of Middle Eastern immigrants as positive (compared to 26 percent for Latin American immigrants, 44 percent for European immigrants, and 47 percent for Asian immigrants).
  - 49 percent of respondents think immigration should be decreased.
- Pew Research Center Survey (September 2014)[236]

Immigration's Impact on U.S. Society Mixed, September 2015, *available at*

[illegible], *accessed* February 22, 2017.

[236] Pew Research Center, "Growing Concern about Rise of Islamic Extremism at Home and Abroad," September 2014,

[illegible], *accessed* February 22, 2017.

  - 50 percent of respondents believe that Islam is more likely than other religions to encourage violence among believers (increased from 25 percent in 2002).
- German Marshall Fund (2010)[237]
  - 32 percent believe legal immigrants increase crime.
  - 58 percent believe illegal immigrants increase crime.
- Gallup Poll (June 2007)[238]
  - 58 percent of respondents think immigration is making crime worse.
  - 37 percent of respondents think immigration is making social and moral values worse.
- National Identity Survey by International Social Survey Programme (1995 and 2003)[239]

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[237] Bansak, Cynthia et al., "Frontiers of Immigration Research," in *Economics of Immigration*, Routledge: New York: 2015.

[238] Gallup, "Immigration," *available at* [illegible] *accessed* February 22, 2017.

[239] Bianchi, Milo, Paolo Buonanno, and Paolo Pinotti. "Do Immigrants Cause Crime?" *Journal of the European Economic Association* 10(6), 2012: 1318-1347, *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1542-[illegible], *accessed* March 24, 2017, Figure 1.

  - People in OECD countries believe immigrants increase crime rates (~30 percent in the United States).

B. Immigration and Crime

i. Existing Research Finds No Impact of Immigration on Increasing Crime

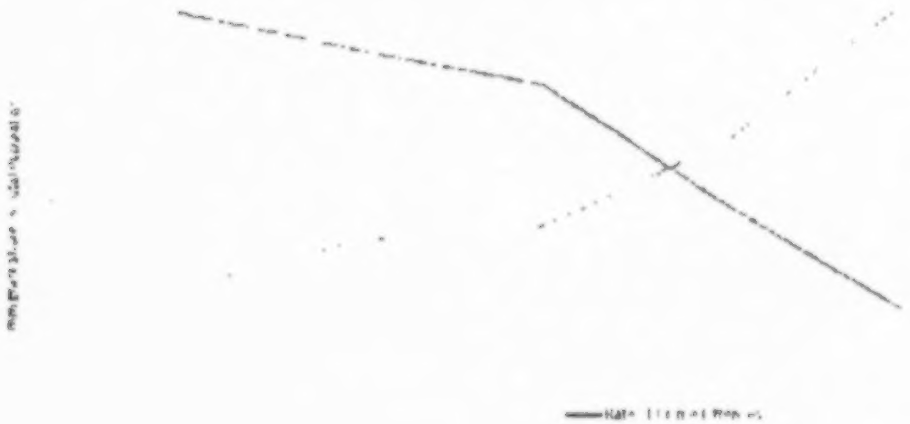
Existing research and empirical evidence show little support of the public belief that immigration increased crime in the United States.

- As illustrated in **Figure VIII.1**, between 2010 and 2014, the increase of the share of immigrants in the total U.S. population coincides with the decreasing trend in the rate of criminal offenses. This relationship is also present at the state level.
- **Figure VIII.2** plots the correlation coefficients between the rate of crime offences and the immigrant share for each state in the United States between 2010 and 2014. A negative correlation coefficient means that an increase in the immigrant share is correlated with a decrease in the crime rate. Among the 51 states, the correlation coefficient is negative for 42 states.

Figure VIII.1

Comparison of the Immigrant Share in the U.S. Population and Rate of Criminal Offenses

2010 – 2014

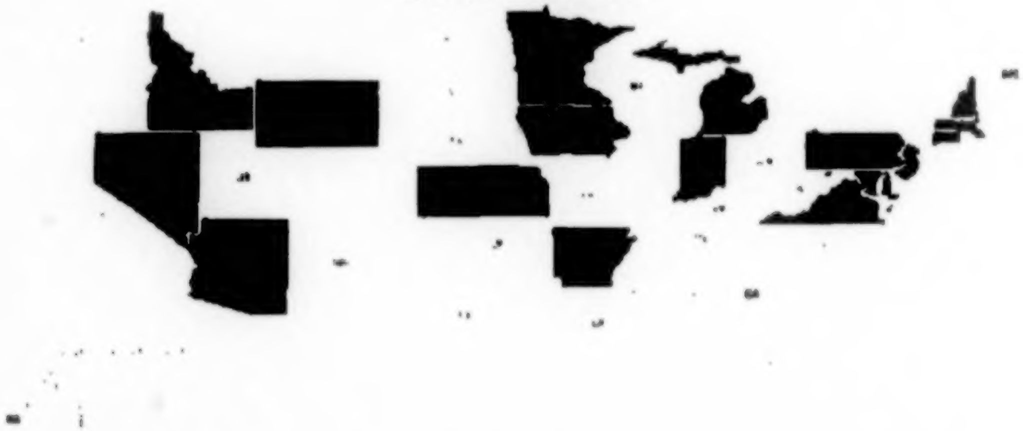


Sources:

[1] U.S. Department of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014," Inter-university Consortium for Political and Social Research (distributor), ***available at*** http://doi.org/10.3886/ICPSR36400.v1.

[2] Brown, Anna, and Renee Stepler, "Statistical Portrait of Hispanics in the United States," 2005-2013 and 2014, ***available at*** http://www.pewhispanic.org/2016/04/19/statistical-data/ and http://www.pe[illegible]org/2016/04/19-statistical-[illegible]

Figure VIII.2
Correlation Coefficients between Rate of Crime Offenses and Immigrant Share in the United States
2010 – 2014



Note: The correlation coefficient is a measure that determines the degree to which two variables' movements are associated. The range of values for the correlation coefficient is -1.0 to 1.0. In particular, a negative correlation coefficient means that an increase in the immigrant share is correlated with a decrease in the crime rate.

Sources:
[1] U.S. Department of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014," Inter-university Consortium for Political and Social Research (distributor), ***available at*** http://doi.org/10.3886/ICPSR36400.v1, ***accessed*** March 24, 2017.
[2] Brown, Anna, and Renee Stepler, "Statistical Portrait of Hispanics in the United States," 2005-2013 and 2014, ***available at*** http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states-about-the-data/ and

http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states, *accessed* March 24, 2017.

The academic literature finds that not only is there a lack of a positive relationship between immigration and crime, the empirical evidence generally indicates that immigration might actually reduce crime, especially violent crime, over time. Studies tend to support the observation of one sociologist, who noted, "Cities of concentrated immigration are some of the safest places around." [240] The literature has found:

- "[C]ities with high crime rates tend to have large numbers of immigrants. However, controlling for the demographic characteristics of the cities, recent immigrants appear to have no effect on crime rates."[241]
- "After controlling for a host of demographic and economic characteristics, [...] immigration does not increase crime rates, and some

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[240] Sampson, Robert J., "Rethinking Crime and Immigration," *Contexts* 7(1), Winter 2008: 28-31, *available at* https://contexts.org/articles/files/2008/01/contexts_winter08_sampson.pdf, *accessed* March 24, 2017, 30.

[241] Butcher, Kristin F., and Anne Morrison Piehl. "Cross-city Evidence on the Relationship between Immigration and Crime," *Journal of Policy Analysis and Management* 17(2), June 1998: 457-493, *available at* http://onlinelibrary.wiley.com/doi/10.1002/(SICI)1520-6688(199822)17:2%3C457::AID-PAM4%3E3.0.CO;2-F/abstract, *accessed* March 24, 2017.

aspects of immigration lessen crime in metropolitan areas."[242]

- "[A] systematic, but small impact of immigration on crime."[243]
- "[C]ities with the largest increases in immigration between 1990 and 2000 experienced the largest decreases in homicide and robbery during the same time."[244]
- "Consistent with the revitalization thesis, results show that the increased size of the foreign-born population reduces lethal violence over time. Specifically, we find that neighborhoods with a larger share of

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[242] Reid, Lesley Williams, Harald E. Weiss, Robert M. Adelman, and Charles Jaret. "The Immigration–Crime Relationship: Evidence across US Metropolitan Areas." *Social Science Research* 34(4), March 2005: 757-780, *available at* http://www.sciencedirect.com/sci [illegible] 05000104, *accessed* March 24, 2017, 757.

[243] Spenkuch, Jörg L, "Understanding the Impact of Immigration on Crime," *American Law and Economics Review* 16(1), September 2013: 177-219, *available at* [illegible] Immig [illegible], *accessed* March 24, 2017, 177.

[244] Wadsworth, Tim, "Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime between 1990 and 2000," *Social Science Quarterly* 91(2), April 2010: 531-533, *available at* [illegible] 1111/j.1540-6237.2010.00706.x/abstract, *accessed* March 24, 2017. 533.

immigrants have fewer total, non-Latino White, and Latino homicide victims."[245]

- As a response to President Trump's campaign message, one study tested whether immigrants were responsible for the violent and drug-related crime in the United States. "Data uniformly show no association between immigrant population size and increased violent crime. However, there appears to be a small but significant association between undocumented immigrant populations and drug-related arrests. [...] Results largely contradict the Trump Hypothesis: no evidence links Mexican or undocumented Mexican immigrants specifically to violent or drug-related crime. Undocumented immigrant associations with drug-related crime are minimal, though significant. The Trump Hypothesis consequently appears to be biased toward rhetoric rather than evidence." [246]

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[245] Martinez, Ramiro, Jacob I. Stowell, and Matthew T. Lee, "Immigration and Crime in an Era of Transformation: A Longitudinal Analysis of Homicides in San Diego Neighborhoods, 1980–2000," *Criminology* 48(3), August 2010: 797-829, available at http://onlinelibrary.wiley.com/doi/10.1111/j.1745-125.2010.00202.x/abstract, *accessed* March 24, 2017, 797.

[246] Green, David, "The Trump Hypothesis: Testing Immigrant Populations as a Determinant of Violent and Drug-Related Crime in the United States," *Social Science Quarterly* 97(3), May 2016: 506-524, *available at* http [illegible] libr [illegible] act, *accessed* March 24, 2017, 506.

- These findings also largely carry over to studies conducted in Canada,[247] the UK,[248] and Italy.[249]

ii. Immigrants Are No More Likely to Be Criminals than Native-Born Individuals

- "No matter how you look at the issue, the inescapable conclusion is that immigrants are, on average, less prone to criminality than the U.S. native-born population."[250]

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[247] Zhang, Haimin, "Immigration and Crime: Evidence from Canada," *CLSRN Working Paper*, April 2014 *available at* [illegible], *accessed* March 24, 2017.

[248] Bell, Brian, Francesco Fasani, and Stephen Machin, "Crime and Immigration: Evidence from Large Immigrant Waves," *Review of Economics and Statistics* 95(4), 2013: 1278-1290, a*vailable at* http://eprints.lse.ac.uk/59323/1/CEP_Bell_Fasani_Machin_ [illegible], *accessed* March 24, 2017.

[249] Bianchi, Milo, Paolo Buonanno, and Paolo Pinotti. "Do Immigrants Cause Crime?" *Journal of the European Economic Association* 10(6), 2012: 1318-1347, *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1542-4774.2012.01085.x/full, *accessed* March 24, 2017.

[250] Ewing, Walter A., Daniel E. Martínez, and Rubén G. Rumbaut, "The Criminalization of Immigration in the United States," *American Immigration Council Special Report*, July 2015: 1-25, *available at* [illegible], *accessed* March 24, 2017, 4.

- "According to an original analysis of data from the 2010 American Community Survey (ACS) conducted by the authors of this report, roughly 1.6 percent of immigrant males age 18-39 are incarcerated, compared to 3.3 percent of the native-born. This disparity in incarceration rates has existed for decades, as evidenced by data from the 1980, 1990, and 2000 decennial censuses. In each of those years, the incarceration rates of the native-born were anywhere from two to five times higher than that of immigrants."[251]
- "The 2010 Census data reveals that incarceration rates among the young, less educated Mexican, Salvadoran, and Guatemalan men who make up the bulk of the unauthorized population are significantly lower than the incarceration rate among native-born young men without a high-school diploma. In 2010, less-educated native-born men age 18-39 had an incarceration rate of 10.7 percent—

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[251] Ewing, Walter A., Daniel E. Martínez, and Rubén G. Rumbaut, "The Criminalization of Immigration in the United States," *American Immigration Council Special Report*, July 2015: 1-25, ***available at*** [illegible] united_states.pdf, ***accessed*** March 24, 2017, 1.

more than triple the 2.8 percent rate among foreign-born Mexican men, and five times greater than the 1.7 percent rate among foreign-born Salvadoran and Guatemalan men."[252]

- For the male population ages 18 to 39 "the incarceration rate of the U.S.-born (3.51 percent) was four times the rate of the foreign-born (0.86 percent). The latter was half the 1.71 percent rate for non-Hispanic white natives, and thirteen times less than the 11.6 percent incarceration rate for native black men. The advantage for immigrants vis-à-vis natives applies to every ethnic group without exception. Almost all of the Asian immigrant groups have lower incarceration rates than the Latin American groups (the exception involves foreign-born Laotians and Cambodians, whose rate of 0.92 percent is still well below that for non-Hispanic white natives)."[253]

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[252] Ewing, Walter A., Daniel E. Martínez, and Rubén G. Rumbaut, "The Criminalization of Immigration in the United States," *American Immigration Council Special Report*, July 2015: 1-25, *available at* [illegible] [illegible] nited_states.pdf, *accessed* March 24, 2017, 1-2.

[253] Rumbaut, Rubén G., Roberto G. Gonzales, Golnaz Komaie, Charlie V. Morgan, and Rosaura Tafoya-Estrada, "Immigration and Incarceration: Patterns and Predictors of Imprisonment among First- and Second-Generation Young Adults," *Immigration and Crime: Ethnicity, Race, and Violence*, 2006: 64-89, *available at*

- "[I]mmigrants are significantly less antisocial despite being more likely to have lower levels of income, less education, and reside in urban areas."[254]
- "[F]irst generation immigrants are less likely to be involved in serious offending and to evidence persistence in offending, and appear to be on a path toward desistance much more quickly than their peers."[255]
- The Investigation of the Annual Survey of Jails[256] shows that, among most of the jail detention facilities, immigrants constitute

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[illegible]
09, *accessed* March 24, 2017, 64.

[254] Vaughn, Michael G., Christopher P. Salas-Wright, Matt DeLisi, and Brandy R. Maynard, "The Immigrant Paradox: Immigrants are Less Antisocial than Native-born Americans," *Social Psychiatry and Psychiatric Epidemiology* 49(7), 2014:1129-1137, *available* at https://link.springer.com/article/10.1007%2Fs00127-013-0799-3, *accessed* March 24, 2017.

[255] Bersani, Bianca E., Thomas A. Loughran, and Alex R. Piquero, "Comparing Patterns and Predictors of Immigrant Offending among a Sample of Adjudicated Youth," *Journal of Youth and Adolescence* 43(11), 2014: 1914-1933, *available* at https://link.springer.com/article/10.1007%2Fs10964-013-0045-z, *accessed* March 24, 2017.

[256] The Annual Survey of Jails gathered data from a nationally representative sample of local jails on jail inmate populations, jail capacity, and related information. U.S. Census Bureau, "Annual Survey of Jails," *available at* [illegible], *accessed* March 22, 2017.

only a small share of the total inmate population in the majority of the jail detention facilities between 2010 and 2014 (**Table VIII.1**). Over all, immigrants account for less than 5 percent of the total inmate population in the surveyed jail detention facilities.[257] Around 50 percent of these immigrant inmates were likely to be detained due to immigration violation, as oppose to violation of other criminal codes.[258]

Table VIII.1
The Proportion of Non-Citizens within Jail Detention Facilities
2010 – 2014

Proportion of Non-Citizens in Facility	Count of Facilities within Proportion Range	Average ICE Inmates as Proportion of Total in These Facilities
1% or Less	2,577	0.29%
1% to 10%	1,334	1.53%
10% to 25%	314	6.83%
25% to 50%	118	22.32%
50% to 75%	34	39.78%
75% to 100%	32	6.12%

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[257] The total inmate population is 2,986,670. Among them, 148,752 of the total inmate population are non-citizens.

[258] Among the 148,752 non-citizen inmates, 73,741 of them have U.S. Immigration and Customs Enforcement flag.

Source: U.S. Census Bureau, "Annual Survey of Jails," *available at* [illegible], *accessed* March 22, 2017.

- These statistics are consistent with the results of a study by U.S. Government Accountability Office (GAO). Among their study sample, GAO found that "the criminal aliens had an average of 7 arrests, 65 percent were arrested at least once for an immigration offense[.]"[259]
- "[Ruled] out deportation as an important mechanical factor for the observed differences in institutionalization" because "[f]irst, the Anti-Terrorism and Effective Death Penalty Act increased the list of criminal acts for which noncitizens must be detained." And "[s]econd, the speed of removal of deportable aliens may critically affect immigrants' institutionalization rates." [260]
- "[T]he process of migration selects individuals who either have lower criminal propensities or

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[259] U.S. Government Accountability Office, "Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs," *GAO-11-187*, March 2011: 1-64, *available at* [illegible], *accessed* March 24, 2017, 19.

[260] Butcher, Kristin F., and Anne Morrison Piehl. "Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation," *National Bureau of Economic Research Working Paper No. 13229*, July 2007: 1-28, *available at* [illegible], *accessed* March 24, 2017.

are more responsive to deterrent effects than the average native. Immigrants who were already in the country reduced their relative institutionalization probability over the decades; and the newly arrived immigrants in the 1980s and 1990s seem to be particularly unlikely to be involved in criminal activity, consistent with increasingly positive selection along this dimension." [261]

C. Immigration and Terrorism

i. The Link between Immigration and Terrorism is Unclear

There are fewer studies on the relationship between immigration and terrorism.

- "[I]migrants stemming from terrorist-prone states moving to another country are indeed an important vehicle through which terrorism does diffuse. Having said that, the findings also highlight that migrant inflows per se actually lead to a lower level of terrorist attacks."[262]

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[261] Butcher, Kristin F., and Anne Morrison Piehl. "Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation," *National Bureau of Economic Research Working Paper No. 13229*, July 2007: 1-28, *available at* [illegible], *accessed* March 24, 2017.

[262] Bove, Vincenzo, and Tobias Böhmelt, "Does Immigration Induce Terrorism?" *The Journal of Politics* 78(2), 2016: 572-588, *available at* http://www.journals.uchicago.edu/doi/pdfplus/10.1086/684679, *accessed* March 24, 2017.

- "[M]ore migration generally (i.e., when immigration is not necessarily linked to terrorism in the migrants' countries of origin) into a country is associated with a lower level of terrorist attacks."[263]

ii. Immigrants Are No More Likely to Be Radicalized than Native-Born Individuals

Empirical analyses suggest that immigrants are no more likely to be criminals or to be radicalized than native-born individuals.

- The Profiles of Individual Radicalization in the United States dataset ("PIRUS")[264] shows that, among the 1,473 crimes reported in this dataset, immigrants account for less than 15%

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[263] Bove, Vincenzo, and Tobias Böhmelt, "Does Immigration Induce Terrorism?" *The Journal of Politics* 78(2), 2016: 572-588, ***available at*** http://www.journals.uchicago.edu/doi/pdfplus/10.1086/684679, *accessed* March 24, 2017.

[264] Profiles of Individual Radicalization in the United States dataset ("PIRUS") includes a sample of individuals espousing Islamist, far right, far left, or single issue ideologies who have radicalized within the United States to the point of committing ideologically motivated illegal violent or non-violent acts, joining a designated terrorist organization, or associating with an extremist organization whose leader(s) has/have been indicted of an ideologically motivated violent offense. START, "Profiles of Individual Radicalization in the United States (PIRUS)," ***available at*** http://www.start.umd.edu/publication/profiles-individual- [illegible], ***accessed*** March 22, 2017.

of the individuals that were radicalized in the United States (**Table VIII.2**).

Table VIII.2
Residency Status of Individuals Radicalized in the United States
1948 – 2004[265]

Residency Status	Number of Individuals	Percent of Total
Born Citizen	1,253	85.06%
Naturalized Citizen	61	4.14%
Legal Permanent Resident	41	2.78%
Temporary Resident	9	0.61%
Undocumented Resident	9	0.61%
Unknown	100	6.79%
Total	**1,473**	**100.00%**

Source: START, "Profiles of Individual Radicalization in the United States (PIRUS)," *available at* http://www.start.umd.edu/publication/profiles-

[illegible], *accessed* March 22, 2017.

- Individuals from the six countries in the Executive Order account for only 2.3% of the individuals that were radicalized in the United States (**Table VIII.3**).

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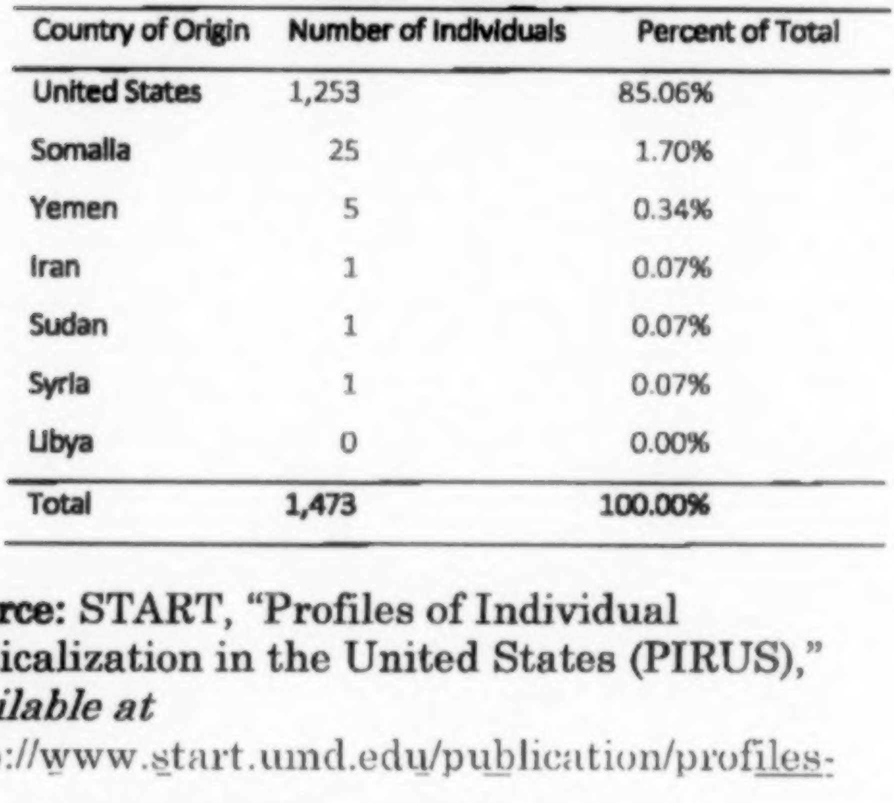
[265] The years during which the 1,473 individuals' activity first came to public attention. START, "Profiles of Individual Radicalization in the United States (PIRUS)," *available at* http://www.start.umd.edu/publication/profiles-individual-

[illegible]

March 22, 2017.

Table VIII.3
Number of Individuals Radicalized in the United States by Country of Origin
U.S. and the Six Countries in the Executive Order
1948 – 2004[266]



Country of Origin	Number of Individuals	Percent of Total
United States	1,253	85.06%
Somalia	25	1.70%
Yemen	5	0.34%
Iran	1	0.07%
Sudan	1	0.07%
Syria	1	0.07%
Libya	0	0.00%
Total	**1,473**	**100.00%**

Source: START, "Profiles of Individual Radicalization in the United States (PIRUS)," *available at* http://www.start.umd.edu/publication/profiles- [illegible], *accessed* March 22, 2017.

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[266] The years during which the 1,473 individuals' activity first came to public attention. START, "Profiles of Individual Radicalization in the United States (PIRUS)," *available at* [illegible], *accessed* March 22, 2017.

D. Immigrants Are More Likely to Be the Victims of Hate Crime

The academic research and empirical evidences shows that immigrants do not increase crime rates, nor are they more likely to be criminals or to be radicalized. If anything, the prevalence of negative public belief regarding immigrants, especially those with Islamic belief, makes these immigrants more likely to be the victims of hate crime.

- "Muslim immigrants living in states with the sharpest increase in hate crimes also exhibit: greater chances of marrying within their own ethnic group; higher fertility; lower female labour force participation; and lower English proficiency."[267]
- "Literature prior to 9/11 indicated that the most frequently targeted minority groups that were victims of hate crimes were Blacks, followed by Jews ... Following 9/11, however, there was a significant rise in the number of attacks on individuals who were or perceived to be of Arab and/or Muslim descent."[268]

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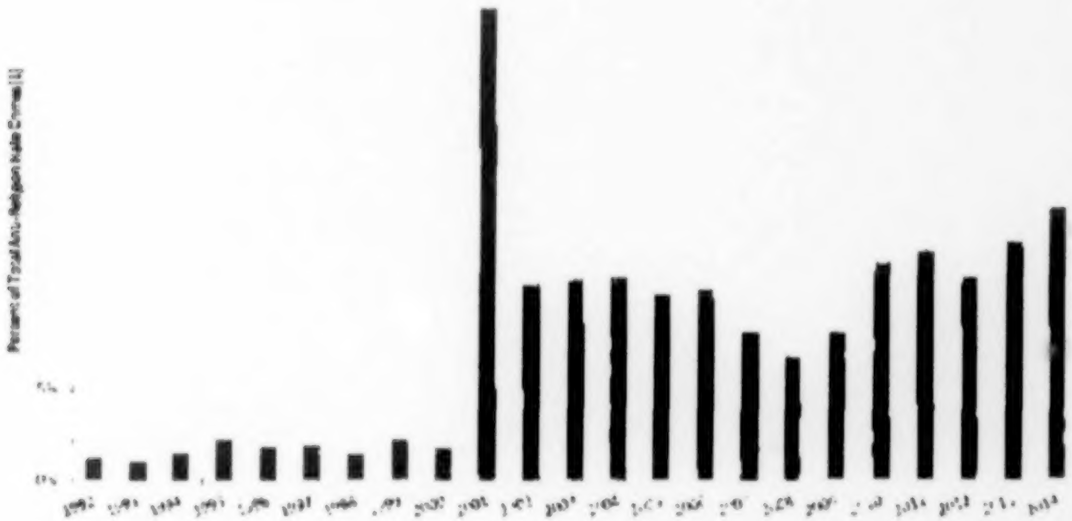
[267] Gould, Eric D., and Esteban F. Klor. "The Long-run Effect of 9/11: Terrorism, Backlash, and the Assimilation of Muslim Immigrants in the West." *The Economic Journal* 126.597 (2016): 2064-2114, *available at* [illegible] ej.pdf, *accessed* April 3, 2017.

[268] Nelson, Matthew S., et al. "Hate Crimes in Post-9/11 Pennsylvania: Case Characteristics and Police Response Revisited." *Race and Justice* 6.4 (2016): 303-324, *available at* https://www.researchgate.net/profile/Alese_Wooditch/publication/284723886_Hate_Crimes_in_Post-911_Pennsylvania_Case_Characteristics_and_Police_Response_Revisited/links/5657e2ee08ae4988a7b5831b.pdf, *accessed* April 3, 2017.

- "[C]ounties experiencing increases in general hate crime, far-right hate crime, and non-right-wing terrorism see associated increases in far-right hate crime, far-right terrorism, and far-right hate crime, respectively."[269]
- **Figure VIII.3** and **Figure VIII.4** show the percentage of total reported hate crimes that have been committed against Muslims in the United States and in Massachusetts, respectively. There was a noticeable spike after the 9/11 terrorist attacks.

Figure VIII.3
Reported Hate Crimes against Muslims in the United States
1992 - 2014



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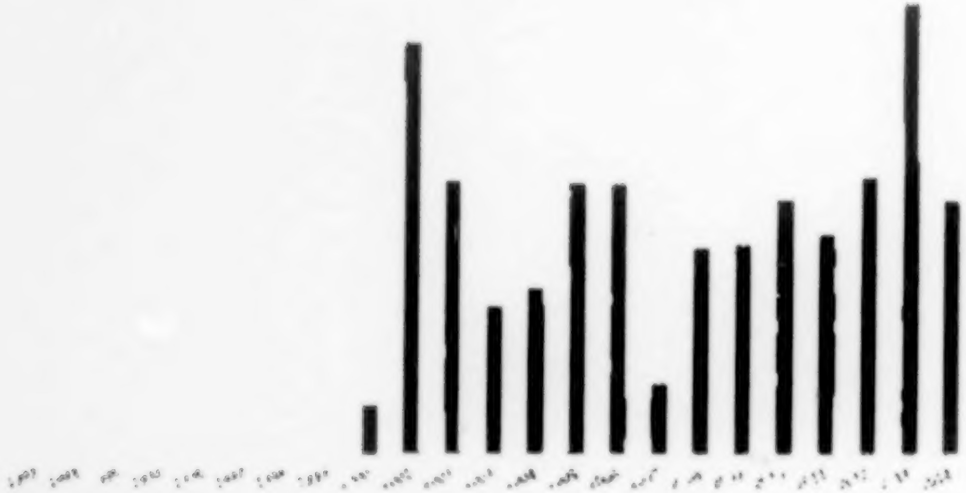
[269] Mills, Colleen E., Joshua D. Freilich, and Steven M. Chermak. "Extreme Hatred Revisiting the Hate Crime and Terrorism Relationship to Determine Whether They Are 'Close Cousins' or 'Distant Relatives'." *Crime & Delinquency* (2015): 0011128715620626, *available at* [illegible] 626, *accessed* April 3, 2017.

Note: Anti-religous hate crimes include Anti-Jewish, Anti-Catholic, Anti-Protestant, Anti-Other Religions, Anti-Multi Religious, and Anti-Athiesm/Agnosticism incidents.

Source: U.S. Department of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Program Data: Hate Crime Data," 2014, Inter-university Consortium for Political and Social Research (distributor), ***available at*** http://doi.org/10.3886/ICPSR36397.v1, ***accessed*** March 1, 2017.

Figure VIII.4
Reported Hate Crimes against Muslims in the Massachusetts
1992 - 2014



Notes:

[1] Anti-religious hate crimes include Anti-Jewish, Anti-Catholic, Anti-Protestant, Anti-Other Religions, Anti-Multi Religious, and Anti-Atheism/Agnosticism incidents.

[2] There were no reported hate crimes in Massachusetts before 2000.

Source: U.S. Department of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Program Data: Hate Crime Data," 2014, Inter-university Consortium for Political and Social Research (distributor), ***available at*** http://doi.org/10.3886/ICPSR[illegible].v1, ***accessed*** March 1, 2017.

IX. RHETORIC AND HATE INCIDENTS AGAINST IMMIGRANTS

KEY TAKEAWAYS

- In the ten days following the election, Southern Poverty Law Center ("SPLC") recorded 867 hate incidents, not including instances of online harassment. The number of incidents recorded peaked on November 9th, the day following the election.
- SPLC reports that between 2015 and 2016, the number of hate groups in the U.S. increased from 892 to 917, an increase of 3 percent. In the same one year period, the number of anti-Muslim hate groups increased 197 percent - from 34 groups in 2015 to 101 in 2016.
- According to SPLC's online survey of over 10,000 K-12 educators:
    - "Nine out of 10 educators who responded have seen a negative impact on students' mood and behavior following the election; most of them worry about the continuing impact for the remainder of the school year."

  - "Eight in 10 report heightened anxiety on the part of marginalized students, including immigrants, Muslims, African Americans and LGBT students."
  - "Four in 10 have heard derogatory language directed at students of color, Muslims, immigrants and people based on gender or sexual orientation."
  - "Over 2,500 educators described specific incidents of bigotry and harassment that can be directly traced to election rhetoric. These incidents include graffiti (including swastikas), assaults on students and teachers, property damage, fights and threats of violence.
- An analysis of President Trump's tweets indicates that the number of tweets mentioning "Muslims," "Mexicans," and "immigrants" increased by 219 percent from 2014 to 2015, when he entered the presidential race.

A. Hate Crimes and Bias Incidents

- In the ten days following the election, Southern Poverty Law Center ("SPLC") recorded 867 hate incidents, not including instances of online harassment.[270] The number of incidents recorded

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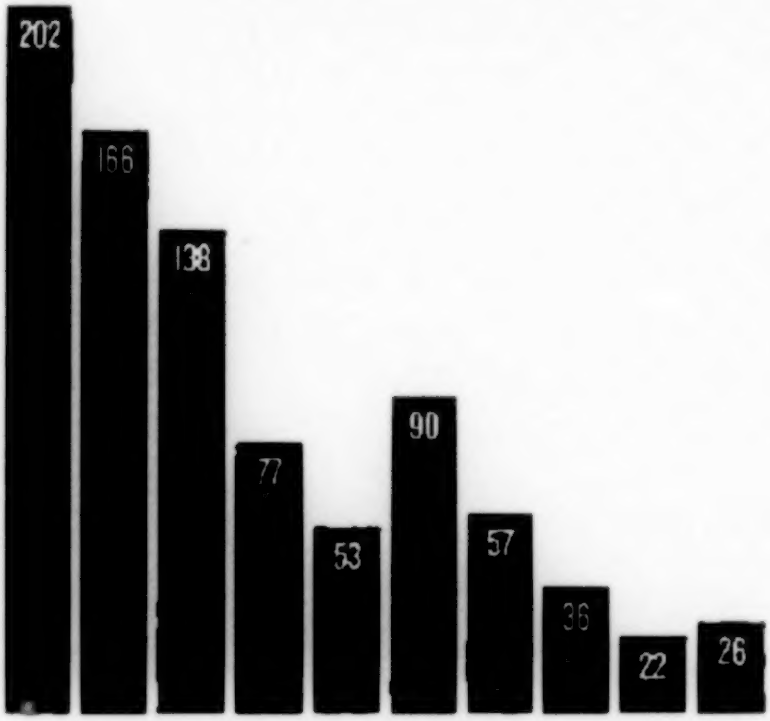
[270] Amend, Alex, Troy Dabney, Cassie Miller, Angbeen Saleem, Will Tucker, and Alexandra Werner-Winslow, "Ten Days

peaked on November 9th, the day following the election.[271]

After: Harassment and Intimidation in the Aftermath of the Election," Southern Poverty Law Center, November 29, 2016, *available at* [illegible] election, *accessed* March 27, 2017.

[271] Amend, Alex, Troy Dabney, Cassie Miller, Angbeen Saleem, Will Tucker, and Alexandra Werner-Winslow, "Ten Days After: Harassment and Intimidation in the Aftermath of the Election," Southern Poverty Law Center, November 29, 2016, *available* [illegible] election, *accessed* March 27, 2017.

Figure IX.1[272]
Number of Reported Hate Incidents in the Ten Days Following Election Day



- In the first 34 days following the election, SPLC counted 1,094 hate instances.[273]

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[272] Amend, Alex, Troy Dabney, Cassie Miller, Angbeen Saleem, Will Tucker, and Alexandra Werner-Winslow, "Ten Days After: Harassment and Intimidation in the Aftermath of the Election," Southern Poverty Law Center, November 29, 2016, ***available at*** https://www.splcenter.org/20161129/ten election, ***accessed*** March 27, 2017.

[273] "Update: 1,094 Bias-Related Incidents in the Months Following the Election," Southern Poverty Law Center, December 16, 2016, ***available at*** https://www.splcenter.org/hatewatch/2016/12/16/update-

- According to the SPLC, 37% of these 1,094 incidents "directly referenced either President-elect Trump, his campaign slogans, or his infamous remarks about sexual assault."[274]
- According to the SPLC, "there was even evidence that Trump's attacks on Muslims during 2015 — when he called for a ban on Muslims entering the U.S., suggested a registry for Muslims already here, and proposed to surveil mosques — had had an effect that early. The FBI reported that anti-Muslim hate crimes went up by 67% in 2015, while other categories rose only slightly."[275]

B. Organized Hate Groups

- The SPLC also noted a spike in the distribution of "white nationalist (47 reports), KKK (7), and anti-Semitic posters and fliers [following the election]. In total, [the SPLC] captured 57 separate incidents with a spike coming on the first Monday following the election."[276]

[illegible], *accessed* March 27, 2017.

[274] "Update: 1,094 Bias-Related Incidents in the Months Following the Election," Southern Poverty Law Center, December 16, 2016, *available at* [illegible], *accessed* March 27, 2017.

[275] Potok, Mark, "The Trump Effect," Intelligence Report, February 15, 2017, *available at* http [illegible], *accessed* March 27, 2017.

[276] "Update: 1,094 Bias-Related Incidents in the Months Following the Election," Southern Poverty Law Center,

- SPLC reports that between 2015 and 2016, the number of hate groups in the U.S. increased from 892 to 917, an increase of 3 percent.[277] In the same one year period, the number of anti-Muslim hate groups increased 197 percent - from 34 groups in 2015 to 101 in 2016.[278]

A study from FiveThirtyEight found a strong overlap between commenters who post in the r/The_Donald subreddit and other "hate-based" discussion pages. Using latent semantic analysis, an approach that measures the co-occurrence of commentators across several Reddit discussion pages, researchers found that when they filtered out commenters from the r/The_Donald who also commented on the most popular general political discussion pages (e.g., r/politics), the remaining commenter pool was most similar to a number of "hate-based" discussion pages with such as characteristics as "virulently misogynistic" and "open and enthusiastic racism." No hate-based discussion pages resulted from

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December 16, 2016, *available at* [illegible], *accessed* March 27, 2017.

[277] Potok, Mark, "The Year in Hate and Extremism," Intelligence Report, February 15, 2017, *available at* [illegible], *accessed* March 27, 2017.

[278] Potok, Mark, "The Year in Hate and Extremism," Intelligence Report, February 15, 2017, *available at* [illegible], *accessed* March 27, 2017.

performing the same process for discussion pages dedicated to other presidential candidates.[279]

C. Anxiety in K-12 Education

- The SPLC also conducted an online survey with K-12 educators. More than 10,000 individuals responded, with the following results:[280]
  - "Nine out of 10 educators who responded have seen a negative impact on students' mood and behavior following the election; most of them worry about the continuing impact for the remainder of the school year."[281]
  - "Eight in 10 report heightened anxiety on the part of marginalized students,

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[279] Martin, Trevor, "Dissecting Trump's Most Rabid Online Following," FiveThirtyEight, March 23, 2017, *available at* [illegible] rabid-online-following/, *accessed* March 28, 2017.

[280] Costello, Maureen B., "The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools," Southern Poverty Law Center, Richard Cohen and Adrienne van der Valk, eds., November 28, 2017, *available at* [illegible], *accessed* March 27, 2017.

[281] Costello, Maureen B., "The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools," Southern Poverty Law Center, Richard Cohen and Adrienne van der Valk, eds., November 28, 2017, *available at* [illegible], *accessed* March 27, 2017.

including immigrants, Muslims, African Americans and LGBT students."[282]

- "Four in 10 have heard derogatory language directed at students of color, Muslims, immigrants and people based on gender or sexual orientation."[283]

"Over 2,500 educators described specific incidents of bigotry and harassment that can be directly traced to election rhetoric. These incidents include graffiti (including swastikas), assaults on students and teachers, property damage, fights and threats of violence."[284]

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[282] Costello, Maureen B., "The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools," Southern Poverty Law Center, Richard Cohen and Adrienne van der Valk, eds., November 28, 2017, *available at* [illegible], *accessed* March 27, 2017.

[283] Costello, Maureen B., "The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools," Southern Poverty Law Center, Richard Cohen and Adrienne van der Valk, eds., November 28, 2017, *available at* [illegible]tions-schools, *accessed* March 27, 2017.

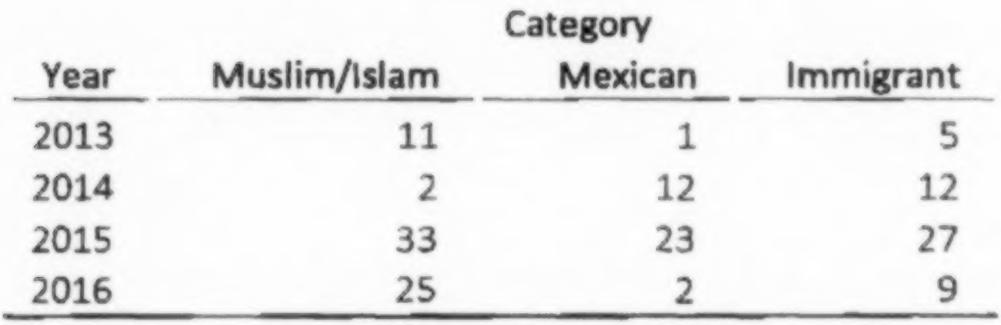
[284] Costello, Maureen B., "The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools," Southern Poverty Law Center, Richard Cohen and Adrienne van der Valk, eds., November 28, 2017, *available at* [illegible] 2016-presidential-el[illegible] nations-schools, *accessed* March 27, 2017.

D. President Trump's Twitter Rhetoric

- An analysis of President Trump's tweets indicates that the number of tweets mentioning "Muslims," "Mexicans," and "immigrants" increased by 219 percent from 2014 to 2015, when he entered the presidential race.
- In addition, as shown in **Table IX.1**, President Trump's tweets have focused more consistently on "Muslims" and "Islam" compared to "Mexican" and "Immigrant".

Table IX.1

Number of Trump's Tweets over Time



	Category		
Year	Muslim/Islam	Mexican	Immigrant
2013	11	1	5
2014	2	12	12
2015	33	23	27
2016	25	2	9

Note: Categories are identified by appearance of the key word. **Source:** "Trump Twitter Archive", *available at* http://www.trumptwitterarchive.com, *accessed* March 27, 2017.

- Using a time-series sentiment analysis of President Trump's tweets, it is possible to identify spikes in negativity and positivity.[285]

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[285] Textual data processed using the tidytext package in R. See: Silge J and Robinson D (2016). "tidytext: Text Mining

We are able to measure sentiment through the AFINN dataset, which lists English words rated from negative five to positive five by Finn Årup Nielsen from the Technical University of Denmark. (*see* **Figure VIII.2**).[286]

- As shown in **Figure VIII.2**, the average sentiment of Trump's tweets is negative in the month of March and the period of June to August of 2016. This negative sentiment corresponds with two of the three peaks in retweets over that year, with about 2.5 million retweets in March and about 4 million retweets in July. This pattern indicates the particularly pervasive nature of President Trump's negative rhetoric.

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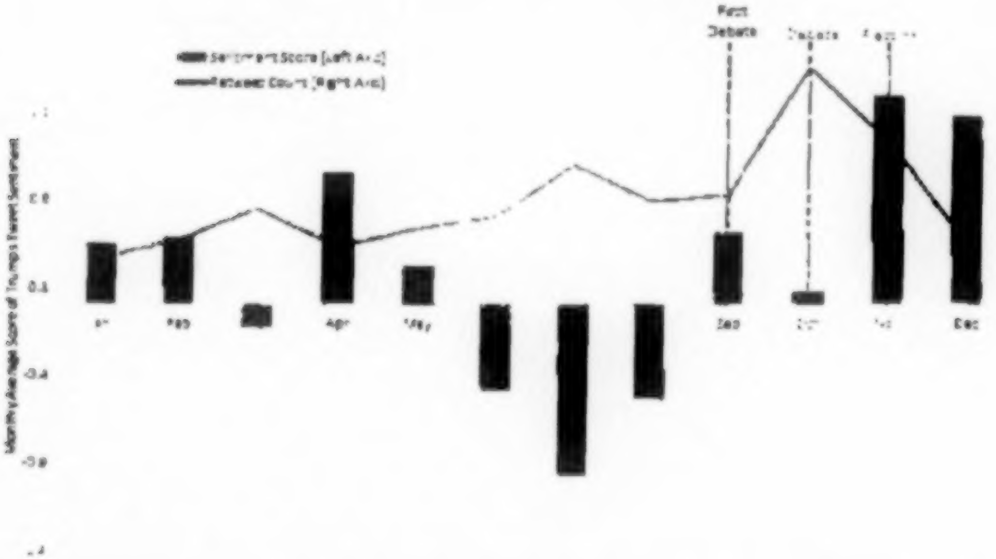
and Analysis Using Tidy Data Principles in R," ***available at*** [illegible], ***accessed*** April 14, 2017.

[286] For example, see Nielsen, Finn Årup, "A new ANEW: Evaluation of a word list for sentiment analysis in microblogs", Proceedings of the ESWC2011 Workshop on 'Making Sense of Microposts': Big things come in small packages 718 in CEUR Workshop Proceedings: 93-98. May, 2011, ***available at*** http://arxiv.org/abs/1103.2903, ***accessed*** April 14, 2017.

Figure IX.2
Analysis of Sentiment and Retweet of Trump's Tweets
Jan 01, 2016 – Dec 31, 2016



Note: Sentiment score of each month is calculated as the average of the sentiment score of each tweet posted by President Trump in that month.

Sources:
[1] "Trump Twitter Archive," available at http://www.trumptwitterarchive.com, accessed March 27, 2017.
[2] Nielsen, Finn Årup, "A new ANEW: Evaluation of a word list for sentiment analysis in microblogs", Proceedings of the ESWC2011 Workshop on 'Making Sense of Microposts': Big things come in small packages 718 in CEUR Workshop Proceedings: 93-98. May, 201, *available at* [illegible] *accessed* April 14, 2017.

X. PROFILE OF IMMIGRANTS FROM THE SIX COUNTRIES AND OTHER SELECTED COUNTRIES

KEY TAKEAWAYS

- Many of the immigrants from the countries affected by the Executive Order are well educated, have high income, and become U.S. citizens at a higher rate than the other foreign-born naturalized citizens.
- Immigrants cluster in certain areas when moving to the U.S.
- The share of a state's population that is foreign born is positively correlated with the share of people in the state that believe that immigrants strengthen American society.
- Immigrants from countries affected by the Executive Order spend more time on education and less time on housework and other work relative to a population of native-born U.S. population with similar characteristics.
- Immigrants from Mexico, Guatemala, and El Salvador spend more time on housework and less time on personal activities such as leisure and sports relative to a population of native-born U.S. population with similar characteristics.

A. Overview of Immigrants from the Six Countries

- **Individuals Affected:** The Executive Order issued by President Trump on March 6, 2017, suspends entry into the U.S. for 90 days of people without current visas from the following countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Additionally, the order bans refugees for 120 days and caps refugees at 50,000 people for 2017.[287]
    - In 2015, green cards were issued to 31,258 individuals from these countries.[288]
    - In 2015, there were nearly 65,000 temporary visits from the six targeted countries, including: recreational or business travelers (49,412); students enrolled on non-immigrant visas (12,205); temporary

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[287] Executive Order, "Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States," March 6, 2017, The White House Office of the Press Secretary, *available at* [illegible], *accessed* April 7, 2017.

[288] Singhvi, Anjali, and Alicia Parlapiano, "Trump's New Immigration Ban: Who is Barred and Who is Not," *The New York Times*, March 6, 2017, *available at* [illegible], *accessed* March 9, 2017.

    workers on non-immigrant work visas and their families (883); Fiancés of U.S. citizens (669).

    - Individuals from these countries comprised 3.6 percent of new legal permanent residents from 1999 to 2015.
    - The ban does not apply to U.S. citizens, dual nationals with a passport from a country not affected by the ban, diplomats, or government officials.

- **Education:** Many immigrants from these six countries are well educated.[289]
    - Approximately 90 percent of those people from Iran and Libya have at least a high school education.[290]

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[289] Fessenden, Ford, et al., "Immigrants From Banned Nations: Educated, Mostly Citizens and Found in Every State," *The New York Times*, January 30, 2017, *available at* [illegible], *accessed* February 17, 2017.

[290] Fessenden, Ford, et al., "Immigrants From Banned Nations: Educated, Mostly Citizens and Found in Every State," *The New York Times*, January 30, 2017, *available at* https://www.nytimes.com/interactive/2017/01/30/us/politics/[illegible], *accessed* February 17, 2017.

  - Many immigrants from these countries have earned bachelor's degrees and advanced degrees: Iran (54 percent), Libya (59 percent), Sudan (36 percent), and Syria (37 percent). The U.S. national average is approximately 30 percent.

- **Income:** Immigrants from Iran have a median income greater than the U.S. median income ($54,645); the median income of immigrants from Syria and Libya is similar to the U.S. median. Immigrants from Yemen, Sudan, and Somalia earn a median income significantly below the U.S. median.
- **Arrival Dates:** Nearly half of Iranian immigrants arrived in the U.S. before 1990, while about two thirds of Somalis and Sudanese have moved to the U.S. since 2000.
- **Citizenship:** The majority of immigrants from these six countries become U.S. citizens at a rate above the overall percentage of foreign-born naturalized citizens (46.6 percent).

i. Department of Homeland Security Data – Summary Tables

a. Countries Covered Under Current Travel Ban

Table X.1
Persons Obtaining Lawful Permanent Resident Status by Country of Birth Fiscal Years 2006 to 2015

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* [illegible], *accessed* February 21, 2017.

Table X.2
Persons Obtaining Lawful Permanent Resident Status by Broad Class of Admission and Country of Birth Fiscal Year 2015

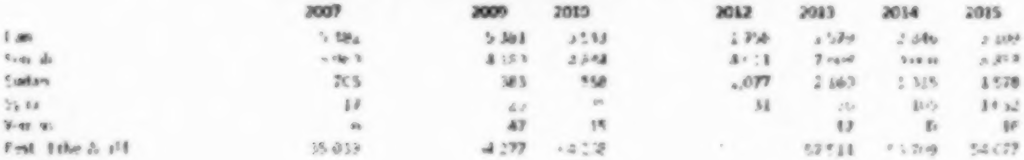
Notes:

[1] D indicates that data are withheld by the DHS to limit disclosure.

[2] A dash represents zero.

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.3
Refugee Arrivals by Country of Nationality
Fiscal Years 2006 to 2015



	2007	2009	2010	2012	2013	2014	2015
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sudan	705	385	558	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	17	[illegible]	[illegible]	31	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	47	15		13	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]

Notes:

[1] Libya did not appear in the DHS dataset.

[2] D indicates that data are withheld by the DHS to limit disclosure.

[3] A dash represents zero.

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.4
Individuals Granted Asylum Affirmatively by Country of Nationality
Fiscal Years 2006 to 2015

Country of nationality	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015

Notes:

[1] D indicates that data are withheld by the DHS to limit disclosure.

[2] A dash represents zero.

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.5

Individuals Granted Asylum Defensively by Country of Nationality

Fiscal Years 2006 to 2015

		2011	2012
Iran	71		
Somalia	[illegible]		
Sudan	10		
Syria	11		
Yemen	8		
Rest of the World	[illegible]		

Note: Libya did not appear in the DHS dataset.

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.6

Persons Naturalized by Country of Birth

Fiscal Years 2006 to 2015

Country of birth	2008	2010	2011	2012	2013	2014	2015
Iran	11 813	9 337	9 286	9 627	11 623	9 620	10 344
Libya	198	173	199	197	206	228	193
Somalia	4 626	5 728	7 971	9 286	6 875	4 097	3 691
Sudan	2 843	2 865	2 481	2 291	1 924	1 452	1 740
Syria	2 105	2 029	1 981	1 814	2 196	1 832	2 004
Yemen	1 080	1 156	1 173	1,452	1 158	1 160	1 254
Rest of the World	1 024 634	599 579	671 011	737 769	755 750	614 997	711 003

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.7
Aliens Apprehended by Country of Nationality
Fiscal Years 2006 to 2015

		2012	2015
[illegible]		301	354
[illegible]		23	[illegible]
[illegible]		316	131
[illegible]		253	81
[illegible]		57	57
[illegible]		[illegible]	71
[illegible]	042 943	670 309	461 872

Notes:

[1] Beginning in 2008, data include administrative arrests conducted by ICE ERO.

[2] Beginning in 2009, data include administrative arrests conducted by ICE ERO and administrative arrests conducted under the 287(g) program.

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

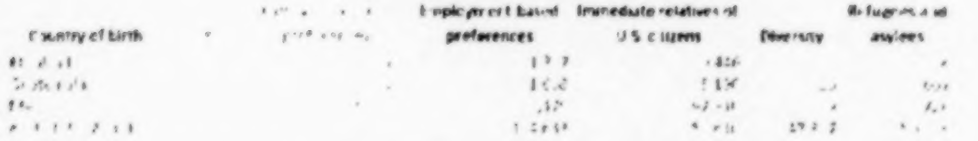
b. Mexico, Guatemala, and El Salvador

Table X.8
Persons Obtaining Lawful Permanent Resident Status by Country of Birth
Fiscal Years 2006 to 2015

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
[illegible]	31 782	21 127	19 659	[illegible]	[illegible]	18 667	16 256	18 260	19 273	[illegible]
[illegible]	24 133	17 908	16 182	12 187	10 467	11 092	[illegible]	[illegible]	[illegible]	11 773
[illegible]	173 749	148 640	189 989	164 920	139 120	143 446	146 406	135 028	134 052	158 619
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

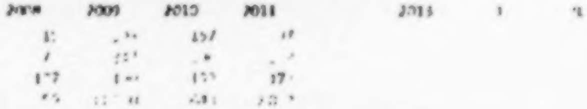
Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.9
Persons Obtaining Lawful Permanent Resident Status by Broad Class of Admission and Country of Birth
Fiscal Year 2015



Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration [illegible], *accessed* February 21, 2017.

Table X.10
Individuals Granted Asylum Affirmatively by Country of Nationality
Fiscal Years 2006 to 2015

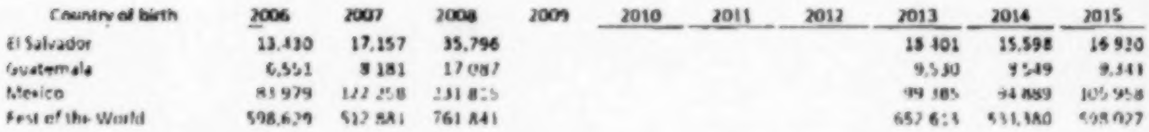


Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.11
Individuals Granted Asylum Defensively by Country of Nationality
Fiscal Years 2006 to 2015

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available* *at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Table X.12
Persons Naturalized by Country of Birth
Fiscal Years 2006 to 2015



Country of birth	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
El Salvador	13,430	17,157	35,796					18,401	15,598	16,930
Guatemala	6,551	8,181	17,087					9,530	9,549	9,341
Mexico	83,979	122,258	231,815					99,385	94,889	105,958
Rest of the World	598,629	512,881	761,841					652,613	531,380	598,027

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

Notes:

[1] Beginning in 2008, data include administrative arrests conducted by ICE ERO.
[2] Beginning in 2009, data include administrative arrests conducted by ICE ERO and administrative arrests conducted under the 287(g) program.

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," *available at* https://www.dhs.gov/immigration-statistics/yearbook/2015, *accessed* February 21, 2017.

B. Where Immigrants Move

i. Summary

- Immigrants cluster in certain geographical areas when moving to the U.S.
- Data from the American Community Survey are used to examine immigrant populations by state. Immigrants from Iran, Syria, Yemen, Sudan, Somalia, and Libya combined make up the largest share of the state immigrant population Minnesota (6.6 percent), followed by Michigan and West Virginia.
- Immigrants from Mexico, El Salvador, and Guatemala combined make up the largest share of the state immigrant population in New Mexico (68.9 percent), followed by Texas and Arizona.

ii. Literature Review

- A review of the literature on immigration patterns finds:
    - New immigrants to the United States are concentrated in the top Standard Metropolitan Statistical Areas (SMSAs). Three quarters of new immigrants are concentrated in the top 25 SMSAs.[291]

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[291] Bartel, Ann P., "Where Do the New U.S. Immigrants Live?" *Journal of Labor Economics* 7(4), pp. 371-391, *available at* [illegible], *accessed* February 25, 2017, p. 389.

- More educated immigrants are more likely to live outside of these top 25 SMSAs, are more likely to move after initial settlement in the United States, and are generally less geographically concentrated.[292]
- Seventy-four percent of the U.S. immigrant population is clustered in six states: California, New York, Texas, Florida, New Jersey, and Illinois.[293]
- Immigrants are more geographically concentrated when English is not the first language spoken at home.[294]

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[292] Bartel, Ann P., "Where Do the New U.S. Immigrants Live?" *Journal of Labor Economics* 7(4), pp. 371-391, *available at* [illegible], *accessed* February 25, 2017, p. 390.

[293] Chiswick, Barry R. and Paul W. Miller, "Where Immigrants Settle in the United States," *The Institute for the Study of Labor*, August 2004, pp. 1-24 , *available at* [illegible] w.Abstract?dp_id=1231, *accessed* February 25, 2017, p. 3.

[294] Chiswick, Barry R and Paul W. Miller, "Where Immigrants Settle in the United States," *The Institute for the Study of Labor*, August 2004, pp. 1-24 , *available at* [illegible] w.Abstract?dp_id=1231, *accessed* February 25, 2017, p. 12.

  - Ninety-four percent of the foreign born in the U.S. live in urban areas.[295]

iii. Descriptive Tables from the American Community Survey

- Data from the American Community Survey are used to summarize where immigrants move from the six countries included in the executive order, as well as immigrants from Mexico and Central America. The analysis counts all foreign-born residents of the United States as immigrants, even if they have since been naturalized.

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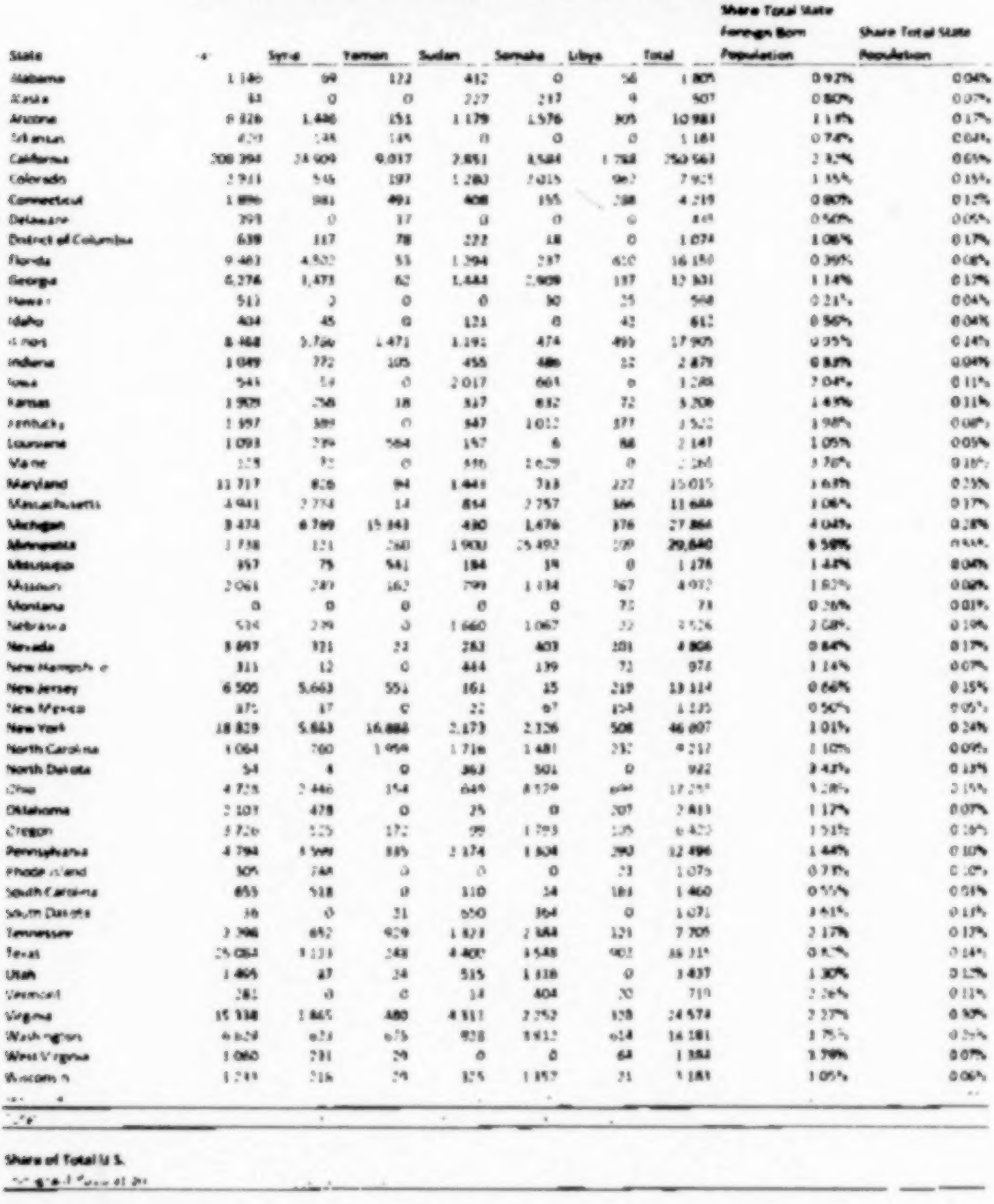
[295] Chiswick, Barry R and Paul W. Miller, "Where Immigrants Settle in the United States," *The Institute for the Study of Labor*, August 2004, pp. 1-24, *available at* http:// [illegible] wAbstract?dp_id=1231, *accessed* February 25, 2017, p. 6.

Table X.14
Number of Immigrants by State
Executive Order Six Countries



State	[illegible]	Syria	Yemen	Sudan	Somalia	Libya	Total	Share Total State Foreign Born Population	Share Total State Population
Alabama	1 146	69	122	412	0	56	1 805	0.92%	0.04%
Alaska	43	0	0	227	217	9	507	0.80%	0.07%
Arizona	6 326	1,446	151	1 179	1,576	305	10 981	1.19%	0.17%
Arkansas	888	148	145	0	0	0	1 181	0.74%	0.04%
California	208 394	24 909	9,017	2,851	3,584	1 768	250 563	2.82%	0.65%
Colorado	2 911	545	197	1 280	2 015	962	7 925	1.35%	0.15%
Connecticut	1 896	981	491	408	155	288	4 219	0.80%	0.12%
Delaware	393	0	17	0	0	0	410	0.50%	0.05%
District of Columbia	638	117	78	222	18	0	1 073	1.06%	0.17%
Florida	9 461	4,522	55	1,294	237	610	16 179	0.39%	0.08%
Georgia	6,276	1,471	62	1,444	2,909	137	12 301	1.14%	0.13%
Hawaii	511	2	0	0	30	25	568	0.21%	0.04%
Idaho	404	45	0	121	0	42	612	0.56%	0.04%
Illinois	8 468	3,766	1,471	3,191	474	493	17 905	0.95%	0.14%
Indiana	1 049	772	105	455	486	22	2 879	0.83%	0.04%
Iowa	545	54	0	2 017	665	0	3 281	2.04%	0.11%
Kansas	1 709	258	18	317	832	72	3 206	1.49%	0.11%
Kentucky	1 397	389	0	947	1 012	377	4 122	1.98%	0.08%
Louisiana	1 093	239	564	157	6	88	2 147	1.05%	0.05%
Maine	125	72	0	330	1 629	0	2 156	3.70%	0.16%
Maryland	11 717	826	94	1,443	713	222	15 015	1.63%	0.25%
Massachusetts	4 941	2 774	14	854	2 757	366	11 686	1.06%	0.17%
Michigan	3 474	6 769	15 343	430	1,476	376	27 864	4.04%	0.28%
Minnesota	1 738	121	260	1 900	25 492	109	29,640	6.58%	0.55%
Mississippi	357	75	541	184	19	0	1 176	1.44%	0.04%
Missouri	2 061	287	162	799	1 134	567	4 972	1.82%	0.08%
Montana	0	0	0	0	0	71	71	0.36%	0.01%
Nebraska	534	239	0	1 660	1 067	22	3 526	2.68%	0.19%
Nevada	3 697	321	22	283	403	101	4 806	0.84%	0.17%
New Hampshire	311	12	0	444	139	72	978	1.14%	0.07%
New Jersey	6 505	5,663	554	161	15	219	13 114	0.66%	0.15%
New Mexico	875	17	0	22	67	154	1 135	0.50%	0.05%
New York	18 829	5,863	16,888	2,173	2,326	508	46 607	1.01%	0.24%
North Carolina	4 064	700	1 959	1 716	1 481	252	9 217	1.10%	0.09%
North Dakota	54	4	0	363	501	0	922	3.43%	0.13%
Ohio	4 728	2 446	154	649	8 579	690	17 251	3.28%	0.15%
Oklahoma	2 101	478	0	25	0	207	2 811	1.17%	0.07%
Oregon	3 726	525	172	99	1 793	105	6 420	1.51%	0.16%
Pennsylvania	4 794	5 599	885	2 174	1 604	290	12 496	1.44%	0.10%
Rhode Island	305	748	0	0	0	23	1 075	0.73%	0.10%
South Carolina	655	518	0	110	34	183	1 460	0.55%	0.03%
South Dakota	36	0	21	650	364	0	1 071	3.61%	0.13%
Tennessee	2 398	652	929	1 823	2 884	121	7 705	2.17%	0.12%
Texas	25 084	3 133	248	4 400	3 548	902	36 315	0.82%	0.14%
Utah	1 495	87	24	515	1 318	0	3 437	1.30%	0.12%
Vermont	281	0	0	14	404	20	719	2.26%	0.11%
Virginia	15 338	1 865	480	4 311	2 252	328	24 574	2.27%	0.30%
Washington	6 629	623	675	928	5 612	614	15 081	1.75%	0.25%
West Virginia	1 080	211	29	0	0	64	1 384	3.79%	0.07%
Wisconsin	1 243	216	29	325	1 357	21	3 183	1.05%	0.06%
[illegible]									
[illegible]									

Share of Total U.S.
[illegible]

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at*

p. doi.org/10. , *accessed* April 4, 2017.

- Immigrants from Iran make up 0.9 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.15

Top Ten States of Immigrant Residence, Iran

State	Number of Immigrants	Share Total Iranian Immigrant Population	Iranian Immigrants per 100,000 (Total State Population)
California		54.56%	542
Texas		6.57%	95
New York		4.93%	96
Virginia		4.02%	186
Maryland		3.07%	198
Florida		2.48%	48
Illinois		2.22%	66
Washington		1.74%	95
New Jersey		1.70%	73
Georgia		1.64%	63

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* p://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

- Immigrants from Libya make up 0.03 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.16
Top Ten States of Immigrant Residence, Libya

State	Number of Immigrants	Share Total Libyan Immigrant Population	Libyan Immigrants per 100,000 (Total State Population)

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** http:[illegible] ***accessed*** April 4, 2017.

- Immigrants from Somalia make up 0.2 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.17

Top Ten States of Immigrant Residence, Somalia

State	Number of Immigrants	Share Total Somali Immigrant Population	Somali Immigrants per 100,000 (Total State Population)
	25,492	29.76%	
	8,812	10.29%	
	8,579	10.02%	
	3,584	4.18%	
	3,548	4.14%	
	2,909	3.40%	
	2,757	3.22%	
	2,384	2.78%	
	2,326	2.72%	
	2,252	2.63%	

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* [illegible], *accessed* April 4, 2017.

- Immigrants from Sudan make up 0.09 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.18
Top Ten States of Immigrant Residence, Sudan

Number of Immigrants	Share Total Sudanese Immigrant Population	Sudanese Immigrants per 100,000 (Total State Population)
4,400	10.46%	17
4,311	10.25%	52
2,851	6.78%	7
2,174	5.17%	17
2,173	5.16%	11
2,017	4.79%	65
1,900	4.52%	35
1,716	4.08%	17
1,660	3.95%	89
1,443	3.43%	24

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

- Immigrants from Syria make up 0.2 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.19
Top Ten States of Immigrant Residence, Syria

State		Number of Immigrants	Share Total Syrian Immigrant Population	Syrian Immigrants per 100,000 (Total State Population)
				65
				68
				30
				45
				64
				23
				16
				28
				41
				21

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** http://doi.org/10.18128/D010.V6.0, ***accessed*** April 4, 2017.

- Immigrants from Yemen make up 0.12 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.20
Top Ten States of Immigrant Residence, Yemen

State	Number of Immigrants	Share Total Yemeni Immigrant Population	Yemeni Immigrants per 100,000 (Total State Population)
New York	16,888	32.80%	86
Michigan	15,343	29.80%	155
California	9,037	17.55%	24
North Carolina	1,959	3.81%	20
Illinois	1,471	2.86%	11
Tennessee	929	1.80%	14
Washington	675	1.31%	10
New Jersey	551	1.07%	6
Louisiana	564	1.10%	12
Virginia	480	0.93%	6

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* http://doi.org/10.18128/D010.V6.0, *accessed* April 4, 2017.

- Mexico and Central America are also major sources of immigrants to the United States.

Table X.21
Number of Immigrants by State
El Salvador, Guatemala, and Mexico

State	El Salvador	Guatemala	Mexico	Total	Share Total State Foreign Born Population	Share Total State Population
Alabama	**2.667**	**10.724**	**58.034**	**71.425**		**1.48%**
Alaska	[illegible]	265	3,231	[illegible]	[illegible]	0.55%
Arizona	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	8.35%
Arkansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
California	425,870	276,293	[illegible]	[illegible]	46.68%	[illegible]
Colorado	6,648	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	5,744	[illegible]	28,524	[illegible]	9.65%	1.43%
Delaware	[illegible]	2,914	[illegible]	[illegible]	[illegible]	[illegible]
District of Columbia	[illegible]	[illegible]	2,984	[illegible]	[illegible]	[illegible]
Florida	45,327	[illegible]	262,403	[illegible]	[illegible]	2.05%
Georgia	[illegible]	[illegible]	379,146	[illegible]	[illegible]	[illegible]
Hawaii	[illegible]	[illegible]	5,543	[illegible]	[illegible]	0.43%
Idaho	646	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Illinois	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Indiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Iowa	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Kansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	3.35%
Kentucky	[illegible]	[illegible]	[illegible]	31,180	[illegible]	0.94%
Louisiana	5,022	5,367	31,909	[illegible]	[illegible]	0.91%
Maine	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Maryland	[illegible]	[illegible]	[illegible]	[illegible]	19.14%	[illegible]
Massachusetts	45,251	[illegible]	[illegible]	[illegible]	[illegible]	1.19%
Michigan	2,526	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Minnesota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1.59%
Mississippi	926	2,794	[illegible]	[illegible]	[illegible]	[illegible]
Missouri	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Montana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nebraska	[illegible]	6,538	[illegible]	[illegible]	[illegible]	[illegible]
Nevada	[illegible]	[illegible]	[illegible]	269,220	[illegible]	[illegible]
New Hampshire	838	2,005	[illegible]	5,026	[illegible]	[illegible]
New Jersey	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	2.43%
New Mexico	[illegible]	[illegible]	[illegible]	**157,606**	**62.91%**	[illegible]
New York	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Carolina	[illegible]	[illegible]	[illegible]	310,266	[illegible]	[illegible]
North Dakota	18	89	1,893	2,019	[illegible]	0.28%
Ohio	1,913	[illegible]	[illegible]	61,950	[illegible]	0.55%
Oklahoma	[illegible]	[illegible]	[illegible]	[illegible]	43.52%	[illegible]
Oregon	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pennsylvania	7,016	11,784	55,032	[illegible]	[illegible]	0.58%
Rhode Island	2,582	15,982	[illegible]	[illegible]	[illegible]	2.08%
South Carolina	[illegible]	7,145	[illegible]	[illegible]	10.91%	[illegible]
South Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tennessee	[illegible]	18,317	53,038	[illegible]	12.38%	[illegible]
Texas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utah	[illegible]	4,436	[illegible]	[illegible]	44.48%	4.04%
Vermont	[illegible]	851	[illegible]	[illegible]	[illegible]	[illegible]
Virginia	96,981	25,515	60,835	[illegible]	16.94%	[illegible]
Washington	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West Virginia	[illegible]	403	2,959	3,465	[illegible]	0.19%
Wisconsin	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wyoming	[illegible]	[illegible]	8,901	9,483	[illegible]	[illegible]
Total	[illegible]	[illegible]	[illegible]			

Share of Total U.S. Immigrant Population	[illegible]

Note: Tables for Central America include immigrant populations from El Salvador and Guatemala. These two countries make up the largest proportion of Central American immigrants coming to the U.S. (Migration Policy Institute, "Central American Immigrants in the United States," September 25, 2015, ***available at*** http://www.migrationpolicy.org/article/central-american-immigrants-united-states, *accessed* March 4, 2017.)

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** http://doi.org/10.181[illegible]V6.0, ***accessed*** April 4, 2017.

- Immigrants from Mexico make up 26.8 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.22
Top Ten States of Immigrant Residence, Mexico

State	Number of Immigrants	Share Total Mexican Immigrant Population	Mexican Immigrants per 100,000 (Total State Population)

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* , *accessed* April 4, 2017.

- Immigrants from El Salvador make up 2.9 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.23
Top Ten States of Immigrant Residence, El Salvador

State	Number of Immigrants	Share Total El Salvadoran Immigrant Population	El Salvadoran Immigrants per 100,000 (Total State Population)

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), ***available at*** [illegible], *accessed* April 4, 2017.

- Immigrants from Guatemala make up 2.1 percent of the total U.S. immigrant population, and reside predominately in the following ten states:

Table X.24
Top Ten States of Immigrant Residence, Guatemala

State	Number of Immigrants	Share Total Guatemalan Immigrant Population	Guatemalan Immigrants per 100,000 (Total State Population)
California		30.10%	
Florida		8.35%	
Texas		7.40%	
New York		7.11%	
New Jersey		4.80%	
Maryland		3.60%	
Massachusetts		3.24%	
Georgia		3.19%	
Virginia		2.78%	
Illinois		2.75%	

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* [illegible], *accessed* April 4, 2017.

iv. Public Opinion on Immigration

- A relationship can be seen between where immigrants move, and public opinion on immigration in those states. The foreign born share of a total state population is positively correlated with the share of state respondents that believe that immigrants strengthen American society.

Figure X.1
Foreign Born Share of Total State Population vs. Public Opinion on Immigration

Sources:
[1] U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* [illegible], *accessed* April 4, 2017.
[2] PRRI, 2015 Atlas of American Values, *available at* [illegible], *accessed* March 15, 2017.

C. How Immigrants Spend Their Time

i. Summary

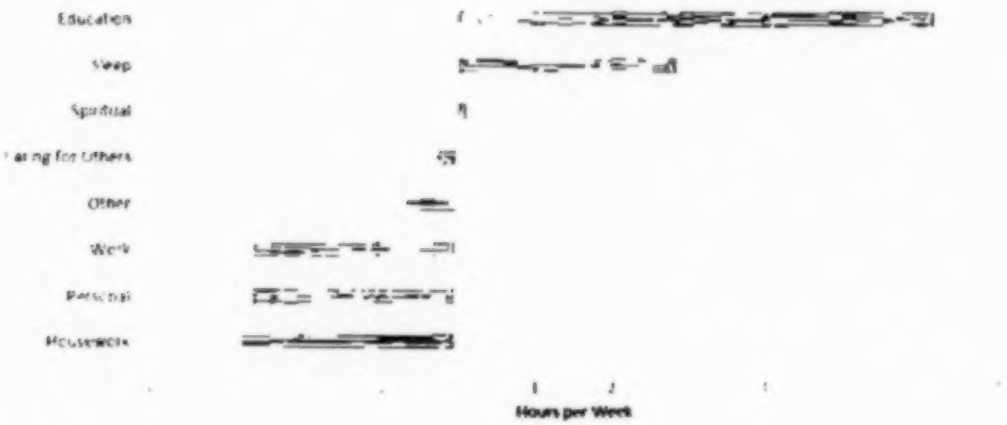
- Immigrants from Iran, Syria, Yemen, Sudan, Somalia, and Libya spend more time on education and less time on housework and other work relative to a population of native-born U.S. population with similar characteristics. Among working adults age 25 and older, immigrants from these countries work more and continue to invest more time in education compared to the native-born U.S. population.

- Immigrants from Mexico, Guatemala, and El Salvador spend more time on housework and sleep and less time on personal activities such as leisure and sports relative to the native-born U.S. population.

ii. Descriptive Statistics from the 2003-2015 Current Population Survey and American Time Use Survey

- Compared to a U.S. population of similar age, sex, and states of residence, immigrants from the six countries spend approximately four hours more per week on education. They spend approximately 0.13 hours (or 7 minutes) more per week on average on spiritual activities.

Figure X.2
Hours per Week Spent on Activity Comparison of U.S. Immigrants from One of the Six Predominantly Muslim Countries Identified in the Executive Order to U.S.-Born Population



Notes:

[1] U.S.-born observations are weighted such that the age, sex, and state of residence composition of the U.S.-born population is equal to the immigrant population.

[2] Results are based on 283 U.S. immigrants born in Iran, Libya, Somalia, Sudan, Syria, or Yemen; and 1,271 U.S.-born respondents.

Source: U.S. Department of Labor, Bureau of Labor Statistics, American Time Use Survey, 2003-2015, ***available at*** http://www.bls.gov/tus/data.htm, *accessed* March 15, 2017.

- Among working age adults age 25 and older, immigrants from the six countries invest more time in education, work, and sleep compared to U.S.-born population of similar age, sex, and state residence. They spend approximately 4.0 hours less per week on personal activities such as leisure and sports.

Figure X.3
Hours per Week Spent on Activity
Comparison of U.S. Immigrants from One of the Six Predominantly Muslim Countries Identified in the Executive Order to U.S.-Born Population
Working Population At Least 25 Years Old

Notes:

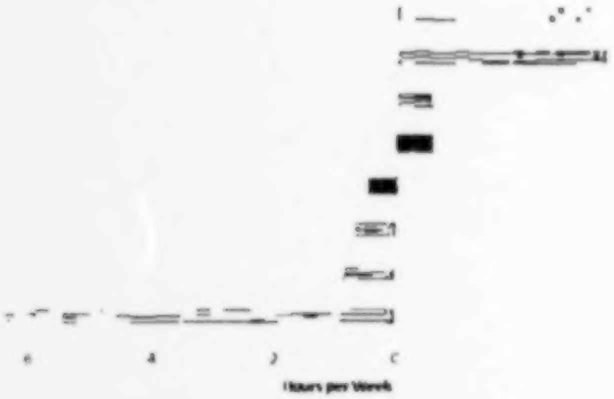
[1] U.S.-born observations are weighted such that the age, sex, and state of residence composition of the U.S.-born population is equal to the immigrant population.

[2] Results are based on 168 U.S. immigrants born in Iran, Libya, Somalia, Sudan, Syria, or Yemen; and 637 U.S.-born respondents.

Source: U.S. Department of Labor, Bureau of Labor Statistics, American Time Use Survey, 2003-2015, ***available at*** http://www.bls.gov/tus/home.htm, *accessed* March 15, 2017.

- Compared to a U.S. population of similar age, sex, and states of residence, immigrants from Mexico, Guatemala, and El Salvador spend approximately 3.4 hours more per week on housework. They sleep more than three hours more than the U.S. population, but they spend 6.6 fewer hours on personal activities.

Figure X.4
Hours per Week Spent on Activity
Comparison of U.S. Immigrants from Mexico, Guatemala, or El Salvador to U.S.-Born Population



Notes:

[1] U.S.-born observations are weighted such that the age, sex, and state of residence composition of the U.S.-born population is equal to the immigrant population.

[2] Results are based on 7,326 U.S. immigrants born in Mexico, Guatemala, or El Salvador; and 19,243 U.S.-born respondents.

Source: U.S. Department of Labor, Bureau of Labor Statistics, American Time Use Survey, 2003-2015, ***available at*** https://www.bls.gov/tus/data.htm, *accessed* March 15, 2017.

D. Appendix: Statistics Pertaining to Iraq

Appendix Table X.1
Select Immigration Statistics for Iraq: 2006 to 2015

Statistic	2011	2013
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," ***available at*** https://www.dhs.gov/immigration-[illegible], ***accessed*** February 21, 2017.

Appendix Table X.2
Iraqi Born Persons: Obtaining Lawful Permanent Resident Status by Broad Class of Admission: Fiscal Year 2015

Family-sponsored	Employment-based	Immediate relatives of U.S. citizens	Refugees and

Source: U.S. Department of Homeland Security, "Yearbook of Immigration Statistics, 2015," ***available at*** https://www.dhs.gov/immigration-[illegible], ***accessed*** February 21, 2017.

Appendix Table X.3
Top Ten States of Immigrant Residence, Iraq

State	Number of Immigrants	Share Total Iraqi Immigrant Population	Iraqi Immigrants per 100,000 (Total State Population)
		26.40%	
		22.29%	
		6.49%	
		6.37%	
		4.54%	
		3.70%	
		2.30%	
		2.25%	
		2.19%	
		2.01%	

Source: U.S. Census Bureau, American Community Survey, 2010-2015 Pooled Data, S. Ruggles, K. Genadek, R. Goeken, J. Grover, and M. Sobek, Integrated Public Use Microdata Series: Version 6.0, University of Minnesota (distributor), *available at* [illegible], *accessed* April 4, 2017.

XI. THE IMPACT OF THE TRAVEL BAN ON THE U.S. TRAVEL INDUSTRY

KEY TAKEAWAYS

- Flight bookings from January 28 to February 4, 2017, have dropped by 6.5 percent overall in comparison to the previous year:
    - Bookings from the at-issue countries have dropped by 80 percent. Bookings from the Middle East have dropped by 23 percent.
- Flight searches for the United States dropped by 17 percent on January 27, 2017, compared to Obama's final two weeks in office.
    - The decline in demand is not limited to the targeted countries. Demand in 103 of 122 countries studied showed a decline in searches for flights to the United States, with China being one of the largest drops (over 40 percent).
- Spending by tourists (including general spending and airfare) from the Middle East has increased from 2.4 to 3.5 percent of total tourist spending in the United States from 2010 to 2015.
- The tourism trade balance with the Middle East increased from a deficit of $1.1 billion in 2010 to a surplus of $2.4 billion in 2015.

A. Changes in Travel Demand Before/After Travel Ban

i. Flight Search Data

- **About Hopper:**
    - Hopper is a mobile application that uses predictive analysis of flight price data to provide users with deals on flights.[296]
    - Hopper published two reports analyzing flight searches following the travel ban – one on February 7, 2017, and an updated analysis on February 23, 2017. They compared average daily flight search queries for flights to the US originating in 122 countries during the period starting three weeks prior to President Trump's inauguration (January 20, 2017) to February 1, 2017.
    - Hopper collected the data – the results of consumer airfare searches – for the study from several unnamed "Global Distribution System partners."[297]

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[296] "About," Hopper, *available at* http://www.hopper.com/corp/about.html, *accessed* April 6, 2017.

[297] Surry, Patrick, "Initial Effects of the Travel Ban on International Travel to the US," Hopper Research, February 21, 2017, *available at* http://www.hopper.com/research/initial-effects-of-the- [illegible], *accessed* April 14, 2017; Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research,

- **Initial Findings:**
    - **"Flight search demand from international origins to the US has dropped 17% overall since Trump's inauguration and implementation of the travel ban, compared to the final weeks of the Obama presidency."[298]**
    - **"Flight search demand to the US has fallen in 94 of 122 origin countries."[299]**
    - **"Weekly search demand for flights to the US is down 33% from countries included in the travel ban."[300]**

February 23, 2017, ***available at*** [illegible] [illegible], *accessed* April 3, 2017.

[298] Surry, Patrick, "Initial Effects of the Travel Ban on International Travel to the US," Hopper Research, February 7, 2017, ***available at*** http://www.hopper.com/research/initial-effects-of-the-[illegible], ***accessed*** February 21, 2017.

[299] Surry, Patrick, "Initial Effects of the Travel Ban on International Travel to the US," Hopper Research, February 7, 2017, ***available at*** http://www.hopper.com/research/initial-effects-of-the-[illegible], ***accessed*** April 21, 2017.

[300] Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, ***available at*** http://www.hopper.com/research/initial-effects-of-the-[illegible], *accessed* April 3, 2017.

Table XI.1
Percentage Change in Flight Search Demand from Pre-Inauguration to Announcement and Implementation of Travel Ban

	Before Inauguration: 12/29 – 1/18	After Travel Ban Announced: 1/26 – 2/1	Percentage Change
Banned[301]	371,590	247,616	-33%
Skipped[302]	1,542,859	1,244,192	-19%
Other	61,552,322	50,898,344	-17%

Source: Surry, Patrick, "Initial Effects of the Travel Ban on International Travel to the US," Hopper Research, February 7, 2017, *available at*

[illegible]

accessed February 21, 2017.

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[301] Banned countries are Libya, Syria, Iraq, Iran, Somalia, and Sudan. Hopper has no data for Yemen.

[302] "Skipped" countries are selected Muslim-majority countries not affected by the travel ban: Turkey, Egypt, Saudi Arabia, Indonesia, Qatar, UAE, and Azerbaijan.

- **Updated Findings:**
    - "Flight search demand was weakest on the day the travel ban was announced [on January 27]; down 17% compared to Obama's final two weeks in office." [303]
    - Demand recovered slightly after the Executive Order was successfully challenged in multiple US District courts, but as of February 23 was still well below expected levels.[304]
    - The decline in demand is not limited to the targeted countries. In fact, according to Hopper, 103 of 122 countries studied showed a decline in searches for flights to the United States, with China being one of the largest drops (over 40%).[305]

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[303] Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, *available at* [illegible], *accessed* April 3, 2017.

[304] Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, *available at* [illegible], *accessed* April 3, 2017.

[305] Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, *available at* [illegible]

  - The average decline in demand was about 22%.[306]
  - Hopper also provides analysis comparing the change from expected daily demand in 2016 and 2017 respectively. That analysis shows that daily flight demand has remained below expectations for most of the days since the travel ban was announced. Notably, the change from expected daily demand was typically positive during the same period in 2016.[307]

[illegible], *accessed* April 3, 2017.

[306] Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, ***available at*** http://www.hopper.com/research/initial-effects-of-the-[illegible], *accessed* April 3, 2017.

[307] Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, ***available at*** http://www.hopper.com/research/initial-effects-of-the-[illegible], *accessed* April 3, 2017.

Table XI.2
Top 6 Countries with Largest Negative Percentage Change in Flight Search Demand

	12/29 – 1/18	1/26 – 2/21	Percentage Change
China	20,194,053	11,981,180	-40.7%
Bahrain	99,747	59,218	-40.6%
Sudan	13,312	7,962	-40.2%
Iraq	128,424	76,847	-40.2%
Uganda	30,313	18,766	-38.1%
Saudi Arabia	331,335	206,082	-37.8%

Source: Surry, Patrick, "UPDATE - Effects of the Travel Ban on International Travel to the US," Hopper Research, February 23, 2017, ***available at*** https://docs.google.com/spreadsheets/d/15EgtC4szaY32KUkpVRNOokkjntqmkE65ASaLylEX8PE/pubhtml, *accessed* April 3, 2017.

- **Kayak Data:**
  - o Kayak is a technology company that searches travel websites, such as online travel agencies and airline, hotel, and

car rental websites, to consolidate information for travelers.[308]

- Analyses of daily searches on Kayak for flights to the U.S. between equivalent periods in 2017 and 2016 show a decline in demand of 8.5% from the seven at-issue countries in the period immediately following the first executive order.
- Daily searches from Muslim-majority not at-issue countries declined by 15.3% in the same period.

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[308] "About Kayak," Kayak, *available at* [illegible], accessed May 17, 2017.

Table XI.3

Percentage Change in Daily Average Searches for Flights to the U.S. from 2016 to 2017

	1/1 - 1/19	1/27 - 4/6
Seven At-Issue Countries	22.6%	-8.5%
Other Muslim-Majority Countries	5.3%	-15.3%
Europe	-3.6%	-2.1%
Russia	-5.4%	-14.6%

Notes:

[1] The table shows the percentage change in the daily average searches for flights to the U.S. between equivalent periods in 2017 and 2016.

[2] President Trump got sworn in on January 20, 2017.

[3] President Trump signed the first travel ban executive order on January 27, 2017.

[4] The Seven At-Issue Countries are Libya, Syria, Iraq, Iran, Somalia, Sudan, and Yemen.

[5] The Other Muslim-Majority Countries are Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Indonesia, Jordan, Kuwait, Lebanon, Oman, Pakistan, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

Source: Kayak Travel Data from January 1 - April 6, 2016; January 1 - April 6, 2017.

ii. Flight Booking Data

- **About ForwardKeys:**
    - ForwardKeys is a market research firm focused on the global travel industry.[309]
    - ForwardKeys analyzes millions of travel booking transactions each day and publishes both historical data and predictions of future travel patterns.[310]
    - In February 2017, ForwardKeys published a study on the impact of the travel ban on air travel to the US based on data collected from over 200,000 travel agencies globally.[311]
    - The study was covered by Reuters, who cited it as evidence that travel ban negatively impacted global demand for travel to the US.[312]

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[309] "ForwardKeys – Who We Are," ForwardKeys, *available at* [illegible], *accessed* April 6, 2017.

[310] "ForwardKeys – Who We Are," ForwardKeys, *available at* [illegible], *accessed* April 6, 2017.

[311] "Trump Travel Ban Impact on Air Travels to the U.S.A.," ForwardKeys, February 8, 2017, *available at* [illegible], *accessed* April 3, 2017.

[312] "Trump Travel Restrictions Hit Demand for Visits to U.S.: Study," Reuters, February 7, 2017, *available at*

- **Initial Reports (as of February 4, 2017):**
    - Between January 28, 2017, and February 4, 2017 (the week following the initial travel ban) air travel bookings from Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen decreased 80% compared to the same period in 2016.[313]
    - The effect is not limited to the countries listed in the ban: net international air travel bookings were down 6.5% compared to the same period in 2016 while cancellations were up 12%.[314]
    - As of February 4, airfare already booked for the following three months was 14.7% lower among the seven countries affected by the ban compared to the prior year.[315]

[illegible] travel-idUSKBN15N007, *accessed* April 6, 2017.

[313] "Trump Travel Ban Impact on Air Travels to the U.S.A.," ForwardKeys, February 8, 2017, *available at* [illegible], *accessed* April 3, 2017.

[314] "Trump Travel Ban Impact on Air Travels to the U.S.A.," ForwardKeys, February 8, 2017, *available at* [illegible], *accessed* April 3, 2017.

[315] "Trump Travel Ban Impact on Air Travels to the U.S.A.," ForwardKeys, February 8, 2017, *available at* [illegible]

  - Year-over-year booking trends from every region of the world were lower on February 4 than they had been on January 27.[316]

- **Additional Reports as of February 25, 2017:**
  - Following the suspension of the ban on February 4, 2017, flight bookings increased modestly, but decreased again following the announcement on February 17 that a new ban would be enacted. In the period from February 5 to February 16, total international flight bookings to the US were 2.2% *higher* than they had been during the same period in 2016. However, following the announcement of the new ban, flight bookings from February 17 to February 25 were 4.0% lower compared to the same period in 2016.[317]

[illegible] travels-to-the-USA.html, *accessed* April 3, 2017.

[316] "Trump Travel Ban Impact on Air Travels to the U.S.A.," ForwardKeys, February 8, 2017, *available at* [illegible] travels-to-the-USA.html, *accessed* April 3, 2017.

[317] "Middle East Meltdown: US Travel to Islamic countries collapses in wake of Trump Ban," ForwardKeys, March 6, 2017, *available at* [illegible], *accessed* April 3, 2017.

Table XI.4
Percentage Change in Flight Bookings to the United States by Origin Region from 2016 to 2017

	1/28 – 2/4	2/5 – 2/16	2/17 – 2/25
Seven At-Issue Countries	-80%	-1.1%	-4.0%
Middle East & Africa	-23%	-9.7%	-5.7%
Asia Pacific	-14%	3.9%	2.6%
Europe	-7.5%	-0.2%	-3.8%
The Americas	2.3%	6.4%	-0.9%
Overall	-6.5%	2.2%	-4.0%

Source: "Middle East Meltdown: US Travel to Islamic countries collapses in wake of Trump Ban," ForwardKeys, March 6, 2017, ***available at*** https://forwardkeys.com/revenue- [illegible] html, *accessed* April 3, 2017.

iii. Additional Sources

- Emirates Airlines reported that booking rates to the United States fell 35% following the travel ban. Emirates noticed an "instantaneous" effect and had not fully recovered as of March 9, 2016. However, the chief executive of Qatar Airways stated that his airline had not experienced a decline in demand for flights to the US.[318]

- The Global Business Travel Association (GBTA) polled its members and found that 30% of companies expected to reduce overall business travel.[319]
- According to the GBTA, for every 1% of annual decrease in business travel spending, the United States loses roughly 71,000 jobs, $5 billion in GDP, $3 billion in wages, and $1.2 billion in tax revenue.[320]
- According to the GBTA, in the week following the travel ban, general uncertainty among travelers caused a loss

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[318] "Emirates Airlines Concerned About Latest U.S. Travel Order," CNBC, March 9, 2017, *available at* [illegible], *accessed* March 12, 2017.

[319] "Press Release: President Trump's Travel Ban Creates Likely Short- and Long-term Travel Disruption," GBTA, February 2, 2017, *available at* http://www.gbta.org/PressRelea[illegible] *accessed* April 6, 2017.

[320] McCormick, Mike, "The Ruling on the Travel Ban: A Lose-Lose Scenario for Business Travel and the Economy," GBTA, February 9, 2017, *available at* http://blog.gbta.org/2017/02/09[illegible] economy/, *accessed* March 2, 2017.

of approximately $185 million in travel bookings.[321]

- Cheapflights.com saw international searches for flights to the United States drop following the ban.[322]
    - From January 27 to January 29, search volume decreased 38% compared to the previous weekend.
    - From February 10 to February 14, search volume decreased 16% compared to the average volume in January.
- Swedish search engine Flygresor.se noted a 47% decline in searches for flights to the United States following the enactment of the travel ban, compared to the same period in 2016.[323]

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[321] McCormick, Mike, "The Ruling on the Travel Ban: A Lose-Lose Scenario for Business Travel and the Economy," GBTA, February 9, 2017, *available at* http://blog.gbta [illegible] economy/, *accessed* March 2, 2017.

[322] Vora, Shivani, "After Travel Ban, Interest in Trips to U.S. Declines," New York Times, February 20, 2017, *available at* [illegible] .html, *accessed* March 12, 2017.

[323] Vora, Shivani, "After Travel Ban, Interest in Trips to U.S. Declines," New York Times, February 20, 2017, *available at* [illegible] ing-interest-trips-to-united-states.html, *accessed* March 12, 2017.

- A study by Tourism Economics (a research firm associated with Oxford Economics) found that Los Angeles County alone could potentially lose 800,000 international visitors in the next three years due to the travel ban, which would amount to approximately $736 million in tourism-related spending. [324]

B. Statistics Regarding Travel and Tourism by Immigrants

i. Air Travel

- In 2015, 1,343,347 people visited the United States from the Middle East, representing a 9.6 percent increase from 2014. [325]

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[324] Vora, Shivani, "After Travel Ban, Interest in Trips to U.S. Declines," New York Times, February 20, 2017, *available at* [illegible], *accessed* March 12, 2017.

[325] "I-94 Program: 2015 Monthly Arrivals Data," Table C – Section 2, U.S. Department of Commerce, ITA, National Travel and Tourism Office, June 2016, *available at* [illegible], *accessed* April 14, 2017.

Table XI.5
Middle East Arrivals to the United States over Time

	2010	2011	2012	2013	2014	2015
Number of Arrivals	735,549	810,688	925,398	1,058,122	1,225,500	1,343,347
As % of Overseas Arrivals	2.8%	2.9%	3.1%	3.3%	3.5%	3.5%
% Change from Prior Year	10.5%	10.2%	14.1%	14.3%	15.8%	9.6%

Source: Monthly Arrivals to the United States, U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* htt[illegible]

ii. Tourism Revenue

- **Tourism from the Middle East represented $8.67 billion of "exports" in 2015. The United States had a positive $2.36 billion net balance of trade with the Middle East for travel and tourism.** [326]

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[326] "U.S. Travel and Tourism Balance of Trade: Middle East," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* ht[illegible], *accessed* March 9, 2017.

- **The 1.3 million tourists who visited the US from the Middle East in 2015 spent $8.1 billion during their visits (excluding airfare), amounting to roughly $6,200 per person.[327]**
    - **This is about $3,000 more, per capita, than tourists from Europe, who spent approximately $3,200 per person (excluding airfare) in the United States in 2015.[328]**
- **While the greatest number of tourists come from North America (Canada, Mexico), these tourists spend much less per visit than people who come from farther.[329]**

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[327] **"2015 Market Profile: Middle East," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible], *accessed* April 6, 2017.**

[328] **"2015 Market Profile: Europe," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible], *accessed* April 6, 2017.**

[329] **Martin, Hugo, "Foreign Tourists' Spending in U.S. Rises to New Record," LA Times, February 22, 2013, *available at* [illegible], *accessed* April 6, 2017.**

- **European tourists, while still a large percentage of total arrivals, are decreasing in number.[330]**
- **Spending by tourists (including general spending and airfare) from the Middle East has increased from 2.4% to 3.5% of total tourist spending in the United States from 2010 to 2015.[331]**
    - **Excluding airfare, the percentage increased 2.7% to 4.0%. Middle Eastern visitors' spending on airfare has decreased from 1.5% to 1.4% of total foreign spending on airfare to the United States.[332]**

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[330] **Martin, Hugo, "Foreign Tourists' Spending in U.S. Rises to New Record," LA Times, February 22, 2013, *available at* [illegible] foreign-tourists-20130222, *accessed* April 6, 2017.**

[331] **"U.S. Travel and Tourism Balance of Trade: Middle East," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible] middle-east.pdf, *accessed* March 9, 2017; "U.S. Travel and Tourism Balance of Trade: All Countries (Total)," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible], *accessed* April 21, 2017.**

[332] **"U.S. Travel and Tourism Balance of Trade: Middle East," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible]**

Table XI.6
Middle East Travel and Tourism Receipts as a Percentage of All International Travel and Tourism Receipts

	2010	2011	2012	2013	2014	2015
Middle East Receipts: Overall	2.4%	2.7%	2.6%	3.2%	3.5%	3.5%
Middle East Receipts: Excluding Airfare	2.7%	3.0%	2.9%	3.6%	4.0%	4.0%
Middle East Receipts: Airfare	1.5%	1.5%	1.5%	1.5%	1.4%	1.4%

Sources:

[1] "U.S. Travel and Tourism Balance of Trade: Middle East," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible] ddle-east.pdf, *accessed* March 9, 2017.

[2] "U.S. Travel and Tourism Balance of Trade: All Countries (Total)," U.S. Department of Commerce,

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[illegible], *accessed* March 9, 2017; "U.S. Travel and Tourism Balance of Trade: All Countries (Total)," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, *available at* [illegible], *accessed* April 21, 2017.

International Trade Administration, National Travel and Tourism Office, ***available at*** p://travel.trade.gov/outreachpages/download_[illegible] [illegible]-new_pdf, ***accessed*** April 21, 2017.

- New York City in particular will be affected by a declining volume in tourists from the Middle East. In 2015, 41% of all tourists originating in the Middle East visit New York City.[333] Meanwhile, foreign tourists in the city spend about four times as much, on average, as domestic tourists.[334]

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[333] "2015 Market Profile: Middle East," U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, ***available at*** [illegible], ***accessed*** April 6, 2017.

[334] McGeehan, Patrick, "New York Expects Fewer Foreign Tourists, Saying Trump is to Blame," *New York Times*, ***available at*** [illegible] .com/20[illegible] trump-polici[illegible] html?_[illegible], ***accessed*** April 3, 2017.

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Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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INTEREST OF *AMICI CURIAE*[1]

Amici are 138 members of Congress who are familiar with the Immigration and Nationality Act and other laws passed by Congress related to immigration and national security concerns, as well as the interplay between those laws and constitutional guarantees. *Amici* are committed to ensuring that our immigration laws and policies both help protect the nation from foreign and domestic attacks and comport with fundamental constitutional principles, including the First Amendment. *Amici* are thus particularly well-situated to provide the Court with insight into the limitations that both the Constitution and federal immigration laws impose on the Executive Branch's discretion to restrict admission into the country, and have a strong interest in seeing those limitations respected.

A full listing of *amici* appears in the Appendix.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The First Amendment reflects our Founding promise that "no sect here is superior to another." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 194 (Jonathan Elliot ed., 1836) ("*Elliot's Debates*"). Consistent with this heritage of religious liberty, our nation's immigration laws regulate entry based on an individualized assessment of an individual's "fitness to reside in this country," *Judulang v. Holder*, 565 U.S. 42, 53 (2011), not on the basis of religious belief.

In a sweeping Executive Order (the "Order") issued on March 6, 2017—the second version of a "travel ban" that President Donald Trump first issued within a week of taking office—the President has sought to rewrite our immigration laws to categorically bar from the United States nationals of six countries with overwhelmingly Muslim populations. The Order excludes tens of millions of individuals from the United States and prevents U.S. citizens and others from sponsoring and reuniting with relatives from the targeted countries. It was issued without any demonstration that the targeted populations pose a danger to our security, on the heels of campaign statements that Muslims have a "great hatred towards Americans," J.A. 477, and that "Islam hates us," *id.* at 58.

The Order cannot be squared with our Constitution's system of separation of powers. Our nation revolted in opposition to the tyrannical rule of a king, and the Framers of our Constitution took pains to deny the President the power to both make the law and then execute it, recognizing that such concentrated power "in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The Framers gave the legislative power, including the authority to make rules concerning immigration, to Congress, ensuring that control of our borders would not be left to the "absolute dominion of one man." Kentucky Resolutions of 1798, *in* 4 *Elliot's Debates* at 543.

Congress chose to delegate a limited portion of these powers to the Executive in the Immigration and Nationality Act ("INA"). The government's defense of the Order principally rests on Section 212(f) of that statute, but that section does not give the President the power to override the parts of the INA he dislikes in favor of his own preferred policy. That is what he has done here. By treating all persons from the six designated Muslim-majority countries as potential terrorists, the Order ignores Congress's carefully chosen, "specific criteria for determining terrorism-related inadmissibility," *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring); 8 U.S.C. § 1182(a)(3)(B), and flouts Congress's explicit prohibition against discrimination on account of "nationality, place of birth, or place of residence," 8 U.S.C. § 1152(a)(1)(A), in the issuance of immigrant visas. Not only that—the Order also fails to even come within the terms of the congressional delegation of power invoked by the President because it does not make any credible finding that entry of nationals from the six specified Muslim-majority nations "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). In short, the Order "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

Even if the Order fell within the President's delegated authority—which it does not—it would still violate the First Amendment. Centuries ago, James Madison observed that "the first step . . . in the career of intolerance" is to place "a Beacon on our Coast," warning the "persecuted and oppressed of every Nation and Religion" that they must "seek some other Haven." James Madison, *Memorial and Remonstrance Against Religious Assessments, in* 2 *The Writings of James Madison* 188 (G. Hunt ed., 1901). The First Amendment prevents official disapproval of a religious minority, "secur[ing] universal religious liberty, by putting all sects on a level—the only way to prevent persecution." 4 *Elliot's Debates* at 196. Where, as here, the government "classif[ies] citizens based on their religious views" and "single[s] out dissidents for opprobrium," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014), it violates the "clearest command of the Establishment Clause": "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Because the Order is shot through with anti-Muslim animus, it violates the central meaning of the Religion Clauses.

When the Executive Branch abuses its authority, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. The best way to protect the nation's security, while also upholding foundational American values, is to respect the Constitution's fundamental protections and the laws passed by Congress. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

ARGUMENT

I. SEPARATION-OF-POWERS PRINCIPLES DO NOT PERMIT THE PRESIDENT TO WRITE RELIGIOUS DISCRIMINATION INTO OUR NATION'S IMMIGRATION LAWS.

Our Constitution entrusts Congress with "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress."). This is reflected explicitly in the Constitution's grant of power to Congress to "establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, which the Framers wrote to "leave a discretion to the Legislature . . . which will answer every purpose," 2 *The Records of the Federal Convention of 1787*, at 268 (Max Farrand ed., 1911).

Of course, Congress may choose to delegate substantial powers to the Executive Branch, *see Arizona*, 567 U.S. at 396 (discussing "broad discretion exercised by immigration officials" over removal); *Carlson v. Landon*, 342 U.S. 524, 544 (1952) (delegation permissible "because the executive judgment is limited by adequate standards"), but the Executive has no independent lawmaking power over the subject of immigration. "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587; *id.* at 655 (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."); Resp'ts Br., *Trump v. Hawaii*, at 3-5.

When the Framers wrote the Constitution more than two centuries ago, they gave the lawmaking power to Congress, recognizing that "the Prerogatives of the British Monarch" were not "a proper guide in defining the Executive powers." 1 *Records of the Federal Convention*, *supra*, at 65.[2] By denying the Executive lawmaking power, the Framers sought "to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); *see The Federalist No. 47*, at 269 (Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); *id.* at 271 ("'[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty'" (quoting Montesquieu)).

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[2] From the sixteenth to the eighteenth centuries, British Kings had claimed, as a royal prerogative, the power to make law without the approval of Parliament as well as the power to suspend the execution of laws enacted by Parliament. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. Ill. L. Rev. 173, 178 (1998); Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 272-77, 279-81 (2009).

Under these foundational principles, "[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (refusing to "cloth[e] the President with a power entirely to control the legislation of congress"). Rather, "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585). Thus, the President cannot make an end-run around the "single, finely wrought," "step-by step, deliberate and deliberative process," *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983), the Framers prescribed for lawmaking. Yet, as demonstrated below, that is exactly what the President has done.

II. THE ORDER RUNS AFOUL OF THE IMMIGRATION AND NATIONALITY ACT.

In support of its claimed authority to categorically exclude from the United States tens of millions of nationals of six Muslim-majority countries, the government relies on a single statutory provision. However, that provision does not give the President the breathtaking authority that the government claims.

Section 212(f) of the INA authorizes the President to "suspend the entry" of any class of aliens into the United States on the basis of the President's "find[ing]" that their entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). This provision—enacted to codify wartime emergency powers—gives the President the flexibility to address promptly admission questions that Congress has not addressed. It does not give the President the authority to supersede Congress's judgment when Congress has already considered an issue and addressed it. Nor does it give the President the equivalent of a line-item veto over the immigration laws enacted by Congress, permitting him to excise those parts of the INA he dislikes. That would "deal a severe blow to the Constitution's separation of powers," *Util. Air Regulatory Grp. v. EPA,* 134 S. Ct. 2427, 2446 (2014), and would "enhance[] the President's powers beyond what the Framers would have endorsed," *Clinton,* 524 U.S. at 451 (Kennedy, J., concurring). Here, as *amici* well know, Congress has put in place a carefully considered and calibrated scheme for addressing potential terrorists' abuse of our immigration laws. Section 212(f) does not give the President authority to upend that scheme. Nor does it give the President the authority to violate the INA's categorical prohibition on nationality-based discrimination in the issuance of immigrant visas.

Moreover, the Order is unlawful for the additional reason that the President has not made an adequate finding that admitting individuals from the six covered countries and more than 50,000 refugees "*would be* detrimental to the interests of the United States," as required by Section 212(f). 8 U.S.C. § 1182(f) (emphasis added).

A. The Order Subverts a Carefully Crafted Legislative Scheme Designed To Prevent Potential Terrorists from Entering the United States.

Section 212(f)'s grant of authority to the President to make a "find[ing]" that the entry of any class of aliens into the United States "would be detrimental" to national interests was a codification of wartime emergency restrictions. *See* Proclamation 2523, 6 Fed. Reg. 5821, 5822, ¶ 3 (Nov. 14, 1941) ("No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."); *see also* H.R. Conf. Rep. No. 100-475, at 165 (1987) (describing the President's authority under Section 212(f) as the authority "to deny admissions by proclamation or to deny entry to aliens *when the United States is at war or during the existence of a national emergency proclaimed by the President*"). In codifying those emergency powers, Congress gave the President an important, but limited, grant of authority, ensuring that he could act quickly in emergency situations—that is, when Congress had not yet had an opportunity to consider a particular issue or class of possible entrants to the country. Resp'ts Br., *Trump v. Hawaii,* at 31-37; *see Kent v. Dulles,* 357 U.S. 116, 128 (1958) (refusing to read congressional statue to give the Executive "unbridled discretion" and instead reading it narrowly "in light of prior administrative practice"). But Congress did not give the President the power to override the considered judgment of Congress—a form of executive lawmaking alien to the Constitution's system of separation of powers.

Here, the President seeks to rely on this provision to deny entry to individuals on the ground that they pose a terrorist threat. But Congress has already spoken to this precise issue, specifying in Section 212(a) several terrorism-related grounds on which an individual may be denied a visa to enter the United States. 8 U.S.C. § 1182(a)(3)(B)(i). In painstaking detail, the statute declares inadmissible any foreign national who has "engaged in," "incited," or "endorse[d] . . . terrorist activity," or "is a member of a terrorist organization." *Id.* As an additional safeguard, the statute expressly authorizes "a consular officer, the Attorney General, or the

Secretary of Homeland Security" to deny entry to any visa applicant he or she "knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity." *Id.* Further, a separate provision makes citizens of countries designated as "state sponsor[s] of terrorism"—a category that includes Iran, Syria, and Sudan—ineligible for nonimmigrant visas absent a determination by the Secretary of State and Attorney General that they "do[] not pose a threat to the safety or national security of the United States." 8 U.S.C. § 1735(a).

Moreover, Congress recently revisited terrorism concerns in 2015 when it passed the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, 129 Stat. 2989, Div. O, § 203 (codified at 8 U.S.C. § 1187(a)(12)). Under the previously created Visa Waiver Program ("VWP"), the Department of Homeland Security may waive the B1/B2 visa requirement for aliens traveling from 38 approved countries, permitting stays of up to 90 days for business or tourism. *See* 8 U.S.C. § 1187; U.S. Dep't of State, *Visa Waiver Program*, https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html (last visited Aug. 9, 2017). With the Visa Waiver Program Improvement Act of 2015, Congress gave the Secretary of Homeland Security the authority to temporarily suspend any VWP country if it "fails to live up to its agreement to provide terrorism-related information." H.R. Rep. No. 114-369, at 3-4 (2015). Nationals from the suspended countries are not barred from traveling to the United States; they simply must apply for and obtain a visa to do so. Despite a documented risk of terrorist travel to the United States, Congress deliberately chose this solution as an alternative to "end[ing] this valuable program." *Combatting Terrorist Travel: Does the Visa Waiver Program Keep Our Nation Safe?, Hearing on H.R. 158 Before the Subcomm. On Border & Maritime Security of the H. Comm. on Homeland Security*, 114th Cong. 2 (2015) (statement of Rep. Candice Miller). It declined to impose a "Muslim Ban" of the sort the President ordered, concluding that the admission of persons from Muslim-majority nations, with proper vetting, is fully consistent with national interests. *See* 161 Cong. Rec. H9054 (Dec. 8, 2015).

To be sure, the same statute and its implementing regulations provided that nationals of VWP countries may no longer be admitted to the United States without a visa if they have traveled to the countries identified in the Order, or are dual-nationals of those countries, and are not subject to a specified exception. *See* § 203, 129 Stat. at 2989 (2015); Press Release, U.S. Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016) (designating additional countries subject to the Act's restrictions). But, again, the 2015 law does not categorically bar the entry of such travelers. Instead, its tailored remedy reinforces Congress's determination that the proper response to the threat of terrorist travel is to require that certain entrants first obtain a visa. The President seeks here to override that judgment.

The government's categorical bar on tens of millions of nationals from six Muslim-majority countries based on the hypothesis that they might pose a terrorist threat, thus, upends Congress's "'comprehensive and reticulated statute.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). The Order writes discrimination into the INA, substituting an applicant's nationality alone for Congress's detailed requirements for evaluating the risk that a visa applicant may engage in terrorist activity in the United States. Further, it ignores the fact that Section 212(a) already allows Executive Branch officials to make individualized assessments that a noncitizen seeking to enter the United States is "likely to engage" in terrorist activity upon arriving in the country. 8 U.S.C. § 1182(a)(3)(B)(i). In light of these detailed and "specific criteria for determining terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring), the government's reliance on Section 212(f) to impose a blanket ban on entry is untenable.

B. The Order Violates the INA's Categorical Prohibition on Nationality-Based Discrimination.

Section 212(f) also does not authorize the President to ignore Congress's categorical prohibition on nationality-based discrimination in the issuance of immigrant visas. The President cannot use Section 212(f) to make an end-run around the congressional mandate of equality in the issuance of immigrant visas in order to keep out Muslims. "The power of executing the laws . . . does not include a power to revise clear statutory terms[.]" *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446.

The INA provides that, with certain exceptions not here relevant, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). In adopting this prohibition, "Congress could hardly have chosen more explicit language," "*unambiguously direct[ing]* that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*") (emphasis added), *vacated on other grounds*, 519 U.S. 1 (1996).

The adoption of this provision was a sharp rebuke to what had come before: a "national quota system of immigration," *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980), according to which "the selection of immigrants was based upon race and place of birth," H.R. Rep. No. 89-745, at 8-10 (1965). As President Lyndon Johnson recognized in signing the law, the prior immigration system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965); *Hearings Before the Subcomm. On Immigration and*

Naturalization of the Senate Comm. on the Judiciary on S.500 to Amend the Immigration and Nationality Act and for Other Purposes, 89th Cong. 547 (1965) (statement of Sen. Maurine B. Neuberger) (the prior system stood "in conflict with our principles of human brotherhood and equality" and was contrary to "our basic American tradition"); Resp'ts Br., *Trump v. IRAP*, at 58-59.

Based on the testimony of such dignitaries as Attorney General Nicholas Katzenbach and Secretary of State Dean Rusk, Congress made the considered judgment that immigration of worthy individuals from all corners of the globe benefits the nation as a whole. *See, e.g., Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 2580 to Amend the Immigration and Nationality Act, and for Other Purposes,* 89th Cong. 8-9 (1965) (statement of Attorney General Katzenbach) (prior system "prevented or delayed" "brilliant and skilled residents of other countries . . . from coming to this country"); *Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 7700 and 55 Identical Bills to Amend the Immigration and Nationality Act, and for Other Purposes,* 88th Cong. 391 (1964) (statement of Secretary of State Rusk) (noting, in the context of testimony in support of the amendments, that many countries "resent the fact that the quotas are there as a discriminatory measure"). Thus, the 1965 ban on discrimination in immigrant visa issuance was designed to prohibit the Executive from practicing wholesale discrimination against people coming from certain countries—precisely what the Order here commands.

Section 212(f) of the INA does not allow the President to ignore this prohibition on national origin discrimination. Indeed, reading Section 212(f) to allow the sort of discrimination that the Order commands would render the later nondiscrimination provision a dead letter. *See LAVAS*, 45 F.3d at 473 ("The appellees' proffered statutory interpretation, leaving it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity.").

Significantly, to the extent Congress wanted to make exceptions to this categorical nondiscrimination rule, it did so with specificity. For example, 8 U.S.C. § 1152(a)(1)(A) provides that the nondiscrimination provision should be applied "[e]xcept as specifically provided in . . . sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title." Those provisions, in turn, permit certain preferences for, among others, immediate relatives of U.S. citizens in specified circumstances. *Id.* §§ 1151(b)(2)(A)(i), 1153. In carving out those express exceptions, Congress determined that the forms of "discrimination" permitted by those programs and preferences were acceptable. Similarly, in other provisions of the Code, Congress expressly carved out exceptions to the Visa Waiver Program, *see id.* § 1187(a)(12)(A); *see also supra* at 11-12, thereby requiring persons from certain countries (e.g., Iraq and Syria) to undergo more rigorous screening. Congress did not, however, carve out a similar exception for Section 212(f).

Nor has Section 212(f) ever been used to enact a categorical bar on entry by all aliens from a particular nation—much less millions of individuals from six nations, like those covered by the Order here. *See* Resp'ts Br., *Trump v. Hawaii*, at 36-37, 45-46 (discussing past uses of Section 212(f)); Resp'ts Br., *Trump v. IRAP*, at 55-56 (same). Rather, as the current Administration has recognized, Section 212(f) orders "arise from a foreign policy decision to keep *certain elements* in a given country from getting a visa." U.S. Dep't of State, *Presidential Proclamations* (emphasis added), https://perma.cc/M2RL-6775 (last visited Sept. 12, 2017).[3] The power may not be used to supersede the nondiscrimination rule that Congress added to the INA in 1965—after Section 212(f) was enacted.

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[3] The Section 212(f) proclamations that were in effect when President Trump took office are a case in point. *See, e.g.*, 50 Fed. Reg. 41329 (Oct. 10, 1985); 71 Fed. Reg. 28541 (May 16, 2006). The same is true of President Reagan's 1986 proclamation concerning Cuban nationals. That proclamation, which was a response to Cuba's violation of an international agreement, was not an outright ban on the entry of Cubans. *See* Resp'ts Br., *Trump v. Hawaii*, at 45; Resp'ts Br., *Trump v. IRAP*, at 55. The proclamation permitted Cuban citizens to enter the United States as nonimmigrants, to the extent permissible, or as immigrants if they were immediate relatives of U.S. citizens, were entitled to other special immigrant status, or met other criteria. 51 Fed. Reg. 30470 (Aug. 26, 1986). Even after September 11, 2001, the Executive did not stray from this targeted use of Section 212(f). *See* Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 & tbl. 1 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf.

C. The Order Lacks the Requisite Finding That Entry of Covered Nationals "Would Be Detrimental" to National Interests.

In addition to its violation of specific congressional judgments reflected in the nation's immigration laws, which Section 212(f) cannot override, the Order fails to comply with the terms of Section 212(f) itself. Specifically, the Order does not establish that admitting individuals from the six covered countries and more than 50,000 refugees "*would be* detrimental to the interests of the United States," as Section 212(f) requires. 8 U.S.C. § 1182(f) (emphasis added). To be sure, the Order parrots the language of the statute, asserting, in conclusory terms, that admitting nationals from the six covered countries and more than 50,000 refugees "would be detrimental to the interests of the United States." J.A. 1417-18. But the Order's claim is belied by its own logic.

The entire rationale for the Administration's "temporary . . . pause" on the entry of the tens of millions of affected individuals is supposedly that this time-limited ban on entry is necessary to facilitate "a worldwide review of screening and vetting procedures to assess what information is needed from foreign governments." Pet'rs Br. at 3. Thus, the Order requires the Secretary of Homeland Security to "identify *whether*, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country . . . in order to determine that the individual is not a security or public-safety threat." J.A. 1425 (emphasis added). Yet the Administration does not even attempt to show that the six covered countries have failed to provide terrorism-related information, thereby thwarting efforts to properly vet their nationals.

At most, then, the Order is predicated on a perceived *potential* threat—or, in other words, speculation that entry of the covered individuals *could be* detrimental to national interests. Especially when viewed against the backdrop of the robust and carefully drawn statutory provisions designed by Congress to protect the country from foreign attacks, and the searching scrutiny required of sweeping assertions of presidential power under these circumstances, *see Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), this falls far short of the sort of definitive "find[ing]" that triggers the exclusion power granted by Section 212(f). *Cf. Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("[T]he exclusion order necessarily must rely . . . upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage . . . . It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.").

* * *

In sum, the Order violates the Immigration and Nationality Act and can be invalidated on that ground alone. It also violates the Establishment Clause, as the remainder of the brief shows.

III. THE ORDER RUNS AFOUL OF THE ESTABLISHMENT CLAUSE.

A. THE TEXT AND HISTORY OF THE RELIGION CLAUSES FORBID LAWS THAT TARGET A DISFAVORED RELIGIOUS MINORITY FOR DISCRIMINATORY TREATMENT.

Our Constitution promises religious freedom to people of *all* religions and nationalities. "The Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, and the Equal Protection Clause as applied to religion—all speak with one voice . . . : Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (citation omitted). The text and history of the Constitution's Religion Clauses firmly prohibit the government from writing into law discrimination against any one set of religious believers. The declaration that "no sect here is superior to another," 4 *Elliot's Debates* at 194, reflects the Framers' understanding that "freedom [of religion] arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society." James Madison, Speech at the Virginia Ratifying Convention (June 12, 1788), *in* 11 *The Papers of James Madison* 130 (Robert Rutland et al. eds., 1977). By commanding a course of religious neutrality, the Framers sought to free our nation "from those persecutions . . . with which other countries have been torn." 4 *Elliot's Debates* at 194.

The original Constitution prohibited all religious tests for federal office, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. The Framers' "decision to ban religious tests was a dramatic departure from the prevailing practice in the states, eleven of which then banned non-Christians and at least four of which banned non-Protestants from office." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409, 1474 (1990). The Framers insisted that this kind of official discrimination against disfavored religious beliefs had no place in the Constitution.

In the North Carolina ratifying convention, James Iredell explained that the ban on religious tests "is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution." 4 *Elliot's Debates* at 196; *id.* at 208 ("No sect is preferred to another. Every man has the right to worship the Supreme Being in the manner he thinks proper."). These founding principles ensure religious liberty for all believers of any religion without exception. As Iredell observed, "it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" *Id.* at 194.

In the Massachusetts ratifying convention as well, supporters of the Constitution stressed that the United States was conceived as a "great and extensive empire," where "there is, and will be, a great variety of sentiments in religion among its inhabitants." 2 *id.* at 118-19. "[A]s all have an equal claim to the blessings of the government under which they live, and which they support, so none should be excluded from them for being of any particular denomination in religion." 2 *id.* at 119. As Reverend Daniel Shute observed: "[W]ho shall be excluded from national trusts? Whatever answer bigotry may suggest, the dictates of candor and equity, I conceive, will be, *None.*" *Id.* (emphasis in original).

Article VI's ban on religious tests, however, was not alone sufficient to ensure religious freedom to all. Antifederalists objected to the lack of a Bill of Rights, pointing out that "[t]he rights of conscience are not secured" and that "Congress may establish any religion." *See Notes on the Debates in the Pennsylvania Convention Taken by James Wilson, reprinted in Pennsylvania and the Federal Constitution, 1787-1788*, at 785 (John Bach McMaster and Frederick Dawson Stone eds., 1888). "What security," they asked, "will there be, in case the government should have in their heads a predilection for any *one* sect in religion?" *See* Noah

Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 399 (2002) (quoting "Z," Boston Indep. Chron., Dec. 6, 1787).

These objections convinced the American people to add the First Amendment to the Constitution, prohibiting the making of any "law respecting an establishment of religion" and broadly guaranteeing the "free exercise thereof." U.S. Const. amend. I. The First Amendment "expresses our Nation's fundamental commitment to religious liberty": the Religion Clauses were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely. . . . [T]he Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring). The "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). This prohibits government from "classif[ying] citizens based on their religious views" and "singl[ing] out dissidents for opprobrium." *Galloway*, 134 S. Ct. at 1826.

As its Framers understood, the prohibition on establishment, together with the guarantee of free exercise, ensure that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man," Madison, *Memorial and Remonstrance Against Religious Assessments, in* 2 *The Writings of James Madison, supra,* at 184, and that "opinion[s] in matters of religion . . . . shall in no wise diminish, enlarge, or affect [our] civil capacities," Thomas Jefferson, Virginia Act for Establishing Religious Freedom, ch. XXXIV (Oct. 1785), *in* 12 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* 84, 86 (1823). By virtue of the First Amendment's twin guarantees, "[a]ll possess alike liberty of conscience . . . . It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. [H]appily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0135; *see Galloway*, 134 S. Ct. at 1854 (Kagan, J., dissenting) (discussing Washington's embrace of "full and equal membership in the polity for members of every religious group").

The Framers wrote the First Amendment against the backdrop of the long history of colonial establishments of religion, which used the awesome power of the state to disfavor certain religious beliefs and deny their adherents the right to freely practice their religion. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183 (2012) ("Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church."). While not all of the colonies had religious establishments and those that did varied in important ways, the colonial religious establishments had this in common: Each used the machinery of government to discriminate against disfavored religious believers. *See* Michael W. McConnell, ***Establishment and Disestablishment at the Founding, Part I: Establishment of Religion***, 44 Wm. & Mary L. Rev. 2105, 2115-30, 2159-69, 2177-81 (2003) (surveying colonial establishments). "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947).

During the debates over the First Amendment, Madison argued that, without the Establishment Clause, "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 1 Annals of Cong. 758 (1789) (Joseph Gales ed., 1834). To prevent such abuses, the Framers withdrew "the machinery of the State to enforce a religious orthodoxy," recognizing that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Consistent with this text and history, this Court's precedent confirms that the "clearest command of the Establishment Clause" is that "one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Indeed, that stricture lies at the "heart of the Establishment Clause." *Kiryas Joel*, 512 U.S. at 703; *see id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *id.* at 728-29 (Kennedy, J., concurring) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion."); *id.* at 729 (Kennedy, J., concurring) (the Religion Clauses forbid "religious gerrymandering"); *Galloway*, 134 S. Ct. at 1826 ("A practice that classified citizens based on their religious views would violate the Constitution."). In short, "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

Free exercise principles, too, proscribe "[o]fficial action that targets religious conduct" for adverse treatment, and they require courts to "'survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)); *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 542)).

Similarly, discrimination by the government on the basis of religion has long been viewed as manifestly inconsistent with the basic equality guarantee that our Constitution promises to all. *See Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[T]he Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."). These First Amendment principles apply in the immigration context no less than in other contexts.

B. THE CONSTITUTION'S COMMAND OF RELIGIOUS NEUTRALITY SQUARELY APPLIES TO IMMIGRATION REGULATIONS.

Our Constitution's Framers understood that immigration rules could be used to entrench a religious majority and disfavor a religious minority. Madison viewed such religious establishments as an impermissible "Beacon on our Coast, warning" the "magnanimous sufferer" to "seek some other haven." Madison, *Memorial and Remonstrance Against Religious Assessments, in* 2 *The Writings of James Madison, supra,* at 188. The First Amendment denied the federal government the power to write this kind of religious discrimination into law.

As Madison knew well, colonial establishments had often included immigration restrictions designed to keep out persons who possessed disfavored religious beliefs, who were often thought to represent a danger to the state. *See, e.g.*, McConnell, *Establishment and Disestablishment*, *supra*, at 2180 (observing that "Americans were convinced that Roman Catholics were under a kind of spiritual submission to Rome that made them incapable of exercising the independent thought necessary to be a good republican citizen"). Although these laws had generally been swept from the books by the time of the Founding, *see* McConnell, *Origins*, *supra*, at 1436-37 (discussing disestablishment in the states), the bitter experience of living under a state-sponsored religious orthodoxy was still fresh in the Framers' minds.

Madison's home state of Virginia had long used its immigration laws to keep out disfavored religious believers. As early as 1609, the Virginia charter provided that "none be permitted to pass in any voyage . . . but such, as first shall have taken the oath of supremacy" to the Church of England and specifically noted that "we should be loath, that any person should be permitted to pass, that we suspected to effect the superstitions of the church of Rome." Second Charter to the Treasurer and Company for Virginia, § XXIX (May 23, 1609), *in* 1 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* 80, 97-98 (1809).

The oath Virginia required "included recognition of the king or queen as head of the Church, thus barring non-Anglicans, and specifically repudiated belief in the Catholic doctrines of papal authority and transubstantiation." McConnell, *Establishment and Disestablishment*, *supra*, at 2116. "So successful was this policy that until after the Revolution, there was no Catholic Church and there were few, if any, Catholic individuals in the Commonwealth of Virginia." *Id.* at 2117. Indeed, Virginia's policy of excluding Catholics was so strict that, in 1628, "[w]hen Lord Baltimore, a Catholic, attempted to stop briefly in the Virginia Colony on his way to visit his holdings in Maryland, he was unceremoniously expelled." *Id.* at 2163.

Virginia's religious establishment also targeted Quakers for exclusion. A 1659 law enacted by the colonial assembly imposed a "penalty of one hundred pounds" on the "master or comander of any shipp or other vessel" that brought "into this collonie any person or persons called Quakers." Grand Assembly, Mar. 13, 1659-60, Act VI, *in* 1 Hening, *supra*, at 526, 532, 533. The law required that any arriving Quakers would be "imprisoned without baile or mainprize till they do abjure this country or putt in security with all speed to depart the colonie and not to returne again." *Id.* at 533.

Other colonies, too, had religious restrictions on entry. In New England, Massachusetts Bay adopted an Act against Heresy in 1646 that provided that "no Master or Commander of any Ship . . . or other Vessel, shall henceforth bring . . . within this Jurisdiction, any known Quaker or Quakers, or any other blasphemous hereticks" on penalty of "one hundred pounds." Act of 1646: Heresie Error, *in Colonial Laws of Massachusetts* 155 (William H. Whitmore ed., 1889). Any such ship owner, if convicted, was required "to carry them backe to the place, whence he brought them." *Id.*; *see Records of* *the Colony or Jurisdiction of New Haven* 217 (Charles J. Hoadly ed., 1858) (1657 order that "no Quaker, Ranter, or other Herritick of that nature, be suffered to come into, nor abide in this jurisdiction").

Further to the South, a number of colonies tried to keep out Catholics. In Maryland, a 1715 law sought to "prevent too great a number of Irish Papists being imported into this province," by requiring "All Masters of Ships and Vessels, or others, importing Irish Servants into this Province" to pay a poll tax of 20 shillings "for every Irish Servant so imported." Act of 1715, ch. 36, § 7, *in* Thomas Bacon, *Laws of Maryland at Large* (1765). That apparently was not enough, because, two years later, in 1717, the legislature imposed "the additional Sum of Twenty Shillings Current Money" in order to "prevent the Growth of Popery by the Importation of too great Number of them." Act of 1717, ch. X, tit., § 1, *in* Bacon, *supra*. In 1732, the General Assembly repealed the poll tax as applied to Irish Protestants, leaving it in full force as to Catholics. Act of 1732, ch. XXIII, *in* Bacon, *supra*.

Georgia "encouraged immigration by welcoming and tolerating a wide variety of dissenters," McConnell, *Establishment and Disestablishment*, *supra*, at 2129, but, like other jurisdictions, contained religious restrictions on Catholics. Georgia's 1732 Charter promised "all . . . persons, except Papists, shall have a free exercise of religion." 1 *The Colonial Records of the State of Georgia* 21 (Allen D. Candler ed., 1904). "Catholics were not even permitted to live in the colony." Joel A. Nichols, *Religious Liberty in the Thirteenth Colony:*

Church-State Relations in Colonial and Early National Georgia, 80 N.Y.U. L. Rev. 1693, 1711 (2005). "[T]he prohibition on Catholics was generally effective, as the largest number reported in Georgia over the first twenty years was four, in 1747." *Id.* at 1749.

Madison called religious establishments that denied an "asylum to the persecuted" based on their religion "a signal of persecution." Madison, *Memorial and Remonstrance Against Religious Assessments, in* 2 *The Writings of James Madison, supra,* at 188. As Madison recognized, "whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us." *Id.* at 186. By adding the First Amendment to the Constitution, the Framers denied the federal government the power to draw lines based on religion—including in the immigration context—in order to ensure "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790). The "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590. That principle prohibits a religious test for immigration.

C. THE ORDER VIOLATES THE CENTRAL MEANING OF THE FIRST AMENDMENT.

The Order establishes an impermissible religious test for immigration, as its text, history, and context demonstrate. It targets Muslims, singling out nationals only from majority-Muslim countries. In doing so, it creates a "danger of stigma and stirred animosities" toward Muslims, *see Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring), denying them the equal dignity the Constitution affords to all, regardless of religious belief. *See* Resp'ts Br., *Trump v. Hawaii*, at 5-10, 54-56; Resp'ts Br., *Trump v. IRAP*, at 1-4, 37-39.

It is irrelevant that the Order does not mention Muslims by name. "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Church of the Lukumi Babalu, Inc.*, 508 U.S. at 534; *Kiryas Joel,* 512 U.S. at 699 ("[O]ur analysis does not end with the text of the statute at issue."). Context matters, *see McCreary*, 545 U.S. at 861-62; *Kiryas Joel*, 512 U.S. at 699, and the textual and contextual evidence that the Order singles out and stigmatizes Muslims is overwhelming. The Order is shot through with animus against Muslims on account of their religion. Indeed, that is why the Government urges this Court to ignore this powerful evidence, insisting that it would be improper to "prob[e] . . . the Chief Executive's subjective views." Pet'rs Br. at 72. But "purpose needs to be taken seriously under the Establishment Clause," and therefore this Court must take account of "the history of the government's actions," not "'turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 874, 866 (citation omitted).

Nor does it matter that the Order does not apply to all Muslims. *See Kiryas Joel*, 512 U.S. at 705 ("Here the benefit flows only to a single sect [of a religion], but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole."). Singling out six Muslim-majority nations (particularly after repeatedly stating the intent to ban all Muslims from the United States) establishes both a religious test and constitutes discrimination on the basis of religion.

Only religious animus can explain the Order; there is no legitimate purpose—independent of religious animus—for the Order's sweeping prohibitions. The Order targets six countries, J.A. 1420-22, even though there is no evidence to suggest that broadly excluding individuals from those countries bears any rational relationship to protecting Americans from terrorist attacks. Indeed, not a single American has been killed as a result of terrorist attacks on U.S. soil carried out by individuals born in those countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order To Limit Migration for "National Security" Reasons*, Cato Inst.: Cato at Liberty (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons; *see id.* ("[T]he countries that Trump chose to temporarily ban are not serious terrorism risks.").

Tellingly, the Order provides only two examples of foreign nationals coming to the United States and later committing terrorist acts—one involving nationals from Iraq, who are no longer subject to the Order, and one involving a naturalized citizen from Somalia who came to the United States as a child, *see* J.A. 1424. Neither incident remotely supplies a neutral justification for the Order's sweeping ban, which flies in the face of the government's own evidence demonstrating that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." *Id.* at 1051.

Even under a more limited form of judicial review, *see Fiallo v. Bell*, 430 U.S. 787 (1977), the Order is plainly inconsistent with the principles of religious freedom enshrined in our Constitution. "Our deference in matters of policy cannot . . . become abdication in matters of law." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). Respect for the powers of the President "can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Id.* In immigration, as in other cases, when other branches of government transgress constitutional boundaries, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. Because the Order transgresses "important constitutional limitations," *Zadvydas v. Davis,* 533 U.S. 678, 695 (2001), it must be invalidated.

CONCLUSION

This Court should affirm the judgments of the courts of appeals for the Fourth and Ninth Circuits.

Respectfully submitted,

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[4] Counsel for *amici* are grateful for the valuable contributions to this brief of Davis Wright Tremaine summer associate Katherine K. Moy, and Professor Brescia's students (Andrew Carpenter, Elyssa Klein, Mary Ann Krisa, Graham Molho, and Gloria Sprague).

APPENDIX

APPENDIX:
LIST OF *AMICI*

U.S. Senate

Dianne Feinstein
Senator of California

Patrick J. Leahy
Senator of Vermont

Richard J. Durbin
Senator of Illinois

Sheldon Whitehouse
Senator of Rhode Island

Amy Klobuchar
Senator of Minnesota

Al Franken
Senator of Minnesota

Christopher A. Coons
Senator of Delaware

Richard Blumenthal
Senator of Connecticut

Mazie K. Hirono
Senator of Hawai'i

LIST OF *AMICI* – cont'd

Tammy Baldwin
    Senator of Wisconsin

Michael F. Bennet
    Senator of Colorado

Cory A. Booker
    Senator of New Jersey

Sherrod Brown
    Senator of Ohio

Benjamin L. Cardin
    Senator of Maryland

Thomas R. Carper
    Senator of Delaware

Tammy Duckworth
    Senator of Illinois

Kamala D. Harris
    Senator of California

Tim Kaine
    Senator of Virginia

Edward J. Markey
    Senator of Massachusetts

LIST OF *AMICI* – cont'd

Robert Menendez
Senator of New Jersey

Jeff Merkley
Senator of Oregon

Patty Murray
Senator of Washington

Jack Reed
Senator of Rhode Island

Bernard Sanders
Senator of Vermont

Brian Schatz
Senator of Hawai'i

Jeanne Shaheen
Senator of New Hampshire

Chris Van Hollen
Senator of Maryland

Elizabeth Warren
Senator of Massachusetts

LIST OF *AMICI* – cont'd

Ron Wyden
Senator of Oregon

U.S. House of Representatives

John Conyers, Jr.
Representative of Michigan

Zoe Lofgren
Representative of California

Jerrold Nadler
Representative of New York

Sheila Jackson Lee
Representative of Texas

Steve Cohen
Representative of Tennessee

Henry C. "Hank" Johnson, Jr.
Representative of Georgia

Theodore E. Deutch
Representative of Florida

Luis V. Gutiérrez
Representative of Illinois

LIST OF *AMICI* – cont'd

Hakeem Jeffries
Representative of New York

David N. Cicilline
Representative of Rhode Island

Eric Swalwell
Representative of California

Ted W. Lieu
Representative of California

Jamie Raskin
Representative of Maryland

Pramila Jayapal
Representative of Washington

Donald S. Beyer Jr.
Representative of Virginia

Sanford D. Bishop, Jr.
Representative of Georgia

Earl Blumenauer
Representative of Oregon

LIST OF *AMICI* – cont'd

Suzanne Bonamici
    Representative of Oregon

Brendan F. Boyle
    Representative of Pennsylvania

Anthony Brown
    Representative of Maryland

Julia Brownley
    Representative of California

Michael E. Capuano
    Representative of Massachusetts

Tony Cárdenas
    Representative of California

André Carson
    Representative of Indiana

Kathy Castor
    Representative of Florida

Joaquin Castro
    Representative of Texas

Judy Chu
    Representative of California

LIST OF *AMICI* – cont'd

Katherine M. Clark
    Representative of Massachusetts

Yvette Clarke
    Representative of New York

W. M. Lacy Clay
    Representative of Missouri

Gerald E. Connolly
    Representative of Virginia

J. Luis Correa
    Representative of California

Joseph Crowley
    Representative of New York

Elijah E. Cummings
    Representative of Maryland

Peter DeFazio
    Representative of Oregon

Suzan K. DelBene
    Representative of Washington

Mark DeSaulnier
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LIST OF *AMICI* – cont'd

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Representative of Michigan

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Eliot L. Engel
Representative of New York

Anna Eshoo
Representative of California

Adriano Espaillat
Representative of New York

Elizabeth H. Esty
Representative of Connecticut

Bill Foster
Representative of Illinois

Marcia Fudge
Representative of Ohio

Ruben Gallego
Representative of Arizona

Vicente Gonzalez
Representative of Texas

LIST OF *AMICI* – cont'd

Raúl M. Grijalva
    Representative of Arizona

Colleen Hanabusa
    Representative of Hawai'i

Brian Higgins
    Representative of New York

Steny H. Hoyer
    Representative of Maryland

Jared Huffman
    Representative of California

William R. Keating
    Representative of Massachusetts

Robin L. Kelly
    Representative of Illinois

Joseph P. Kennedy III
    Representative of Massachusetts

Ro Khana
    Representative of California

Dan Kildee
    Representative of Michigan

LIST OF *AMICI* – cont'd

Derek Kilmer
Representative of Washington

Brenda L. Lawrence
Representative of Michigan

Barbara Lee
Representative of California

Sander Levin
Representative of Michigan

John Lewis
Representative of Georgia

Alan Lowenthal
Representative of California

Ben Ray Luján
Representative of New Mexico

Stephen F. Lynch
Representative of Massachusetts

Doris Matsui
Representative of California

Betty McCollum
Representative of Minnesota

LIST OF *AMICI* – cont'd

A. Donald McEachin
Representative of Virginia

James P. McGovern
Representative of Massachusetts

Gregory W. Meeks
Representative of New York

Gwen Moore
Representative of Wisconsin

Seth Moulton
Representative of Massachusetts

Grace F. Napolitano
Representative of California

Donald Norcross
Representative of New Jersey

Eleanor Holmes Norton
Representative of District of Columbia

Frank Pallone, Jr.
Representative of New Jersey

Bill Pascrell, Jr.
Representative of New Jersey

LIST OF *AMICI* – cont'd

Donald M. Payne, Jr.
Representative of New Jersey

Nancy Pelosi
Representative of California

Chellie Pingree
Representative of Maine

David Price
Representative of North Carolina

Mike Quigley
Representative of Illinois

Kathleen M. Rice
Representative of New York

Lucille Roybal-Allard
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In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF MEMBERS OF THE CLERGY; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; THE RIVERSIDE CHURCH IN THE CITY OF NEW YORK; AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF MEMBERS OF THE CLERGY; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; THE RIVERSIDE CHURCH IN THE CITY OF NEW YORK; AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

Amici are members of the clergy, a house of worship, and religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to preserving constitutional protections for all.[1]

The issues presented in this case affect individuals and families living across the United States and around the world. If the challenged Executive Order is upheld, parents and children, grandparents and grandchildren will be kept apart; universities will lose students, faculty, and visiting scholars; and employers will be denied the skills and perspectives of a diverse workforce. And all Americans, Muslim and non-Muslim alike, will know that our government officially denigrates Muslims as outsiders by virtue of their faith.

Amici have a strong interest in ensuring that the Executive Order remains enjoined, lest we betray our constitutional commitments to religious freedom, equal rights, and equal dignity for all without regard to faith or belief.

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' letters consenting to the filing of this brief are on file with the Clerk's office.

The *amici* are:

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- Michael Hidalgo, Lead Pastor, Denver Community Church, Denver, Colorado.
- The Reverend Bertram Johnson, The Riverside Church, New York, New York.
- The Reverend Jim Keat, Associate Minister, The Riverside Church, New York, New York.
- Brian D. McLaren, Board Chair, Convergenceus.org, Marco Island, Florida.
- Pastor George Mekhail, Director of Partnerships & Innovation, The Riverside Church, New York, New York.
- Pastor Doug Pagitt, Solomon's Porch, Minneapolis, Minnesota.
- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Lambda Legal Defense and Education Fund, Inc.
- People For the American Way Foundation.
- The Riverside Church in the City of New York.
- The Southern Poverty Law Center.

More detailed descriptions of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our constitutional order admits of no official denigration of religious minorities or official disfavor toward anyone based on faith or belief. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Hence, the Religion Clauses of the First Amendment and the Fifth and Fourteenth Amendments' guarantees of equal protection "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). "[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause." *Id.* at 728 (Kennedy, J., concurring in the judgment).

This "essential commitment to religious freedom" (*Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993)) was no accident. "The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). Accordingly, the Framers drafted the First Amendment with "awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Id.* at 432.

The challenged Executive Order reneges on our Nation's commitment to religious freedom by targeting Muslims for opprobrium, denigration, and discrimination based solely on their faith. This marking of one religion for official disfavor—this ban on Muslims—cannot be justified by the government's asserted interest in combating terrorism, because the Muslim ban is woefully ill-suited to achieving that interest.

The Muslim ban has also unleashed and placed the government's imprimatur on persecution and violence that endanger lives and rip communities apart. Consequently, attacks on mosques and other anti-Muslim hate crimes have nearly doubled since the Muslim ban was instituted. The Establishment Clause protects against this official incitement of prejudice and cruelty.

The government's casting of one group as the object of fear, disrespect, and maltreatment is invidious discrimination and an unconstitutional religious preference that cannot withstand scrutiny. This Court should affirm the preliminary injunctions to preserve the "profound commitment to religious liberty" "that has served [this Nation] so well." (*McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 882, 884 (2005) (O'Connor, J., concurring)).

ARGUMENT

The Challenged Executive Order Violates the First Amendment.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Yet by design and in actual effect the challenged Executive Order denigrates, maltreats, and fuels discrimination against Muslims, just for being Muslim. This official denominational preference and the harms that it causes cannot be squared with the First Amendment's guarantees of religious freedom.

A. The First Amendment forbids the government to disfavor and denigrate one faith.

"[T]he Framers of the First Amendment forbade" any "official denominational preference." *Larson*, 456 U.S. at 255 (holding that state statute treating some religious denominations more favorably than others violated Establishment Clause). They thus mandated the strict "principle of denominational neutrality." *Id.* at 246; see also *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) ("[T]he First Amendment means at least this: * * * No person can be punished for entertaining or professing religious beliefs * * *."). For nothing more plainly violates the Establishment Clause than when government favors one religion over another. *Larson*, 456 U.S. at 244.[2]

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[2] Accord, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington * * * down to the present day, has * * * ruled out of order

The Framers crafted the First Amendment's Religion Clauses against the backdrop of "centuries * * * filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson*, 330 U.S. at 8–9. "These practices of the old world were transplanted to and began to thrive in the soil of the new America," with members of disfavored denominations being "jail[ed]," "hounded," and "persecuted." *Id.* at 9–10. The oppression "became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." *Id.* at 11. "It was these feelings which found expression in the First Amendment." *Ibid.*; accord *Lukumi*, 508 U.S. at 532–533. The Framers thus "emphatically disclaimed th[e] European legacy" of "official denominational preference" that had denied equality to persecuted religious minorities. *Larson*, 456 U.S. at 244–245; see also George Washington, *To the Jews (August 18, 1790), in* THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 110 (Forrest Church ed., 2004) ("the government of the United States * * * gives to bigotry no sanction, to persecution no assistance").

Accordingly, this Court's "Establishment Clause cases * * * have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532 (citing *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 248

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government-sponsored endorsement of religion * * * where the endorsement is sectarian * * *."); *Wallace* v. *Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was * * * designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

(1990) (plurality opinion); *Sch. Dist.* v. *Ball*, 473 U.S. 373, 389 (1985); *Wallace*, 472 U.S. at 56; *Epperson* v. *Arkansas*, 393 U.S. 97, 106–107 (1968); *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963); *Everson*, 330 U.S. at 15–16).

So fundamental is the prohibition against denominational preferences that courts "apply strict scrutiny in adjudging [their] constitutionality." *Larson*, 456 U.S. at 246. On this score, the Establishment and Free Exercise Clauses speak with one voice. See *Lukumi*, 508 U.S. at 546.

Nor may the government skirt the prohibition by clothing denominational preferences and disfavor toward minority faiths in a secular rationale, for the Establishment Clause "extends beyond facial discrimination" to "'forbid[] subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'" *Lukumi*, 508 U.S. at 534 (basing Free Exercise Clause analysis on parallel Establishment Clause jurisprudence) (quoting *Gillette* v. *United States*, 401 U.S. 437, 452 (1971); *Bowen* v. *Roy*, 476 U.S. 693, 703 (1983) (opinion of Burger, C.J.)). "Facial neutrality is not determinative," because the First Amendment forbids "governmental hostility which is masked, as well as overt." *Ibid.* Hence, religious preferences require a nonreligious justification that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; see *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000) ("it is * * * the duty of the courts to 'distinguish a sham secular purpose from a sincere one'") (brackets omitted) (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)); *Larson*, 456 U.S. at 254 (striking down law "drafted with the explicit intention of including particular religious denominations and excluding others").

What is more, the Establishment and Equal Protection Clauses "mirror[]" and reinforce each other, together safeguarding against governmental targeting of minorities based on religion or belief. *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); see also *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment). "When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Lee*, 505 U.S. at 606 (Blackmun, J., concurring). The Clauses thus share the common purpose of prohibiting government from denigrating minority groups and thereby coercing adherence to "state-created orthodoxy." *Id.* at 592 (opinion of the Court).

"In determining if the object of a law is a neutral one," therefore, this Court employs an "'equal protection mode of analysis.'" *Lukumi*, 508 U.S. at 540 (plurality opinion) (basing free-exercise analysis on Establishment Clause jurisprudence) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The Court evaluates governmental action by considering "both direct and circumstantial evidence," including, "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by * * * the decisionmak[er]." *Ibid.* (citing *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–268 (1977)). "These objective factors bear on the question of discriminatory object." *Ibid.* (citing *Pers. Adm'r*

v. *Feeney*, 442 U.S. 256, 279 n.24 (1979)); see also *McCreary*, 545 U.S. at 862–863 (determination of discriminatory object turns not on "judicial psychoanalysis of a drafter's heart of hearts" but on "readily discoverable fact" and "openly available data support[ing] a commonsense conclusion that a religious objective permeated the government's action").

The upshot is that governmental action targeting disfavored groups for special legal disabilities cannot be reconciled with the Establishment Clause's mandate of equal treatment by government. "Respect for this principle explains why laws singling out a certain class * * * for disfavored legal status or general hardships are rare." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Here, the discriminatory object is plain and unambiguous.

B. The Executive Order disfavors and denigrates Muslims.

1. The Executive Order is the Administration's promised Muslim ban.

Born as a political maneuver designed to spark and capitalize on religious and racial animus, a ban on Muslims was entrenched into law at the first opportunity after the current Administration took office in January 2017 (see Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)). The challenged Executive Order (No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017)) is just the latest step in implementing that official policy.

a. From the very beginning, a pledge to ban Muslims was central to the President's campaign. See, *e.g.*, Amy Davidson Sorkin, *Donald Trump's First, Ugly TV Ad*, NEW YORKER (Jan. 4, 2016), http://bit.ly/1PH9tp5. Starting in December 2015, and consistently from then on, Mr. Trump called for the "total and complete shutdown of Muslims entering the United States." *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALD J. TRUMP FOR PRESIDENT (Dec. 7, 2015), http://bit.ly/2tODc9U). That message remained on the Trump website long after the election and inauguration, including after the enactment and subsequent invalidation of the first Executive Order and the enactment of the revision currently under review. See Cogan Schneier, *Removal of Trump's Muslim Comments Raises Travel Ban Questions*, NAT'L L.J. (May 11, 2017), http://bit.ly/2rRhzcB.[3]

Mr. Trump explained: "we're having problems with Muslims coming into the country." Steve Guest, *Trump: 'We're Having Problems with the Muslims,'* DAILY CALLER (Mar. 22, 2016), http://bit.ly/2sBoYtz. "Islam hates us, * * * [a]nd we can't allow people coming into this country who have this hatred." Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4. So "we have to have a ban. * * * It's gotta be a ban." *Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire*, C-SPAN 28:00 (Feb. 8, 2016), http://cs.pn/2kY4f1T.

Mr. Trump pledged that, if elected, he would act within his first 100 days in office to ban Muslims from entering the United States. See, *e.g.*, Patrick Healy, *'President Trump?' Here's How He Says It Would Look*, N.Y. TIMES (May 4, 2016), http://nyti.ms/2uFaEmg. When the time came, he did it in seven. See Exec. Order No. 13,769 § 3(c).

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[3] The message was abruptly removed on the day of the *en banc* argument in the Fourth Circuit in No. 16-1436. See Schneier, *supra*.

b. Executive Order No. 13,769 immediately and categorically banned all travel to the United States by nationals of seven countries with populations that are overwhelmingly (most more than 99%) Muslim. See Exec. Order No. 13,769 § 3(c); see also PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (2012), http://bit.ly/2k4Us8B (reporting population statistics). The Order barred entry by all non-U.S. citizens from the seven countries, whether students, workers, or tourists; it applied even to legal permanent residents for whom the United States was and is their only home. See Exec. Order No. 13,769 § 3(c); Michael Edison Hayden & Benjamin Siegel, *Green Card Holders Fall Under Trump's Executive Order*, ABC NEWS (Jan. 28, 2017), http://abcn.ws/2kzvWdV.

Though the Executive Order did not come bearing the name 'Muslim ban,' the President made clear both before and after taking office that labels are fungible: "[C]all it whatever you want." *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), http://cbsn.ws/29NrLqj. That approach is official policy: "[T]he lawyers and the courts can call it whatever they want, but I am calling it * * * a TRAVEL BAN!" @realDonaldTrump, TWITTER (June 5, 2017, 3:25 AM), http://bit.ly/2rWPMHa.[4]

At the signing ceremony for the first Executive Order, the President publicly announced the Order's title (unchanged for the revised Order), "Protecting the Nation from Foreign Terrorist Entry into the United States," and intimated: "we all know what that means." *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), http://abcn.ws/2kbeqPu. He further confirmed the policy objective later that day, announcing that the government would henceforth give Christian refugees priority over Muslim refugees. See David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN NEWS (Jan. 27, 2017), http://bit.ly/2kCqG8M. And Rudolph Giuliani, vice chair of the President's transition team, confirmed that the Executive Order was the implementation of the President's directive to "do" a "Muslim ban" "legally." Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally,'* WASH. POST (Jan. 29, 2017), http://wapo.st/2jLbEO5.

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[4] The Administration has confirmed that the President's tweets are official statements. See Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements,'* CNN (June 6, 2017), http://cnn.it/2s58bOs.

c. Despite some official protestations to the contrary, the proponents, critics, and observers of the first Executive Order all understood that the Order was the long-promised Muslim ban. See, *e.g.*, Matthew Nussbaum, *Flynn's Son Says 'Muslim Ban' Is 'Necessary,'* POLITICO (Jan. 29, 2017), http://politi.co/2k6e2jr (noting that supporter recognized Executive Order as "Muslim ban"); Jane C. Timm, *Advocacy, Aid Groups Condemn Trump Order as 'Muslim Ban,'* NBC NEWS (Jan. 28, 2017), http://nbcnews.to/2sV0YVc (same for critics).

So did the federal courts, which therefore enjoined it. See *Aziz* v. *Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (Executive Order was product not of "rational national security concerns" but of "Trump's desire for a Muslim ban"); *Washington* v. *Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017).

d. The first Order having been enjoined, the Administration endeavored to revise it (Adam Liptak, *Trump Will Issue New Travel Order Instead of Fighting Case in Court*, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kP0qso), updating the lyrics without changing the tune. Declaring, "I keep my campaign promises," the President announced that the Administration would redraft the Executive Order in a way "very much tailored to what I consider to be a very bad decision" from the Ninth Circuit, explaining: "[W]e can tailor the order to that decision and get just about everything, in some ways, more." *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kXcFW4.

Other Administration officials underscored this ongoing commitment. For example, White House Senior Policy Adviser Stephen Miller stated that the revised Executive Order would include only "minor technical differences" and would produce the "same basic policy outcome." Matt Zapotosky, *A New Travel Ban with 'Mostly Minor Technical Differences'? That Probably Won't Cut It, Analysts Say*, WASH. POST (Feb. 22, 2017), http://wapo.st/2mmmECm.

e. After prolonged delays, the revised Executive Order was finally issued in March 2017. As promised, it "expressly excludes * * * categories of aliens that have prompted judicial concerns" (Exec. Order No. 13,780 § 1(i)), to sidestep the Ninth Circuit's ruling that the original Executive Order likely violated the due-process rights of lawful permanent residents and aliens with a connection to the United States (see *Washington*, 847 F.3d at 1166). See generally Exec. Order No. 13,780 § 3(a)–(b); Jeremy Diamond, *Trump Rails Against Court Ruling Blocking Travel Ban*, CNN (Mar. 15, 2017), http://cnn.it/2rG3oGD (quoting

President's statement that "[t]his new order was tailored to the dictates of the 9th Circuit's—in my opinion—flawed ruling"). Otherwise, "'[t]he principles of the executive order remain the same.'" William Gallo & Victoria Macchi, *Trump Signs New Travel Ban Order*, VOA (Mar. 6, 2017), http://bit.ly/2rZksTy (quoting White House Press Secretary).

f. To the reasonable observer the discriminatory object is likewise the same: The government continues to ban immigrants, visitors, and refugees from six overwhelmingly Muslim countries. Compare Exec. Order No. 13,780 §§ 2(c), 3, with Exec. Order No. 13,769 § 3(c). In doing so, it continues to use nationality as a proxy for religion. See Pet. App. 49a ("As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion."); *The Republican Ticket*, *supra* (quoting then-candidate Trump's announcement of this strategy). Hence, reviewing courts have similarly recognized the revised Executive Order as a second attempt to enact the "long-envisioned Muslim ban," and they have enjoined it accordingly. Pet. App. 246a; see also, *e.g.*, *id.* at 51a ("EO-2's purpose is to effectuate the promised Muslim ban * * *.").

g. They were right to do so: The President has officially stated time and again that the revised Executive Order is: "a watered-down version of the first one," "the Travel Ban," "the TRAVEL BAN," and "the watered down Travel Ban."[5] "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" @realDonaldTrump (June 5, 2017, 3:25 AM).[6]

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[5] Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), http://nyti.ms/2np9Kbh; @realDonaldTrump, TWITTER (June 3, 2017, 4:17 PM), http://bit.ly/2rzYrwd; @realDonaldTrump, TWITTER (June

Indeed, in describing the revised Executive Order as a "watered down, politically correct version" of the original, the President has bemoaned the watering down, complaining: "The Justice Dept. should have stayed with the original Travel Ban." @realDonaldTrump, TWITTER (June 5, 2017, 3:29 AM), http://bit.ly/2svraEu. "'[W]e ought to go back to the first one and go all the way, which is what I wanted to do in the first place.'" Diamond, *supra* (quoting President Trump). Most recently, he has declared: "The travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" @realDonaldTrump, TWITTER (Sept. 15, 2017, 3:54 AM), http://bit.ly/2wh0o66.

h. Petitioners appear to concede that if the Executive Order had banned Muslims by name rather than by proxy, it would not withstand judicial review. See *International Refugee Assistance Project v. Trump*, C-SPAN 30:29 (May 8, 2017), http://cs.pn/2j4kM4h. But

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13, 2017, 3:44 AM), http://bit.ly/2vJj4Lw; @realDonaldTrump, TWITTER (June 5, 2017, 3:37 AM), http://bit.ly/2uKjVYU.

[6] See also @realDonaldTrump, TWITTER (Apr. 26, 2017, 3:30 AM), http://bit.ly/2gN1HDe (calling Case No. 16-1540 "the 'ban' case"); @realDonaldTrump, TWITTER (Apr. 26, 2017, 3:20 AM), http://bit.ly/2oJNjK8 (calling original Order "the ban"); @realDonaldTrump, TWITTER (Feb. 4, 2017, 1:44 PM), http://bit.ly/2f3F9tQ (same); @realDonaldTrump, TWITTER (Feb. 4, 2017, 12:44 PM), http://bit.ly/2eGVHYb ("a Homeland Security travel ban"); @realDonaldTrump, TWITTER (Feb. 4, 2017, 5:06 AM), http://bit.ly/2xP334e ("the ban"); @realDonaldTrump, TWITTER (Jan. 30, 2017, 5:31 AM), http://bit.ly/2okbtwc (same).

they insist that the Executive Order is not the promised Muslim ban because the Order's "text does not refer to or draw any distinction based on religion." Br. 70. That was by design: When his express calls on the campaign trail for a Muslim ban were roundly and almost universally denounced, including by his future running mate,[7] Mr. Trump responded that because "[p]eople were so upset when [he] used the word Muslim," he would begin "talking territory instead of Muslim" (*Meet the Press*, NBC NEWS (July 24, 2016), http://nbcnews.to/29TqPnp). That shift in terminology was semantic, not substantive: "So you call it territories. OK? We're gonna do territories. * * * [C]all it whatever you want. We'll call it territories." *The Republican Ticket*, *supra*.

This strategy and the preferred terminology of petitioners' counsel notwithstanding, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. An objective observer familiar with the pledge to ban Muslims, the Executive Orders, and the President's official statements could reach no conclusion other than that the Orders are the promised Muslim ban.

i. The government, however, seeks to brush aside the evidence that the Executive Orders are campaign promises fulfilled. It contends that considering "campaign statements long before development of the Order" would require impermissible "'judicial psychoanalysis'" (Br. 70 (quoting *McCreary*, 545 U.S. at 862)), and that taking the presidential oath of office "marks a profound transition from private life to the Nation's highest public office" that washes away all that came before (Br. 73). But there is nothing improper about relying on campaign statements to illuminate the nature of governmental action in fulfillment of a campaign promise. See, *e.g.*, *Epperson*, 393 U.S. at 107–108 & n.16 (relying on campaign statement to conclude that "fundamentalist sectarian conviction was and is the law's reason for existence"). That is especially true when, once in office, the decisionmaker—here a single official, the President himself—continues to invoke his campaign promises to explain the official action. See, *e.g.*, *Full Transcript and Video, supra* ("I keep my campaign promises * * *.").

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[7] See Jessie Hellmann, *Trump to Stick with Muslim Ban*, HILL (May 4, 2016), http://bit.ly/1OekCvt (reporting strong criticism by both Republican and Democratic officials); *The Republican Ticket*, *supra* ("'Calls to ban Muslims from entering the U.S. are offensive and unconstitutional.'" (quoting then-Gov. Pence)).

If on assuming office the President had renounced the ban, or changed his rhetoric other than cosmetically, or consulted with knowledgeable government officials and experts (cf. p. 21, *infra*), or considered the contrary findings of his own Department of Homeland Security (see *ibid.*), there might be some possible worry about unfairly criticizing permissible governmental action based on ill-advised campaign rhetoric. Instead, the President, as President, explicitly propounded the anti-Muslim pledge; wrote it into law—twice; and then underscored the object of the Executive Orders by repeatedly describing them as the promised ban, emphasizing that "[t]hese are campaign promises" (*Full Transcript and Video, supra*).

j. In all events, no one is asking this Court to consider stale campaign statements while ignoring more recent, repeated, official acts. As explained above, the whole "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body," are all "objective factors [that] bear on the question of discriminatory object." *Lukumi*, 508 U.S. at 540 (plurality opinion). The government's official acts and statements of policy since January 20, and their antecedents, are all "readily discoverable fact[s]." *McCreary*, 545 U.S. at 862.

And these facts are compelling. The Executive Orders are *executive* orders—official acts of the President. And so, the Administration has confirmed, are the presidential tweets. See note 4, *supra*. The President and his closest advisers are also the drafters of both Executive Orders; and the President is the authority who issued them and dictated that they be enforced. After the inauguration as well as before, the President has consistently told the American public exactly what he is doing, and why. There is thus no danger of falsely attributing stray statements of third parties to the actual decisionmaker.

Judicial psychoanalysis this is not. One need not be Sigmund Freud to understand what the President is doing; one need only take him at his word.

2. *The government's assertion of a national-security rationale is inadequate to justify a Muslim ban.*

Because this Court "appl[ies] strict scrutiny in adjudging [the] constitutionality" of a denominational preference, petitioners must demonstrate that the Muslim ban is "justified by a compelling governmental interest" and that it is "closely fitted to further that interest." *Larson*, 456 U.S. at 246–247; accord

Lukumi, 508 U.S. at 546 (actions disfavoring one faith must satisfy "the most rigorous of scrutiny" and are impermissible unless they "advance 'interests of the highest order'" that "could [not] be achieved by narrower [restrictions]" (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). What is more, the governmental objective must "be sincere and not a sham." *Edwards* v. *Aguillard*, 482 U.S. 578, 587 (1987). The Muslim ban fails in all respects.

a. The challenged Executive Order purports "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." Exec. Order No. 13,780 pmbl. While no one doubts that preventing terrorist attacks would be a compelling interest, the Order's bald assertion of that objective is insufficient to justify a denominational preference. "To survive strict scrutiny * * * a State must do more than assert a compelling state interest—it must also demonstrate that its law is necessary to serve the asserted interest." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992); see also, *e.g.*, *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) (under strict scrutiny, "we have always expected that the [government's] action would substantially address, if not achieve, the avowed purpose"). Strict scrutiny thus "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–431 (2006) (explaining strict scrutiny in case arising under Religious Freedom Restoration Act).

In other words, the government must show that its asserted interest here is genuinely served by, and genuinely requires, the blanket exclusion of all the persons affected by the ban. Blunt instruments are not good enough: "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 523 (1985)).

Were the rule otherwise, the government could always defeat strict scrutiny by invoking some vague phrase—be it 'preventing terrorism' or 'promoting national security,' advancing "public safety" (*Nat'l Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 677 (1989)), "combating corruption" (*Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011)), "protecting children" (*Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)), or anything else that, under some set of conditions, might be compelling.

b. Here, the best that can be said for the Executive Order is that it is wildly over- and underinclusive as a means to prevent terrorism, because it does not even try to identify those who are actual or potential terrorists. In fact, it is so poorly fitted to any genuine national-security objective that the sincerity of the rationale is in doubt.

First, were the Executive Order and its precursor truly concerned with national security, one would expect the Administration to have called on the government's own national-security experts as drafters or consultants. It didn't. The Executive Order was instead crafted by the President and a small group of political advisers with a record of anti-Muslim animus. See Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), http://cnn.it/2kGdcZy; Andrew Kaczynski, *Steve Bannon in 2010: 'Islam Is Not a Religion of Peace. Islam Is a Religion of Submission,'* CNN (Jan.

31, 2017), http://cnn.it/2knpxSE. The authors neither solicited nor accepted input from the Department of Homeland Security, the Department of Defense, the State Department, or other agencies or experts. See Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), http://nyti.ms/2jtHiPd.

Second, although Administration officials have described the Executive Order as necessary to combat terrorism, the Department of Homeland Security found the opposite: It determined that citizenship (*i.e.*, the focus of both Executive Orders on country of origin) is an "'unreliable' threat indicator" for terrorism, and that nationals of the seven predominantly Muslim countries that were targeted in the Executive Orders were "rarely" involved in terrorism in the United States.[8] Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), http://wapo.st/2lOkpKW. And after the revised Executive Order was issued, more than 100 former government officials, from both Republican and Democratic administrations, signed an open letter explaining that the Order would "weaken U.S. national security" rather than enhance it. Nicholas Loffredo, *Trump Travel Ban Weakens National Security, Foreign Policy Experts Argue*, NEWSWEEK (Mar. 11, 2017), http://bit.ly/2mWUZM2.

Third, a measure truly tailored to ensuring national security would apply equally to all countries from which similar levels of terrorist threat might arise. Again, that is not how the revised Executive Order operates. Though it points to concerns over "terrorist safe havens" identified by the State Department (see Exec. Order No. 13,780 § 1(e)), it singles out only Muslim-majority countries. The Order ignores the many other countries, including multiple non-Muslim countries, that the very same State Department report identifies as terrorist safe havens (see U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2015 ch. 5, http://bit.ly/2qoos3M). And although the asserted purpose of the ban is to ensure proper "screening and vetting of foreign nationals" (Exec. Order No. 13,780 § 2(c)), on the very day when the revised Order was signed, the Secretary of Homeland Security publicly acknowledged that there are "thirteen or fourteen other countries, not all of them Muslim countries, * * * that have very questionable vetting procedures" (Daniella Diaz, *Kelly: There Are '13 or 14' More Countries with Questionable Vetting Procedures*, CNN (Mar. 7, 2017), http://cnn.it/2mSdv94 (video)). None of those—and no countries other than ones with overwhelmingly Muslim populations—are mentioned in or covered by the Order.

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[8] Nationals of six of the seven Muslim countries from the first Executive Order are still barred from the United States under the revised version (see Exec. Order No. 13,780 § 2(c)), and nationals of the seventh, Iraq, are subjected to extra scrutiny (see *id.* § 4).

In other words, the Executive Order targets only Muslim countries and their nationals, while ignoring what the government itself has identified as identically situated non-Muslim-majority countries and *their* nationals. And it does that even though, in the last forty years, no one from *any* of the banned countries has killed *anyone* in a terrorist attack on U.S. soil. See Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), http://bit.ly/2kWoddx.

Fourth, although the Executive Order asserts that "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States," it identifies just one person from *any* of the banned countries: a Somali refugee who came to the United States as a five-year-old child. Exec. Order No. 13,780 § 1(h); see Lynne Terry, *Family of Portland's Bomb Suspect, Mohamed Mohamud, Fled Chaos in Somalia for New Life in America*, OREGONIAN (Dec. 5, 2010), http://bit.ly/2rZnhEm. On the strength of that one incident, the Executive Order categorically bars virtually all the nationals of six countries whose people share the faith that the President promised to keep out of the United States.

Fifth, if the revised Executive Order were truly necessary to address "unacceptably high" risks that terrorists would enter the United States (Exec. Order No. 13,780 §§ 1(f), 2(c)), it should have been implemented as soon as practicable. In January 2017, White House Senior Policy Adviser Stephen Miller warned that "if we waited five days, 10 days, six months to begin establishing the first series of controls," the government would be leaving "the homeland unnecessarily vulnerable." Phil McCausland & Hallie Jackson, *Donald Trump Expected to Sign New Immigration Order: A Timeline*, NBC NEWS (Mar. 6, 2017), http://nbcnews.to/2n3Ao5m. Yet after the first Order was enjoined, the Administration postponed issuing the revised version again and again—including to prolong a favorable news cycle on unrelated matters. See *ibid.*; Laura Jarrett et al., *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN (Mar. 1, 2017), http://cnn.it/2mOWkRp.

Sixth, were the Muslim ban genuinely intended, as it says, "[t]o temporarily reduce investigative burdens" while the government "conduct[s] a worldwide review to identify * * * what[] additional information will be needed * * * to adjudicate" visa applications (Exec. Order No. 13,780 §2(a), (c); see also Br. 8), the duration of the ban (set for 90 days (see Exec. Order No. 13,780 § 2(c))) would have been tied to the pendency of that review. Though the district court in No. 16-1540 temporarily enjoined the review—which should at that point already have been underway for weeks under the original Executive Order (see Exec. Order No. 13,769 § 3(a))—the Ninth Circuit's vacatur of that portion of the injunction on June 12 (see Supp. Add. 71) meant that the review was again entirely unimpeded. Yet the President acted on June 14 to ensure that the ban would be in place for a full 90 days if and when the injunctions of the ban were "lifted or stayed" (Effective Date in Executive Order 13780, 82 Fed. Reg. 27,965 (June 14, 2017)), without regard to whether the agencies might complete their review earlier or find, consistent with the Department of Homeland Security's February 2017 report, that the ban does not promote national security. The government offered no justification for this decoupling of the ban from its stated purpose.

c. The government protests that none of that should matter because "[e]ach of the countries" whose nationals it singles out for unfavorable treatment "had previously been identified as presenting heightened terrorism-related concerns in connection with the Visa Waiver Program." Br. 71. But the Executive Order targets people without regard to whether they currently reside in or have any ongoing connection with any of the listed countries—much less whether they have any connection to terrorism or terrorists. Even those who, for example, fled one of the countries as refugees decades ago and have resided peacefully elsewhere ever since are branded for exclusion.

This policy is irrational and inexplicable except with reference to anti-Muslim bias. "Just as Holmes's dog could tell the difference between being kicked and being stumbled over" (*McCreary*, 545 U.S. at 866 n.14), American Muslims can tell the difference between rank bias and genuine national-security concerns that keep them from their children, parents, or grandparents and deny people who share their faith the opportunity to learn, teach, and work in this country.

That is why "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary*, 545 U.S. at 866 n.14; cf., *e.g.*, *Grumet*, 512 U.S. at 702 n.6 (single-religion school district created using "a religious criterion" is constitutionally distinct from one "whose boundaries are derived according to neutral historical and geographic criteria"); *Lukumi*, 508 U.S. at 539–540 (invalidating ordinance that "appear[ed] to apply to substantial nonreligious conduct" because it "had as [its] object the suppression of religion," even if it might otherwise have "survive[d] constitutional scrutiny"); *Edwards*, 482 U.S. at 594 (invalidating Creationism Act, "primary purpose" of which was "to endorse a particular religious doctrine," even though "teaching a variety of scientific theories about the origin of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction").

d. In all events, the Executive Orders are in no sense "the same government action" as the earlier implementation of visa requirements. There is, after all, a world of difference between banning travelers from Muslim countries outright and simply requiring that people obtain a visa before coming to the United

States. A bare visa requirement exists for many countries throughout the world, without regard to the religious makeup of their populations. See *Visa Waiver Program*, U.S. DEP'T STATE, http://bit.ly/1V9XIeB (last visited Sept. 6, 2017) (listing just 38 countries of origin for which *no* visa is required). The visa requirements thus neither embodied nor communicated religious animus but instead implemented genuine assessments about appropriate immigration policy, while not barring—or tarring—any groups.

The ban, by contrast, conclusively identifies all immigrants and travelers from six predominantly Muslim countries as dangerous, marks them as collectively responsible for acts that other people, from other countries, have committed in the name of Islam, and treats them as unworthy to visit our shores—for no reason other than their religion.

* * *

The government "asks us to pretend that we do not recognize what every [American] understands clearly—that this policy is about [religion]. The [government] further asks us to accept what is obviously untrue: that [the ban is] necessary" for national security. *Santa Fe*, 530 U.S. at 315. This Court should "refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of" banning Muslims. *Ibid.* The Executive Order is inconsistent with—and certainly, therefore, not narrowly tailored to—the government's professed national-security objective. Rather, it can be explained, if at all, solely as effecting the President's ongoing commitment to ban Muslims from the United States.

C. The government's denigration of Muslims foments the social divisiveness and violence that the Establishment Clause was meant to forestall.

The Establishment Clause's prohibition against denominational preferences is critical, because "nothing does a better job of roiling society" than when government singles out people for differential treatment based on their adherence to a favored or disfavored faith. *McCreary*, 545 U.S. at 875–876. That "sectarianism[,] which is so often the flashpoint for religious animosity" (*Lee*, 505 U.S. at 588), has been unleashed by the government's enactment of the Muslim ban.

1. Governmental policies that disfavor a minority group impermissibly "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2602 (2015). Hence, "[j]ust as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment).

2. This causal connection between governmental stigmatization and violence against disfavored groups is well documented. See, *e.g.*, Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws*, 35 HARV. C.R.–C.L. L. REV. 103, 124, 137–143 (2000) (explaining that anti-sodomy laws have been used to rationalize private violence and discrimination against lesbians and gay men); Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment 2*, 32 WASHBURN L.J. 367, 369–370 (1993) (reporting that violence against lesbians and gay men tripled after Colorado passed constitutional amendment, ultimately invalidated by *Romer*, *supra*, that had precluded laws banning discrimination based on sexual orientation); José Roberto Juárez Jr., *Recovering Texas History: Tejanos, Jim Crow, Lynchings & the University of Texas School of Law*, 52 S. TEX. L. REV. 85, 92–93 (2010) (noting that "the Jim Crow system * * * encouraged violence against" racial minorities). For "[s]tate-sanctioned condemnation of a group of citizens * * * sends the clear message that this group is not entitled to the freedom from physical violence provided other citizens." Leslie, *supra*, at 126.

3. The current experience of Muslims in this country is of a piece with other sad chapters in our Nation's history in revealing how official messages of exclusion fuel animus and persecution against their targets, in both the public and private spheres. Accordingly, it is no surprise that the pernicious effects of the Muslim ban go well beyond legally mandated separation of children, parents, and grandparents; disruption of businesses and educational institutions; and relegation of refugees to further suffering. As the former Assistant Attorney General for Civil Rights has testified: "Policies singling out protected groups can normalize hate and legitimize hate-motivated violence directed at Muslims or people perceived to be Muslim." *Responses to the Increase in Religious Hate Crimes: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Vanita Gupta, President, Leadership Conference on Civil and Human Rights), http://bit.ly/2xa29Bp.

4. The government's clear message that Muslims are not worthy of equal respect and dignity and do not belong in this country has this stigmatizing effect, not just in the substance of the Executive Orders—banning nationals of Muslim-majority countries—but also in the words.

The original Order, for example, declared the objective to protect the United States from those who "bear hostile attitudes toward it and its founding principles," "do not support the Constitution," and "would place violent ideologies over American law." Exec. Order No. 13,769 § 1. This language echoes that of anti-Muslim extremists, who routinely assert that Muslims and Islam are hostile to the Constitution (*e.g.*, *Stop Importing Jihadists*, CTR. FOR SECURITY POL'Y (June 28, 2016), http://bit.ly/2vJQllS[9]) and adhere to "an ideology that does not assimilate and aims to dominate" (Katie Jones, *U.S. Hits Refugee Cap Months Early: How America's Muslim Population Is Shaping the Nation*, GELLER REPORT (Aug. 5, 2017), http://bit.ly/2wLZehW).

Similarly, both the original and revised Executive Orders direct the Department of Homeland Security to compile statistics not just on terrorism but also on "honor killings" committed "by foreign nationals." Exec. Order No. 13,780 § 11(a); Exec. Order No. 13,769 § 10(a). Aside from being wholly unrelated to terrorism or national security, the Orders' focus on 'honor killings' is another tip of the hat to anti-Muslim extremists, many of whom inaccurately associate the practice with Islam. See Nahal Toosi, *'Honor Killings'*

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[9] See generally *Center for Security Policy*, S. POVERTY L. CTR., http://bit.ly/2atHufL (last visited Sept. 7, 2017) (designating Center for Security Policy as a hate group). *Amicus* Southern Poverty Law Center defines hate groups as those with beliefs or practices that attack or malign an entire class of people, typically based on immutable characteristics.

Highlighted Under Trump's New Travel Ban, POLITICO (Mar. 6, 2017), http://politi.co/2x74mLr.

5. As private speech, of course, that odious rhetoric is protected, as long as it stops short of direct incitement to violence. Cf. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). But government speech is different: The government is not permitted to communicate that one religion or race or other insular minority is by its very nature inferior and a threat to American values or the American way of life.

In part that is because official messages of disapprobation and denigration bear the unique weight of governmental authority, placing official imprimatur on private discrimination. When government puts its thumb on the scale in favor of prejudice, it promotes violence and social strife. Conversely, when government signals respect for minority groups, attacks on those groups may diminish. For instance, after President George W. Bush rejected the equation of Islam with terrorism and spoke at a mosque on September 17, 2001, about the value of tolerance, anti-Muslim hate crimes "dropped dramatically across the country." Brian H. Levin & Kevin Grisham, *Hate Crimes Rise in Major American Localities in 2016*, CTR. FOR STUDY HATE & EXTREMISM, CAL. ST. UNIV., SAN BERNARDINO 17 (June 29, 2017), http://bit.ly/2wcQZaT.

Government speech and official action have real, palpable force in telling people what conduct toward others is acceptable and what is not. So when the government communicates that minority groups are objects of scorn who do not belong, private citizens are encouraged to treat them as such.

6. That is just what has happened here. In the period since the President signed the original Executive

Order in January, attacks on Muslims have increased dramatically across the country.

The Council on American–Islamic Relations reports a *91%* increase over the same period in 2016 in the number of anti-Muslim hate crimes and a 24% increase in anti-Muslim bias incidents. *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, COUNCIL ON AM.–ISLAMIC RELATIONS (July 17, 2017), http://bit.ly/2uCpFqR.[10] Muslim Advocates has identified more than 80 incidents between January and May 2017 of violence or threats of violence against Muslims and people who appear to be Muslim. *Map: Recent Incidents of Anti-Muslim Hate Crimes*, MUSLIM ADVOCATES, http://bit.ly/1Orsk4m (last visited Sept. 7, 2017); see also *Responses to the Increase in Religious Hate Crimes*, 115th Cong. 6 (Gupta statement). And fully 60% of Muslims reported experiencing discrimination based on their religion in the past year alone. DALIA MOGAHED & YOUSSEF CHOUHOUD, INST. FOR SOC. POL'Y & UNDERSTANDING, AMERICAN MUSLIM POLL 2017: MUSLIMS AT THE CROSSROADS 4 (2017), http://bit.ly/2x2klx8.

Chillingly, there were at least 85 anti-Muslim incidents at mosques during the first half of 2017. Christopher Ingraham, *American Mosques—and American Muslims—Are Being Targeted for Hate Like Never Before*, WASH. POST (Aug. 8, 2017), http://wapo.st/2x3nCty. Among them:

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[10] CAIR defines bias incidents as cases involving "an identifiable element of religious discrimination" and hate crimes as "criminal offenses against persons or property" under state or federal law. *CAIR Report*, *supra*.

- On January 28, the day after the President issued the first Executive Order, a Texas mosque was destroyed by an arsonist who apparently believed that the worshippers there were terrorists. See *Man Indicted for Hate Crime for Texas Mosque Fire*, CBS NEWS (June 23, 2017), http://cbsn.ws/2wcTtWP; *Investigator: Suspect in Texas Mosque Fire Feared Muslims*, U.S. NEWS & WORLD REP. (Mar. 10, 2017), http://bit.ly/2vJp8jk.
- On February 11, an Islamic Center in Ohio was vandalized by a man whose car bore the words "Oppose Trump You Are Doomed!" Kevin Landers, *Hilliard Man Charged with Vandalizing Perry Township Mosque*, WBSN-10TV (Feb. 17, 2017), http://bit.ly/2gLyUeo.
- On March 19, two weeks after the President issued the revised Executive Order, a note left at an Islamic Center in Iowa warned that the "new sheriff in town—President Donald Trump"—was "going to cleanse America" and would "start with you Muslims"; the note threatened that the President was "going to do to you Muslims what Hitler did to the Jews." Jason Le Miere, *Trump Will Do to Muslims 'What Hitler Did to the Jews,' Claims Hate Crime Note Sent to Iowa Mosque*, NEWSWEEK (Mar. 20, 2017), http://bit.ly/2f7XExn.

The sharp increase in violence and threats since the Muslim ban was instituted is all the more disturbing because the level of anti-Muslim animus was already high. The FBI had catalogued 257 anti-Muslim hate crimes in 2015—a 67% increase over the prior year. See Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, PEW RES.

CTR. (Nov. 21, 2016), http://pewrsr.ch/2ga9TYk. And the number of organized anti-Muslim hate groups in America had jumped from 34 in December 2015 to 101 in December 2016. See *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, S. POVERTY L. CTR. (Feb. 15, 2017), http://bit.ly/2lPK1Vw.

7. To be sure, hate crimes against Muslims are not new; this religious and racial bias has a long and shameful pedigree. But the skyrocketing threats and violence coincide with the demonization of Muslims and the repeated pledge to ban them. *Amicus* Southern Poverty Law Center received reports of nearly 50 incidents of intimidation, harassment, or hate crimes against Muslims in just the first ten days after President Trump was elected. This anti-Muslim persecution was not only spurred by campaign rhetoric; it received official sanction through the Executive Orders, thus emboldening harassment and hate crimes against American Muslims.

8. In sum, official action can and does profoundly influence private treatment of minority groups, whether encouraging respect toward those groups or sanctioning violence, harassment, and discrimination against them. The government here chose the poorer path, with the expected results.

Cognizant of these dangers, this Court has been scrupulous in rejecting official measures that treat religious and other minorities unequally. See *Grumet*, 512 U.S. at 699–705; *Lukumi*, 508 U.S. at 534–542; *Larson*, 456 U.S. at 253–255; see also, *e.g.*, *Romer*, 517 U.S. at 634 (striking down anti-gay state constitutional amendment where "the disadvantage imposed [was] born of animosity toward the class of persons affected"); *United States* v. *Windsor*, 133 S. Ct. 2675, 2693–2695 (2013) (invalidating Defense of Marriage Act because design, purpose, and effect were impermissible targeting of same-sex couples and their families for stigma and discrimination); *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) ("[D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes."). The Court should do the same here.

CONCLUSION

Government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion." *Lukumi*, 508 U.S. at 547. Declaring a religion's adherents unworthy even to visit this country is "precisely the sort of official denominational preference that the Framers of the First Amendment forbade" (*Larson*, 456 U.S. at 255). This "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," much less a *compelling* one. *Romer*, 517 U.S. at 634 (quoting *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)). And the resulting unleashing of violence against Muslims, or against any group, is abhorrent and indefensible. Our government should not tolerate persecution of religious minorities, much less encourage it.

The preliminary injunctions should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX OF *AMICI CURIAE*

AMICI MEMBERS OF THE CLERGY

Amici include members of the clergy who practice and promote the values of the Christian faith and worry about the government's harmful message of judgment and condemnation of our Muslim brothers and sisters. As Christian leaders, we are obligated to lead in matters of faith and to defend our freedom of religion from governmental intrusion. Among other concerns, the Executive Order risks being misunderstood as representing our faith, furthering the inaccurate and harmful narrative that America is a "Christian Nation"—a message that we strongly reject. And the Executive Order will be correctly interpreted by the world as bare discrimination against Muslims. Actions of this nature perpetuate inaccurate narratives and harmful stereotypes and undermine the arduous path to peace between the world's two largest faiths.

Although the Executive Order's discriminatory treatment of Muslims will be interpreted by many in the global community as a statement from Christians, it does not represent our will or our position as the actual representatives of our faith. As Christian leaders, we did not and do not request preferential treatment for adherents of our faith. The risk of appearance that the American government is in any way, shape, or form representing the Christian faith with this action is of grave concern to us—and should be to the courts and to the American people, regardless of their faith affiliation. Whether this trespass of our sovereign agency is intentional or not is inconsequential to our fundamental opposition. The Order is an embarrassing distortion of everything we profess, and it stands to harm our cause domestically and abroad.

We descend from a lineage of martyrs who modeled self-sacrifice, not self-protection. We take seriously the responsibility of continuing a legacy of welcoming foreigners and loving our neighbors as ourselves. We embrace this responsibility gladly and join our colleagues in asking the Court to reject this Executive Order.

ORGANIZATIONAL *AMICI*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by this Court and by the federal courts of appeals throughout the country. Consistent with our support for the separation of church and state, Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that government must not favor, disfavor, or punish based on religion or belief.

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund, Inc., is a national impact-litigation, public-policy, and advocacy organization committed to achieving full recognition of the civil rights of those who are lesbian, gay, bisexual, or transgender or living with HIV—including many who are Muslim and face increased discrimination because of the challenged Executive Order. Through its decades of work on behalf of historically persecuted people, Lambda Legal has deep knowledge of the corrosive effect of government measures that single out marginalized groups for mistreatment. Lambda Legal has also worked to vindicate protections afforded by the Establishment Clause to those treated unequally based on religious beliefs and affiliations, and has a long-standing interest in access to immigration and asylum for individuals who are LGBT or living with HIV.

Lambda Legal has participated as counsel or *amicus curiae* in this Court and lower courts in numerous cases addressing First Amendment, Equal Protection, and other civil-rights bulwarks for LGBT people, and has had a long-standing interest in immigration and asylum matters. For example, Lambda Legal has served as party counsel in *Romer* v. *Evans*, 517 U.S. 620 (1996); *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015); and *Barber* v. *Bryant*, 860 F.3d 345 (5th Cir. 2017), *petition for reh'g en banc filed*, No. 16-60477 (5th Cir. July 6, 2017), and participated as an *amicus* in asylum cases such as *Hernandez-Montiel* v. *INS*, 225 F.3d 1084 (9th Cir. 2000), and *Velasquez-Banegas* v. *Lynch*, 846 F.3d 258 (7th Cir. 2017).

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles that both the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution work to truly protect religious liberty for all Americans, and that it violates the Establishment Clause for government to take action that, effectively or on its face, harms one particular religious group. This is especially important because of the additional harm such government opprobrium can and does cause, and with respect to particularly vulnerable populations like immigrants, as in this case.

The Riverside Church in the City of New York

The Riverside Church is an interdenominational church, influential on the nation's religious and political landscapes. We are an interdenominational, interracial, international, open, welcoming, and affirming church and congregation. The Riverside Church in the City of New York seeks to be a community of faith. Its members are united in the worship of God known in Jesus, the Christ, through the inspiration of the

Holy Spirit. The mission of the Church is to serve God through word and witness; to treat all human beings as sisters and brothers; and to foster responsible stewardship of all God's creation.

Southern Poverty Law Center

The Southern Poverty Law Center has provided *pro bono* civil-rights representation to low-income persons in the Southeast since 1971. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. SPLC also monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing discriminatory governmental action that undermines the promise of civil rights for all.

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OF THE UNITED STATES, ET AL., *PETITIONERS*
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL., *PETITIONERS*
v.
STATE OF HAWAI'I, ET AL.

On Writs of Certiorari to the United States Courts
of Appeals for the Fourth and Ninth Circuits

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BRIEF OF AMICI CURIAE

The Muslim Justice League, Muslim Public Affairs Council, and Council on American-Islamic Relations, California, submit this brief in support of Respondents International Refugee Assistance Project (IRAP), et al. and the State of Hawai'i, et al.[1]

INTEREST OF AMICI CURIAE

Amici Curiae are organizations that advocate for the dignity and fair treatment of the Muslim community throughout the United States. Amici can provide unique and important insights regarding the impact of the March 6, 2017 Executive Order 13780 (the "EO-2" or "Muslim Ban") and how it unfairly subjects Muslims, persons from Muslim-majority countries, and even those simply perceived as Muslim, to unwarranted harassment and religious discrimination by government officials. Moreover, Amici can address the effects and public perceptions caused by an executive order that targets the Muslim community under the guise of national security, including the stigmatization of Muslims and Muslim communities, increased discrimination, and discouragement of Muslims and persons from Muslim-majority countries—both U.S. citizens and non-citizens alike—from fully and freely participating in American society for fear of reprisal, directly undermining Amici's work.

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[1] Counsel for amici authored this brief in whole, and no other person or entity other than amici, its members, or counsel made monetary contributions for the preparation or submission of this brief. Amici's counsel notified counsel for the parties of their intent to file this amicus brief and received their consent.

This case addresses the legality of an executive order that targets and restricts entry of people from six designated countries and refugees into the United States. Amici support the arguments that EO–2 is unconstitutional, and submit this brief to address the deleterious effects of targeting members, or perceived members, of a religious community via an order that was "motivated" by a "desire to exclude Muslims from the United States."[2] Accordingly, Amici have a substantial interest in the proper resolution of the issues this case presents.

The **Muslim Justice League (MJL)** is an independent nonprofit organization advocating for the protection of human and civil rights that are threatened under national security pretexts, through community education and organizing, and legal and policy advocacy. In the course of providing educational workshops, MJL has fielded increased questions since the announcement of the Muslim Ban from concerned community members regarding their fears about the consequences of traveling to see family or pursue educational, professional, or religious objectives. MJL participated as amicus curiae in *Ashcroft* v. *Abbasi* (U.S. 2017) challenging government policies and practices that targeted people based on their race, religion, ethnicity, or national origin.

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[2] *IRAP* v. *Trump*, 857 F. 3d 554, 595 (CA4 2017).

The **Muslim Public Affairs Council (MPAC)** is a community-based public affairs nonprofit organization working for the integration of Muslims into American society. MPAC aims to increase the public understanding of Islam and improve policies that affect American Muslims by engaging our government, media, and communities. MPAC's view is that America is enriched by the vital contributions of American Muslims. MPAC works diligently to offer the public a portrayal that goes beyond stereotypes and shows that Muslims are part of a vibrant American pluralism. MPAC participated as amicus curiae in cases concerning civil liberties (*Boumediene* v. *Bush* and *al Odah* v. *U.S.* (U.S. 2007)), immigration (*Arizona* v. *U.S.* (U.S. 2012)), and religious liberties (*Holt* v. *Arkansas Dept. of Correction* (U.S. 2014)).

The **Council on American-Islamic Relations, California (CAIR-CA)**, is a chapter of the nation's largest American

Muslim civil rights and advocacy organization. CAIR-CA's mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. Through its four offices, CAIR-CA serves California's estimated one million American Muslims by providing direct legal services to victims of discrimination, working with the media, facilitating community education, and engaging in policy advocacy to advance civil rights and civic engagement.

SUMMARY OF ARGUMENT

The EO–2 focuses exclusively on six Muslim-majority countries by banning the entry of their nationals and tying the alleged "risks" of their nationals' entry to the need for enhanced vetting procedures, thus violating the Establishment Clause by creating a disfavored religion in the United States. The injuries the EO–2 inflicts apply to Muslim communities across the country, disrupting personal, professional, and academic activities and unfairly and irreparably stigmatizing Muslims. Because the EO–2 is nothing more than religious intolerance masquerading as an attempt to address (unfounded) security concerns, the judgments of the courts of appeals should be affirmed.

ARGUMENT: THE EO–2 HARMS MUSLIMS THROUGHOUT THE COUNTRY, VIOLATES THE ESTABLISHMENT CLAUSE, AND WAS PROPERLY ENJOINED.

I. The EO–2's effect on Muslims in the United States constitutes injury under the Establishment Clause.

"[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). By imposing a ban on travel from six Muslim-majority countries and proposing an "extreme vetting" program targeting Muslims and travelers from Muslim-majority countries long after the Muslim Ban expires, the President has violated this "clearest command" and created a system officially disfavoring Muslims. Multiple courts evaluating challenges to the EO–2 have found that the harms caused by the Muslim Ban are direct, concrete injuries under the Establishment Clause.[3] These injuries include:

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[3] *See e.g.*, *IRAP*, 857 F. 3d at 584 (quoting *Suhre* v. *Haywood County*, 131 F. 3d 1083, 1086 (CA4 1997)) (finding Plaintiff "Doe #1 has had 'personal contact with the alleged establishment of religion'" due to injuries

- ***Prolonged separation of family members***, an "imminent, sufficiently

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caused by prolonged separation from his wife, an Iranian national, and the alleged state-sanctioned message that foreign-born Muslims, like Doe #1, are political outsiders); *Washington* v. *Trump*, 847 F. 3d 1151, 1168-1169 (CA9 2017) ("When the [E.O.] was in effect, the States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad. These [deprivations of constitutional rights] are substantial injuries and even irreparable harms."); *Sarsour* v. *Trump*, 2017 WL 1113305, *14 (ED Va. 2017) ("The Fourth Circuit has held that, as a matter of law, 'loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (citing *Giovani Carandola, Ltd.* v. *Bason*, 303 F. 3d 507, 520-521 (CA4 2002)); *IRAP* v. *Trump*, 2017 WL 1018235, *16-17 (D Md. 2017) ("'[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place.' … The Court accordingly finds that Plaintiffs have established a likelihood of irreparable harm when the Second Executive Order takes effect."); *see also Aziz* v. *Trump*, 2017 WL 580855, *10 (ED Va. 2017); *Hawai‘i* v. *Trump*, 2017 WL 1011673, *16 (D Haw. 2017).

'real' and concrete" injury that causes "a personal and 'particularized'" harm.[4]

- ***The loss of First Amendment freedoms***, causing unquestionable irreparable harm from the moment the government action took place.[5]
- ***Significant restraint of travel and freedom of movement***, causing, e.g., the separation of families,[6] the cancellation of personal and professional travel plans abroad or visits from family or colleagues to America,[7] and disruption of academic activities.[8]
- ***The promotion of harmful stereotypes of Muslims***, causing deep sadness that both the original and revised executive order convey the message that a broad travel ban is "needed" to prevent people from certain Muslim countries from entering the United States, and further sending an "alleged state-sanctioned

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[4] *IRAP*, 857 F. 3d at 583-84.

[5] *Id.*

[6] *Id.*, at 606 (Keenan, J., concurring); *Washington*, 847 F. 3d at 1169.

[7] *Aziz*, 2017 WL 580855, *2-3, *10; *Washington*, 847 F. 3d at 1159.

[8] *Aziz*, 2017 WL 580855, *2; *Sarsour*, 2017 WL 1113305, *5.

message that foreign-born Muslims" are "'outsiders, not full members of the political community.'"[9]

- ***Psychological harm and mental stress***, including "significant fear, anxiety and insecurity" due to the Muslim Ban and underlying "anti-Muslim attitudes" and "official anti-Muslim sentiment"[10]; feelings of isolation and disparagement, worries about safety and belonging in this country, and concerns about "the disfavoring of Islam"[11]; "anxiety, confusion, and distress" due to the uncertainty introduced by the Muslim Ban, and "an uptick in students, employees, and faculty using [university] counseling services"[12]; being affected by the knowledge that the federal government would discriminate against their ethnicity and religion; "psychological harm that flows from confronting official action preferring or disfavoring a

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[9] *IRAP*, 857 F. 3d at 584 (citing *Moss* v. *Spartanburg Cty. Sch. Dist. Seven*, 683 F. 3d 599, 607 (CA4 2012)); *Hawai'i*, 2017 WL 1011673, *10.

[10] *IRAP*, 2017 WL 1018235, *7-8.

[11] *Id.*; *IRAP*, 857 F. 3d at 584-585.

[12] *Aziz*, 2017 WL 580855, *3.

> particular religion"[13]; the "direct, painful effects" of a message of "religious condemnations"[14]; feeling targeted as Muslim because of their religious views and national origin, and concern about not being able to associate as freely as those of other faiths; and hurt, confusion, sadness and stigma generally.[15]

Further injuries to refugee resettlement agencies include the diversion of significant resources to assist clients ensnared by the Muslim Ban and direct financial injury due to the reduction of refugee admissions into the United States.[16]

With the EO–2, the Administration chose to use the bluntest of tools to tackle a problem that does not exist—there was no immediate security need that justified the ban. Rather, American Muslims have been targeted because of their faith, and the only common thread between those affected is their religion. While the President is provided wide discretion in administering the immigration laws, the policies and directives must be Constitutional. The Administration's intentional disfavoring of one religion is not.

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[13] *IRAP*, 857 F. 3d at 585.

[14] *Id.*

[15] *Hawai'i*, 2017 WL 1011673, *10.

[16] *IRAP*, 857 F. 3d at 578.

A. The Muslim Ban unlawfully and injuriously restrains travel among Muslim communities.

The EO–2's harmful impact has been far-reaching—upending the personal, professional, and academic activities of countless Muslim individuals and communities nationwide. Amici have been overwhelmed from concerned Muslim individuals, both citizens and non-citizens alike, who are justifiably worried about the EO–2's impact. Like the plaintiffs in the cases challenging the EO–2, Amici's members include Muslims and those from Muslim-majority countries forced to make difficult decisions on account of the Muslim Ban—whether to visit a terminally ill mother in Iran, whether to attend a conference abroad due to uncertainty about being permitted reentry into the U.S., whether to travel while one's wife is pregnant due to her anxiety that her partner could not return, and many other difficult considerations. In short, the reality simply does not match the government's assertion of a religiously neutral executive order.

1. The Muslim Ban has had a chilling effect on personal activities.

As intended, the Muslim Ban has prevented families from traveling to the United States from the six targeted countries, often with heartrending effect on families. For instance, a bride's mother and sister were barred from attending a wedding in Baltimore because the U.S. consulate canceled their scheduled visa interviews after the first executive order was instituted, and refused to reschedule, even after the initial Muslim Ban was stayed.[17] Illustrating the compounding impact the Muslim Ban has had on individual families, the bride's sister-in-law (a green card holder) and her infant child were also visiting Iran and were temporarily barred from returning home to the United States when the initial Muslim Ban went into effect.[18]

Those already in the United States with families from countries affected by the Muslim Ban are unable to see their families due to fear the Muslim Ban will bar their reentry into the United States.[19] For example, couples based in the United States "with immigrant parents say they are hesitant about traveling to their familial homelands to celebrate [weddings]" because they fear that they may not be allowed back into the United States.[20]

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[17] Ed Pilkington, *Trump travel crackdown turns 'wedding celebration into a family separation,'* The Guardian (Apr. 14, 2017), https://www.theguardian.com/us-news/2017/apr/14/trump-travel-ban-visa-iran-wedding.

[18] *Id.*

[19] *See, e.g.*, Christina Capecchi & Mary Chapman, *Where the Immigration Ban Hits Home*, N.Y. Times (Jan. 31, 2017), http://www.nytimes.com/2017/01/30/us/immigration-ban-locations.html; Donald McNeil Jr., *Trump's travel ban, aimed at terrorists,*

The travel ban has resulted in families in the United States being separated from their grandparents, aunts, and uncles.[21] In the popular Instagram account "Banned Grandmas," people share pictures of their grandmothers with stories that include grandparents missing weddings and college and law school graduations, and being unable to receive medical treatment in the United States because of the travel ban.[22]

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has blocked doctors, N.Y. Times (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/health/trump-travel-ban-doctors.html.

[20] Jack Healy & Anemona Hartocollis, *Love, interrupted: travel ban separates couples*, N.Y. Times (Feb. 9, 2017), http://www.nytimes.com/2017/02/08/us/love-interrupted-a-travel-ban-separates-couples.html.

[21] Ashley Hoffman, *Meet the people posting photos of "Banned Grandmas" to protest the travel ban*, TIME Magazine (July 6, 2017), http://time.com/4845841/travel-ban-banned-grandmas-social-media/.

[22] *Id.*, @BannedGrandmas, Instagram (July 2, 2017),

Religious activity has also been chilled. For example, the Islamic Society of Baltimore canceled its annual pilgrimage to Mecca "amid fears that Donald Trump's travel ban on certain Muslim-majority countries might bar re-entry even to those who call the United States their home."[23] Amici report that they are bracing for calls from travelers who continue to be impacted by the Muslim Ban during the annual Hajj pilgrimage.

2. The Muslim Ban has interfered with professional activities.

The EO–2 has deeply impacted the professional lives of American Muslims and those traveling to the United States to conduct business. Amici report members taking steps when they travel that they would not have considered before the Muslim Ban, such as carrying a United States

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https://www.instagram.com/p/BWEJI3_HxGf/; @BannedGrandmas, Instagram (July 1, 2017), https://www.instagram.com/p/BWAvUJ_neD-/?hl=en&taken-by=bannedgrandmas; @BannedGrandmas, Instagram (June 30, 2017), https://www.instagram.com/p/BV-cFrin0U4/?taken-by=bannedgrandmas.

[23] Sabrina Siddiqui, *At mosque Obama visited, fear replaces hope as new Trump travel ban looms*, The Guardian (Mar. 14, 2017), https://www.theguardian.com/us-news/2017/mar/14/mosque-obama-visited-trump-travel-ban-muslim.

passport when traveling domestically for fear of having to provide documentation of citizenship.

The EO–2 has also directly affected Amici's professional endeavors. For example, the EO–2 has led to amicus MJL ratifying a practice of not allowing its staff to travel with electronics containing client information. MJL was concerned about how the profiling of Muslims at the border or airports could lead to its employees' devices containing confidential client information and privileged communications being searched by the government. This burdens MJL's limited time and resources, requiring MJL employees to make alternate arrangements and additional purchases to ensure that MJL staff can continue their vital work while traveling.

Moreover, multiple Amici have reported that even those with no ties to the targeted Muslim-majority countries have expressed concern about traveling outside of the country. For example, CAIR-CA was recently contacted by a U.S. citizen of Pakistani origin traveling to China for business. He was frightened that ancestry from a Muslim-majority country could bar or complicate his reentry into the United States.[24]

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[24] *See also,* Jayashri Srikantiah, et al., *The new travel ban, national security, and immigration*, Stanford Law School Blogs (Feb. 1, 2017),

Further, this ban has greatly impacted highly skilled professionals who are working in the United States. There are over 7,000 physicians working in the U.S. who trained in the six countries listed in the EO–2.[25] There are also 80 medical students from those six countries, as well as 1,000 people who have applied for residencies and fellowships.[26] Many of these highly skilled professionals are considering leaving the country, and their loss would be devastating for the mostly rural,

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https://law.stanford.edu/2017/02/01/the-new-travel-ban-national-security-and-immigration/ ("[T]here have been numerous reports of effects on individuals from countries that are not included in the current travel ban, such as Pakistan, possibly as the result of border agents treating the travel ban as a license to discriminate against other groups of travelers who are Muslim or perceived to be Muslim [thus affecting] immigrants beyond refugees and individuals from the seven countries.").

[25] Anna Maria Barry-Jester, *Trump's new travel ban could affect doctors, especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017), https://fivethirtyeight.com/features/trumps-new-travel-ban-could-affect-doctors-especially-in-the-rust-belt-and-appalachia/

[26] *Id.*

underserved communities in which they practice.[27]

A physician in rural Minnesota found himself questioning why he should come to rural America to help people who think he's a "terrorist."[28] He said he considered moving to Dubai, and his brother, an investment advisor, is moving to Canada.[29]

3. The Muslim Ban has also impeded academic activities.

Students who have obtained admission to American universities have contacted Amici regarding difficulty in obtaining student visas. Many universities have seen a sharp drop in applications from Muslim-majority countries in the months leading up to the Muslim Ban, when then-candidate Trump repeatedly vowed to ban Muslims from the United States.[30] Students from Muslim-majority countries studying in the United States have reported being "distracted from school … waiting to read something that might change the situation, or at least make them comfortable."[31]

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[27] *Id.*

[28] Stephanie McCrummen, *Love Thy Neighbor? When a Muslim doctor arrived in a rural Midwestern town, "it felt right." But that feeling began to change after the election of Donald Trump*, Wash. Post (July 1, 2017), https://www.washingtonpost.com/national/in-a-midwestern-town-that-went-for-trump-a-muslim-doctor-tries-to-understand-his-neighbors/2017/07/01/0ada50c4-5c48-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.3577e33033a1.

[29] *Id.*

A leader of a college campus Muslim Student Association in California explained that "she was so worried about herself and her fellow students that she couldn't keep up with her studies," adding, "It really takes away your focus when your identity is being targeted."[32]

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[30] *See* Susan Svuluga, *'They're afraid to come': University leaders worry Trump policies will deter international scholars*, Wash. Post (Mar. 24, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/03/24/theyre-afraid-to-come-university-leaders-worry-trump-policies-will-deter-international-scholars/?utm_term =.3bb1753095d0.

[31] Stephanie Saul & Anemona Hartocollis, *After visa ban, hints of hidden tension on Mississippi campus*, N.Y. Times (Feb. 2, 2017), http://www.nytimes.com/2017/02/01/us/mississippi-state-trump-visa-ban.htl.

[32] Sammy Caiola, *Travel ban, targeting of mosques trigger mental health concerns among California Muslims*, Sacramento Bee (Feb. 22, 2017), http://www.sacbee.com/news/local/health-and-medicine/article134386439.html.

While attempting to travel abroad for school, a Muslim student (an American citizen) was given an ultimatum from airport security to "[show] proof that you're going to school or we can't let you go through."[33] Amici similarly can attest to instances of students on valid visas forgoing trips home to spend holidays with their family because they are concerned that their visas may be canceled, rendering years of work toward advanced degrees meaningless. One Libyan graduate student reported that he had not seen his family in three years—"If I want to see them, I will not be able to come back here, and if I want to stay here, I will not be able to see my family."[34]

Now that a new school year has begun, international university students, particularly Muslim students, have expressed fears that can be linked to the President's anti-immigration rhetoric in general and the Muslim Ban in particular.[35] A recent survey of universities reported a decline in 2017 admissions for international graduate students, with more than half of the universities responding that they noted declines in admission yield for students from the Middle East and North Africa.[36]

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[33] Saima Fariz, *Torrance Islamic community shaken by travel ban*, Easy Reader News (Feb. 25, 2017), http://www.easyreadernews.com/146725/torrance-islamic-community-shaken-travel-ban/.

[34] Elizabeth Redden, *Fragile Status: Two students from Libya consider the executive order banning entry to the U.S. for them and their compatriots,* Inside Higher Ed (Feb. 1, 2017), https://www.insidehighered.com/news/2017/02/01/two-students-libya-consider-trumps-entry-ban.

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[35] *See* Roberta Pennington, *Immigration puts Middle Eastern students off studying in US*, The National (Aug. 16, 2017), https://www.thenational.ae/uae/immigration-puts-middle-eastern-students-off-studying-in-us-1.620323 (reporting 46 percent of institutions surveyed were told by Middle Eastern international students that securing and maintaining a visa were their biggest concerns, followed by "feeling welcome in the US [as] almost an equal concern" at 41 percent of institutions).

[36] Ellie Bothwell, *International students less likely to accept offers in Trump's US*, Times Higher Education (July 6, 2017), https://www.timeshighereducation.com/news/international-students-less-likely-accept-offers-trumps-us.

B. The Muslim Ban promotes harmful stereotypes about Muslims.

Not only is the Muslim Ban premised on offensive and false stereotypes, it further perpetuates harm against Muslims across the country by broadly typecasting them and those from Muslim-majority countries as threats to national safety. *IRAP*, 857 F. 3d at 584-585 (citing *Moss* v. *Spartanburg Cty. Sch. Dist. Seven*, 683 F. 3d 599, 607 (CA4 2012)) (noting "flowing from EO-2 is the alleged state-sanctioned message that foreign-born Muslims … are 'outsiders, not full members of the political community,'" thus evoking feelings of disparagement and exclusion and fear for personal safety). While campaigning, then-candidate Trump repeatedly invoked offensive stereotypes in calling for a ban to prevent Muslims from entering the United States,[37] a required registry of Muslims in the United States,[38] and the consideration of shutting down mosques as a purported strategy to fight terrorists.[39]

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[37] *Donald J. Trump Statement on Preventing Muslim Immigration*, Donald J. Trump for President, Inc. (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

[38] Mona Chalabi, *Support for Trump travel ban in line with anti-Muslim attitudes in America*, The Guardian (Feb. 2, 2017),

In candidate Trump's press release calling for "a total and complete shutdown of Muslims entering the United States," he claimed "large segments of the Muslim population" harbored "great hatred towards Americans" and further justified a Muslim Ban by claiming it would protect the country from becoming "the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."[40] Candidate Trump further insinuated that a majority of Muslims believed that "murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women" should become authorized in the United States.[41]

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https://www.theguardian.com/us-news/2017/feb/02/polls-widespread-backing-trump-travel-ban.

[39] Alan Rappeport, *Donald Trump repeats call to inspect mosques for signs of terrorism*, N.Y. Times (Nov. 16, 2015), https://www.nytimes.com/politics/first-draft/2015/11/16/donald-trump-repeats-call-to-inspect-mosques-for-signs-of-terrorism/.

[40] *Donald J. Trump Statement on Preventing Muslim Immigration, supra.*

[41] *Id.*

It is therefore no surprise that the EO–2 is interpreted "by civil rights organizations and in other Muslim communities across the country [] as a ban on Muslims and, more broadly, as a statement that Muslims are not welcome in the United States."[42] Indeed, the EO–2's text adopts the rhetoric of President Trump's campaign by alleging that "to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles," and further mandating the collection and publication of information regarding foreign nationals that have been radicalized and have committed either terrorism-related crimes or acts of gender-based violence, "including so-called 'honor killings.'"[43] This particular provision is a "shaming" and "dehumanizing device" seemingly "designed to whip up fear of Muslims" and perpetuate the "damaging stereotype of Muslims as terrorists."[44]

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[42] Abigail Hauslohner, *Imam: There's an atmosphere of intolerance that says, 'That's okay, that's acceptable now,'* Wash. Post (Mar. 10, 2017), https://www.washingtonpost.com/national/imam-theres-a-climate-of-hate-that-says-thats-okay-thats-acceptable-now/2017/03/09/127f4fd0-0434-11e7-ad5b-d22680e18d10_story.html?utm_term=.76d9792b8d12; *see also* Tracey Wilinson, *Iranian Americans join human rights groups in protesting new ban*, L.A. Times (Mar. 6, 2017), http://www.latimes.com/politics/la-live-updates-9th-circuit-arguments-iranian-americans-others-protest-new-1488825822-htmlstory.html ("Margaret Huang, executive director of the U.S. branch of Amnesty International, said the [revised] order represented 'the same hate and fear with new packaging' and 'blatant bigotry.' 'It will cause extreme fear and uncertainty for thousands of families by, once again, putting anti-Muslim hatred into policy,' she said, 'and will do nothing to make the country safer.'").

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[43] Donald J. Trump, *Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States*, The White House Office of the Press Secretary (Mar. 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states; *see also* Nora Caplan-Bricker, *Donald Trump plans to track "honor killings" even as he slashes violence against women grants*, Slate (Jan. 25, 2017), http://www.slate.com/blogs/xx_factor/2017/01/25/donald_trump_s_immigration_order_will_track_violence_against_women_by_foreign.html ("When Trump suggests that Muslims 'believe that sharia law should supplant American law' and cannot 'share our values and respect our people,' he appeals to ugly prejudices that paint Muslim men as inherently violent and Muslim women as servile and oppressed. Now, he's vowing to use the reach and resources of the federal government to amass stories that will bolster those stereotypes, boosting his agenda in the process.").

Thus, the EO–2 rests on, and serves to bolster, these harmful and blatantly offensive stereotypes.[45] Like the stereotypes perpetuated during the President's campaign, the stereotypes advanced by the EO–2 depict "Islam [as] an inherently violent and foreign faith, and Muslims [as] a presumptively subversive and inassimilable class of people,"[46] and further "send[s] a message that Muslims are not welcome in the U.S."[47] Many Muslims are receiving this message not only from the country's highest office, but from their neighbors as well, putting some in the harmful position of "religious advocacy and outreach" to combat the EO–2's "pernicious effects."[48] For example, one Minneapolis physician described having to respond to these stereotypes after a patient asked, "Why do you people hate us?" in the weeks following the Muslim Ban.[49]

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[44] Matt Zapotosky, *Federal judge in Hawaii freezes President Trump's new entry ban*, Wash. Post (Mar. 16, 2017), https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.0f8cb56a7ede; *see also* David Nakamura, *Blame game: Trump casts immigrants as dangerous criminals, but the evidence shows otherwise*, Wash. Post (Mar. 24, 2017), https://www.washingtonpost.com/politics/blame-game-trump-casts-immigrants-as-dangerous-criminals-the-evidence-shows-otherwise/2017/03/23/f12dffdc-0f4d-11e7-9d5a-a83e627dc120_story.html?utm_term=.f059ae1aa26e ("Although his two travel-ban orders have been blocked in federal court, the most recent one included a provision mandating that the government begin publicizing information about acts of 'gender-based violence against women,' including 'honor killings,' in the United States by foreign nationals.").

[45] *See* Khaled Beydoun, *Being a Muslim under Trump is risky. That's why many are hiding their identity*, The Guardian (Mar. 30, 2017),

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https://www.theguardian.com/commentisfree/2017/mar/30/being-muslim-under-trump-risky-many-hiding-identity ("The stereotypes … are deeply rooted, and readily repackaged and redeployed by Trump's 'Muslim Ban' and rhetoric holding that 'Islam hates us.'").

[46] *Id.*

[47] Human Rights Watch, *US: Trump's new refugee order renews old harms* (Mar. 6, 2017), https://www.hrw.org/news/2017/03/06/us-trumps-new-refugee-order-renews-old-harms.

[48] *Sarsour*, 2017 WL 1113305, *5.

[49] McNeil, *supra*, *Trump's travel ban, aimed at terrorists, has blocked doctors.*

The youngest targets of these abhorrent stereotypes have not been spared. Since the EO–2's signing, Muslim parents have been burdened with explaining to their children why their faith has been vilified in official U.S. policy. One Baltimore mother described finding her 10-year-old daughter crying when she went to pick her up from school. Her daughter explained that a friend told her that she "wasn't allowed to be friends with people who wear those things on their heads."[50] "Kids," a Pennsylvania parent explained, "don't understand the difference between a green card or a citizen or a visa—but they know that Islam is mentioned all the time, and they want to know why the president is singling out Islam—are we different? Is there something wrong with us?"[51] In short, "the new ban, and its justification, conveys the same spurious messages: that Muslims are inherently dangerous."[52] These stereotypes foster the stigmatization of the Muslim communities, increase discrimination, and effectively prevent Muslims and persons from Muslim-majority countries from fully and freely participating in American society.

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[50] Siddiqui, *supra*, *At mosque Obama visited, fear replaces hope as new Trump travel ban looms.*

[51] Neil Munshi, *Muslim Americans express anxiety over Trump travel ban*, Financial Times (Feb. 2, 2017), https://www.ft.com/content/ba9f2d88-e905-11e6-893c-082c54a7f539.

[52] The Editorial Board, *Muslim ban lite*, N.Y. Times (Mar. 7, 2017),

C. In targeting Muslims, the Muslim Ban has caused psychological—and arguably physical—harm.

Muslims across the country have also suffered psychological harm and distress as a result of the Muslim Ban. Public health specialists warn that the Muslim Ban could result in mental health harms, as those targeted may "experience social isolation and alienation from their community."[53] From "growing anxiety,"[54] "fear,"[55] and feeling "terrified,"[56] to describing

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http://www.nytimes.com/2017/03/06/opinion/president-trumps-muslim-ban-lite.html.

[53] Lawrence Gostin, et al., *Presidential immigration policies endangering health and well-being?* JAMA (Mar. 23, 2017), http://jamanetwork.com/journals/jama/fullarticle/2613724 ("[L]awful residents such as Muslims could be adversely affected, experiencing social isolation and alienation from their community.").

[54] Fariz, *supra*, *Torrance Islamic community shaken by travel ban.*

[55] *Id.*

the ban as "traumatizing,"[57] "increas[ing] stigmatization of Muslim communities,"[58] and leaving one "feeling hunted [], as if you did something wrong, even if you didn't,"[59] the psychological harms of the Muslim Ban have been concrete and indisputable.

Worse still, the dangerous stereotypes fostered by the Muslim Ban have also led to physical violence against its targets.[60] In

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[56] Capecchi, *supra, Where the Immigration Ban Hits Home.*

[57] *Id.*

[58] United Nations Human Rights Office of the High Commissioner, *US travel ban: "New policy breaches Washington's human rights obligations" – UN experts* (Feb. 1, 2017), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21136&LangID=E ("'Such an order is clearly discriminatory based on one's nationality and leads to increased stigmatization of Muslim communities,' said the UN Special Rapporteurs on migrants, François Crépeau; on racism, Mutuma Ruteere; on human rights and counter-terrorism, Ben Emmerson; on torture, Nils Melzer; and on freedom of religion, Ahmed Shaheed.").

[59] McNeil, *supra, Trump's travel ban, aimed at terrorists, has blocked doctors.*

[60] *See* Siddiqui, *supra, At mosque Obama visited, fear replaces hope as new Trump travel ban looms* ("'When you talk about the policies

February 2017, a gunman in Kansas shot two Indian men, killing one and injuring the other.[61] Before opening fire, he allegedly used racial slurs indicating that he thought the men were Middle Eastern and shouted, "Get out of my country."[62] In May 2017, two men were killed and a third was violently injured in Oregon when they tried to intervene in a verbal attack against a Muslim teen and her African American friend.[63] At one point the attacker

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being harmful, that's one thing,' said Ahmed Mahmoud, a native of Maryland who attends prayer services at the Islamic Society of Baltimore. 'But the discourse that they use to justify and facilitate the creation of [Trump's] policies—that in and of itself has been harmful and you see that manifesting in the increase in hate crimes, targeting especially not just Muslims but anybody who shares the physical traits of Muslims.'").

[61] Mark Berman, *He yelled 'Get out of my country,' witnesses say, and then shot 2 men from India, killing one*, Wash. Post (Feb. 24, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/get-out-of-my-country-kansan-reportedly-yelled-before-shooting-2-men-from-india-killing-one/?utm_term=.6c3c7c2a1ef9.

[62] *Id.*

[63] Maxine Bernstein, *MAX attack unfolded quickly: extremist cut three in neck, police say*,

allegedly stated that "Muslims should die."[64] In August 2017, an improvised explosive device was used to bomb a mosque in Minneapolis.[65] According to CAIR's figures, the tally of anti-Islamic incidents at mosques during the first six months of 2017 was already greater than the total number of incidents in any year between 2009 and 2015.[66]

Unfortunately, in the midst of increasing anti-Muslim rhetoric, such violent attacks have not been isolated incidents. Following the presidential election and the implementation of the Muslim Ban, "attacks on conspicuous

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The Oregonian/OregonLive (Jun. 2, 2017), http://www.oregonlive.com/portland/index.ssf/2017/05/horrific_scene_unfolds_on_max.html#incart_river_index#incart_big-photo.

[64] *Id.*

[65] Kurtis Lee, *'There is too much anger out there.' Bombing of a Minnesota mosque leaves Muslims concerned*, L.A. Times (Aug. 5, 2017), http://www.latimes.com/nation/la-na-mosque-bombing-20170805-story.html.

[66] Christopher Ingraham, *American mosques—and American Muslims—are being targeted for hate like never before*, Wash. Post. (Aug. 8, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/08/american-mosques-and-american-muslims-are-being-targeted-for-hate-like-never-before/?utm_term=.b066b29d76a0.

Muslim expression were hardly confined to one part of the country, or in rural instead of urban centers."[67] Many American Muslims say they feel an atmosphere in which some feel like they can voice prejudices or attack Muslims without fear of retribution.[68]

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[67] Khaled Beydoun, *Acting Muslim*, 53 Harv. C.R.-C.L. L. Rev., at 39 (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926162; *see also* Abigail Hauslohner, *supra*, *Imam: There's an atmosphere of intolerance that says, 'That's okay, that's acceptable now'* ("Law enforcement officials in Texas and Florida are investigating fires at three mosques, at least two of which have been ruled arson. Last month in Kansas, a white man shouting 'Get out of my country' shot dead an Indian engineer, who he apparently believed to be from the Middle East. Near Seattle this month, a masked assailant wounded a Sikh man—a member of an Indian religious minority who are sometimes confused for Muslims because the men wear turbans—after shouting at him to 'go back to your country,' and authorities are investigating it as a hate crime. Police in South Carolina are investigating the shooting death of an Indian man there the day before.").

[68] Mahmoud Mourad, Stephen Kalin, *Muslims at haj are worried about Trump's policies towards them*, Reuters (Sept. 2, 2017), http://www.reuters.com/article/us-saudi-haj-trump/muslims-at-haj-are-worried-about-

II. Despite attempts to sanitize its text, the clear intent of the Muslim Ban is to disfavor and burden Muslims.

Though the Ban's text may not explicitly mention the targeting of Muslims, the EO–2's application makes clear that that is its effect, and statements from President Trump and his senior advisor, Stephen Miller, reveal that this is by design. After signing the revised Muslim Ban, President Trump referred to it as merely a "watered-down version" of the original executive order and suggested that "we ought to go back to the first one and go all the way," adding that "the need for my executive order is clear."[69] Miller likewise referred to the distinctions between the first and second executive orders as "mostly minor, technical differences," reiterating, "[f]undamentally, you are still going to have the same, basic policy outcome for the country."[70]

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trumps-policies-towards-them-idUSKCN1BD0N4?il=0.

[69] Zapotosky, *supra*, *Federal judge in Hawaii freezes President Trump's new entry ban.*

[70] Jamiles Lartey, *"Not about religion": how Trump officials have attempted a travel ban rebrand,* The Guardian (Mar. 15, 2017), https://www.theguardian.com/us-news/2017/mar/15/trump-administration-travel-ban-muslim-religion.

Notably, President Trump expressed regret for revising the Muslim Ban in light of successful court challenges[71] and continued to portray Muslim-majority countries subject to the Ban as "suspect" and the people as "SO DANGEROUS!"[72]

In fact, President Trump said the "travel ban" was for "certain DANGEROUS countries, not some politically correct term that won't help us protect our people!"[73] and requested that the Justice Department "seek [a] much tougher version."[74]

These statements highlight the Administration's continued commitment, under the second Muslim Ban, to exclude people from the United States on the basis of their religious identity, thereby causing irreparable harm to

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[71] Zapotosky, *supra*, *Federal judge in Hawaii freezes President Trump's new entry ban.*

[72] Donald J. Trump (@realDonaldTrump), Twitter (Feb. 11, 2017, 4:12 AM), https://twitter.com/realDonaldTrump/status/830389130311921667.

[73] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM), https://twitter.com/realDonaldTrump/status/871899511525961728.

[74] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:37 AM), https://twitter.com/realDonaldTrump/status/871677472202477568.

Muslims across the country. These statements cannot be dismissed as campaign rhetoric; these are statements made or endorsed by the President to explain the reasoning behind, and support the continuance of, his Muslim Ban.

III. The Muslim community may still face impermissibly invasive interrogations at the border even after the Muslim Ban portion of the EO–2 is lifted.

The EO–2 suspends travel into the United States by citizens of six Muslim-majority countries pending the implementation of "maximum" vetting of these travelers.[75] Also called "extreme vetting" during the campaign, President Trump likened it to an "ideological screening test" for immigrants.[76] This announcement immediately raised "significant legal, policy and practical concerns,"[77] heightened by the EO–2 and State Department instructions regarding targeted scrutiny and social media inspections of visa applicants.[78]

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[75] *See Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States, supra.*

[76] *See* John Santucci & Veronica Stracqualursi, *Donald Trump proposes 'extreme vetting' for immigrants, with ideological screening test*, ABC News (Aug. 15, 2016) http://abcnews.go.com/Politics/donald-trump-proposes-extreme-vetting-immigrants-ideological-screening/story?id=41392682; Daniel White, *Read Donald Trump's Ohio Speech on Immigration and Terrorism*, TIME Magazine (Aug. 15, 2016), http://time.com/4453110/donald-trump-

Such widespread fears are supported by reports of Muslims being denied entry into the United States at the Canadian border after lengthy detentions and interrogations regarding their religious beliefs. One Moroccan-born Canadian Muslim described being able to enter the United States to visit her parents and brother, who live in the U.S., numerous times without incident before the Muslim Ban.[79] Yet

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national-security-immigration-terrorism-speech/.

[77] David Catanese, *Trump promises 'extreme vetting' in terror speech*, Inside Higher Ed (Aug. 15, 2016), https://www.usnews.com/news/articles/2016-08-15/trump-promises-extreme-vetting-in-terror-speech.

[78] Michael Shear, *Trump Administration Orders Tougher Screening of Visa Applicants,* N.Y. Times (Mar. 23, 2017), https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html.

[79] Steve Rukavina, *Canadian woman turned away from U.S. border after questions about religion, Trump*, CBC News (Feb. 10, 2017), http://www.cbc.ca/news/canada/montreal/canadi

shortly after the Muslim Ban was implemented—and while a nationwide injunction halting the travel restrictions of the original executive order was in place—she and her cousin were stopped, endured an hour-long search through their phones, and were questioned about their religious practices for 45 minutes, including where and how often she goes to mosque, and about her thoughts on the Muslim Ban. After another hour-long wait, she was denied entry into the United States. She felt "humiliated" and was "treated as if [she] was less than nothing."[80]

These are not isolated stories. Muslims and those from Muslim-majority countries are increasingly subjected to lengthy, invasive, and impermissible religion-based questioning and searches at points of entry, including demands for passwords to cell phones and social media accounts, hours-long searches, and detailed interrogations regarding religious identity, affiliations, and practices. Over two dozen human rights and civil liberties groups recently detailed (in an open letter to United Nations experts) such targeted treatment of Muslim travelers as clear injury in the form of "violation[s] of human rights ... including the

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an-woman-turned-away-from-u-s-border-after-questions-about-religion-trump-1.3972019.

[80] *Id.*

fundamental rights to privacy, the freedom of opinion, expression, religion, belief, movement, and association," and "the principle of non-discrimination and right to equal protection."[81]

Amici have also witnessed a spike in concerns about privacy and freedom of speech, with many Muslim community members inclined to self-censor political speech and avoid certain communication platforms entirely due to fears the "extreme vetting" provisions of the Muslim Ban could lead law enforcement to maintain records of their political or religious views and other personal, First Amendment–protected information. Many have reached out to Amici to request assistance in preparing G-28 forms ("Notice of Entry of Appearance as Attorney or Accredited Representative") in anticipation of targeted harassment at airports and other points of entry due to their religious identity.

Further, these tactics targeting Muslim-majority countries appear to be working. An analysis of data provided by the State Department shows that as of April 2017, the number of non-immigrant visas granted to visitors from nearly 50 Muslim-majority countries has fallen almost 20 percent from the previous year, while the number of non-immigrant visas for the six countries targeted by the Muslim Ban has been cut in half—falling 55 percent.[82] Such drastic reductions—even in the midst of court and public attention—highlight the importance of careful scrutiny of the motives of the EO–2.

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[81] *Letter from Access Now to Zeid Ra'ad Al Hussein, High Commissioner for Human Rights, et al.* (Feb. 16, 2017), https://www.accessnow.org/cms/assets/uploads/2017/02/JointLetterUSBorderSearches-Feb17.pdf.

IV. The EO–2's focus on Muslims and Muslim-majority countries is divorced from evidence, ill-conceived, and ill-advised.

In stark contrast to the Administration's claims, reports clearly demonstrate that Muslims, especially Muslim immigrants, pose an infinitesimal threat to national security.[83]

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[82] Nahal Toosi & Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, Politico (May 25, 2017), http://www.politico.com/story/2017/05/25/trump-muslim-visas-238846.

[83] Numerically, Muslim immigrants constitute a very small portion of the American population. The Pew Research Center estimates that there were about 3.3 million Muslims living in the United States in 2015—approximately 1% of the total population. Approximately 10% of all immigrants are Muslim, and approximately half of all Muslims in the United States immigrated in the past

For example, an assessment of the initial executive order by the Department of Homeland Security reported that the targeted Muslim-majority countries were "rarely implicated" in U.S.-based terrorism and that citizenship (including citizenship from a Muslim-majority country) is an unreliable indication of a terrorist threat.[84]

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25 years. Thus, recent immigrants make up approximately 0.5% of the total population. Pew Research Center, *A new estimate of the U.S. Muslim population* (Jan. 6, 2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/; Pew Research Center, *The religious affiliation of U.S. immigrants: majority Christian, rising share of other faiths* (May 17, 2013), http://www.pewforum.org/2013/05/17/the-religious-affiliation-of-us-immigrants/#muslim.

[84] Zapotosky, *Revised executive order bans travelers from six Muslim-majority countries from getting new visas*, Wash. Post (Mar. 6, 2017), https://www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.f4a41594a2f8 ("A Department of Homeland Security report assessing the terrorist threat posed by people from the seven countries covered by the

Likewise, the Cato Institute determined that the odds of an American perishing in a terrorist attack committed by a foreigner on U.S. soil over the past 41 years (including the attacks of September 11) was 1 in 3.6 million per year, or a 0.00003% chance.[85] Since 2001, only 365 individuals have been charged with or died engaging in terrorism or related activities inside the United States.[86] The risk is even smaller from immigrants from the Muslim-majority nations listed in the EO–2.[87] The EO–

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president's original travel ban had cast doubt on the necessity of the executive order, concluding that citizenship was an 'unreliable' threat indicator and that people from the affected countries had rarely been implicated in U.S.-based terrorism.").

[85] Alex Nowrasteh, *Terrorism and Immigration: a risk analysis*, CATO at Liberty (Sept. 13, 2016) https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_1_1.pdf.

[86] *See* Peter Bergen et al., *Terrorism in America after 9/11*, New America Foundation, www.newamerica.org/in-depth/terrorism-in-america.

[87] Alex Nowrasteh, *Little national security benefit to Trump's Executive Order on immigration*, CATO at Liberty (Jan. 25, 2017), https://www.cato.org/blog/little-national-

2's insistence on reporting crimes committed by foreign nationals, including "honor killings," is likewise misplaced, as such crimes are exceedingly rare.[88]

Moreover, despite the fact that the Administration justified the Muslim Ban by claiming it would allow government agencies to conduct a comprehensive review of immigration procedures, there have been no formal policy changes.

Multiple lawmakers have commented that the Administration has had well over the 90 days it sought to "review vetting procedures."[89] But the Administration has never completed its vetting review or even created the "appearance

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security-benefit-trumps-executive-order-immigration.

[88] Cynthia Helba, et al., *Report on exploratory study into honor violence measurement methods*, Justice Dep't (May 2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/248879.pdf (estimating between 23 and 27 honor killings annually; i.e., approximately 0.008 offenses per 100,000 persons).

[89] Paige Winfield Cunningham, *New opposition emerges as Trump pushes for travel ban*, Chicago Tribune (Jun. 4, 2017), http://www.chicagotribune.com/news/nationworld/politics/ct-trump-travel-ban-20170604-story.html.

of effort towards stronger vetting."[90] Further, the Administration has not sought to fast-track any of the hearings, in either the appeals court or before the Supreme Court, undercutting the argument for the urgency of the executive order.[91]

All told, the EO–2 does nothing to make the United States safer.[92] Instead, the EO–2 traffics in prejudicial stereotypes, contributes to a climate of distrust toward the Muslim community, and has further stoked fears in the Muslim community that "the Trump Administration would scrutinize their religious identity with an unprecedented degree of suspicion and heavy-handed policy."[93]

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[90] *Id.*; Michael Shear & Ron Nixon, *Despite Trump's tough talk on travel ban, few changes to vetting*, N.Y. Times (June 11, 2017), https://www.nytimes.com/2017/06/11/us/politics/as-trump-sounds-urgent-note-on-travel-ban-a-vetting-revamp-grinds-on.html.

[91] *Id.*

[92] Alejandro Beutel, *Data on Post-9/11 Terrorism in the United States*, Muslim Public Affairs Council (June 2012), http://www.mpac.org/assets/docs/publications/MPAC-Post-911-Terrorism-Data.pdf.

[93] Beydoun, *Acting Muslim*, *supra* at n. 48.

CONCLUSION

This Court should affirm the opinions of the Fourth and Ninth Circuits.

Respectfully submitted,

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Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

For over 75 years, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has strived—as its central mission—to secure the constitutional promise of equality for all people in the United States. From its earliest advocacy led by the late Supreme Court Justice Thurgood Marshall to last term's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), LDF has litigated before this Court some of the most significant and pressing legal issues pertaining to discrimination in our country. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (exclusion of Black voters from primary election); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racial covenants on real estate transfers); *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial segregation of public schools); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (unjustified disparate impact in employment discrimination); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (challenge to discriminatory application of death penalty); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (defense of constitutionality of Section 5 of the Voting Rights Act).

LDF's commitment to, and advocacy for, equality under the law is not limited to the rights of African Americans. Indeed, throughout its history of civil rights advocacy, LDF has pressed for the equal treatment of other traditionally disfavored groups and individuals seeking equal protection of the laws. For example, LDF submitted an *amicus* brief in support of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Petitioner Torao Tokahashi's successful challenge to the State of California's refusal to issue fishing licenses to non-citizens, including people of Japanese ancestry, who were federally barred at that time from obtaining United States citizenship amid growing anti-Japanese hostility in the aftermath of the Second World War. *See Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948). A long supporter of gay and lesbian rights, LDF also supported petitioners advancing the right to same-sex marriages in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). And, as recently as last year, LDF urged this Court to denounce a juror's racial slurs, which explicitly associated a Mexican defendant's race with a propensity for criminal and violent conduct. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

The President's Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, which *inter alia* bars entry of non-citizens and refugees from six predominantly Muslim countries, raises grave constitutional concerns due to its reliance on a false and pernicious stereotype that associates Muslims with inherent dangerousness. LDF, therefore, has both the experience and expertise to assist the Court in its review of this case of national and historical importance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Last term, this Court decided two cases in which criminal defendants were deemed dangerous based on stereotypes about their race or ethnicity. In *Buck v. Davis*, 137 S. Ct. 759 (2017), Duane Buck's own "expert" witness testified at his capital trial that Mr. Buck was more likely to commit violent acts in the future because he is Black.[2] The Court held that this testimony rendered Mr. Buck's death sentence constitutionally intolerable because it appealed to a "particularly noxious strain of racial prejudice," *viz.*, the stereotype that Black men are "violence prone."[3] In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), Mr. Peña-Rodriguez was convicted of sexual assault following jury deliberations in which one juror stated that "Mexican men" are "physically controlling of women," "take whatever they want," and "nine times out of ten . . . were guilty of being aggressive toward women and young girls."[4] This Court denounced the egregious racial stereotyping of Latino men and held that the Sixth Amendment right to an impartial trial required the consideration of this evidence even though statements made by jurors during deliberations are ordinarily inadmissible.

The resolution of both cases turned on "a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are."[5] Individuals may not be disfavored because of who they are, and they assuredly cannot be singled out for mistreatment because of their race, ethnicity, or religion.[6] This prohibition is particularly important when the discriminatory conduct is motivated by the "powerful . . . stereotype" that an individual is "violence prone" because of who he is.[7] That stereotype is a "toxin," which "can be deadly [even] in small doses."[8]

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[2] *Buck*, 137 S. Ct. at 768-69.

[3] *See id.* at 776 (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986)).

[4] *Peña-Rodriguez*, 137 S. Ct. at 862.

[5] *Buck*, 137 S. Ct. at 778.

Nor are the victims of that toxin limited to its immediate targets. Our country's long, fraught history of legalized discrimination demonstrates beyond peradventure that "racial bias implicates unique historical, constitutional, and institutional concerns."[9] Whether embodied in criminal law or in national security directives, permitting racial prejudice to find a home in our legal system thwarts "the promise of equal treatment under the law that is so central to a functioning democracy,"[10] "'poisons public confidence,'"[11] and "injures . . . 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'"[12] Consequently, "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with . . . the equal dignity of all persons."[13] The duty to confront animus is shared by all three branches, but this Court is obligated to enforce the Constitution's guarantee against state-sponsored discrimination when the other branches abjure their duty to do so.[14]

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[6] *See id.*; *Peña-Rodriguez*, 137 S. Ct. at 867; U.S. Const. Amend. XIV; *cf.* U.S. Const. Amend. I; 8 U.S.C.A. § 1152(a)(1)(A) ("[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.").

[7] *Buck*, 137 S. Ct. at 776; *see also id.* (describing race-as-dangerousness stereotypes as "a particularly noxious strain of racial prejudice").

[8] *Id.* at 777.

[9] *Peña-Rodriguez*, 137 S. Ct. at 868.

[10] *Id.*

[11] *Buck*, 137 S. Ct. at 778 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)).

[12] *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

That is precisely what has happened here. Through Executive Order 13780, the Executive Branch has banned individuals from six nations, whose residents are predominately Muslim, from entering the United States. As explained by the courts below, this ban is not based on the kind of legitimate considerations that ordinarily require substantial deference to the Executive Branch in matters of immigration. This ban is instead the result of the President's endorsement of the particularly noxious stereotype that people from these countries are dangerous because of their religion. The deference owed to the President in immigration matters does not extend that far: it does not permit the Executive Branch to equate race/ethnicity/religion with inherent dangerousness in order to decide who may enter this country. The President's use of that stereotype, as the basis for public policy, demeans not only the targets of its discrimination; it demeans the integrity of our legal system and demeans us all.

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[13] *Peña-Rodriguez*, 137 S. Ct. at 867; *see also id.* at 871 ("The Nation must continue to make strides to overcome race-based discrimination.").

[14] *Id.* at 867.

ARGUMENT

I. OUR COUNTRY'S LONG HISTORY OF SANCTIONING THE STEREOTYPE THAT CERTAIN RACES OR ETHNICITIES ARE INHERENTLY DANGEROUS HAS BEEN A SOURCE OF DEEP NATIONAL SHAME AND IS ANATHEMA TO THE FOUNDATIONAL PRINCIPLES OF OUR CONSTITUTIONAL DEMOCRACY.

In *Peña-Rodriguez*, this Court observed that "[i]t is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history."[15] Unfortunately, our history provides no shortage of lessons in which unconstitutional discrimination was motivated or justified by the stereotype that certain people were inherently dangerous because of their race or ethnicity. In the past, the judicial branch has often permitted these discriminatory acts to stand and, in so doing, conferred its imprimatur to the actions. In many instances, Congress has acknowledged the anti-American character of the discrimination long after the harm, and this Court's opinions endorsing the discrimination have been relegated to the "American anticanon"—the Supreme Court cases "that all legitimate constitutional decisions must be prepared to refute."[16]

Here, too, this Court is faced with Government action motivated by the stereotype that a group of people are dangerous because of who they are. This time, that group is defined by religion rather than race or ethnicity. But religion, like race, is a protected category under the Constitution precisely because treating people differently based on either category is fundamentally inconsistent with our commitment to democracy and the rule of law. This Court, therefore, is confronted with a stark choice in this case: adding to the anticanon or enforcing the constitutional ban on the use of odious stereotypes in setting public policy.

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[15] 137 S. Ct. at 871.

[16] Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011).

A. Slavery, Jim Crow and Lynching

Our shameful history of using racial stereotypes of inherent dangerousness to drive the enactment of laws ostensibly designed to protect the public is instructive. The stereotype of African Americans—particularly, African-American men—as inherently dangerous dates back to the earliest contacts between colonial Americans and Africans.[17] African Americans were described by white colonists as "barbarous, wild, [and] savage,"[18] and "a bloody people" "as neer beasts as may be."[19] Beginning in the 17th century, most American colonies enacted "slave codes" that relied on these racist beliefs to justify slavery and the separation of the races.[20] For instance, South Carolina's slave code stated that its creation was necessary to "restrain the disorders, rapines and inhumanity[] to which [slaves] are naturally prone and inclined . . ."[21]

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[17] *See, e.g.*, Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550–1812, at 28 (1968).

[18] A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period 167 (1978) (quoting 7 The Statutes At Large Of South Carolina 352 (Thomas Cooper and David J. McCord, eds.) (1836-41)).

[19] Richard Ligon, A True & Exact History of the Island of Barbados 46-47 (1657).

[20] Nat'l Park Serv., U.S. Dep't of the Interior, *NPS Ethnography: African American Heritage & Ethnography: Laws that Bound*, https://www.nps.gov/ethnography/aah/aaheritage/histContextsE.htm (last visited Sept. 17, 2017).

These laws, as well as the assumptions on which they were built, were critical to American slavery. "[T]he myth of blacks' inherent, criminal propensity (and, particularly, violent criminality) was key to dehumanizing the enslaved as 'beasts' or chattel over whom brutal control was both needed and justified."[22] Furthermore, the codes "added both the enforcement power and perceived legitimacy of the law to the customary stigmatization of blacks as inherently predisposed toward criminality."[23]

Although the slave codes principally used the stereotype of African Americans as inherently dangerous to justify their forced labor, some provisions reflected that stereotype more directly. For example, because African Americans were seen as inherently dangerous, they were prohibited from meeting in groups of five or more, except for a narrow set of circumstances.[24] The slave codes—and the stereotypes they legitimized and amplified—later received the Supreme Court's imprimatur in *Scott v. Sandford*,[25] when this Court cited them with approval in support of its holding that African Americans, whether enslaved or free, had no rights or privileges because they were not considered "citizens" under the United States Constitution.[26]

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[21] William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 Chi.-Kent. L. Rev. 1051, 1060-61 (1993); Paul Finkelman, *The Crime of Color*, 67 Tul. L. Rev. 2063, 2099 (1993) ("Being black in South Carolina was inherently criminal, and . . . the public policy was always to keep as many blacks as possible in servitude or in jail. South Carolina believed that the alternatives were crime, slave rebellion, and 'self-destruction.'").

[22] William M. Carter, Jr., *Race, Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1373 (2007); *see also* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 Harv. C.R.-C.L. L. Rev. 17, 57 (2004) ("[R]ace-based criminal suspicion, legally enforced through the Slave Codes, was used to keep blacks in fear and in their 'place' during slavery. It also had the corollary effect of placing whites in constant fear of blacks, thereby making them more willing to accept black subordination in the name of white safety.").

[23] Carter, *Race, Rights*, *supra* note 22, at 1373

Following the Civil War and the enactment of the 14th and 15th Amendments, efforts to codify anti-Black discrimination adapted and took new forms. Once again, the race-as-dangerousness stereotype was central. In the immediate aftermath of the Civil War, states passed "Black Codes," which criminalized "such behavior as vagrancy, bre[a]ch of job contracts, absence from work, the possession of firearms, [and] insulting gestures or acts."[27] The goal of these laws was to keep African Americans "as near to the condition of slavery as possible, and as far from the condition of the white man as [was] practicable."[28] The

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[24] Finkelman, *supra* note 21, at 2089.

[25] 60 U.S. (19 How.) 393 (1857).

[26] *Id.*

[27] Angela Y. Davis, Racialized Punishment and Prison Abolition, in the Angela Y. Davis Reader 96, 100 (1998); Eric Foner, Give Me Liberty!: An American History Vol. 2, 535 (2d ed. 2009) (noting that the Black Codes "denied [African Americans] the right to testify against whites, serve on juries or in state militias, or to vote" and "declared that those who failed to sign yearly labor contracts could be arrested and hired out to white landowners"); *United States v. Clary*, 846 F. Supp. 768, 776 (E.D. Mo. 1994) (noting that Black codes "limited the rights of [African Americans] to own or rent property and permitted imprisonment for breach of employment contracts") (quotation and citation omitted), *rev'd on other grounds by* 34 F.3d 709 (8th Cir. 1994).

[28] Stephen Budiansky, The Bloody Shirt: Terror After Appomattox 25 (Viking Books 2008).

Black Codes included two notable features that turned on the stereotype that Black people are inherently dangerous or criminal. First, those codes prescribed differential punishment for crimes based on race.[29] This discrepancy was most pronounced in rape cases, where the death penalty was often "reserved for black men who raped white women."[30] Second, the codes restricted gun ownership by African Americans, and sometimes made it a crime for whites to even lend guns to them.[31]

In time, the Black Codes yielded to Jim Crow and the segregation of the races. As it did in *Scott*, this Court notoriously granted its stamp of approval to state-sanctioned race discrimination in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The stereotype of Black criminality likewise continued to justify patently unconstitutional discrimination. For example, some "sundown towns" had ordinances that literally prohibited Black people from being present in the town after a certain hour.[32] Flagrant discrimination against Black men accused of raping white women also continued to be prevalent.[33]

The stereotype that Black people are inherently dangerous criminals was likewise the foundation for one of the most shocking episodes of our history: the lynching of at least 4,075 Black men, women, and children between 1877 and 1950.[34] Government officials repeatedly justified their failure to hold the murderers accountable by claiming that the lynchings were necessary to prevent Black men from raping white women.

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[29] Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1, 15 (2006); Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. Rev. 721, 751 (2003).

[30] Butler, *supra* note 29.

[31] Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 345 & n.178 (1991).

[32] Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 Ind. L. Rev. 537, 541 (2008).

[33] *Id.* at 22-34.

For example, in 1900, Senator Benjamin Tillman of South Carolina justified murders of Black people in South Carolina as follows: "We of the South have never recognized the right of the negro to govern white men, and we never will." "We have never believed him to be the equal of the white man, and we will not submit to his gratifying his lust on our wives and daughters without lynching him."[35] In 1906, white mobs killed an unknown number of African Americans in Atlanta after unverified reports that four white women had been raped by Black men. When asked how to prevent these lynchings, the mayor of Atlanta stated: "The only remedy is to remove the cause. As long as the black brutes assault our white women, just so long will they be unceremoniously dealt with."[36] As late as 1937, a Mississippi congressman opposed a federal anti-lynching law on the ground that it was "a bill to encourage rape" and would incite "the more vicious element of the Negro race to attack white women."[37]

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[34] Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror 5 (2d ed. 2015).

[35] David Remnick, *Charleston and the Age of Obama*, The New Yorker (June 19, 2015), https://www.newyorker.com/news/daily-comment/charleston-and-the-age-of-obama.

[36] Rebecca Burns, Rage in the Gate City: The Story of the 1906 Atlanta Race Riot 134 (Univ. of Georgia Press rev. ed. 2009).

Tragically, Congress never enacted an anti-lynching law, as Southern Democrats repeatedly filibustered bills that had passed the House in the 1920s and 1930s.[38] In apologizing for this failure in 2006, the Senate admitted that "protection against lynching was the minimum and most basic of Federal responsibilities," and that the Senate refused repeated entreaties from civil rights groups to pass such legislation.[39]

Slavery and Jim Crow remain our singular national shame because they stand in such stark contravention to what America purports to be. For centuries, the country that proclaimed that "all men were created equal" punished people for who they were, not what they did—and did so at an incalculable human cost. Both houses of Congress have issued formal apologies acknowledging "the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow," and that "visceral racism against persons of African descent" was central to the creation and perpetuation of both systems.[40]

This Court's majority opinions in *Dred Scott* and *Plessy* have faced a similar historical judgment. They—along with *Lochner v. New York*, 198 U.S. 45

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[37] John Howard, Concentration Camps on the Home Front: Japanese Americans in the House of Jim Crow 45 (Univ. of Chicago Press 2008).

[38] Kyle Grossman, *The Untold Story of the State Filibuster: The History and Potential of a Neglected Parliamentary Device*, 88 S. Cal. L. Rev. 413, 436 (2015).

[39] S. Res. 39, 109th Cong. (2005).

[40] H. Res. 194, 111th Cong. (2009); S. Con. Res. 26, 111th Cong. (2009).

(1905), and *Korematsu v. United States*, 323 U.S. 214 (1944)—have been selected "by the broader legal and political culture" as "the American anticanon. Each case embodies a set of legal propositions that all legitimate constitutional decisions must be prepared to refute. Together, they map out the land mines of the American constitutional order . . . ."[41] Tellingly, the anticanon is populated in the main by cases where this court acquiesced to legislative or executive actions that targeted individuals for mistreatment simply based on who they are.

B. The Chinese Exclusion Act

Drawn by the Gold Rush and the prospect of employment on the transcontinental railroad, thousands of Chinese immigrants moved to the west coast in the 1850s and 1860s.[42] At first, the new immigrants were greeted with curiosity, admiration or indifference, but "such views were not long lasting."[43] As more immigrants arrived from China, xenophobia and virulent anti-Chinese racism spread along the west coast.[44] Once again, that racism frequently took the form of the race-as-dangerousness stereotype. The immigrants were cast "as invading 'hordes'" with no individual identities and "inscribe[d with] qualities of inhumanity, paradoxical mindlessness, savagery, and brutality."[45] Other times, they were depicted as "criminals and prostitutes."[46] These stereotypes were broadly circulated by newspaper headlines and advertisements, organized interest groups, and various forms of media and entertainment.[47]

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[41] Greene, *supra* note 16, at 380-81.

[42] H. Res. 201, 112th Cong. (2011); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 299-300 (1997); Commission on Wartime Relocation and Internment of Civilians, VRH9-KAGV, Personal Justice Denied 29 (1984); Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, The Gentleman's Agreement, and the Coming of World War II*, 117 W. Va. L. Rev. 1409, 1422 (2015).

[43] Finkelman, *supra* note 42, at 1422.

[44] *See id.*; *Oyama v. California*, 332 U.S. 633 (1948).

"The press and political parties pandered to these anti-Chinese attitudes,"[48] and anti-Chinese racism was soon reflected in "lethal vigilante violence" and a raft of discriminatory legislation such as California's 1862 "Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California."[49] Chinese immigrants were subjected to a dizzying array of penalties and prohibitions including, *inter alia*: a miner's tax that disproportionately affected Chinese immigrants, a California Supreme Court decision prohibiting Chinese people from testifying against white people in courts of law, a constitutional amendment that prohibited "non-whites" from owning land, an anti-miscegenation law that prohibited marriage between whites and "Mongolians," and a law that prohibited "aliens" from fishing in California state waters.[50]

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[45] Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1, 32 (1996).

[46] Saito, *supra* note 42, at 299.

[47] *See* Aoki, *supra* note 45, at 20.

[48] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 29.

[49] Finkelman, *supra* note 42, at 1422; *Oyama*, 332 U.S. at 651-52; Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian L.J. 71, 79 (1997).

[50] R. Scott Baxter, *The Response of California's Chinese Populations to the Anti-Chinese Movement*, 42 Historical Archaeology 29, 30 (2008).

The statements of elected officials demonstrated the ubiquity of the "yellow peril" stereotype. For instance, Representative James A. Johnson of California described Chinese people as an "immense, teeming, swarming, seething hive of degraded humanity turned loosed upon our country" which threatened to "drown out and destroy our institutions and our race."[51] Oregon Senator George H. Williams channeled the same stereotype when he urged the United States not to "deliver itself up to the political filth and moral pollution that are flowing with a fearfully increasing tide into our country from the shores of Asia."[52] Governor Stanford of California stated, "[t]he presence among us of numbers of degraded and distinct people must exercise a deleterious influence upon the superior race. . . ."[53]

The anti-Chinese campaign culminated in Congress's enactment of the Chinese Exclusion Act in 1882, which prohibited the immigration of Chinese laborers for a decade and precluded all Chinese immigrants from obtaining naturalized citizenship.[54] The act "underscored the belief of some senators at the time that . . . the United States is under God a country of Caucasians . . . to be governed by white men" and that "the Chinese people were unfit to be naturalized," "revolting," and "like parasites."[55] The Chinese Exclusion Act was the country's first immigration law to restrict immigrants because of their race and class,[56] but not its last. Indeed, it launched six "decades of Federal legislation deliberately targeting the Chinese by race," during which time many members of Congress claimed "that all persons of Chinese descent were . . . dangerous to the political and social integrity of the United States."[57]

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[51] Aoki, *supra* note 45, at 32.

[52] *Id.*

[53] Roger Olmsted, *The Chinese Must Go!*, 50 Cal. Hist. Q.J. Cal. Hist. Soc'y 285, 286 (1971).

[54] Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 Journal of American Ethnic History 36, 36 (2002).

[55] S. Res. 201, 112th Cong. (2011).

The pervasiveness of these stereotypes was demonstrated yet again when the Scott Act of 1888—an addendum to the Chinese Exclusion Act, which forbade Chinese laborers then abroad from returning to the United States—was challenged in this Court.[58] In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Court upheld Congress's authority to set immigration policy and, in so doing, described Chinese immigrants as "vast hordes of . . . people crowding in upon us," "who will not assimilate with us," and are "dangerous to [the nation's] peace and security."[59] The Court also cited with approval the California constitutional convention of 1878, which claimed that the "immigration [of Chinese laborers] was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[60] *Chae Chan Ping* belongs in the anticanon, yet it remains the font of the current rule that Congress can exclude groups as part of its immigration policy.

Ultimately, Congress would recognize that the Chinese Exclusion Act and its myriad progeny were an affront to "the basic founding principles recognized in the Declaration of Independence that all persons are created equal" and apologized for its actions.[61] The Senate admitted that its actions "fostered an atmosphere of racial discrimination that deeply prejudiced the civil rights of Chinese immigrants," "legitimized racial discrimination," and "induced trauma that persists within the Chinese community."[62]

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[56] Lee, *supra* note 54, at 37.

[57] S. Res. 201, 112th Cong. (2011).

[58] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

[59] *Id.* at 606.

[60] *Id.* at 595.

C. The Japanese-American Internment

The history leading up to the Japanese-American internment bears striking similarities to the events that resulted in the Chinese Exclusion Act. Japanese immigrants began to arrive in the United States in significant numbers around the turn of the 20th century. At the time, the Chinese Exclusion Act had succeeded in significantly reducing the Chinese population, and anti-Asian furor was on the wane.[63] "But the arrival of the Japanese fanned anew the flames of anti-Oriental prejudice," and "[h]istory then began to repeat itself."[64] "The political and cultural ideology that came to be used in the anti-Japanese movement immediately connected the new threat to the old Chinese one."[65] Newspaper headlines broadcast that the "Japanese [Were] Taking the Place of the Chinese," and anti-Chinese stereotypes were applied to Japanese immigrants.[66] People entering the United States from Japan became "the new yellow peril."[67] They were depicted as "unassimilable" and "unexploitable cheap labor[,]" like the stereotype of Chinese immigrants before them, but were viewed as more "aggressive and warlike" as well as "tricky and unscrupulous."[68]

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[61] S. Res. 201, 112th Cong. (2011); H. Res. 683, 112th Cong. (2012).

[62] S. Res. 201, 112th Cong. (2011).

[63] *Oyama*, 332 U.S. at 652.

[64] *Id.*

[65] Lee, *supra* note 54, at 36-37.

[66] *See id.*; *see also* Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 4 ("The anti-Japanese agitation also fed on racial stereotypes and fears: the 'yellow peril' of an unknown Asian culture achieving substantial influence on

Japanese immigrants became "a convenient target for political demagogues" in "all the major parties," and "[p]olitical bullying was supported by organized interest groups."[69] As a result, Japanese people were subjected to a spate of discriminatory legislation in the first four decades of the 20th century. Japanese immigration was restricted in 1908 and banned in 1924; Japanese immigrants were barred from obtaining American citizenship; and many western states forbade Japanese persons from owning land.[70] The intention of this legislation was clear: "The 'Japanese menace' was to be dealt with on a racial basis."[71]

This history of political animosity and the creation of stereotypes that portrayed Japanese people as unassimilable and dangerous provided the backdrop for the Japanese-American internment.[72] On

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the Pacific coast or of a Japanese population alleged to be growing far faster than the white population.").

[67] Finkelman, *supra* note 42, at 1426.

[68] *Lee*, *supra* note 54, at 36-37.

[69] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 4.

[70] *Id.*

[71] *Oyama*, 332 U.S. at 656.

[72] *See* Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 4, 28, 34, 37; Aoki, *supra* note 45, at 18 ("Likewise, it is hard to conceive of the mass internment of Japanese American citizens in 1942 without a background of

February 19, 1942—approximately ten weeks after the attack on Pearl Harbor—President Roosevelt issued Executive Order 9066, which granted to the Secretary of War the power to exclude all persons of Japanese ancestry from designated military zones on the west coast.[73] The government justified the order as a "military necessity," though the necessity was founded on racial stereotypes of Japanese-Americans as dangerous.[74] General DeWitt, who proposed the relocation, justified his recommendation as follows: "The Japanese race is an enemy race and while many second and third generation Japanese born on American soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted."[75] On another occasion, General Dewitt put his view more succinctly: "A Jap is a Jap."[76] Based on that justification, "the government banished 120,000 Japanese Americans—two-thirds of whom were native-born U.S. citizens—from the West Coast and imprisoned them in ten desolate camps without charges, attorneys, indictment, or hearings."[77] They would remain in "bleak barracks camps" "surrounded by barbed wire and guarded by military police" until December 1944.[78]

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pervasive and seemingly 'natural' stereotypical tropes serving to justify such internment.").

[73] Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 Asian L.J. 37, 40 (2003).

[74] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 6.

[75] *Id.* at 66

[76] *Id.* at 222.

[77] Serrano and Minami, *supra* note 72, at 40.

[78] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 2.

In stark contrast, although the United States was also at war with Germany and Italy, immigrants from those countries and their descendants were not treated similarly.[79] They were instead granted individualized loyalty hearings to determine whether they, in fact, constituted a danger to the republic.[80] Only Japanese-Americans were compelled *en masse* to report to internment camps on the theory that they were inherently dangerous and could not be trusted.[81]

While 120,000 Japanese-American individuals were so detained, this Court considered the constitutionality of the exclusion order in *Korematsu*. The Court accepted the argument advanced by the Department of Justice and upheld the exclusion by endorsing the race-as-dangerousness stereotype.[82] The Court stated: "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue."[83] In other words, the Court reasoned that sending over 100,000 Americans to internment camps because of their ethnicity did not reflect racial prejudice because Japanese Americans were inherently dangerous. Justice Murphy recognized the majority opinion for what it was: an endorsement of unconstitutional racial discrimination by the Executive Branch. He explained that "[s]uch exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[84]

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[79] *Id.* at 3, 284-85.

[80] *Id.* at 284-85.

[81] *Id.* at 6, 56, 64, 66, 79, 80, 83, 222.

[82] *Korematsu*, 323 U.S. at 223-24.

[83] *Id.* at 223.

[84] *Id.* at 233 (Murphy, J., dissenting).

Over time, Justice Murphy's dissent has been vindicated. In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to investigate the Japanese-American internment. Its final report, *Personal Justice Denied,* concluded:

> The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it—detention, ending detention and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.[85]

Over time, *Korematsu* has assumed its rightful place in the anticanon,[86] and the Japanese-American internment has elicited apologies from President Ronald Reagan, the House of Representatives, and the

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[85] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 18.

[86] Greene, *supra* note 16, at 380-83.

Senate.[87] Indeed, the Senate expressed that "policies that discriminate against any individual based on the actual or perceived race, ethnicity, national origin, or religion of that individual would be . . . a repetition of the mistakes of Executive Order 9066; and . . . contrary to the values of the United States."[88] Indeed, Fred Korematsu—whose conviction for violating the internment order was upheld by this Court in *Korematsu*—had his conviction overturned by the district court on a *coram nobis* application in 1983.[89]

II. THE EXECUTIVE ORDER AT ISSUE PUNISHES INDIVIDUALS BASED ON THEIR RELIGION, HARKENING BACK TO SHAMEFUL PERIODS OF OUR NATION'S HISTORY.

This Court's recent decisions in *Buck* and *Peña-Rodriguez* make clear that courts will no longer tolerate the race-as-dangerous stereotyping that was used to justify the lynching of African Americans, the exclusion of Chinese immigrants, or the internment of thousands of Japanese Americans during World War II. Yet, history is now repeating itself as this Court is presented with another act of executive authority that penalizes a distinct group of people based on "who they are."

Our Constitution confers broad authority on the President in the realm of immigration. But that authority has limits: the Executive cannot avoid scrutiny of actions motivated by racial or religious animus by simply invoking the magic words "national security." The President's authority must always be exercised in a manner consistent with constitutional guarantees against arbitrary and impermissible discrimination.

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[87] S. Res. 373, 114th Cong. (2015); H. Res. 442, 100th Cong. (1987); The American Presidency Project, *Ronald Reagan XL President of the United States: 1981*-1989 (Aug. 10, 1988), http://www.presidency.ucsb.edu/ws/?pid=36240.

[88] S. Res. 373, 114th Cong. (2015).

[89] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

Rather than relying on any legitimate concerns about national security, Executive Order 13780 is founded upon the pernicious stereotype that Muslims are inherently dangerous—a stereotype that is soundly refuted by the millions of Muslims living peacefully and lawfully both in and outside the United States. Although this stereotype targets a new and distinct group, it bears a strong resemblance—in terms of its usage, its practical effect, and the constitutional issues it raises—to the stereotypes that have been used to target other minorities in the past.

A. The Executive Order Is Based On, and Perpetuates, the False and Pernicious Stereotype that Muslims Are Inherently Dangerous.

The record provides ample evidence that the Executive Order was motivated by a false and discriminatory belief that Muslims are inherently predisposed to violence. Indeed, just as the "expert" in *Buck* testified that Duane Buck was dangerous because he is Black, President Trump has made clear on multiple occasions that he believes Muslims are dangerous because they are Muslim. And it is that false stereotype that motivated the exclusion order at issue here.

A review of the text from Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, makes its motivation clear. That Order referenced the Muslim-as-dangerous stereotype directly, citing "honor killings"—a frequently used stereotype that Muslims engage in violence against women—as its justification.

The evidence, however, is not limited to the text of that first Order. "Islam hates us."[90] Those three words, uttered by then-candidate Trump in March 2016, make clear that he does not consider Muslims to be part of "us," and also explain his view of Muslims as being inherently dangerous to "us." President Trump's spokeswoman, Katrina Pierson, noted shortly after he made that statement: "We've allowed this propaganda to spread all through the country that [Islam] is a religion of peace."[91]

Further, on the rare occasions when self-proclaimed Muslims have committed violent acts, President Trump has suggested that they did so because they were Muslim. For example, in March 2016, after a violent attack in Brussels, then-candidate Trump stated that Islam is the main source of global terrorism.[92] He continued: "Frankly, we're having problems with the Muslims."[93] In June 2016, after mass shootings by two self-proclaimed Muslims in San Bernardino, President Trump made clear that he believed the shootings showed that Muslims are predisposed toward violence. He called for a ban on Muslim immigration to the United States and commented that "many are saying that I [am] right to do so."[94] When asked in December 2016 whether recent violence in Germany affected his plans to ban Muslims, he stated: "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful."[95] Similarly, President Trump has claimed, falsely, that violent acts by individual Muslims have widespread support among other Muslims in the United States. At a September 2015 campaign rally, he propagated the dangerous and unfounded falsehood that "thousands and thousands" of Muslims living in New Jersey "cheered" the attacks of September 11, 2011.[96] That falsehood has been repeatedly disproved.[97]

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[90] Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,"* CNN.com (Mar. 10, 2016), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html.

[91] *Id.*

[92] Mark Hensch & Jesse Byrnes, *Trump: Frankly, We're Having Problems with the Muslims*, The Hill (Mar. 22, 2016, 8:56 AM), http://thehill.com/blogs/ballot-box/presidential-races/273857-trump-frankly-were-having-problems-with-the-muslims.

[93] *Id.*

In sharp contrast, when individual white persons have committed terrorist acts in the name of white supremacy, President Trump has not suggested that white people are inherently dangerous or that their actions are supported by white people generally. He provided only a belated, and general, statement condemning violence after an Islamophobic white supremacist killed two men on a train in Portland, Oregon; said nothing when a white man traveled from

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[94] Associated Press, *How Donald Trump's Plan to Ban Muslims Has Evolved*, Fortune (Jun. 28, 2016), http://fortune.com/2016/06/28/donald-trump-muslim-ban/.

[95] Katie Reilly, *Donald Trump on Proposed Muslim Ban: "You Know My Plans,"* Time (Dec. 21, 2016), http://time.com/4611229/donald-trump-berlin-attack/.

[96] Brent Johnson, *Trump: "Thousands" in Jersey City Cheered on 9/11*, NJ.com (Nov. 23, 2015, 5:35 PM), http://www.nj.com/politics/index.ssf/2015/11/trump_thousands_in_jersey_city_cheered_on_911.html.

[97] Lauren Carroll, *Fact-Checking Trump's Claim that Thousands in New Jersey Cheered When World Trade Center Tumbled*, Politifact (Nov. 22, 2015, 6:17 PM), http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/.

Baltimore to New York to kill a Black person; and infamously blamed "both sides" after a white supremacist killed an anti-racist protester in Charlottesville, Virginia.[98] The President's selective response to these terrorist acts is telling. When terrorist acts have been committed by Muslim individuals, the President has invoked the Muslim-as-dangerous stereotype by claiming the perpetrator committed the terrorist act because of his faith. By contrast, the President has never suggested that terrorist acts committed by white non-Muslims were the result of any group-based characteristic.

Having embraced the false and discriminatory view of Muslims, as a people, being prone to violent acts, President Trump has repeatedly reiterated that they, as well as their places of worship, should be subject to additional scrutiny and surveillance by law enforcement. In November 2015, President Trump promised that, if elected, he would order the surveillance of "certain mosques" and would have "absolutely no choice" but to order the closure of some of them. Then-candidate Trump additionally stated that he would "certainly implement" a national database of all Muslims in the United States.[99] When asked whether there was a difference between requiring Muslims to register "and Jews having to register in Nazi Germany," he responded, "You tell me," rather than denouncing any registration program with similarities to what happened to Jews during the Holocaust.[100]

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[98] Dan Merica, *Trump Says Both Sides To Blame Amid Charlottesville Backlash,* CNN.com (Aug. 16, 2017, updated 1:14 AM), http://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html; Bonnie Malkin & Martin Pengelly, *Portland Attack: Trump Says Victims Stood Up to 'Hate and Intolerance,"* The Guardian (May 29, 2017), https://www.theguardian.com/us-news/2017/may/29/portland-attack-donald-trump-called-on-to-make-statement-about-double; Camila Domonoske, *White Supremacist Charged With Terrorism Over Murder of Black Man,* NPR.org (Mar. 28, 2017, 3:05 PM), http://www.npr.org/sections/thetwo-way/2017/03/28/521805165/white-supremacist-charged-with-terrorism-over-murder-of-black-man.

The culmination of President Trump's claims regarding Muslims' purported threat to American security was his demand for an outright ban on Muslims entering the United States. In a December 2015 press release, he "call[ed] for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[101] He left no doubt as to the basis for his decision: "Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."[102]

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[99] Jeremy Diamond, *Trump Would "Certainly Implement" National Database for U.S. Muslims*, CNN.com, (Nov. 20, 2015, 12:18 PM), http://www.cnn.com/2015/11/19/politics/donald-trump-barack-obama-threat-to-country/.

[100] Trip Gabriel, *Donald Trump Says He'd "Absolutely" Require Muslims to Register*, N.Y. Times, Nov. 20, 2015, 1:31 AM), https://www.nytimes.com/politics/first-draft/2015/11/20/donald-trump-says-hed-absolutely-require-muslims-to-register/.

[101] Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.*, CNN.com (Dec. 8, 2015, updated 4:18 AM), http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html.

[102] Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA Today (May 9, 2017, 6:03 AM), https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/.

These blatantly discriminatory statements continued after Mr. Trump was sworn into office as President. On social media and in interviews, he has referred to his own Executive Order as a "Ban."[103] For this reason, the President's modifications to the specific parameters of the Executive Order must be seen as a transparent effort to minimize judicial scrutiny. There can be no doubt that the origin for—and motivation behind—the ban remains the same: to prevent entry of Muslim people *as a group* due to the false and pernicious stereotype that they are more likely to commit violence within the United States' borders.[104]

Although the Government now invokes national security as a purported justification for the order (just as it did in *Korematsu*), Respondents have demonstrated that this justification is entirely pretextual. Indeed, given the extensive screening of immigrants already in place, it is not surprising that the U.S. Department of Homeland Security ("DHS") explicitly rejected the need for the Executive Order. In a memo that DHS prepared for the Trump Administration, entitled "Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States," it concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."[105] The absence of a legitimate justification necessitating the broad terms of the Executive Order, and the Order's ineffectiveness in achieving its stated national security goals, confirms that the Order's true purpose is to impose an immigration ban on Muslims based on an entrenched, yet patently false, stereotype that they are inherently dangerous.

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[103] Donald J. Trump (@realDonaldTrump), Twitter (Sept. 15, 2017, 3:54 AM), https://twitter.com/realDonaldTrump/status/908645126146265090.

[104] Amy B. Wang, *Trump Asked for a "Muslim Ban," Giuliani Says—and Ordered a Commission To Do It "Legally,"* Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/.

B. The Order, if Approved, Would Contribute to Increasing Animosity and Violence Towards Innocent Muslim-Americans.

This Court must make clear, in unequivocal terms, that religious discrimination emanating from a false and pernicious stereotype of Muslims as a group will not be tolerated under the United States Constitution. This is especially crucial when, as here, that discrimination comes from the Executive Branch of our federal government. Allowing the Executive Order to have this Court's constitutional stamp of approval would legitimize those stereotypes and lead to the same broader harms to Muslims that similar stereotypes have caused other minorities in the past.

State and local entities have already attempted to enact legislation targeting Muslims. In October 2010, Oklahoma approved a constitutional amendment responding to the unjustified concern that "sharia"—Islamic jurisprudence—poses a threat to the American judicial system.[106] The author of the bill, Representative Rex Duncan, proclaimed that "sharia" was a "cancer" and that his bill would "act as a preemptive strike against sharia law" coming to Oklahoma.[107] According to Representative Duncan, Muslims come to America to take away "liberties and freedom from our children . . . . This is a war for the survival of America. It's a cultural war."[108] At least seven other states have considered similar legislation.[109]

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[105] Memorandum from U.S. Dep't of Homeland Sec., Citizenship Likely an Unreliable Indicator of Terrorist Threat in the United States at 1, as reported by Rick Jervis, *DHS Memo Contradicts Threats Cited by Trump's Travel Ban*, U.S.A. Today (Feb. 25, 2017, 3:36 PM), http://www.usatoday.com/story/news/2017/02/24/dhs-memo-contradict-travel-ban-trump/98374184/.

There has been a similarly disturbing increase in opposition to the opening of mosques, often based on the unsubstantiated belief that they serve as a gathering place for violent individuals. For example, in 2010, residents of Murfreesboro, Tennessee sued Rutherford County for issuing permits allowing for the expansion of a local mosque.[110] The litigants opposed the construction of the mosque on the grounds that Islamic law supposedly "advocates sexual abuse of children, beating and physical abuse of women, death edicts, honor killings, killing of homosexuals, outright lies to Kafirs, Constitutional free zones, and total world dominion."[111] A federal court ultimately ordered Rutherford County to grant the Islamic Center's request for a permit, nullifying a state court decision in favor of the plaintiffs.[112] More recently, the city council in Bayonne, New Jersey rejected a request for a permit to build a mosque.[113] One of the opponents said Muslims "are trying to take over the block and the neighborhood" and referenced the 1993 World Trade Center bombing.[114]

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[106] Ryan J. Reilly, *Oklahoma Anti-Sharia Constitutional Amendments Struck Down by Federal Judge*, Huffington Post (Aug. 16, 2013), http://www.huffingtonpost.com/2013/08/15/oklahoma-sharia-constitution_n_3764313.html.

[107] *Id.*

[108] James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. Times, Nov. 15, 2010, at A12 (quoting State Representative Rex Duncan).

[109] Donna Leinwand, *More States Enter Debate on Sharia Law*, USA Today (Dec. 9, 2010, 10:29 AM), http://usatoday30.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm.

[110] Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 Hastings Race & Poverty L.J. 191, 210 (2012).

Existing mosques in New York, New Jersey, Tennessee, Wisconsin, Connecticut, Kentucky, California, and Oklahoma have been subject to similar threats and accusations.[115] On April 10, 2011, the Islamic Center of Springfield, Missouri received a threatening letter stating that Muslims "stain the earth" and vowing that "Islam will not survive."[116] The letter ended with a drawing of a ram's head with "Death to Islam!" printed below it.[117] Earlier that year, the same mosque was vandalized with graffiti stating, "You bash us in Pakistan, we bash you here."[118] The following week, the Islamic Center in Cartersville, Georgia had its doors and windows shattered with rocks, one of which was painted with the words "Muslim murderers."[119]

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[111] *Id.*

[112] *United States v. Rutherford County,* No. 12 Civ. 0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012).

[113] Sharon Otterman, *Mosque Is Blocked in New Jersey, but Dispute Is Far from Over*, N.Y. Times (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/nyregion/mosque-bayonne-new-jersey.html.

[114] *Id.*

[115] Aziz, *supra* note 110, at 210-11.

[116] *Id.* at 211.

[117] *Id.*

[118] *Id.*

[119] *Id.*

The notion that Muslims are inherently violent is a myth. But, the violence against Muslims resulting from that stereotype is all too real.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions of the Fourth and Ninth Circuits.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.,
Respondents.

**On Writs of Certiorari to the
United States Courts of Appeals
for the Fourth and Ninth Circuits**

BRIEF OF JANET A. NAPOLITANO AND OTHER FORMER FEDERAL IMMIGRATION OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici have served in senior positions in the federal agencies charged with enforcement of U.S. immigration laws under both Democratic and Republican Administrations.

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[1] Pursuant to Supreme Court Rule 37.3(a), amici certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici or their counsel made a monetary contribution to its preparation or submission.

Paul Virtue served as General Counsel of the U.S. Immigration and Naturalization Service ("INS") from 1998 to 1999. He also served as Executive Associate Commissioner from 1997 until 1998 and Deputy General Counsel from 1988 until 1997.

As former leaders of the nation's primary immigration enforcement agencies, amici are familiar with the historical underpinnings of the immigration laws' prohibition of national-origin discrimination and with the effectiveness of current procedures for vetting non-citizens wishing to enter the United States. In amici's experience, the most effective methods by which to secure our nation involve the use of individualized threat evaluations rather than group-based classifications. There is no basis, and until recently there had been no precedent, for denying entry to entire nationalities based on a supposition that their national origin alone makes them a threat to national security.

ARGUMENT

The Executive Order under review in this case, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (J.A. 1416) (the "Order"), is unwarranted and unprecedented. Never before has a President sought a blanket entry ban on all nationals from majority-Muslim nations based solely on the fear that *all* nationals of those countries are inherently dangerous.

The Order does not identify any specific threat based on intelligence, nor does it isolate any particular weaknesses in existing vetting procedures that would justify prohibiting the entire populations of these nations from entering the United States. Instead, the Order paints all nationals of six countries with the broadest imaginable brush, stating that they "present heightened risks" to national security. Order § 1(e).

The Order's stated rationale is that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high" pending completion of "the assessment of current screening and vetting procedures required by section 2 of this order[.]" Order § 1(f). That rationale ignores the individualized assessments that already take place within robust vetting procedures established via Congress's legislative scheme and the Executive regime designed to implement it, and the Order does not identify which, if any, of the numerous procedures contained within that overarching scheme are suspected to be inadequate.

Even if certain procedures within the existing scheme might be improved, the Order's remedy is senseless: the Order relies upon national-origin-based classifications, rather than individual threat assessments, to predict future dangerousness, while leaving in place each and every one of the purportedly inadequate vetting procedures for every prospective applicant from countries except for those included in the Order. The obvious flaws inherent in such an approach explain why, until the issuance of this Order, both Republican and Democratic administrations had consistently relied upon targeted and individualized threat assessments, rather than group-based generalizations, to prevent our nation's immigration system from becoming a conduit for terrorists to enter the United States.

I. INDIVIDUAL THREAT ASSESSMENTS MANDATED BY CURRENT LAW PROTECT THE UNITED STATES MORE EFFECTIVELY THAN THE EXECUTIVE ORDER'S RELIANCE ON NATIONAL-ORIGIN DISCRIMINATION

A. Congress Has Sought to Eradicate National-Origin Discrimination from U.S. Immigration Laws

For much of our country's history, the immigration laws embodied ugly prejudices that regarded some nationalities as less desirable—and more dangerous—than others.

The Chinese Exclusion Act of 1882 was the first U.S. law significantly restricting immigration, suspending entry of "Chinese laborers" to the United States and barring any court from "admit[ting] Chinese to citizenship" based on fears that "the coming of Chinese laborers to this country endangers the good order[.]" Act of May 6, 1882, ch. 126, 22 Stat. 58. The Immigration Act of 1917 imposed further nationality-based immigration restrictions by barring admission to the United States by anyone born in what would become known as the Asiatic Barred Zone (generally consisting of most countries on the Asian continent). Pub L. 64-301, 39 Stat. 874. Not long thereafter, the Immigration Act of 1924 established the "first permanent quota law," imposing strict caps based on country of origin. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 279 & n.18 (1996) ("*Civil Rights Revolution*") (citing Pub L. 68-139, 43 Stat. 153).

Beginning in 1943, Congress began to roll back nationality-based immigration restrictions. *See, e.g.*, Act of Dec. 17, 1943, Pub. L. 78-199, 57 Stat. 600 (awarding China a minimum immigration quota and allowing Chinese nationals to become U.S. citizens). President Roosevelt, the State Department, and Members of Congress noted that these reforms served foreign policy objectives, namely, to strengthen the United States' relationship with China—a key ally during World War II—while countering Japan's anti-American propaganda campaign, which highlighted the United States' restrictionist immigration policies as evidence of its hostility to East Asian countries. *Civil Rights Revolution* at 282–86 & nn.36–47.[2]

The start of the Cold War compelled Congress to continue easing exclusionary policies based on national origin. Congress enacted the Immigration and Nationality Act ("INA") of 1952, which repealed the Asiatic Barred Zone, gave minimum quotas to all Asian nations, and eliminated racial bars on

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[2] The 1943 reforms were modest. China was given a "negligible" annual quota of only 105 immigrants. S. Rep. No. 78-535, at 6 (1943). Nationality-based prejudices continued intertwining with racial prejudices to influence immigration and national security policy, culminating in the forced internment of "all persons of Japanese ancestry" residing in California and in much of Washington and Oregon. *Korematsu* v. *United States*, 323 U.S. 214, 217, 227 (1944) (upholding application of an "exclusion order" pursuant to Executive Order 9066 resulting in the "imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States").

U.S. citizenship. Pub L. 82-414, 66 Stat. 163. The law's proponents "relied almost exclusively on the foreign policy benefit of reducing racial restrictions against Asians" as the United States sought to isolate the Soviet Union during the early years of the Cold War. *See Civil Rights Revolution* at 287. The House Judiciary Committee explained that the legislation would "have a favorable effect on our international relations, particularly in the Far East" where "American exclusion policy ha[d] long been resented[.]" H.R. Rep. No. 82-1365, at 28–29, *reprinted in* 1952 U.S.C.C.A.N. 1653.

The most significant shift from nationality-based stereotyping to individually-driven assessments occurred with Congress' passage of the Immigration and Nationality Act of 1965, which not only prohibited discrimination based on "nationality" in the "issuance of an immigrant visa," 8 U.S.C. § 1152(a)(1)(A), but also replaced the nationality-based quotas with a system that prioritized applicants based on their own individual skills and ties to U.S. citizens, *id.* § 1153. These reforms furthered two congressional aims: that "favoritism based on nationality will disappear[,]" and that "[f]avoritism based on individual worth and qualifications will take its place." 111 Cong. Rec. 24,226 (1965) (statement of Sen. Edward Kennedy); *accord* 111 Cong. Rec. 21,780 (1965) (statement of Rep. Arch Moore) ("[I]ntending immigrants must satisfy strict moral, mental, health, economic, and national security requirements. The law is long and detailed on the specific criteria to be applied in testing the qualifications of applicants.").

The INA established an "individualized adjudication process" in which "a visa applicant bears the burden of showing that the applicant is eligible to receive a visa or other document for entry and is not inadmissible," and the Executive Branch determines whether to admit or deny entry to that individual based on the unique facts and circumstances of that person's application. J.A. 1203 (citing 8 U.S.C. § 1361).

B. Congress Has Explicitly Directed the Executive Branch to Consider the Threat of Terrorism when Evaluating an Individual's Eligibility for Entry

The Order's purported purpose, "to protect the Nation from terrorist activities by foreign nationals admitted to the United States," Order, preamble, ignores that Congress has already directed the Executive Branch to address the risk of terrorism through individualized eligibility determinations. Those existing individualized procedures are far more likely to be effective than resorting to group-based national origin classifications.

Congress began building a counter-terrorism framework within the federal immigration system in 1990, when it amended the INA to add 8 U.S.C. § 1182(a)(3)(B).[3] That statutory provision states that a person is "ineligible to receive visas and ineligible to be admitted to the United States" if certain criteria are present indicating that the person may engage in acts of terrorism. Immigration Act of 1990, § 601, Pub. L. 101-649, 104 Stat. 4978.

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[3] Before the 1990 Act, "there was no express terrorism-related ground for exclusion." Michael J. Garcia & Ruth E. Wasem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens* at 3, Cong. Res. Serv. (Jan. 12, 2010), available at https://goo.gl/YtCcwg.

In its current form, Section 1182(a)(3)(B) bars admission by anyone who has "engaged in a terrorist activity," is "likely to engage after entry in any terrorist activity," is a "member of a terrorist organization," has "received military-type training . . . from or on behalf of any" terrorist organization, or has "incited" terrorist activity, or who "endorses or espouses" or "persuades others to endorse or espouse" terrorist activity or to "support a terrorist organization[.]" 8 U.S.C. § 1182(a)(3)(B)(i). This statute directs Executive Branch officials to decide—on an individualized basis—whether any person seeking admission is likely to engage in terrorist activities, or has any history of committing or supporting terrorism. *See Kerry* v. *Din*, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring) ("§ 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist" and requires "at least a facial connection to terrorist activity").

Congress has amended Section 1182(a)(3)(B) in response to changing circumstances since the statute's enactment nearly three decades ago. For example, in the aftermath of the September 11, 2001 attacks, Congress enacted the USA PATRIOT Act, § 411, Pub. L. 107-56, 115 Stat. 272 (2001), which amended § 1182(a)(3)(B) by expanding the definition of "terrorist organization" to include an organization that "engages" in terrorist "activities" or has been designated as such by the Secretary of State, even if it has not been designated as such under 8 U.S.C. § 1189. Congress further expanded and refined Section 1182(a)(3)(B)'s exclusionary criteria in 2005 to cover persons who provide a wider range of assistance to terrorist organizations, such as fundraising, paramilitary training, and soliciting others to support the organization. REAL ID Act of 2005, Pub. L. 109-13, § 103, 119 Stat. 231.

More recently, Congress considered the precise problem that the Order purports to address: whether nationals from certain countries should be denied entry on the grounds that they present higher risks of engaging in terrorist attacks if admitted. Congress rejected that notion and instead concluded that those nationals should undergo individualized vetting. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, tit. II, Pub. L. 114-113, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)) (restricting Iraqi and Syrian nationals' access to the tourist visa waiver program, thus requiring individualized assessments though existing vetting procedures). The Order, by contrast, would have immigration authorities adopt a crude presumption that *any* national of six predominantly Muslim countries is likely to engage in terrorist activity. Amici's experience is that the individualized assessments required by the existing statutory regime are far more effective at rooting out threats than the Order's sweeping use of national-origin discrimination.

C. The Executive Branch Has Developed Comprehensive and Effective Vetting Procedures to Make Individualized Admission Determinations

For nearly a century, the Executive Branch has promulgated rules and regulations to effectuate the policy objectives enshrined in federal immigration legislation without resorting to national-origin discrimination.

In 1924, Congress passed legislation requiring any individual seeking admission to the United States to present certain documents prior to entry, and assigning consular officers the responsibility to approve or deny visas. *See* Immigration Act of 1924, Pub L. 68-139, 43 Stat. 153. Shortly before the passage of the INA in 1952, the Senate Judiciary Committee observed:

> [T]he Congress provided in the Immigration Act of 1924 for a double check of aliens by separate independent agencies of the Government, first by consular officers before the visas were issued, and by immigration officers after the aliens reached the port of entry. If a double check was essential 25 years ago to protect the United States against criminals or other undesirables, it is the opinion of the subcommittee that it is even more necessary in the present critical condition of the world to use the double check to screen aliens seeking to enter the United States.

S. Rep. No. 81-1515, at 327 (1950). The concept of a "double check" prevailed when Congress passed the INA, which remains the statutory basis for the individualized, risk-based screening of visa applicants. Ruth E. Wasem, *Visa Security Policy: Roles of the Departments of State and Homeland Security* at 3, Cong. Res. Serv. (June 30, 2011), available at https://goo.gl/WqC8Th ("*Visa Security Policy*").

In the years following the attacks of September 11, 2001, the two-tiered screening process has evolved into a robust and multi-layered system of individualized vetting procedures to screen immigrants for potential admission. Letter from J. Napolitano & M. Chertoff to B. Obama (Nov. 19, 2015), available at https://goo.gl/P7bPA5, *quoted in* 161 Cong. Rec. H8385 (daily ed. Nov. 19, 2015) ("*Napolitano Letter*"); *see also Statement for the Record Before the U.S. H.R. Comm. on Homeland Sec. Regarding "Shutting Down Terrorist Pathways Into America"*, 114th Cong., 2d Sess. (Sept. 14, 2016), available at https://goo.gl/pbwq16 (statement of Leon Rodriguez and others) ("*Terrorist Pathways Statement*"); Ron Nixon & Jasmine C. Lee, *Getting a Visa to Visit the U.S. Is a Long and Extensive Process for Most*, N.Y. Times (Mar. 16, 2017). Drawing on data collected and shared by the State Department, DHS, the National Counterterrorism Center, the FBI, the Defense Department, and local and international partners, the vetting system comprehensively investigates each visa and refugee applicant through a series of interview-based, biographical, and biometric checks that extend over many months, even after an applicant's admission. *Napolitano Letter*; *Terrorist Pathways Statement*. This tailored and thorough review ensures that each applicant is clear of the concerns enumerated as grounds for inadmissibility in Section 1182(a), including concerns related to security and terrorism. *See Visa Security Policy* at 3, 7; *see also, e.g.*, USCIS Policy Manual, ch. 8 (current as of Aug. 23, 2017), available at https://goo.gl/Nbs8zK (detailing Section 1182(a) grounds for inadmissibility).

1. The Visa Applicant Vetting Process

The visa vetting process begins with an online application, which allows consular, intelligence, and law enforcement personnel to analyze and share data in advance of the applicant's interview. *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs* at 2, 114th Cong., 2d Sess. (Mar. 15, 2016) (statement of David Donahue), available at https://goo.gl/qaRwQD ("*Donahue Statement*"); Michael J. Garcia & Ruth E. Wasem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens* at 14–16, Cong. Res. Serv. (Jan. 12, 2010), available at https://goo.gl/YtCcwg ("*Terrorist Grounds*"). During the interview, consular officers investigate case-relevant information regarding the applicant's identity, qualifications for the particular visa category, and possible ineligibilities due to criminal history, prior visa applications, or travel to the United States, and potential security threats. *Donahue Statement* at 3; *Terrorist Grounds* at 14. A visa applicant's data is also reviewed through specific electronic databases set up by the State Department, which contain tens of millions of visa records, in order to detect and respond to any derogatory information regarding the applicant. *Donahue Statement* at 3; *Terrorist Grounds* at 14.

Additionally, nearly all visa applicants submit to a 10-print fingerprint scan that is screened against two primary databases: (1) DHS's IDENT database, which contains available fingerprints of known and suspected terrorists, wanted persons, and those who have committed immigration violations, and (2) the FBI's Next Generation Identification ("NGI") system, which contains more than 75.5

million criminal history records. *Donahue Statement* at 3; *Terrorist Grounds* at 17–18. All visa photos are also compared to a gallery of photos of known or suspected terrorists obtained from the FBI as well as the State Department's repository of all visa applicant photos. *Donahue Statement* at 4; *Terrorist Grounds* at 14.

Visa applicants are further vetted through various interagency systems using pooled data from law enforcement and intelligence sources. DHS's Pre-adjudicated Threat Recognition and Intelligence Operations Team ("PATRIOT") and Visa Security Program ("VSP") provide another level of review of visa applications at overseas locations. *Donahue Statement* at 4. Using resources from DHS Immigration and Customs Enforcement ("ICE"), CBP, and the State Department, PATRIOT reviews applications to identify national security, public safety, and other eligibility concerns before a visa is granted. Part of this review consists of manual vetting by a team of agents, officers, and analysts from ICE and CBP if an application presents potential derogatory information. *Id.* at 4–5; *Terrorist Pathways Statement*. Similarly, the VSP deploys DHS officers to diplomatic posts to provide additional visa security services in order to identify terrorists, criminals, and others who are ineligible for visas before they apply for admission or travel to the United States. *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs* at 3, 114th Cong., 2d Sess. (Mar. 15, 2016) (statement of Sarah R. Saldaña), available at https://goo.gl/Ur169i ("*Saldaña Statement*").

The VSP does not simply deny visas: it works collaboratively with other U.S. agencies and overseas law enforcement to identify previously unknown threats and bolster existing security data. In Fiscal Year ("FY") 2015, VSP reviewed over two million visa applications, contributing to the refusal of approximately 8,600 visa applications. *See Terrorist Pathways Statement*. Over 2,200 of these refusals presented a known or suspected connection to terrorism or terrorist organizations. *See id.*

In 2013, the State Department worked with interagency partners to launch the Kingfisher Expansion counterterrorism visa vetting system ("KFE"), which provides yet another layer of interagency review. *Donahue Statement* at 4. KFE first compares multiple fields of data extracted from visa applications against intelligence community and law enforcement agency databases in order to identify terrorism and security concerns. *Id.* KFE then provides an additional level of interagency evaluation for any applicant presenting a security concern. This second-level review must resolve all concerns in order for the applicant to be found eligible for a visa. *Id.*; *see* Jerome P. Bjelopera *et al.*, *The Terrorist Screening Database and Preventing Terrorist Travel* at 13, Cong. Res. Serv. (Nov. 7, 2016), available at https://goo.gl/JcRVW4.

The government's vetting efforts continue during and after an approved applicant's travel to the United States. If at some point a visa holder matches derogatory information in a government database, DHS and DOS collaborate to determine whether the information warrants visa revocation. *Saldaña Statement* at 6–7.

The Order asserts that "conditions" in the six targeted countries are such that those countries' governments have "diminishe[d] . . . willingness or ability to share or validate important information about individuals seeking to travel to the United States." Order §1(d). To the extent that assertion is true, existing law and procedure already address it: at all points during the vetting process, the visa applicant bears the burden of producing documents and information substantiating that he is eligible for a visa and that he does not trigger any of the enumerated criteria for inadmissibility. 8 U.S.C. § 1361. Thus, where the government lacks the information necessary to determine whether an applicant is eligible for a visa, existing procedures do not permit the visa to be granted.

2. The Refugee Vetting Process

The Order not only suspends entry by individuals from six predominantly Muslim nations, it further suspends entirely the United States Refugee Admissions Program ("URAP"), participants of which already undergo extensive individualized vetting.

The United States sets its refugee profile by specifying that it is willing to admit to the country as refugees the world's most vulnerable individuals, including mother-led family units, victims of torture, and those with severe medical conditions. *See Napolitano Letter*. These refugees receive "the highest level of scrutiny from a law enforcement and national security perspective." *Id.*; *accord* Natasha Hall, *Refugees Are Already Vigorously Vetted*, Wash. Post (Feb. 1, 2017); *see also* Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Al-*

ready Face A Rigorous Vetting Process, N.Y. Times (Jan. 29, 2017) ("*Rigorous Vetting Process*") (detailing the twenty steps a refugee must undertake before entering the United States); David Inserra, *How the Refugee Vetting Process Works*, Heritage Foundation (Dec. 21, 2015), available at https://goo.gl/PtSXYs ("*Refugee Vetting*") (listing various agency databases and multiple checkpoints in vetting process).

The refugee vetting process is "lengthy and deliberate," extending between 18 to 24 months and offering no possibility to waive applicable requirements. *See Napolitano Letter*. The prospective refugee begins the screening process by first registering and interviewing with the United Nations, which decides whether the individual fits the definition of a refugee and whether to refer that individual to the United States or elsewhere for resettlement. *Rigorous Vetting Process*.

If the applicant is referred for resettlement in the United States, he or she must interview with the State Department and proceed through several biographical and biometric screenings. *Rigorous Vetting Process*; *Terrorist Pathways Statement*. Specially-trained USCIS officers conduct an in-person interview of every principal refugee applicant and every accompanying family member age 14 or older in order to identify any possible grounds of ineligibility. *Hearing on the Crisis of Confidence: Preventing Terrorist Infiltration through U.S. Refugee and Visa Programs before the House Comm. on Homeland Sec.*, 114th Cong., 2d Sess. (Feb. 3, 2016) (statement of Leon Rodriguez), available at https://goo.gl/wzj8cq ("*Rodriguez Statement*"). The officers evaluate the credibility of each applicant and assess, among other things, whether his testimony is consistent with known country conditions. *Id.*

A refugee applicant's biographic and biometric information is assessed against a broad array of databases from various law enforcement and intelligence agencies to help confirm the applicant's identity, check for any criminal or other derogatory information, and identify information that may inform interview questions and potentially lead to additional, higher-level review. *See Refugee Vetting* (listing databases). These databases include the State Department's Consular Lookout and Support System ("CLASS"), which includes watchlist information, and the National Counterterrorism Center's Interagency Checks ("IACs"). *See Rodriguez Statement.* These checks are recurring, so any derogatory information that is identified following the initial check but before the applicant has traveled to the United States will be shared with USCIS. *Id.*

USCIS also conducts biometric checks by assessing fingerprints and photographs against three sets of data, including the FBI's NGI system, DHS's IDENT, and the Defense Department's Automated Biometric Identification System ("ABIS"). *See Rodriguez Statement.* IDENT screens fingerprints against information from watchlists and previous immigration encounters in the United States and overseas, including prior visa applications. *Id.* ABIS contains a variety of records, including fingerprint records captured in theatre in Iraq. *See id.*

Refugee applicants are also subject to a mandatory supervisory review before a final decision on their applications. Certain categories of sensitive cases, such as certain national security-related cases, must be referred to USCIS's Refugee Affairs Division Headquarters for additional research, information-sharing with law enforcement and intelligence agencies, or consultation with an outside expert before a final decision. *See Rodriguez Statement.*

Like visa applicants, refugees bear the burden of producing documents and information substantiating that they are eligible for refugee status and that they do not satisfy any inadmissibility criteria. 8 U.S.C. § 1361. If documents or information are unavailable to establish the applicant's eligibility, the application is denied.

3. Enforcement

The available evidence demonstrates that vetting officers vigorously enforce the heavy burden of proof placed upon visa applicants by assessing each applicant's eligibility and risk on a targeted, individualized basis. The evidence also confirms that although existing vetting procedures already address the purportedly-relevant "conditions" in the six designated countries, Order § 1(e), insofar as nationals from the six designated are refused entry into the United States at relatively high rates, the Order fails to meet its own rationale because it does not suspend entry from countries with even higher refusal rates.

According to State Department data that calculates on a per-country basis the percentage of applicants for U.S. temporary visas who were refused entry, in fiscal year 2016, eighteen countries had adjusted refusal rates above 60% for applicants for B visas, which are nonimmigrant visas issued to persons who wish to enter the United States temporarily for business or pleasure. *See* Table 1, *infra.* Only one of these countries—Somalia—is designated under the Order, and its refusal rate is still lower than those of ten other countries. *Id.*

Table 1. B Visa Adjusted Refusal Rates by Nationality.[4]

Country	FY 2016 Adjusted Refusal Rate
Cuba	82%
Afghanistan	74%
Guinea-Bissau	72%
Mauritania	72%
Liberia	70%
Gambia	70%
Bhutan	70%
Ghana	66%
Burkina Faso	65%
Haiti	65%
Somalia	64%
Guinea	64%
Bangladesh	63%

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[4] Adjusted refusal rates are taken from U.S. Dep't of State, *Calculation of the Adjusted Visa Refusal Rate for Tourist and Business Travelers Under the Guidelines of the Visa Waiver Program*, tbl. FY2016, available at https://goo.gl/dSW5aa and https://goo.gl/7pjQrQ (last visited Sept. 13, 2017) ("*Visa Refusal Rates*"), and rounded to the nearest whole number. The shaded cell in Table 1, *infra* indicates one of the six countries designated under the Order.

Georgia	63%
Vatican City	63%
Laos	62%
Burundi	61%
Sierra Leone	61%

Among the designated countries, the adjusted refusal rates for B visa applicants were relatively high: about 36 percent to 137 percent higher than the average refusal rates of B visa applicants from all other countries. *See* Table 2, *infra*. In fact, the majority of applicants in two countries—Somalia and Syria—were refused entry. *Id.*

Table 2. B Visa Adjusted Refusal Rates by Nationality.[5]

Country	**FY 2016 Adjusted Refusal Rate**	**Percentage Higher than Non-Designated Countries' Average Refusal Rate (27%)**
Iran	45%	67% higher
Libya	41%	50% higher
Somalia	64%	137% higher
Sudan	37%	36% higher
Syria	60%	121% higher
Yemen	49%	81% higher
Average	***49%***	***81% higher***

Common reasons for visa refusals include a lack of information proving eligibility, inability to qualify for the particular visa category, or evidence showing inadmissibility under the INA's specified grounds. *See* U.S. Dep't of State, *Visa Denials*, available at https://goo.gl/undMvW (last visited Sept. 13, 2017). In amici's experience, the relatively high refusal rates for applicants from the designated countries reflects that the consular and immigration officers are conducting case-specific inquiries appropriately, as mandated by the INA. Further, even if high refusal rates suggested a disproportionate "risk" associated with applicants or applications from particular countries, the Order fails to target *any* of the highest-risk countries by that measurement. *See* Table 1, *supra.*

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[5] Calculations based on *Visa Refusal Rates*.

There is no evidence whatsoever that individual applicants from the six designated countries present a heightened security risk vis-à-vis individuals from other countries, such as those listed in Table 1, much less a risk that the existing vetting system is incapable of handling.

Nationals from the six countries identified in the Order have killed no Americans in terrorist attacks on U.S. soil between 1975 and 2015. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, Cato at Liberty (Jan. 26, 2017), available at https://goo.gl/18jW5T. Multiple studies show that the overwhelming majority of individuals who were charged with or who died while perpetrating terrorism-related crimes inside the United States since September 11, 2001 have been U.S. citizens or legal permanent residents—not refugees or nonimmigrant visa-holders. *See* Peter Bergen *et al.*, *Who Are the Terrorists?*, New Am. Found., available at https://goo.gl/kEDnBt (last accessed Sept. 13, 2017) ("*Who Are the Terrorists*"); *see also* Phil

Hirschkorn, *Most Convicted Terrorists Are U.S. Citizens. Why Does the White House Say Otherwise?*, PBS NewsHour (Mar. 12, 2017), available at https://goo.gl/zCXq1N (citing five studies supporting the conclusion that "the vast majority of terrorism convictions are against U.S. citizens, as opposed to immigrants"). In fact, every perpetrator of a lethal terrorist attack on U.S. soil in the name of Islam during this time period was a U.S. citizen or permanent resident. *See Who Are the Terrorists*.

The empirical evidence available demonstrates that national origin is an exceedingly poor proxy for security risk. Since September 11, 2001, thirteen terrorists have committed deadly domestic attacks in the name of Islam. *See Who Are the Terrorists*. Most of the perpetrators of these attacks were U.S. citizens, and their countries of birth exhibited no discernible pattern: eight from the United States, and one each from Russia, Kyrgyztan, Egypt, Kuwait, and Pakistan. *See id*. Omar Mateen, who was born in New York to Afghan parents, was responsible for 49 of the 94 total deaths in those attacks. Kurtis Lee, *Islamist Terrorists Have Struck the U.S. 10 Times Since 9/11. This Is Where They Were Born*, L.A. Times (Feb. 7, 2017 2:36 p.m.), available at https://goo.gl/hmPvxt. Tashfeen Malik, a Pakistani woman, and her husband, Syed Rizwan Farook, who was born in the United States, were responsible for fourteen deaths. *Id.*; Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis* at 12, CATO Institute (Sept. 13, 2016), available at https://goo.gl/ZgEAux.

By any measure, neither visa/refugee status nor nationality bears any relationship to security risk, and certainly not enough of a relationship to support a generalized entry ban. Moreover, as noted above, several provisions of the INA are already aimed at the threat that the Order purports to address. By prohibiting national-origin discrimination in Section 1152(a) while requiring exclusion of aliens on individualized security and terrorism-related grounds in Section 1182(a)(3) and exempting those present in certain countries of concern from the visa waiver program in Section 1187(a)(12), the immigration laws reflect Congress's judgment that the multiple checks of our individualized visa and refugee vetting system are a more effective means of addressing security risks than national-origin discrimination. *See, e.g.*, Br. of Former National Security Officials, *Hawaii* v. *Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017) (ECF No. 108); Decl. of Albright *et al.*, *Aziz* v. *Trump*, No. 1:17cv116 (E.D. Va. Feb. 8, 2017) (ECF No. 57).

II. THE EXECUTIVE ORDER'S RESORT TO NATIONAL-ORIGIN DISCRIMINATION DEPARTS FROM DECADES OF EXECUTIVE BRANCH PRACTICE

The sensibility and proven efficacy of approaching the vetting of visa applications with individualized, rather than group-based, threat assessments help explain why no previous administration has attempted to invoke statutory suspension authorities to ban entire nationalities of applicants based on perceived dangerousness. Contrary to the Government's assertion, the Order is not justified by either "history" or Sections 1182(f) and 1185(a)(1). Pet. Br. at 53. In the wake of numerous national security crises, including the attacks of September 11, 2001, no prior President has invoked Section

1182(f) or Section 1185(a)(1) in the manner they are invoked in the Order.

In the rare occasions in which Section 1182(f) or Section 1185(a)(1) has been invoked, entry was suspended based on criteria other than national origin, such as affiliation as a foreign government agent or prior harmful conduct involving human rights abuses or impeding peace or democracy—in effect, to deny entry as a sanction designed to respond to specifically-identified conduct. *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* at 6–10 tbl.1, Cong. Res. Serv. (Jan. 23, 2017), available at https://goo.gl/jj3cRi (collecting proclamations and orders invoking § 1182(f)).[6]

The Government argues that a number of previous Executive actions provide legal and historical precedent for the Order, but none of those examples supports the Order's use of nationality as a proxy for dangerousness.

The Government's reliance on President Carter's invocation of Section 1185(a) during the Iran hostage crisis (Pet. Br. at 53) is misplaced. In response to the storming and seizure of the U.S. Embassy in Tehran, and the taking of more than fifty American hostages, President Carter delegated authority to the Secretary of State and the Attorney General "in respect of Iranians . . . to prescribe limitations and exceptions on the rules and regulations governing the entry of aliens into the United States." Exec. Order No. 12172, 44 Fed. Reg. 67,947

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[6] An Appendix to this brief reproduces the substance of Table 1 in this Congressional Research Service report that lists prior presidential invocations of § 1182(f).

(Nov. 26, 1979); *see* Exec. Order No. 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980) (expanding this authority "by deleting 'holding immigrant visas'" as a limitation). Although President Carter's announcement might be read as suggesting that all entry by Iranian nationals would be suspended,[7] the regulations promulgated pursuant to President Carter's executive orders did not enact such a blanket suspension. Rather, the State Department required visas issued to Iranian nationals before the April 7, 1980 Executive Order to be re-endorsed by a U.S. consular officer under new guidelines,[8] and the INS shortened the time period in which Iranian nationals who were *unlawfully* present in the United States could depart voluntarily.[9]

President Carter's Executive Orders were unlike the Order in that they were a direct response to an armed takeover of the U.S. Embassy in Tehran, the capture and holding hostage of American Embassy personnel, and the Iranian Government's refusal to "to take custody of the American hostages." *Iran Remarks*. A decision to suspend the issuance of visas from a country in response to the storming and capture of the U.S. Embassy does not amount to national-origin discrimination. As described above, consular officials at U.S. embassies help receive and process applications for visas, and they perform critical investigative and vetting functions. *See, e.g., Visa Security Policy* at 1. The inability to perform such tasks during heightened tension between two countries is a justification for the exercise of extraordinary Executive authorities that is distinct from any assumption about an individual applicant's likely or potential dangerousness. Further unlike the Order here, President Carter's announced restrictions were only one of many sanctions proposed in order to increase political pressure on the Iranian Government to ensure the return of the hostages to the United States.

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[7] *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980), available at https://goo.gl/ozpkMo ("*Iran Remarks*").

[8] *See* 45 Fed. Reg. 24,436 (Apr. 9, 1980) (promulgating 22 C.F.R. § 46.8, later repealed, which provided in pertinent part: "An immigrant or nonimmigrant visa, . . . issued prior to April 7, 1980, to a national of Iran shall not be valid . . . unless such visa shall have been presented to a consular officer on or after April 7, 1980, and the consular officer shall have endorsed the visa in the manner prescribed by the Department of State.")).

[9] *See* 45 Fed. Reg. 27,917 (Apr. 25, 1980) (amending 6 C.F.R. § 242.5(a)(2)); *see also Nademi* v. *INS*, 679 F.2d 811, 814 (10th Cir. 1982) ("The amendment does no more than implement the President's foreign policy of severing relations with Iran.").

The Government also errs in its reliance on President Reagan's 1981 proclamation directed at attempted undocumented entry from the high seas. *See* Proc. No. 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981); *accord* Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (implementing this interdiction policy). While President Reagan's proclamation did not facially impose nationality-based restrictions, it was widely understood to have been directed at undocumented "Haitian migrants" attempting to enter the United States by sea, as this Court later recognized in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 187–88 (1993). Yet the proclamation did not bar anyone that otherwise would have been admissible, nor did it reflect any prejudicial judgment on the inherent characteristics of the Haitian nationals seeking admission. The proclamation instead simply reiterated that certain migrants were inadmissible under existing law, and it implemented agreements between the United States and foreign governments that permitted U.S. interdiction of vessels carrying undocumented migrants and allowed the U.S. to return those migrants to their countries of origin.

Only once before President Trump took office had a President invoked Section 1182(f) or Section 1185(a)(1) to suspend entry into the United States based on nationality. Proc. No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). But even in that *sui generis* case, national origin was deployed not to discriminate invidiously against a particular race or group, but rather as a foreign policy countermeasure against a nation that had disrupted migration to and from the United States in violation of that nation's bilateral diplomatic agreement with the United States. In that case, President Reagan suspended entry of Cuban nationals in response to Cuba's own decision "to suspend all types of procedures regarding . . . the December 14, 1984 immigration agreement between the United States and Cuba" as well as to Cuba's "failure . . . to resume normal migration procedures with the United States[.]" 51 Fed. Reg. at 30,470. The proclamation provided for the suspension to be lifted when the Cuban government complied with the agreement allowing normal immigration procedures to be resumed.

The Order here, by contrast, is not a response to the acts of the foreign sovereigns, or an effort to insist upon reciprocity from a foreign government with respect to bilateral immigration policy. Nor does the Order indicate that it may no longer be effective if a foreign sovereign meets certain conditions (*i.e.*, resuming normal migration procedures), as the Order's entry suspension expires after a fixed period. *See* Order § 2(c) ("90 days from the effective date").

President Reagan's Executive Order made no assumptions about the inherent dangerousness of applicants from Cuba, and hence engaged in no discriminatory treatment, by suspending entry of Cuba's citizens until the Cuban government resumed normal migration procedures, including admitting U.S. citizens. By contrast, the Order here uses nationality as a proxy for perceived individual dangerousness—it assumes that because an individual is a citizen of a covered nation, he is inherently more dangerous than a citizen of a non-covered nation. That assumption—the branding of an individual based *solely* upon perceived traits of the biological, ethnic, national, or religious group to which that individual belongs—is the essence of discrimination under our Constitution. *See Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741–46 (2007) (plurality op. of Roberts, C.J.). It is a rationale that, unlike the Reagan order, goes to the heart of the prohibition against national-origin discrimination found in the INA. *See Legal Assistance for Vietnamese Asylum Seekers* v. *U.S. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 473 (D.C. Cir. 1995).

The Government's assertion, therefore, that the preliminary injunctions issued by the district courts were "extraordinary"[10] ignores that the injunctions responded to an Order that is itself extraordinary. None of the Executive actions cited by the Government,[11] nor any others known to amici, invoked Section 1182(f) or Section 1185(a)(1) to suspend entry from one or more countries based on the assumption that nationals from those countries were inherently dangerous.

Our history counsels against resorting to discriminatory assumptions, rather than individual considerations, as the basis of immigration policy. National-origin discrimination displaces particularized individual determinations where they are most needed in federal immigration policy. Departing from the carefully crafted threat identification framework in our immigration system, and forcing nationality-based prejudices into its foundation, will "result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms." *Schuette* v. *BAMN*, 134 S. Ct. 1623, 1635 (2014) (plurality op. of Kennedy, J.); *accord Peña-Rodriguez* v. *Colorado*, 137

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[10] Br. for Appellants at 1, *Int'l Refugee Assistance Proj.* v. *Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017) (ECF No. 36); Br. for Appellants at 2, *Hawaii* v. *Trump*, No. 17-15589 (9th Cir. Apr. 7, 2017) (ECF No. 23).

[11] The remaining examples cited by the Government involved suspending entry of "members and officials of particular foreign governments," which were based not on nationality but rather on agency (*i.e.*, a foreign power's designation of certain individuals as members of its government) and voluntary association as a government official. Pet. Br. at 53 (citing Proc. No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996); Proc. No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988)).

S. Ct. 855, 867 (2017) (majority op. of Kennedy, J.) (impeaching a jury verdict infected with racial bias and stating that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons"); *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.") (footnote calls omitted). The Order's central tenet—that our existing vetting procedures are inadequate on the whole, but must be suspended *only* as-applied to persons hailing from the six targeted nations on the basis of a presumed risk of terrorism—improperly jettisons the thorough and individualized assessment of visa applicants that is fundamental to our immigration laws and their enforcement.

* * *

CONCLUSION

Amici respectfully urge this Court to affirm the judgments of the courts of appeals.

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APPENDIX[12]

Date & President	Nature of Exclusion
2016, Apr. 21 – Obama Executive Order 13726, 81 Fed. Reg. 23559	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have "contributed to the situation in Libya" in specified ways (e.g., engaging in "actions or policies that threaten the peace, security, or stability" of that country or may lead to or result in the misappropriation of Libyan state assets)
2016, Mar. 18 – Obama Executive Order 13722, 81 Fed. Reg. 14943	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain transactions involving North Korea (e.g., selling or purchasing metal, graphite, coal, or software directly or indirectly to or from North Korea, or to persons acting for or on behalf of the North Korean government or the Workers' Party of Korea)
2015, Nov. 25 – Obama Executive Order 13712, 80 Fed. Reg. 73633	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have "contributed to the situation in Burundi" in specified ways (e.g., engaging in "actions or policies that threaten the peace, security, or stability of Burundi," or "undermine democratic processes or institutions" in that country)

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[12] Reproduced in substance from Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* at 6–10 tbl.1, Cong. Res. Serv. (Jan. 23, 2017).

2015, Apr. 2 – Obama Executive Order 13694, 80 Fed. Reg. 18077 (later amended by Executive Order 13757, 82 Fed. Reg. 1 (Jan. 3, 2017))	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in "significant malicious cyber-enabled activities" (e.g., harming or significantly compromising the provision of services by a computer or computer network that supports an entity in a critical infrastructure sector)
2015, Mar. 11 – Obama Executive Order 13692, 80 Fed. Reg. 12747	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have "contributed to the situation in Venezuela" in specified ways (e.g., engaging in actions or policies that undermine democratic processes or institutions, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights)
2015, Jan. 6 – Obama Executive Order 13687, 80 Fed. Reg. 819	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens with specified connections to North Korea (e.g., officials of the North Korean government or the Workers' Party of Korea)
2014, Dec. 24 – Obama Executive Order 13685, 79 Fed. Reg. 77357	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain transactions involving the Crimea region of Ukraine (e.g., materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services to or in support of, persons whose property or interests are blocked pursuant to the order)

2014, May 15 – Obama Executive Order 13667, 79 Fed. Reg. 28387	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have contributed to the conflict in the Central African Republic in specified ways (e.g., engaging in actions or policies that threaten the peace, security, or stability of that country, or that threaten transitional agreements or the political transition process)
2014, Apr. 7 – Obama Executive Order 13664, 79 Fed. Reg. 19283	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to South Sudan (e.g., actions or policies that "have the purpose or effect of expanding or extending the conflict" in that country, or obstructing reconciliation or peace talks or processes)
2014, Mar. 24 – Obama Executive Order 13662, 79 Fed. Reg. 16169	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have contributed to the situation in Ukraine in specified ways (e.g., operating in the financial services, energy, metals and mining, engineering, or defense and related materiel sectors of the Russian Federation economy)
2014, Mar. 19 – Obama Executive Order 13661, 79 Fed. Reg. 15535	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have contributed to the situation in Ukraine in specified ways (e.g., officials of the government of the Russian Federation, or persons who operate in the arms or related materiel sector)

2014, Mar. 10 – Obama Executive Order 13660, 79 Fed. Reg. 13493	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have contributed to the situation in Ukraine in specified ways (e.g., engagement in or responsibility for misappropriation of state assets of Ukraine or of economically significant entities in that country)
2013, June 5 – Obama Executive Order 13645, 78 Fed. Reg. 33945	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who have engaged in certain conduct related to Iran (e.g., materially assisting, sponsoring, or providing support for, or goods or services to or in support of, any Iranian person included on the list of Specially Designated Nationals and Blocked Persons)
2012, Oct. 12 – Obama Executive Order 13628, 77 Fed. Reg. 62139	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain actions involving Iran (e.g., knowingly transferring or facilitating the transfer of goods or technologies to Iran, to entities organized under Iranian law or subject to Iranian jurisdiction, or to Iranian nationals, that are likely to be used by the Iranian government to commit serious human rights abuses against the Iranian people)
2012, July 13 – Obama Executive Order 13619, 77 Fed. Reg. 41243	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to threaten the peace, security, or stability of Burma in specified ways (e.g., participation in the commission of human rights abuses, or importing or exporting arms or related materiel to or from North Korea)

2012, May 3 – Obama Executive Order 13608, 77 Fed. Reg. 26409	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to Iran and Syria (e.g., facilitating deceptive transactions for or on behalf of any person subject to U.S. sanctions concerning Iran and Syria)
2012, Apr. 24 – Obama Executive Order 13606, 77 Fed. Reg. 24571	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have engaged in specified conduct involving "grave human rights abuses by the governments of Iran and Syria via information technology" (e.g., operating or directing the operation of communications technology that facilitates computer or network disruption, monitoring, or tracking that could assist or enable serious human rights abuses by or on behalf of these governments)
2011, Aug. 9 – Obama Proclamation 8697, 76 Fed. Reg. 49277	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who participate in serious human rights and humanitarian law violations and other abuses (e.g., planning, ordering, assisting, aiding and abetting, committing, or otherwise participating in "widespread or systemic violence against any civilian population" based, in whole or in part, on race, color, descent, sex, disability, language, religion, ethnicity, birth, political opinion, national origin, membership in a particular social group, membership in an indigenous group, or sexual orientation or gender identity)

2011, July 27 – Obama Proclamation 8693, 76 Fed. Reg. 44751	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens subject to U.N. Security Council travel bans and International Emergency Economic Powers Act sanctions
2009, Jan. 22 – Bush Proclamation 8342, 74 Fed. Reg. 4093	Suspending the entry into the United States, as immigrants or nonimmigrants, of foreign government officials responsible for failing to combat trafficking in persons
2007, July 3 – Bush Proclamation 8158, 72 Fed. Reg. 36587	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten Lebanon's sovereignty and democracy (e.g., current or former Lebanese government officials and private persons who "deliberately undermine or harm Lebanon's sovereignty")
2006, May 16 – Bush Proclamation 8015, 71 Fed. Reg. 28541	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten the transition to democracy in Belarus (e.g., Members of the government of Alyaksandr Lukashenka and other persons involved in policies or actions that "undermine or injure democratic institutions or impede the transition to democracy in Belarus")
2004, Jan. 14 – Bush Proclamation 7750, 69 Fed. Reg. 2287	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who have engaged in or benefitted from corruption in specified ways (e.g., current or former public officials whose solicitation or acceptance of articles of monetary value or other benefits has or had "serious adverse effects on the national interests of the United States")

2002, Feb. 26 – Bush Proclamation 7524, 67 Fed. Reg. 8857	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for actions that threaten Zimbabwe's democratic institutions and transition to a multi-party democracy (e.g., Senior members of the government of Robert Mugabe, persons who through their business dealings with Zimbabwe government officials derive significant financial benefit from policies that undermine or injure Zimbabwe's democratic institutions)
2001, June 29 – Bush Proclamation 7452, 66 Fed. Reg. 34775	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for actions that threaten international stabilization efforts in the Western Balkans, or are responsible for wartime atrocities in that region
2000, Oct. 13 – Clinton Proclamation 7359, 65 Fed. Reg. 60831	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who plan, engage in, or benefit from activities that support the Revolutionary United Front or otherwise impede the peace process in Sierra Leone
1999, Nov. 17 – Clinton Proclamation 7249, 64 Fed. Reg. 62561	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens responsible for repression of the civilian population in Kosovo or policies that obstruct democracy in the Federal Republic of Yugoslavia (FRY) or otherwise lend support to the government of the FRY and the Republic of Serbia
1998, Jan. 16 – Clinton Proclamation 7062, 63 Fed. Reg. 2871	Suspending the entry into the United States, as immigrants or nonimmigrants, of members of the military junta in Sierra Leone and their family

1997, Dec. 16 – Clinton Proclamation 7060, 62 Fed. Reg. 65987	Suspending the entry into the United States, as immigrants or nonimmigrants, of senior officials of the National Union for the Total Independence of Angola (UNITA) and adult members of their immediate families
1996, Nov. 26 – Clinton Proclamation 6958, 61 Fed. Reg. 60007	Suspending the entry into the United States, as immigrants or nonimmigrants, of members of the government of Sudan, officials of that country, and members of the Sudanese armed forces
1996, Oct. 7 – Clinton Proclamation 6925, 61 Fed. Reg. 52233	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who "formulate, implement, or benefit from policies that impede Burma's transition to democracy" and their immediate family members
1994, Oct. 27 – Clinton Proclamation 6749, 59 Fed. Reg. 54117	Suspending the entry into the United States, as immigrants or nonimmigrants, of certain aliens described in U.N. Security Council Resolution 942 (e.g., officers of the Bosnian Serb military and paramilitary forces and those acting on their behalf, or persons found to have provided financial, material, logistical, military, or other tangible support to Bosnian Serb forces in violation of relevant U.S. Security Council resolutions)
1994, Oct. 5 – Clinton Proclamation 6730, 59 Fed. Reg. 50683	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who formulate, implement, or benefit from policies that impede Liberia's transition to democracy and their immediate family

1994, May 10 – Clinton Proclamation 6685, 59 Fed. Reg. 24337	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens described in U.N. Security Council Resolution 917 (e.g., officers of the Haitian military, including the police, and their immediate families; major participants in the 1991 Haitian coup d'etat)
1993, Dec. 14 – Clinton Proclamation 6636, 58 Fed. Reg. 65525	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who formulate, implement, or benefit from policies that impede Nigeria's transition to democracy and their immediate family
1993, June 23 – Clinton Proclamation 6574, 58 Fed. Reg. 34209	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who formulate or benefit from policies that impede Zaire's transition to democracy and their immediate family
1993, June 7 – Clinton Proclamation 6569, 58 Fed. Reg. 31897	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who formulate, implement, or benefit from policies that impede the progress of negotiations to restore a constitutional government to Haiti and their immediate family
1992, June 1 – Bush Executive Order 12807, 57 Fed. Reg. 23133	Making provisions to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any covered vessel carrying such aliens
1988, Oct. 26 – Reagan Proclamation 5887, 53 Fed. Reg. 43184	Suspending the entry of specified Nicaraguan nationals into the United States as nonimmigrants (e.g., officers of the Nicaraguan government or the Sandinista National Liberation Front holding diplomatic or official passports)

1988, June 14 – Reagan Proclamation 5829, 53 Fed. Reg. 22289	Suspending the entry into the United States, as immigrants or nonimmigrants, of certain Panamanian nationals who formulate or implement the policies Manuel Antonio Noriega and Manuel Solis Palma, and their immediate families
1986, Aug. 26 – Reagan Proclamation 5517, 51 Fed. Reg. 30470	Suspending the entry of Cuban nationals as immigrants with certain specified exceptions (e.g., Cuban nationals applying for admission as immediate relatives under INA § 201(b))
1985, Oct. 10 – Reagan Proclamation 5377, 50 Fed. Reg. 41329	Suspending the entry of specified classes of Cuban nationals as nonimmigrants (e.g., officers or employees of the Cuban government or the Communist Party of Cuba holding diplomatic or official passports)
1981, Oct. 1 – Reagan Proclamation 4865, 46 Fed. Reg. 48107	Suspending the entry of undocumented aliens from the high seas, and directing the interdiction of certain vessels carrying such aliens

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Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF FOR THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AND OTHERS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Asian Pacific American Bar Association ("NAPABA") is a national association of Asian Pacific American ("APA") attorneys, judges, law professors, and law students, representing the interests of over seventy-five national, state and local APA bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as a national voice for APAs, including Muslim Americans of Asian descent, in the legal profession and has promoted justice, equity, and opportunity for APAs. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law. NAPABA and its members have experience with and a unique perspective on attempts by the U.S. government to improperly restrict admission and immigration based on nationality or religion, of which the Executive Orders at issue are simply the latest versions.

The Arizona Asian American Bar Association is a voluntary bar association and a non-profit organization composed of legal professionals, law students, and members of the community interested in Asian-American issues. Its vision is to promote and advocate for justice, equity, equality, inclusion, and opportunity for APAs in the Arizona legal profession and the community at large.

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than NAPABA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The Asian American Bar Association of Greater Chicago ("AABA Chicago") is the largest association of Asian American attorneys in the Chicago area. AABA Chicago opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The Asian American Bar Association of Houston ("AABA of Houston") is a non-profit association of attorneys, judges, and law students of Asian-Pacific heritage or who have Asian-Pacific and APA interests. Founded in 1984, the AABA of Houston's membership reflects all aspects of Houston's APA legal community. The AABA of Houston promotes equality and justice for Asian Americans.

The Asian American Bar Association of New York ("AABANY") was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. The mission of AABANY is to improve the study and practice of law and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

Established in 1992, the Asian American Bar Association of Ohio is the oldest association of APA attorneys in Ohio. In furtherance of its mission, it opposes discrimination and promotes the equitable treatment of all under the law.

The Asian American Bar Association of the Greater Bay Area ("AABA-GBA") is one of the largest Asian American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, the AABA-GBA and its members have been actively involved in civil rights issues, community service, and the advancement of APAs in the legal profession.

The mission of the Asian American Criminal Trial Lawyers Association – Greater Bay Area is to improve the study and practice of criminal defense and to promote the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

Since its inception in 1984, the Asian American Lawyers Association of Massachusetts has devoted its energy and resources to serving the Asian American legal community and improving and facilitating the administration of law and justice.

The Asian Bar Association of Washington ("ABAW") is the professional association of APA attorneys, judges, law professors, and law students that strives to be a network for its members in Washington State. Created in 1987, the ABAW advocates for the legal needs and interests of the APA community, and represents over 200 APA attorneys in a wide-range of practice areas.

The Asian Pacific American Bar Association of Central Ohio ("APABA-CO") is a non-profit voluntary association for APA attorneys, judges, law professors, and law students, and other members of the legal community in the Central Ohio area. Since its inception, APABA-CO has advocated for and served the legal needs and interests of the APA community in Central Ohio. The organization and those that it serves represent a significant number of individuals who actively contribute to the social and economic welfare of the United States.

The mission of the Asian Pacific American Bar Association of Colorado is to represent the interests of the APA community and attorneys; to speak on behalf of, and advocate, the interests and ideas of APA attorneys in Colorado; to foster the exchange of ideas and information among and between the organization's members and other members of the legal profession, the judiciary, and the legal community; to encourage and promote the professional growth of the members of the organization; to broaden opportunities for APA lawyers and law students; to present educational programs aimed at the needs of the practice of APA attorneys; to provide an opportunity for fellowship among the organization's members; to provide coordinated services to the Colorado community; to develop and encourage cooperation with NAPABA and with other organizations of minority attorneys; to provide a vehicle and forum for the unified expression of opinions and positions by the organization's members upon current social, political, economic, legal, or other matters or events of concern to the members of the organization; and to serve as a communication network among APA attorneys across the state.

The Asian Pacific American Bar Association of Indiana was formed on July 21, 2014, to promote and assist the interests of APAs in the legal profession and the community as a whole in Indiana. It is the Indiana affiliate for NAPABA.

The Asian Pacific American Bar Association of Los Angeles County is a member organization comprised of attorneys, judges, and law students throughout Los Angeles County. It has served as a voice for issues of concern to the Asian Pacific American community since its formation in 1998.

The Asian Pacific American Bar Association of Maryland is an association of APA attorneys and law students that serves the legal profession and seeks to promote justice, equity, and opportunity for APAs.

The Asian Pacific American Bar Association of Pennsylvania ("APABA-PA"), formerly the Asian American Bar Association of the Delaware Valley, is a non-profit organization founded in 1984 to serve a wide network of Asian Pacific American attorneys. APABA-PA is dedicated to the professional, economic, social and educational advancement of APA lawyers and to promote the administration of justice for the APA community.

The Asian Pacific American Bar Association of Silicon Valley's ("APABA-SV") mission is to foster professional development, advocacy and community involvement for Silicon Valley's APA legal community, and to promote justice and equality for all. Formed over thirty years ago, the APABA-SV is a forum for APA attorneys in the Silicon Valley to network, develop professional skills, participate in community service, take positions on issues affecting the APA community, and empower APAs in the Valley.

The Asian Pacific American Bar Association Solano County is a non-profit organization of lawyers, judges, and law students dedicated to supporting opportunity for the community and increasing diversity in the areas of leadership in Solano County, California.

The Asian Pacific American Bar Association of South Florida ("APABA-SF") is a non-profit, voluntary bar organization of attorneys in Miami-Dade, Broward, and Palm Beach counties. APABA-SF's objectives include working towards civil rights reform, combating anti-immigrant agendas and hate crimes, and increasing diversity in federal, state, and local government.

The Asian Pacific American Bar Association of Tampa Bay supports its members, its community, its colleagues, and its profession in the Greater Tampa Bay area. It strives to create sustainable change and growth through dialogue, education, fellowship, and service.

The Asian Pacific American Bar Association of Virginia, Inc. is a diverse and non-partisan association of attorneys and those interested in matters of importance to the Asian Pacific American legal community. Its mission is to foster professional development, legal scholarship, advocacy and community involvement and to promote justice, equality, and opportunity for APAs and those who may seek its voice.

The Asian Pacific American Lawyers Association of New Jersey ("APALA-NJ") is a local association of APA attorneys in New Jersey. As the bar association that represents one of the fastest growing minority populations in the New Jersey, APALA-NJ continues to focus on ensuring greater representation of APA attorneys in various sectors of the legal profession as well as in government and the state's judiciary.

The Asian Pacific American Women Lawyers Alliance is an organization that promotes inclusion, empowerment and advancement of APA women in the legal profession. It is devoted to advocating for, educating, mentoring, networking, and developing leadership within the profession and larger community.

The Asian/Pacific Bar Association of Sacramento ("ABAS") is a non-profit legal organization created to foster the exchange of ideas, to provide services to the general and local communities, and to protect people's civil and human rights. Since 1980, ABAS has been a force in advocating for diversity in the legal system, from encouraging APAs to join the legal profession, urging for diversity among the bench, and fighting for issues affecting those beyond APAs who are in need of equality in the justice system.

The Austin Asian American Bar Association ("AAABA") serves the Asian Pacific American legal community in Austin and the surrounding Central Texas region. AAABA supports equal treatment and justice for all under the law, and opposes any form of discrimination based on race, ethnicity, and religious beliefs.

Formed in 1986, the Chinese American Bar Association of Greater Chicago ("CABA"), is the first local bar association for attorneys of Asian descent in the Chicagoland area. As an organization of Chinese American attorneys, descended from immigrants or immigrants themselves, CABA has experienced firsthand the history of American exclusionary immigration laws and detrimental impact therefrom. CABA rejects xenophobia and nativism, and discrimination on the basis of race, ethnicity, or national origin.

The Connecticut Asian Pacific American Bar Association ("CAPABA") is the only association focused towards all APA attorneys in Connecticut. CAPABA's membership consists of attorneys, law professors, law students, and other interested individuals. CAPABA's mission is to establish a support network for APA attorneys and communities and those interested in APA legal issues throughout the state of Connecticut.

The Federation of Asian Canadians – Ontario ("FACL") is a diverse coalition of Asian Canadian legal professionals who promote equity, justice, and opportunity for Asian Canadian legal professionals and the broader community. FACL fosters advocacy, community involvement, legal scholarship, and professional development.

The Filipino American Lawyers Association of Chicago is a professional network of attorneys, judges, law students, and supporters that facilitates career development, learning opportunities, and fellowship within the Chicagoland legal community. It provides access to colleagues across numerous practice areas and their related organizations, including law firms and corporations of all sizes, non-profits, and public sector employers.

The Filipino American Lawyers Association of New York opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The Filipino American Lawyers of San Diego is committed to ensuring that attorneys of color, particularly Filipino American attorneys, have access to equal opportunities in the legal profession. It aims to develop multicultural solutions, to foster diversification, and to sustain multicultural coalitions in all channels of the legal system.

The Filipino Bar Association of Northern California ("FBANC") is an organization of attorneys, judges, and law students dedicated to serving the Filipino community. Through the volunteer work of its members, FBANC offers various service programs, including regular, free legal clinics, professional development programs for attorneys, and mentorship for law students and young attorneys.

The objectives of the Filipino Lawyers of Washington ("FLW") are to foster the exchange of ideas and information among and between FLW members and other members of the legal profession, the judiciary, and the community; to encourage and promote the professional growth of the members of the FLW; to provide service to the general and local community; to encourage and promote diversity in the legal profession; to develop and encourage cooperation with other organizations of minority attorneys; to celebrate the Filipino culture; and to provide a vehicle and forum for the expression of opinions and positions by the FLW upon current social, political, economic, legal, or other matters, or events that concern its members.

The Japanese American Bar Association ("JABA") is the national bar association for Japanese American attorneys, with over 340 members across the United

States and Japan. As one of the oldest minority bar associations in the United States, JABA has been a strong advocate regarding civil rights matters, whether it affects its own community or others that are faced with inequality, discrimination, or oppression.

The Korean-American Bar Association for the Washington, D.C. Area ("KABA-DC") was established in 2009 to be the voice for Korean Americans in the legal profession in the Greater Washington, D.C. Metropolitan Area. KABA-DC promotes professional development, legal scholarship, advocacy, and community involvement.

The Korean American Bar Association of Chicago ("KABA-Chicago") is an organization of over 400 lawyers, law students, and government officials. Since 1993, KABA-Chicago has diligently worked together to help the Korean American and minority community in the greater Chicago area.

The Korean American Bar Association of Northern California ("KABANC") is an affiliate of NAPABA. Since its founding in the mid-1980s, KABANC has continued to serve and be a voice for the Korean-American and broader community on legal and other issues of interest which impact its community.

Founded in 1980, the Korean American Bar Association of Southern California has worked with the local community and its sister bars to fight for fairness and justice for all minorities under the law.

The mission of the Korean American Bar Association of Washington ("KABA-Washington") is to provide professional development, networking, and mentorship opportunities to its members and serve the community as a resource by hosting professional, educational, and community events. KABA-Washington is committed to leadership, community, and service. KABA-Washington was founded with the purpose of serving the community.

The Korean American Lawyers Association of Greater New York ("KALAGNY") is a professional membership organization of attorneys and law students engaged with the issues affecting the Korean American community in greater New York. Incorporated in 1986, KALAGNY seeks to encourage the professional growth of its members as well as to provide legal support for the Korean American community.

The Louisiana Asian Pacific American Bar Association ("LAPABA") is a non-profit, professional legal organization for Louisiana attorneys, judges, law professors, and law students of Asian and Pacific heritage, and others who support the interests of APA lawyers, the legal profession, and APA communities. LAPABA provides a network for its members and serves the legal needs and interests of the community.

The Michigan Asian Pacific American Bar Association strongly and adamantly opposes any restriction based on nationality, religion, culture, creed, or race. The State of Michigan knows firsthand the evils that spur from xenophobia, as highlighted by the murder of Vincent Chin in 1982.

The Minnesota Asian Pacific American Bar Association is committed to promoting and supporting the personal and professional development of Asian American and Pacific American lawyers, judges, and law students, serving as an advocate for the APA community in Minnesota, and promoting equal access to justice.

The Missouri Asian American Bar Association ("MAABA") is an organization of nearly 100 Asian American attorneys in the St. Louis area. MAABA was founded in 2001 with the mission to support the Asian American legal community, as well as the community at large.

The NAPABA - Hawaii Chapter ("NAPABA-Hawaii") is a Hawaii association of more than eighty APA attorneys, judges, and law professors. NAPABA - Hawaii's mission is to educate the public and to represent and to advocate for the interests of Asian and Pacific Americans and their communities in Hawaii.

The National Filipino American Lawyers Association ("NFALA") is a national association of Filipino American attorneys, judges, law professors, and law students dedicated to promoting the professional development, interests, and success of Filipino American legal professionals nationwide. NFALA is a voice for the national Filipino American legal community and strives to fight for equal opportunity and the rights of underserved minority groups.

The New Jersey Muslim Lawyers Association ("NJMLA") is the state's association of Muslim lawyers. Since its inception in 2006, the NJMLA has strived to promote fairness and inclusion in the legal field.

Since 1993, the Orange County Asian American Bar Association has fostered professional development, served as mentors to local law students, promoted diversity in the private and public sectors, volunteered for legal clinics for low income and disadvantaged communities, and supported causes which affect and advance the needs of APAs and the public at-large.

The Orange County Korean American Bar Association was established in November 2005 to promote networking among minority attorneys, provide more effective legal counsel to the local Orange County community, to serve the Korean American community's legal needs with pro bono services, to promote the appointment of Korean American judges, and to assist law students in making the transition into full-time law practice.

The Oregon Filipino American Lawyers Association is a professional association of Filipino American judges, lawyers, law students and legal professionals, and supporters. Its members work together to promote equality and multiculturalism by increasing diversity within the Oregon State Bar and within the broader legal system, and to empower Oregon's Filipino American community by increasing its access to the legal system.

Since 1978 Pan Asian Lawyers of San Diego ("PALSD"), a non-partisan organization, has been dedicated to the advancement of Asian American attorneys in the legal profession, assisting Asian American communities and the wider San Diego community. However, PALSD does not limit its scope to benefit one single race or ethnic group.

The Philippine American Bar Association ("PABA") was founded more than 30 years ago to address legal issues affecting the Filipino-American community and to support Filipino-American lawyers and law students in Southern California. PABA sponsors community legal clinics and also provides continuing legal education seminars and professional development opportunities for its members, and assists Filipino-American law students through mentorship programs and scholarships.

The Sacramento Filipino American Lawyers Association is a newly formed affiliate of NAPABA in the Eastern California Region. It seeks to represent, serve, and embody the highest standards of professionalism and ethics in the legal and local communities.

SABA Chicago, formally known as IABA Chicago, is a professional organization serving South Asian professionals and the Greater Chicago community over the past seventeen years. The organization was founded to advance the professional development and growth of a diverse member community, disseminate relevant information, and foster a culture of service within and beyond the legal community.

The South Asian Bar Association of Northern California was founded to ensure that Bay Area South Asian lawyers were provided an avenue to develop professionally, network among peers, and volunteer within the South Asian community.

The South Asian Bar Association of San Diego, in conjunction with the South Asian Bar Association national organization, has served as a voice of the South Asian community in San Diego and around the country.

The South Asian Bar Association of Southern California ("SABA-SC") is one of the oldest and largest South Asian bar associations in the country. SABA-SC strives to promote justice and fair treatment for Arab, African, Middle Eastern, Muslim, Sikh, and South Asian individuals and communities, and to foster goodwill, fellowship, and unity among these communities.

The South Asian Bar Association of Washington ("SABAW") represents South Asian lawyers and South Asians in the state of Washington. SABAW promotes South Asian lawyers and provides a platform for their unique voice in the legal industry.

The Southern California Chinese Lawyers Association is one of the country's oldest minority, and APA legal associations, and since its formation over 42 years ago, has sought to advance the legal, professional, and community interests of APAs in the Southern California region.

The Taiwanese American Lawyers Association ("TALA") is the national association of Taiwanese descent American lawyers. Since 1991, TALA has served the interests of Taiwanese American lawyers called to the bars of the various states, as well as advocate for the interests of Taiwanese Americans living in the United States and abroad. These interests include the promotion of justice, equity, and opportunity for Taiwanese Americans. Taiwanese Americans' religious environment is characterized by inclusive diversity and tolerance.

The Thai American Bar Association ("TABA") is national association of Thai-American and other APA attorneys. Since its inception in 2011, TABA has sought to promote justice, equity, and opportunity for Thai Americans and other APAs.

The Vietnamese American Bar Association of Northern California was founded in 1998 to provide Vietnamese American attorneys with a vehicle for the unified expression of opinions and positions on matters of concern to all Vietnamese American attorneys, to encourage and promote the professional growth of its members, and to foster the exchange of ideas and information among its members and with the community at large.

The Vietnamese American Bar Association of Washington is the Vietnamese American Bar Association's local association in Washington. It serves as a voice for the Vietnamese community.

SUMMARY OF THE ARGUMENT

APAs are acutely familiar with the impact of exclusionary immigration laws, having long been the subjects of systematic and expansive restrictions driven by racial, ethnic, and religious animus. These historical laws not only excluded people from Asian countries, but hurt those already in the United States by legitimizing and validating ugly stereotypes and inequalities. APAs know the lasting pain and injury that result from the use of national origin as a basis for preference or discrimination in immigration laws.

The Revised Order is an unwelcome return to a pre-Civil Rights Era approach to immigration when prospective immigrants were excluded based upon their national origin, which served as a pretext for discrimination on the basis of the predominant races, religions, and ethnicities in those countries. Challenges to the Revised Order are informed by both evidence of the order's history and purpose, and by the country's historical experience using nationality-based restrictions in the immigration context as a proxy for discrimination on the basis of race and religion.

Amici respectfully request the Court affirm the decisions of the Fourth and Ninth Circuits enjoining enforcement of the Revised Order, or, at a minimum, make permanent the result of this Court's June 26, 2017 order.

ARGUMENT

I. Executive Order History.

On January 27, 2017, President Donald J. Trump issued Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017), titled, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Original Order"). The Original Order was temporarily enjoined by multiple courts, including by the U.S. District Court for the Western District of Washington, which the Ninth Circuit declined to stay. *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir. 2017) (per curiam).

On March 6, 2017, the President signed Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), with the same title ("Revised Order"), replacing the Original Order. It had many of the same restrictions, including one on issuing visas to citizens of six Muslim-majority countries. *See* Revised Order §§ 1, 2, 3, 9, 12. Challenges to the Revised Order are informed by both evidence of the order's history and purpose, and by the country's historical experience using nationality-based restrictions in the immigration context as a proxy for discrimination on the basis of race and religion.[2]

II. The United States Has Renounced Nationality-Based Discrimination in Immigration Due to Past Abuse and Injustice that Should Inform Any Assessment of the Executive Orders.

During the heart of the Civil Rights Era, Congress enacted, and President Lyndon Johnson signed, the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, to prohibit preference, priority, or discrimination in the issuance of immigrant visas due to "race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This provision marked a firm break from the invidious discrimination in historical immigration laws. It sought to prevent the country from repeating those errors. Nevertheless, the Revised Order discriminates on the basis of nationality and warrants close scrutiny, particularly given the Fourth Circuit's finding that "in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the Revised Order], the 'watered down' version of that plan that 'get[s] just about everything,' and 'in some ways, more.'" *Int'l Refugee Assistance Project v. Trump ("IRAP")*, 857 F.3d 554, 599–600 (4th Cir. 2017) (J.A. 332–33).

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[2] The history of the Executive Orders is set forth in more detail in Respondent's Brief. Res.'s Br. at 5–10, *Trump v. Hawaii*, No. 16-1540 (U.S. Sep. 11, 2017).

A. The Revised Order Echoes Historical Discrimination in the Application of Immigration Laws Based upon National Origin.

Asians first began migrating to the United States mainland in significant numbers in the mid-1800s, led by Chinese nationals. *See* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990* 19–20 (1993). As conditions weakened in their homelands, economic opportunity beckoned Asian laborers to the United States. The discovery of gold and westward expansion fueled demand for low-wage labor. Industrial employers actively recruited Chinese nationals to fill some of the most demanding jobs, particularly in domestic service, mining, and railroad construction. *Id.* at 20.

However, the resulting growth in the immigrant labor population provoked anger and resentment among native-born workers eager for work and better wages. *Id.* at 21. Chinese immigrants, in particular, became targets of fierce hostility and violence. The so-called "Yellow Peril" refers to the widespread characterization of Chinese immigrants as "unassimilable aliens" with peculiar and threatening qualities. *See* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian Am. L.J. 71, 86–89 (1997).

Congress catered to this xenophobia and racism by passing a series of laws that discouraged and ultimately barred immigration from China and other Asian countries. These laws marked the first time the federal government broadly enacted and enforced an immigration admissions policy that defined itself based on whom it excluded.[3] The first such law came toward the end of Reconstruction, when Congress enacted the Page Act. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). Barring the entry of Asian immigrants considered "undesirable," the Page Act was largely enforced against Asian women, who were *presumed to be prostitutes* simply by virtue of their ethnicity. *See* George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882*, 6 J. Am. Ethnic Hist. 28, 28–46 (1986).

A few years later, Congress responded to persistent anti-Chinese fervor with the Chinese Exclusion Act on May 6, 1882, 22 Stat. 58, the first federal law to exclude people on the basis of their nationality. On the premise that the "coming of Chinese laborers . . . endanger[ed] the good order" of areas in the United States, the Act provided that "[i]t shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States." *Id.* § 1. The Chinese Exclusion Act halted immigration of Chinese laborers for ten years, prohibited Chinese nationals from becoming U.S. citizens, and uniquely burdened Chinese laborers who were already legally present and wished to leave and re-enter the United States. Congress first extended the exclusionary period by ten years in 1892 with the

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[3] Naturalization and citizenship laws have always limited the scope of who could be a citizen, but the same was not so for rules on entry to the United States. The Naturalization Act of 1870, 16 Stat. 254, which barred Asians from naturalization, prefaced the era of Asian exclusion.

Geary Act, 27 Stat. 25, and then indefinitely in the Act of April 29, 1902, Pub. L. No. 57-90, 32 Stat. 176.

After the Chinese exclusion laws foreclosed employers from importing *Chinese* laborers, immigrants from Japan, Korea, India, and the Philippines began coming in larger numbers. *See* Hing, *supra*, at 27–31. As with Chinese nationals before them, these immigrants encountered strong nativist opposition as their numbers rose. *Id.* at 32.

The exclusionary policies of the U.S. government enforced and validated xenophobic and racist sentiments and enabled violent backlash. Nativist Americans established the Asiatic Exclusion League in the early 20th century to prevent immigration by people of Asian origin to the United States and Canada, which had a similar nationality-based system of immigration at the time.[4] On September 4, 1907, the Asiatic Exclusion League and labor unions led the "Bellingham Riots" in Bellingham, Washington, to expel South Asian immigrants from local lumber mills. *See 1907 Bellingham Riots*, Seattle Civil Rights & Labor History Project, http://depts.washington.edu/civilr/bham_intro.htm; *see also* Erika Lee, *The Making of*

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[4] *See* Victor M. Hwang, *Brief of* Amici Curiae *Asian Pacific Islander Legal Outreach and 28 Asian Pacific American Organizations, in support of all respondents in the Six Consolidated Marriage Cases, Lancy Woo and Cristy Chung, et al., Respondents, v. Bill Lockyer, et al., Appellants on Appeal to the Court of Appeal of the State of California, First Appellate District, Division Three*, 13 Asian Am. L.J. 119, 132 (2006) (the Asiatic Exclusion League was formed for the stated purpose of preserving "the Caucasian race upon American soil . . . [by] adoption of all possible measures to prevent or minimize the immigration of Asiatics to America" (internal quotation marks omitted)).

Asian America: A History 163–64 (2015). Herman Scheffauer's *The Tide of the Turbans* noted that: "Again on the far outposts of the western world rises the spectre of the Yellow Peril and confronts the affrighted pale-faces," and lamented "a threatening inundation of Hindoos over the Pacific Coast," which it proposed to address by legislation. 43 Forum 616 (1910).[5]

Congress responded to native concerns about these growing populations in the same way that it had to the perceived threat of Chinese immigrants. The Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, created the "Asiatic Barred Zone," which extended the Chinese exclusion laws to include nationals of other countries in South Asia, Southeast Asia, the Polynesian Islands, and parts of Central Asia.[6] The racial undertones of this act were such that, in addressing whether a "high-caste Hindu, of full Indian blood" was a "white person," eligible to naturalize under the laws at the time, the Supreme Court inferred from it that Congress would have "a similar [negative] attitude toward Asiatic naturalization." *United States v. Thind*, 261 U.S. 204, 206, 215 (1923).[7]

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[5] The term "Hindoo" or "Hindu" was applied to all South Asian persons, regardless of faith. The "Tide of Turbans" referenced the distinctive turban worn by members of the Sikh faith.

[6] An executive agreement, the Gentlemen's Agreement, reached in 1907 and 1908, restricted the immigration of Japanese laborers, as well as Koreans, whose nation was under Japanese forced occupation between 1910 and 1945. *See* Hing, *supra*, at 29.

[7] Bhagat Singh Thind was a member of the Sikh faith, though described as "Hindu" as explained in Footnote 6. The question posed was whether a South Asian of Caucasian ancestry was distinct from "Asiatic" or other racial groups under the prevailing racial theories and qualified as "white" under U.S. law. *See Thind*,

A few years later, the Immigration Act of 1924 (the "Asian Exclusion Act"), Pub. L. No. 68-139, 43 Stat. 153, imposed immigration caps based upon national origin and prohibited immigration of persons ineligible to become citizens, which effectively barred people from Asian countries from immigrating altogether. As explained by an opponent of the law, its nationality restrictions were driven by animus against religious and ethnic groups—such as Jews—by restricting immigration from countries where they lived in larger numbers, just as the law treated other "inferior peoples":

> Of course the Jews too are aimed at, not directly, because they have no country in Europe they can call their own, but they are set down among the inferior peoples. Much of the animus against Poland and Russia, old and new, with the countries that have arisen from the ruins of the dead Czar's European dominions, is directed against the Jew.

65 Cong. Rec. 5929–32 (1924) (Statement by Rep. Clancy).

Because of then-U.S. jurisdiction over the Philippines, Filipinos were still able to migrate to the United States. Lee, *supra*, at 157. However, U.S. citizenship remained out of reach and Filipinos could not escape racial animus, as they were seen to present an economic threat and to "upset the existing racial hierarchy between whites and nonwhites." *Id.* at 157, 185. Anti-Filipino agitation culminated in passage of

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261 at 209–14 (Justice Sutherland's discussion of theories of racial classification).

the Philippine Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934), which granted independence to the Philippines and changed the status of Filipinos from U.S. nationals to "aliens," making them subject to the same restrictions as other Asian groups. The next year, Filipino nationals already in the United States became subject to deportation and repatriation. Filipino Repatriation Act, Pub. L. No. 74-202, 49 Stat. 478 (1935).[8]

The exclusionary racism and xenophobia underpinning these laws crystallized and escalated during World War II, when the U.S. government forcibly incarcerated over 110,000 permanent residents and U.S. citizens in internment camps on the basis of their Japanese ancestry.[9]

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[8] The idea, still prevalent today, that race keeps one from being an American particularly resonated with Filipinos affected by the new restrictions: "We have come to the land of the Free and where the people are treated equal only to find ourselves without constitutional rights . . . . We . . . did not realize that our oriental origin barred us as human being in the eyes of the law." Lee, *supra*, at 185 (citing June 6, 1935 letter from Pedro B. Duncan of New York City to the Secretary of Labor and other letters).

[9] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). For a further discussion of the improper justification for the Japanese American incarceration, see brief of the Fred T. Korematsu Center for Law and Equality, *et al.* as *Amicus Curiae*, *State of Hawaii, et al., v. Donald J. Trump, et al.*, No. 17-15589 (9th Cir. Apr. 21, 2017).

B. In 1965, Congress and President Johnson Dismantled Quotas Based upon Nationality and Barred Distinctions Based upon "Race, Sex, Nationality, Place of Birth, or Place of Residence."

Starting during World War II and continuing over the next twenty years, Congress gradually loosened restrictions on Asian immigration to further the interests of the United States on the world stage.

First, at the urging of President Franklin D. Roosevelt, who called the exclusion of Chinese citizens by the United States "a historic mistake," Lee, *supra*, at 256, Congress repealed the Chinese exclusion laws with the Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600. In 1946, the Act of July 2, 1946, Pub. L. No. 79-483, 60 Stat. 416, allowed 100 Filipinos and Indians, each, to immigrate per year and permitted their naturalization.[10]

Then, in 1952, the Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163, repealed the Asiatic Barred Zone and eliminated the racial bar on citizenship. Nevertheless, it left in place national origin quotas intended to heavily favor immigration from Northern and Western Europe, with unmistakable racial, religious, and ethnic consequences.

After decades of highly regimented immigration quotas tied to prospective immigrants' countries of origin, the Immigration and Nationality Act of 1965,

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[10] This bill allowed Dalip Singh Saund to become a naturalized citizen. He would become the first APA Member of Congress. *See* Lee, *supra*, at 373–75, 392.

Pub. L. 89-236, 79 Stat. 911, marked a dramatic turning point. Like Presidents Harry S. Truman and Dwight D. Eisenhower before him, President John F. Kennedy opposed the national origins quota system, calling it "nearly intolerable" and inequitable. *Remarks to Delegates of the American Committee on Italian Migration*, The American Presidency Project (June 11, 1963), *available at* http://www.presidency.ucsb.edu/ws/?pid=9269. In the Fourth Circuit, Judge Wynn noted criticisms of the national origins system by Presidents Kennedy and Johnson as incompatible with "our fundamental belief that a man is to be judged—and judged exclusively—on his worth as a human being." *IRAP*, 857 F.3d at 627 (Wynn, J. concurring) (quoting Special Message to the Congress on Immigration, 1965 Pub. Papers 37, 37, 39 (Jan. 13, 1965)) (J.A. 293).

In 1965, Congress answered these calls, abolishing the national origins quotas in an act signed by President Johnson and providing that "[e]xcept as specifically provided" in certain subsections, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).[11] In signing the bill, as Judge Wynn noted, President Johnson proclaimed that hereinafter

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[11] The excepted subsections address "[p]er country levels for family-sponsored and employment-based immigrants," 8 U.S.C. § 1152(a)(2), statutory creation of "special immigrant" categories for preferred treatment (e.g., certain Panamanian nationals who worked in the Canal Zone, etc.), 8 U.S.C. § 1101(a)(27), admission of immediate relatives of U.S. citizens, 8 U.S.C. § 1151(b)(2)(A)(i), and the statutorily created system of allocation of immigrant visas, 8 U.S.C. § 1153.

"immigrants would be permitted to come to America 'because of what they are, and *not because of the land from which they sprung*.'" *IRAP*, 857 F.3d at 627 (Wynn, J. concurring) (quoting with emphasis Special Message to the Congress on Immigration, 1965 Pub. Papers 37, 37, 39 (Jan. 13, 1965)) (J.A. 294).

The legislative history of 8 U.S.C. § 1152(a)(1)(A) confirms that Congress intended to reject and repudiate the "national origins system" as an inequitable and irrelevant basis for admission decisions. For instance, a member of Congress opined that the system "embarrasse[d] us in the eyes of other nations, . . . create[d] cruel and unnecessary hardship for many of our own citizens with relatives abroad, and . . . [was] a source of loss to the economic and creative strength of our country." Oscar M. Trelles II & James F. Bailey III, *Immigration Nationality Acts, Legislative Histories and Related Documents 1950–1978* 417 (1979). Attorney General Robert F. Kennedy lamented that the national origins system harmed citizens with relatives abroad, "separat[ing] families coldly and arbitrarily." *Id.* at 411. Indeed, it confirms Congress overwhelmingly regarded the system as an outdated, arbitrary, and above all, un-American, basis upon which to decide whom to admit into the country.

Statements in the legislative history resoundingly denounced the use of nationality in immigration decisions, as it furthered the un-American belief that individuals born in certain countries were more desirable or worthy of admission than others. Prior to 1965, nationality-based immigration restrictions excluded nationals of Asian countries based upon unfounded and unjust stereotypes that conflated race, ethnicity, and religion. Several members of Congress echoed President Kennedy's sentiments, when in 1963 he wrote in a letter to Congress:

> The use of a national origins system is without basis in either logic or reason. It neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism, for it discriminates among admission into the United States on the basis of accident of birth.

Id. at 2 (quoting Kennedy, John F., 1964 Pub. Papers, 594–97 (July 23, 1963)).

President Kennedy's reference to prohibiting discrimination in "*admission* into the United States," confirms the contemporaneous understanding that the 1965 Act foreclosed discrimination in *admission*, not just for immigration. Indeed, it would be perverse to provide more protection to foreign nationals seeking to immigrate to the United States than to those merely seeking to visit family. Not surprisingly, during Congressional hearings on the 1965 Act, Attorney General Kennedy contended that abolition of the national origins system sought:

> [N]ot to penalize an individual because of the country that he comes from or the country in which he was born, not to make some of our people feel as if they were second-class citizens. . . . [Abolition of the national origins system] will promote the interests of the United States and will remove legislation which is a continuous

> insult to countries abroad, many of whom are closely allied with us.

Id. at 420. If certain citizens' relatives cannot visit from abroad, or are prohibited from obtaining visas on equal footing with those of others, they cannot help but feel that they are themselves "second-class citizens" in the eyes of the U.S. government.

In light of this history, the reference in 8 U.S.C. § 1152(a)(1)(A) to the prohibition against discrimination in the "issuance of immigration visas" must not be read to sanction discrimination in issuance of nonimmigrant visas. If it were, the Executive could discriminate in the very manner that the act sought to prevent.

C. By Promoting Discrimination, the Executive Orders are Contrary to the Statutory Language and Purpose.

Today, nearly two-thirds of APAs are foreign-born. Karthick Ramakrishnan & Farah Z. Ahmad, *State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population* 23, AAPIDATA (Sept. 2014), http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf. The experience of many APA families in the United States began with the opportunity to immigrate that was denied to their ancestors. Nevertheless, the harmful legacies of those earlier laws—which tore apart families, denied the right to naturalize and the rights that accompany citizenship to lawful immigrants, and validated xenophobia, racism, and other invidious stereotypes—persist.

Indeed, Congress recently reaffirmed its condemnation of the Chinese exclusion laws with the passage of resolutions expressing regret for those laws. S. Res. 201, 112th Cong. (2011); H.R. Res. 683, 112th Cong. (2012). The Senate resolution explicitly recognized that "[the] framework of anti-Chinese legislation, including the Chinese Exclusion Act, is incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal." S. Res. 201, 112th Cong. (2011).

As the Maryland District Court hearing a challenge to the Revised Order recognized, the Immigration and Nationality Act of 1965 "was adopted expressly to abolish the 'national origins system' imposed by the Immigration Act of 1924," that aimed to "'maintain to some degree the ethnic composition of the American people.'" *IRAP*, 2017 WL 1018235, at *8 (quoting H.R. Rep. No. 89-745, at 9 (1965)) (J.A. 139). This accords with the D.C. Circuit's holding that "Congress could hardly have chosen more explicit language" in barring discrimination against the issuance of a visa because of a person's nationality or place of residence. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State* ("*LAVAS*"), 45 F.3d 469, 472–73 (D.C. Cir. 1995) (finding "Congress has unambiguously directed that no nationality-based discrimination shall occur"); *see also Abdullah v. INS*, 184 F.3d 158, 166–67 (2d Cir. 1999) ("[T]he Constitution does 'not permit an immigration official, in the absence of [lawful quota] policies, to . . . discriminate on the basis of race and national origin.'") (citing *Bertrand v. Sava*, 684 F.2d 204, 212 n.12 (2d Cir. 1982)); *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (concluding that nationality is an impermissible basis for deportation and "invidious discrimination against a particular race or group" is prohibited as a basis for deportation). Consistent with the contemporaneous and monumental Civil Rights Act of 1964, which outlawed discrimination on the basis of "race color, religion, sex, or national origin," and the Voting Rights Act of 1965, the Immigration and Nationality Act of 1965 marked a departure from the nation's past reliance upon such characteristics to restrict entry into the country. *See Olsen v. Albright*, 990 F. Supp. 31, 38 (D.D.C. 1997) (noting that policies that discriminate "based on impermissible generalizations and stereotypes" contravene Section 1152(a)(1)(A)); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273 (1996).

Both Executive Orders expressly discriminate against applicants for entry based on nationality and are premised on a construction of Section 1182(f) that would obviate limits Congress imposed on the Executive's inadmissibility determinations under Section 1182(a)—precisely what Congress and President Johnson specified by statute the Executive Branch could *not* do. Because Congress has already provided "specific criteria for determining terrorism-related inadmissibility," *see Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring), any reliance upon more general language in 8 U.S.C. § 1182(f) is misplaced. Section 1182(f) permits both denial of entry and restrictions upon entry "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." If this were to bar issuance of visas to citizens of six nations on the basis of their nationality as potential terrorists, it would defy Justice Kennedy's controlling opinion in *Din*, which explains that the Executive's authority to exclude an individual from admission on the basis of claimed terrorist activity "rest[s] on a determination that [he or she does] not satisfy the . . . requirements" of 8 U.S.C. § 1182(a)(3)(B). *Id.* Similarly, other courts have held that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a).*" *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (concluding that authority under one subsection cannot "swallow" the limitations imposed by Congress on inadmissibility under other parts of Section 1182) (emphasis added), *aff'd mem.*, 484 U.S. 1 (1987). Applying the same principle of construction, *Allende v. Shultz* held that subsections of 8 U.S.C. § 1182(a) could not be rendered superfluous by interpretation of others. 845 F.2d 1111, 1118 (1st Cir. 1988).

The Ninth Circuit correctly rejected the government's argument that Section 1182(f)'s authority overrides the protections in Section 1152(a)(1)(A):

> Under the Government's argument, the President could circumvent the limitations set by § 1152(a)(1)(A) by permitting the issuance of visas to nationals of the six designated countries, but then deny them entry. Congress could not have intended to permit the President to flout § 1152(a) so easily. . . .
>
> To avoid this result, and to give effect to § 1152(a)(1)(A), the section "is best read to

> prohibit discrimination throughout the visa process, which must include the decision whether to admit a visa holder upon presenting the visa."

State of Hawaii v. Trump, 859 F.3d 741, 777 (9th Cir. 2017) (J.A. 1212).

D. The History of Discrimination Informs the Present Dispute.

The 1965 amendments to the Immigration and Nationality Act sought to constrain executive authority to afford any preference, priority, or discrimination in immigration based on nationality, place of birth, or place of residence, among other characteristics. Pub. L. No. 89-236 (1965) (codified at 8 U.S.C. § 1152(a)(1)(A)). The D.C. Circuit has interpreted this provision to apply to admission as well, holding that "Congress has unambiguously directed that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 472–73.

Thus, the President lacked statutory authority or discretion to issue the Revised Order. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (observing that the President's power is at "its lowest ebb" when it is "incompatible with the expressed . . . will of Congress"). Congress relegated this kind of discrimination into the past in 1965, aligning our immigration laws with notions of equality etched into the nation's conscience during the Civil Rights Era.

This Court, in *Din*, recognized that courts "look behind" the government's express rationale where there is "an affirmative showing of bad faith." 135

S. Ct. at 2141; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (recognizing that a well-supported allegation of bad faith could render an immigration decision not *bona fide*). The long history of abusing nationality-based restrictions on immigration to target other groups should also inform the Court's consideration of whether the Revised Order comports with the Establishment Clause of the United States Constitution. U.S. Const. amend. I, cl. 1; *see Larson v. Valente*, 456 U.S. 228, 244, 254–55 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

From statements made by the President, before and after his inauguration, the Fourth Circuit found "direct, specific evidence [that] . . . President Trump's desire to exclude Muslims from the United States" motivated the Executive Orders. *IRAP*, 857 F.3d at 595 (J.A. 222). It also found that the order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it." *Id.* at 601 (J.A. 236).[12]

The barely concealed animus behind the Executive Orders is even more glaring when set against the long history of such discrimination that Congress has expressly tried to stamp out, and ignoring such evidence would abet pretextual discrimination between people of different religions and nationalities.

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[12] Although the language of the Revised Order is more facially neutral than that of the Original Order, the motivating religious animus remains clear. The President acknowledged as much in referring to the Revised Order as "a watered-down version" of its predecessor. Michael D. Shear, *Who Undercut President Trump's Travel Ban? Candidate Trump*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/politics/trump-travel-ban-campaign.html.

Rather than exhaustively recite the extensive evidence of the Revised Order's foundation in animus, which cannot escape the Court's notice, we submit that this Court should consider the evident deleterious effect the Executive Orders have had on U.S. citizens from the affected nations and Muslims. As the Fourth Circuit observed in echoing earlier observations of this Court, "[w]hen the government chooses sides on religious issues, the 'inevitable result' is 'hatred, disrespect and even contempt' towards those who fall on the wrong side of the line." *IRAP*, 857 F.3d at 604 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)). These fears were borne out in a measureable uptick in hate crimes and harassment against Muslims in the first half of 2017, for which the Council on American-Islamic Relations ("CAIR") found "ethnicity or national origin" to be the most common "trigger." *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, Council on American-Islamic Relations (June 17, 2017), https://www.cair.com/press-center/press-releases/14476-cair-report-shows-2017-on-track-to-becoming-one-of-worst-years-ever-for-anti-muslim-hate-crimes.html. Indeed, the deputy director of CAIR in Chicago was threatened by a man charged with a felony hate crime for leaving messages that began: "Hey. Guess what? This is America calling, ... You are not welcome here. Take your [double expletive] back to Syria. We will kill you." William Lee, *Man charged with hate crime in phone threat to Muslim-*

American advocate: 'We will kill you', Chicago Tribune (June 17, 2017) (alteration in original), http://www.chicagotribune.com/news/local/breaking/ct-man-charged-with-phone-threat-to-muslim-american-advocate-we-will-kill-you-20170617-story.html.

As Judge Wynn's concurrence concluded, such invidious "discrimination contravenes the authority Congress delegated to the President in the Immigration and Nationality Act . . . 8 U.S.C. § 1101 *et seq.*, and it is unconstitutional under the Establishment Clause." *IRAP*, 857 F.3d at 612 (Wynn, J. concurring).

Based on their long history of experiencing discrimination, APAs well understand the harmful effects of the President's actions and urge this Court to not allow the Executive Orders to stand.

CONCLUSION

The U.S. government severely restricted and at times prohibited the entry, immigration, and naturalization of people from Asian nations for nearly a century. In 1965, Congress and the President recognized that this practice reflected animus toward people of races, ethnicities, and religions that prevailed in those countries and restricted the use of nationality in immigration. Many APAs are in the United States today because Congress prohibited such discrimination during the Civil Rights Era, when the harm and injustice of government-sanctioned discrimination on the basis of "race, sex, nationality, place of birth, [and] place of residence" could no longer be countenanced.

The Revised Order seeks to side-step these restrictions on nationality-based discrimination, as well as the constitutional establishment clause and equal protection rights they reflect, to discriminate against nationals of six Muslim-majority countries. This Court should prevent the President from exercising such authority, lest it presage a return to the era of invidious discrimination that Congress sought to foreclose more than fifty years ago.

Dated: September 18, 2017

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Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE OF HAWAII, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICUS CURIAE* NATIONAL CIS COUNCIL 119 IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National CIS Council 119 is a labor organization that represents over 11,000 bargaining unit employees of the Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS"). Council 119's constituents include men and women of the USCIS Refugee Officer Corps who serve our country by traveling to some of the most inhospitable places in the world where they interview and vet refugees seeking resettlement in the United States.

Amicus curiae has a special interest in this case because Executive Order No. 13780's suspension of the United States Refugee Admissions Program ("USRAP") and reduction in the number of refugees eligible to be admitted into the United States for Fiscal Year 2017 are based on the notion that USRAP lacks adequate controls to ensure that refugees seeking to enter the United States do not pose a threat to our national security. As the collective bargaining unit of federal government employees who are at the forefront of the refugee resettlement process, *amicus curiae*'s members have first-hand knowledge as to whether the procedures and protocols guiding the admission and resettlement process ensure that refugees admitted into the United States do not pose a risk to our national security.

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

In providing the Court with an overview of USRAP's process for vetting refugees seeking resettlement in the United States, this brief relies upon information that is publicly available and that is not confidential, law enforcement sensitive, or classified. It represents the views of Council 119 on behalf of the bargaining unit. It does not represent the views of USCIS employees in their official capacities.

SUMMARY OF ARGUMENT

USRAP, a consortium of several federal agencies responsible for identifying and admitting refugees for resettlement into the United States, is a shining example of the longstanding American tradition of offering safe haven to those fleeing persecution because of their race, religion, nationality, political opinion, or membership in a particular social group. America has offered its protection to the world's most vulnerable since its inception, and has allowed nearly five million refugees to resettle on its land since World War II. Our Nation's assistance to displaced people throughout the world, particularly through the work of USRAP, allows our country to lead by example. Because of these efforts, the United States has been able to exercise leadership with respect to refugee resettlement—a matter of humanitarian concern and American strategic interests—by persuading other countries to do their fair share in addressing the worldwide refugee crisis.

In Executive Order No. 13780, titled "Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States," President Donald J. Trump suspended USRAP for 120 days and lowered the number of refugees that can be admitted into the country for Fiscal Year 2017 from 110,000 to 50,000. The President's stated reason for doing so, as plainly reflected in the Executive Order, is that the current procedures for screening refugees seeking resettlement in the United States are inadequate and need to be evaluated to ensure that refugees entering the country do not pose a national security threat.

Contrary to the premise of the Executive Order, the participants in USRAP already use robust and exhaustive procedures to ensure that refugees approved for resettlement in the United States do not pose a threat to our national security. USRAP has long been at the forefront of innovation, adapting its procedures to identify and address ever-changing risks, threats, and challenges. These protocols include thorough screening and vetting by numerous international and federal agencies: the United Nations High Commissioner for Refugees ("UNHCR"), the international organization mandated to assist refugees that refers most refugee applicants to USRAP; Resettlement Support Centers ("RSCs"), non-governmental and international organizations monitored and funded by the Department of State that are located in close proximity to refugee populations and that conduct pre-screening interviews to collect data and information about each applicant's identity, background, and claims of persecution; USCIS

Refugee Officers who decide whether to approve each applicant seeking resettlement in the United States; and various other federal departments and agencies, including the Department of Homeland Security, Department of State, Department of Defense, Federal Bureau of Investigation, Customs and Border Protection, and the National Counterterrorism Center. As a result, refugees are the most thoroughly vetted of all immigrant populations seeking entry to the United States.

Given the evolving nature of our national security concerns, the vetting procedures that USRAP participants follow are dynamic and constantly being refined. To perform its important mission at this cutting edge level, USRAP requires the support of the Administration and Congress, including financial resources and personnel. But the Executive Order's wholesale suspension of USRAP for 120 days and slashing of the number of refugees that can be admitted for Fiscal Year 2017 by more than half are wholly unwarranted given the already robust nature of the vetting process. These actions undermine USRAP's critical work and America's standing as a global leader.

ARGUMENT

I. THE RESETTLEMENT OF REFUGEES IN AMERICA IS IN FURTHERANCE OF OUR LONGSTANDING TRADITION OF OFFERING SAFE HAVEN TO PERSONS FLEEING PERSECUTION

A America Has Been a World Leader in Refugee Resettlement

The story of refugees in America is older than that of America itself, with the country's roots sprouting from the footsteps of Pilgrims onto a Massachusetts shore in November 1620.[2] Fleeing religious persecution in their native England and exiled to Holland, the Pilgrims journeyed across the Atlantic to make their permanent home in what would become the United States.[3] Their arrival etched into the Nation's identity the promise that it would serve as a safe haven for the persecuted.

The mid-19th century brought millions more refugees to America's doorstep.[4] Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.[5] During the same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution— known as the "Forty-Eighters"—came to America seeking freedom of thought and expression.[6]

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[2] *See* William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006).

[3] Jeremy Dupertuis Bangs, *Strangers and Pilgrims, Travellers and Sojourners, Leiden and the Foundations of Plymouth Plantation* vii, 7, 605, 614, 630 (2009).

[4] While U.S. policy during the 19th century did not draw a distinction between immigrants and refugees, historians have characterized groups whose emigration during this period was motivated by persecution, oppression, or natural disaster as refugees. *See* Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996).

[5] Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). *See generally* William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees, 1845–1851* (Margaret M. Mulrooney ed., 2003). Many historians refer

Our Nation's treatment of refugees, however, is not unblemished, as demonstrated by United States policy towards Jewish refugees during World War II.[7] Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.[8] American indifference to refugees fleeing German aggression is perhaps best reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[9] The ship returned to Europe where many of its

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to these Irish migrants as refugees because their plight had roots in British colonial repression and conditions of serfdom. *See, e.g.*, Meagher, at 66-71 (discussing various historians' assignment of culpability for the famine's devastation to British colonial rule and noting "the paradox that Ireland exported food while its people starved.").

[6] *See generally* Adolf Eduard Zucker, *The Forty-Eighters: Political Refugees of the German Revolution of 1848* (1967).

[7] Richard Breitman & Alan M. Kraut, *American Refugee Policy and European Jewry, 1933–1945* 1–10 (1987).

[8] Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

[9] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), http://archives.jdc.org/wp-content/uploads/2017/02/stlouis_minutesjune-5-1939.pdf.

occupants met their fate—254 would die in the Holocaust.[10] Nazi Germany found it "astounding" that countries that found it "incomprehensible why Germany did not wish to preserve in its population an element like the Jews . . . seem in no way particularly anxious to [welcome Jews] themselves, now that the opportunity offers."[11]

In many ways, our Nation's refugee policy since the Second World War has sought to rectify our wartime failures. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[12]

After the war's end, in response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.[13] Congress also took action by enacting the Displaced Persons Act of 1948—the first major refugee legislation in American history[14]—that allowed for the admission of 415,000 displaced persons by the end of 1952.[15]

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[10] *Id.*

[11] Clarence K. Streit, *Germans Belittle Results*, N.Y. Times, July 13, 1938, at 12, https://timesmachine.nytimes.com/timesmachine/1938/07/13/issue.html; *see also No One Wants to Have Them: Fruitless Debates at the Jew-Conference in Evian*, Voelkischer Beobachter, (July 13, 1938), http://www.jewishvirtuallibrary.org/german-paper-ridicules-evian-conference.

[12] *See* Maggie Black, *The Children and the Nations: The Story of Unicef* 25–35 (1986); Bryan L. McDonald, *Food Power: The Rise and Fall of the Postwar American Food System* 143 (2017).

American compassion toward refugees following the Second World War was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act of 1953, which, along with its amendments, authorized the admission of 214,000 refugees, including escapees from Communist-dominated countries.[16] In 1956, the United States permitted entry of over 30,000 refugees fleeing persecution in Hungary.[17] Soon after, the Refugee-Escapee Act of 1957 allowed for the resettlement of "refugee-escapees," defined as persons fleeing persecution in Communist or Middle Eastern countries.[18] In the following years, the United States continued to welcome millions of refugees from other parts of the world: Cubans after Fidel Castro's assumption of power in 1959;[19] Vietnamese, Laotians, and Cambodians after the fall of American-supported governments in the wake of the Vietnam War;[20] and those fleeing persecution from the Soviet Union, the Russian Republic, Eastern Europe, and Afghanistan.[21]

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[13] *See* Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945–Present* 4–6 (1986).

[14] Congressional action surrounding refugees should not be confused with legislation regarding economic immigrants, which dates back to the Immigration Act of 1875 and the Chinese Exclusion Act of 1882. These laws limited entry of Chinese nationals into the United States. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); Immigration Act (Page Law) of 1875, ch. 141, 18 Stat. 477.

[15] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 4, at 5.

[16] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; *see* Holman, *supra* note 4, at 5.

[17] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 70–73 (2008).

The United States also began to undertake international treaty obligations related to refugee resettlement.[22] In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the UNHCR.[23] The 1967 Protocol removed the geographic and temporal limits to refugee resettlement contained in an earlier treaty, the 1951 Convention Relating to the Status of Refugees, which limited resettlement to European refugees displaced prior to 1951.[24] By ratifying the 1967 Protocol, the United States also became bound by all of the substantive provisions of the 1951

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[18] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; *see* Holman, *supra* note 4, at 6.

[19] Bon Tempo, *supra* note 17, at 107–15.

[20] *Id.* at 148–151; Loescher & Scanlan, *supra* note 13, at 102–69.

[21] Mark Gibney, *Global Refugee Crisis* 91–92 (2d ed. 2010).

[22] *See id.* at 8–13.

[23] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[24] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

Convention.[25] By ratifying the 1967 Protocol, the United States agreed not to, among other things: discriminate against refugees on the basis of their race, religion, or nationality; penalize refugees for their illegal entry or stay in the country; or return refugees against their will to territories where they fear threats to life or freedom.[26]

In 1980, Congress enacted legislation that sought to convert the existing *ad hoc* approach to refugee resettlement to a more permanent and standardized system for identifying, vetting, and resettling refugees.[27] The Refugee Act of 1980 declares:

> [I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian

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[25] Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1, 1 n.1 (1997).

[26] *Id.* at 2.

[27] Claire Felter & James McBride, *How Does the U.S. Refugee System Work?*, Council on Foreign Relations (Feb. 6, 2017), https://www.cfr.org/backgrounder/how-does-us-refugee-system-work.

> concern to the United States, and transitional assistance to refugees in the United States.[28]

The Act also aligned United States refugee law with our country's international treaty obligations, namely the 1951 Convention and the 1967 Protocol.[29] For instance, it adopted the definition of "refugee" contained in Article 1 the Convention[30] and also—consistent with Article 33 of the Convention—prohibited the removal of an alien to any country where "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[31] Additionally, notwithstanding the fact that the 1951 Convention and the 1967 Protocol impose obligations on the United States only with respect to refugees that have set foot on American soil (referred to as "asylees"), the Act established the legal basis for USRAP, which focuses on resettlement of refugees located outside of the United States.[32]

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[28] Pub. L. 96–212, title I, §101, 94 Stat. 102 (1980).

[29] *See INS v. Stevic*, 467 U.S. 407, 425–26 (1984).

[30] *Compare* United Nations Convention Relating to the Status of Refugees, *supra* note 24, at art. 1A(2) *with* 8 U.S.C. § 1101(a)(42)(A).

[31] *Compare* United Nations Convention Relating to the Status of Refugees, *supra* note 24, at art. 33(1) *with* 8 U.S.C. § 1231(b)(3)(A).

[32] Tom K. Wong, *The Politics of Immigration: Partisanship, Demographic Change, and American National Identity* 52–53 (2017).

American leadership in refugee resettlement since World War II is perhaps best reflected in the sheer number of refugees absorbed into the United States since the war. In total, since World War II, the United States has granted entry to nearly five million refugees, representing well over 70 nationalities.[33]

But American leadership in refugee resettlement goes far beyond accepting refugees into the country. The United States has also been a major donor to the UNHCR, each year contributing several folds more than the next largest donor.[34] Leading by example, the United States has also persuaded other countries to do more. For instance, in 2016, the United States sponsored the Leaders' Summit on Refugees, an international conference designed "to increase global responsibility-sharing for refugees worldwide and thereby strengthen the international community's capacity to address mass displacement," particularly in relation to the civil war in the Syria.[35] At the summit, more than 50 countries pledged a combined $4.5 billion to assist refugees.[36]

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[33] David W. Haines, *Safe Haven?: A History of Refugees in America* 4 (2010).

[34] *See, e.g.*, UNHCR, *Donor Profiles*, Global Focus: UNHCR Operations Worldwide, http://reporting.unhcr.org/donor-profiles?y=2012 (last visited Sept. 6, 2017).

[35] UNHCR, *Summary Overview Document: Leaders' Summit on Refugees* (Nov. 10, 2016), http://www.unhcr.org/en-us/events/conferences/58526bb24/overview-leaders-summit-on-refugees.html.

[36] *Id.*

B. The World Is Experiencing an Unprecedented Level of Displacement

Today, the world is in the throes of a migration crisis that is unprecedented in its scale, surpassing even the aftermath of the Second World War.[37] In 2016, there were 65.6 million individuals who had been forcibly displaced from their homes—including over 22 million living outside their country of origin and 40 million who are internally displaced.[38] The ravages of the Syrian civil war have produced the largest number of new refugees—over 800,000 in 2016 alone.[39] These numbers do not include those who have lost their lives attempting to reach a safe haven.[40]

Now, perhaps more than ever, the world needs America to continue its longstanding tradition of offering protection, freedom, and opportunity to the vulnerable and persecuted.[41]

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[37] *See* UNHCR, *Global Trends: Forced Displacement in 2016* at 5 (June 19, 2017), http://www.unhcr.org/5943e8a34.

[38] *Id.* at 2–3, 7.

[39] *Id.* at 13.

[40] Dionne Searcey & Jaime Yaya Barry, *Why Migrants Keep Risking All on the 'Deadliest Route'*, N.Y. Times (June 22, 2017), https://nyti.ms/2tTCSXe.

[41] *See Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs*, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland Security), http://docs.house.gov/meetings/FA/FA13/20151027/104123/HHRG-114-FA13-Transcript-

II. THE U.S. REFUGEE ADMISSIONS PROGRAM ADMINISTERS THE RESETTLEMENT PROCESS FOR REFUGEES SEEKING ADMISSION INTO THE UNITED STATES

USRAP is a multi-agency consortium established to effectuate the Refugee Act of 1980's objective "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."[42] USRAP is managed jointly by the Department of State through its Bureau of Population, Refugees, and Migration and the Department of Homeland Security through the USCIS's Refugee, Asylum and International Operations Directorate.[43] The Bureau

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20151027.pdf. ("[T]he United States has a proud and long-standing tradition of offering protection, freedom, and opportunity to refugees from around the world who live in fear of persecution and are often left to languish in difficult conditions of temporary asylum.").

[42] Refugee Act of 1980, Pub. L. No. 96–212, § 101(b), 94 Stat. 102.

[43] *See* U.S. Citizenship and Immigration Servs., *Hearing on "Refugee Admission FY 2017 and Refugee Security Screening" before the Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest on September 28, 2016 by USCIS Director Leon Rodriguez*, Official Website of the Department of Homeland Security, https://www.uscis.gov/tools/resources-congress/testimonies-and-speeches/hearing-refugee-admission-fy-2017-and-refugee-security-screening-senate-committee-judiciary-subcommittee-immigration-and-national-

is responsible for "overarching coordination and management," which includes working with the various participants in the refugee resettlement process that is discussed below.[44]

USRAP's work is guided by an annual determination made by the President for each fiscal year. The Refugee Act of 1980 provides that "the number of refugees who may be admitted . . . in any fiscal year . . . shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest."[45] The statute defines "appropriate consultation" as "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives."[46] For Fiscal Year 2017, President Barack Obama authorized the admission of up to 110,000 refugees into the United States.[47]

Section 207(a)(3) of the Immigration and Nationality Act ("INA") requires USRAP to allocate admissions among refugees "of special humanitarian concern to the United States in accordance with a determination made by the President after

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interest-september-28-2016-uscis-director-leon-rodriguez (last updated Jan. 26, 2017).

[44] *Id.*

[45] 8 U.S.C. § 1157(a)(2).

[46] *Id.* § 1157(e).

[47] 81 Fed. Reg. 70315 (Oct. 11, 2016).

appropriate consultation."[48] USRAP has set up three categories—referred to as "processing priorities"[49]—that delineate individuals and groups that are of "special humanitarian concern."[50] The three categories are: (i) Priority 1, which is for individuals "of any nationality, in any location, often with compelling protection needs, for whom resettlement appears the only durable long-term solution";[51] (ii) Priority 2, which is for specific groups of special concern "within certain nationalities, clans, or ethnics groups; sometimes in specified locations . . . whose members are in need of resettlement";[52] and (iii) Priority 3, which "affords USRAP access to members of designated nationalities who have immediate family members in the United States who initially entered as refugees or were granted asylum."[53]

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[48] 8 U.S.C. § 1157(a)(3).

[49] "Although the access categories to the USRAP are referred to as 'processing priorities,' it is important to note that entering the program under a certain priority does not establish precedence in the order in which cases will be processed. Once cases are established as eligible for access under one of the three processing priorities, they all undergo the same processing steps." U.S. Dep't of State, U.S. Dep't of Homeland Security & U.S. Dep't of Health and Human Servs., *Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress* 7 (Sept. 15, 2016) [hereinafter *2017 Refugee Admissions Proposal*], https://www.state.gov/documents/organization/262168.pdf.

[50] *Id.* at 6.

[51] U.S. Gov't Accountability Office, GAO–17–706, *Refugees: Actions Needed by State Department and DHS to Further Strengthen Applicant Screening Process and Assess Fraud Risks* 72 (July 2017) [hereinafter *GAO Report*], https://www.gao.gov/assets/690/686310.pdf.

[52] *2017 Refugee Admissions Proposal*, *supra* note 49, at 8.

The application process for most refugees seeking resettlement in the United States begins with UNHCR, which, as discussed in more detail in Section III, *infra*, evaluates whether the applicant meets the requirements of the 1951 Convention and 1967 Protocol and performs other biographical checks on the applicant.[54] The application is then referred to the RSCs, which are located abroad within distinct geographic areas and operated by international and non-governmental organizations that communicate directly with applicants to process their applications, collect their information, and conduct in-person prescreening interviews.[55]

The process then moves to the adjudication stage, in which USCIS determines whether the applicant qualifies for refugee status and is eligible for admission and resettlement in the United States.[56] The USCIS process is administered by its Refugee Officer Corps—"a cadre of specially-trained USCIS officers who are dedicated to adjudicating applications for refugee status overseas"[57]—and officers in the International Operations division.[58] These officers travel throughout the world on six- to eight-week "circuit rides," conducting in-person interviews and gathering fingerprints and other biometric information used to conduct additional security screening checks.[59] Each adjudicatory decision by these officers is reviewed by a USCIS supervisory officer.[60]

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[53] *Id.* at 12.

[54] *GAO Report*, *supra* note 51, at 14; *see* Section III.A., *infra*.

[55] *GAO Report*, *supra* note 51, at 2.

[56] *Id.* at 15–16.

[57] *Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs*, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland

If an application is approved by USCIS, the applicant must undergo a medical screening and receive cultural orientation through the RSCs.[61] Prior to departure and upon arrival in the United States, each applicant is subject to additional vetting by U.S. Customs and Border Protection.[62] Upon admission to the United States, refugees are assisted by non-governmental resettlement agencies that provide them with essential services such as housing, furnishings, food, and clothing.[63]

For a majority of applicants, the entire process takes well over a year, and often two years, to

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Security), http://docs.house.gov/meetings/FA/FA13/20151027/104123/HHRG-114-FA13-Transcript-20151027.pdf.

[58] *GAO Report*, *supra* note 51, at 16.

[59] U.S. Citizenship and Immigration Servs., *Fact Sheet: Refugee Security Screening* (Dec. 3, 2015) [hereinafter *USCIS Fact Sheet*], https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[60] *GAO Report*, *supra* note 51, at 17.

[61] *Id.*; *2017 Refugee Admissions Proposal*, *supra* note 49, at 18.

[62] *USCIS Fact Sheet*, *supra* note 59.

[63] *2017 Refugee Admissions Proposal*, *supra* note 49, at 19–20.

complete.[64] Each stage of the process is managed by highly trained individuals who care deeply about the objectives of United States refugee policy while safeguarding American national security.[65]

III. THE EXECUTIVE ORDER'S LIMITATIONS ON REFUGEES ARE UNWARRANTED BECAUSE USRAP PARTICIPANTS ALREADY USE ROBUST SECURITY MEASURES TO ENSURE AGAINST NATIONAL SECURITY RISKS

Refugees seeking entry into the United States undergo exhaustive vetting procedures specifically designed to identify and curtail national security risks. By the time a refugee is permitted to enter the United States, he or she has been screened by multiple agencies, including by thorough background checks, biometric tests, and in-person interviews. As a result, refugees entering the United States go through the most thorough vetting of all immigrants traveling to the country. The vetting process is dynamic, and USRAP participants constantly strive to refine it. But the Executive Order's approach—wholesale suspension of USRAP for 120 days and slashing the number of refugees that may be admitted into the United States for Fiscal Year 2017 by more than half—is unprecedented and unwarranted. This approach unnecessarily disrupts USRAP's process and mission.

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[64] *See GAO Report*, *supra* note 51, at 27–28.

[65] Letter from National Citizenship and Immigration Services Council 119 to Hon. Representative Zoe Lofgren, Ranking Member, House Subcommittee on Immigration and Border Security, USCIS employees Union Statement of Opposition to H.R. 2826 (June 27, 2017), http://local1924.org/wp-content/uploads/2014/06/HR-2826_AFGE119-Opposition-Statement.pdf.

A. UNHCR Pre-Screens Applicants for Security Risks Before Referring Them to USRAP

The vast majority of refugees seeking resettlement in the United States are referred to USRAP by UNHCR.[66] UNHCR maintains its own screening criteria and security protocols.[67] These processes aim to identify terrorism and other security-related concerns, prevent application fraud, and ensure that the applicant has a *bona fide* claim for refugee status and need for resettlement.

Consistent with the exclusion criteria of the 1951 Convention, UNCHR also excludes—and does not refer to USRAP—individuals who are believed to have committed war crimes, crimes against humanity, or acts contrary to the principles of the United Nations.[68] UNHCR gives special attention to an applicant's membership in a group or organization that commits or incites others to carry out violent crimes and to any evidence or allegation that the applicant has been associated with an act of terrorism.[69]

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[66] U.S. Dep't of State, Bureau of Population, Refugees, and Migration, *U.S. Refugee Admissions Program FAQs* (Jan. 20, 2017), https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm.

[67] UNHCR, *UNHCR Resettlement Handbook* (2011) [hereinafter "*UNHCR Handbook*"], http://www.unhcr.org/46f7c0ee2.html.

[68] *Id.* at § 3.5.1; *see* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (Sept. 4, 2003), http://www.refworld.org/docid/3f5857d24.html.

To effectuate these security checks, UNHCR submits each refugee applicant to a vetting process that begins with verification of the information provided by the applicant, including biographical details and the applicant's stated need for resettlement. UNHCR verifies the applicant's biographical data—including photographs of the applicant and any dependents and a complete description of the applicant's family composition—through its computerized *proGres* database.[70] After the biographical information is verified, UNHCR conducts a preliminary assessment of the individual's need for resettlement, which includes an evaluation of whether there are sufficient independent sources of information available to make a resettlement determination. During this process, UNHCR looks for any indicators of fraud in the applicant's case file, such as evidence of tampering.[71]

For each applicant, UNHCR's preliminary assessment culminates in a written report that is reviewed by a supervising UNHCR officer.[72] If UNHCR determines that the applicant is qualified for resettlement, the applicant sits for an in-person status determination interview. UNHCR's interviewers prepare a written report summarizing the information provided by the applicant, assess the applicant's credibility, evaluate whether the applicant should be excluded based on the 1951 Convention's exclusionary criteria, and make a recommendation on whether the applicant should be resettled.[73] If the information provided by the applicant raises any red flags, the case is sent to UNHCR's Protection Unit for a full-fledged exclusion analysis.[74]

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[69] *UNHCR Handbook*, *supra* note 67, at §§ 3.6.4 and 3.6.5.

[70] *Id.* § 7.2, 7.2.1.

[71] *Id.* § 7.2.3.

[72] *Id.* § 3.8.1.

Upon satisfactory completion of these checks, UNHCR refers the application to a country offering resettlement, such as the United States. In pairing an applicant with a specific country, UNHCR considers whether the applicant has any familial links to the country, admission priorities and quotas set by the country, and the applicant's language abilities and cultural alignment.[75] In other words, an applicant cannot unilaterally elect to seek resettlement in the United States, although UNHCR will consider the applicant's expressed preferences.[76] If UNHCR determines that an applicant is a *bona fide* refugee who may be eligible for resettlement in the United States, it makes a referral to the Department of State.

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[73] *Id.* § 3.8.1.

[74] *Id.* § 7.2.2.

[75] *Id.* § 7.6.1.

[76] Some applicants may apply directly to USRAP for refugee status rather than going through UNHCR if they meet certain pre-determined criteria. *See GAO Report, supra* note 51, at 14.

B. RSCs Initiate Checks to Screen for National Security Concerns

Applicants referred to the Department of State by UNHCR first undergo prescreening and biographic checks at RSCs.[77] RSCs prepare a case file for each applicant and upload the applicant's information into the Worldwide Refugee Admissions Processing System, a Department of State database that tracks the status of all individual refugee applicants to USRAP.[78] RSCs then conduct an in-person interview with the applicant to record key information, including the applicant's persecution story and extended family information.[79] RSCs use this information to submit background security checks to the Department of State, the Department of Homeland Security, the Federal Bureau of Investigation, and other federal agencies.

In particular, Department of State standard operating procedures require RSCs to initiate three biographic security checks:

- A Department of State process in which the applicant's name and aliases are checked against the Consular Lookout and Support System, a database of various federal and other agency records containing information on prior visa applications, immigration law violations, and terrorism-related concerns.[80] In addition to information from the Department of State, this database contains information from, among others, the National Counterterrorism Center/Terrorist Screening Center, Interpol, the Drug Enforcement Administration, the Department of Health and Human Services, and various databases of the Federal Bureau of Investigation, such as the National Crime Information Center's Wanted Persons File, Immigration Violator File, Foreign Fugitive File, Violent Gang and Terrorist Organization File, and the Interstate Identification Index.[81]

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[77] *Id.*

[78] *Id.* at 4, 14.

[79] *Id.* at 14.

- Security Advisory Opinions, which are biographic checks conducted by the Federal Bureau of Investigation and other intelligence entities for any applicant who is a member of a group or nationality designated by the United States government as requiring more thorough vetting.[82] These checks require clearance from multiple law enforcement and intelligence agencies before the applicant can continue the resettlement process.[83] The

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[80] *Id.* at 15.

[81] U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening*, Official Website of the Dep't of Homeland Security, https://www.uscis.gov/refugeescreening (last updated Dec. 3, 2015).

[82] *GAO Report*, *supra* note 51, at 15.

[83] U.S. Committee for Refugees and Immigrants, *Security Screening of Refugees Admitted to the United States*, https://static1.squarespace.com/static/577d437bf5e231586a

Security Advisory Opinion process was implemented after September 11, 2001, to provide an additional security mechanism to screen individuals in certain higher-risk categories who are seeking to enter the United States.[84]

- Applicants within a certain age range are required to undergo an Interagency Check, in which the National Counterterrorism Center and other members of the intelligence community cross-check applicant data against intelligence and law enforcement databases and security holdings.[85] Syrian refugees and other categories of applicants are subject to additional review by the Department of Homeland Security as part of the pre-screening process.[86]

RSCs also implement antifraud measures overseen by the Department of State.[87] For example, the Department of State may require, where warranted, DNA testing for applications based on

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7055a9/t/57a24d23893fc0eb3919ad0f/1470254386734/USCRI+Security+Screening+Process+%285.16.16%29.pdf (last visited Sept. 6, 2017).

[84] U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening, supra* note 81.

[85] *GAO Report, supra* note 51, at 15.

[86] *Id.* at 16.

[87] *See generally* U.S. Gov't Accountability Office, GAO–17–737, *Refugees: State and Its Partners Have Implemented Several Antifraud Measures but Could Further Reduce Staff Fraud Risks* (July 2017), http://www.gao.gov/assets/690/686323.pdf.

claimed parent and child biological relationships.[88] Some RSCs also conduct two prescreening interviews with each applicant using different interpreters to decrease the likelihood of collusion and to identify any false information provided by the applicant.[89]

Upon satisfactory completion of these checks, RSCs notify the Department of State and USCIS that the applicant is ready for further vetting and adjudication of their application.

C. *USCIS Officers Vet Each Applicant to Identify National Security Risk*

After clearance from RSCs, USCIS officers conduct individual, in-person interviews of each applicant at RSC locations. These officers have substantial training and access to robust tools in identifying national security risks. Applicants who are flagged as posing a national security risk are subject to additional vetting.

1. ***USCIS Officers Receive Substantial Training in Identifying National Security Risks***

Officers in USCIS's Refugee Officer Corps—who interview a majority of refugee applicants—receive substantial training in identifying national security and fraud risks.[90] Specifically, in addition to the basic training required of all USCIS officers, the officers in the Refugee Officer Corps receive specialized training, including on grounds of inadmissibility, fraud detection and prevention, security protocols, interview techniques, credibility analysis, and country conditions research.[91] Officers who adjudicate applications from Iraq and Syria are further required to participate in an intensive Middle East Refugee Processing training, focusing on that region's history, country conditions, and particular security concerns.[92] New officers receive additional in-field training during which they observe experienced interviewers conduct interviews, receive individualized guidance and feedback, and discuss case-specific issues with trainers.[93] Finally, before departing for in-person interviews, these officers receive pre-departure briefings that provide additional information related to, among other things, groups being interviewed, location of interviews, and national security concerns.[94]

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[88] *GAO Report*, *supra* note 51, at 54.

[89] *Id.*

[90] *Id.* at 16.

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[91] U.S. Citizenship and Immigration Servs., *Hearing on "Refugee Admissions, Fiscal Year 2016" before the Senate Committee on the Judiciary on October 1, 2015 by Chief of Refugee Affairs Division Barbara L Strack and Acting Associate Director Matthew D. Emrich*, Official Website of the Dep't of Homeland Security (Oct. 1, 2015), https://www.uscis.gov/tools/resources/hearing-refugee-admissions-fiscal-year-2016-senate-committee-judiciary-october-1-2015-chief-refugee-affairs-division-barbara-l-strack-and-acting-associate-director-matthew-d-emrich.

[92] *GAO Report*, *supra* note 51, at 41.

[93] *Id.* at 42.

[94] *Id.* at 41–42.

2. *USCIS Officers Thoroughly Evaluate National Security Risk*

USCIS officers use their training and an array of procedural tools to identify applicants who have engaged in persecution of others or pose a criminal or a national security concern.[95] Applicants posing a national security risk are rendered inadmissible by the INA, which sets out several security-related grounds of inadmissibility.[96] Moreover, throughout the USCIS adjudication process, USCIS officers make credibility determinations and look for indicators of these concerns, with emphasis placed on the INA's Terrorism-Related Inadmissibility Grounds ("TRIG").

Under TRIG, with certain exceptions, an applicant is inadmissible if he or she: has or is believed to have engaged in terrorist activity; is likely to engage in terrorist activity after entry; incited terrorist activity with intent to cause bodily harm or death; is a representative of current member of a terrorist organization; endorsed or espoused terrorist activity; received military-type training from a terrorist organization; or is the spouse or child of an alien who has engaged in terrorist activity within the last five years.[97] The definition of "terrorist activity" is "quite expansive[] such that the term can apply to persons and actions not commonly thought of as terrorists and to actions not commonly thought of as terrorism."[98] As there is no exception under the law for "freedom fighters," most rebel groups are considered to be engaging in terrorist activity even if fighting against an authoritarian regime.[99]

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[95] 8 U.S.C. §§ 1101(a)(42), 1182(a)(2), (3).

[96] *See* 8 U.S.C. §§ 1182(a)(3)(A), (B), (F), 1227(a)(4)(A), (B).

[97] *See* 8 U.S.C. § 1182(a)(3)(B)(i).

USCIS officers employ various tests and procedures to identify whether an applicant may fall within the TRIG criteria or otherwise pose a national security concern. For example, prior to or during an interview, USRAP officials submit the applicant's fingerprints for three biometric tests: (i) the Federal Bureau of Investigation 's Next Generation Identification check, which searches for any criminal history of the applicant and immigration data; (ii) the Department of Homeland Security's Automated Biometric Identification System, which identifies the applicant's travel and immigration history, immigration violations, and law enforcement and national security concerns; and (iii) the Department of Defense's Automated Biometric Identification System, which searches the Department's holdings in areas of conflict and other classified and unclassified government databases.[100] The information collected from these checks is utilized during the interviews or provides grounds for conducting additional interviews.[101]

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[98] *See* U.S. Citizenship and Immigration Servs., *Terrorism-Related Inadmissibility Grounds (TRIG)*, Official Website of the Dep't of Homeland Security, https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig (last updated July 18, 2017). The INA defines "terrorist activity" as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involve," among other things, hijacking of any conveyance, the detaining or killing of another individual in order to compel a third person to do or abstain from doing any act, a violent attack on an internationally protected person, an assassination, the use of any weapon with intent to endanger the safety of another or to cause substantial damage to property. 8 U.S.C. § 1182§§ (a)(3)(B)(iii). A person can engage in terrorist activity by planning or executing a terrorist activity, soliciting others to do so, providing material support to a terrorist organization or member of a terrorist organization, and soliciting funds or recruiting members for a terrorist organization. *Id.* § 1182(a)(3)(B)(iv). "[M]aterial support" in this context includes actions such as providing a safe house, transportation, counterfeit documents, or funds to a terrorist organization or its members. *Id.* § 1182(a)(3)(B)(iv)(VI).

[99] U.S. Citizenship and Immigration Servs., *Terrorism-Related Inadmissibility Grounds (TRIG)*, *supra* note 98.

USCIS has developed a number of additional resources to help interviewers identify and address national security concerns.[102] For example, USCIS maintains training lesson plans, guidance on terrorism-related issues, and country condition information that is accessible to interviewing officers overseas.[103] Further, in 2016, USCIS initiated a pilot program in which officers with expertise in national security—known as Security, Vetting, and Program Integrity officers—traveled with Refugee Officers to provide advice on adjudicating applications presenting national security and fraud concerns.[104] Due to the success of the pilot program, the expert officers will continue to assist Refugee Officers in cases presenting national security risks.[105]

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[100] *USCIS Fact Sheet*, *supra* note 59, at 3–4.

[101] *GAO Report*, *supra* note 51, at 16.

[102] *Id.* at 45.

[103] *Id.*

If any national security concerns are raised during the USCIS adjudication process—through either information obtained from security or background checks, or personal interviews or testimony—the application is subjected to a more rigorous internal process known as the Controlled Application Review and Resolution Process.[106] This process ensures "that immigration benefits or services are not granted to individuals who pose a threat to national security and/or public safety, or who seek to defraud our immigration system."[107]

Moreover, Syrian applicants undergo additional enhanced review in which refugee adjudicators collaborate with USCIS's Refugee, Asylum and International Operations Directorate and the Fraud Detection and National Security Directorate.[108] The latter provides intelligence-driven support to adjudicators, including threat identification techniques, topics for questioning, and any relevant national security information.[109]

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[104] *Id.* at 46 n.75.

[105] *Id.* at 47.

[106] U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening, supra* note 81.

[107] *Id.*

[108] *USCIS Fact Sheet, supra* note 59, at 5.

[109] *Id.*

After the in-person interview and any enhanced vetting, USCIS uses a refugee application assessment tool to determine if the applicant, among other things, (i) was appropriately granted access to USRAP, (ii) had past persecution or well-founded fear of persecution, (iii) is credible, (iv) is not a persecutor, and (v) is admissible into the United States (*e.g.*, whether the applicant poses national security or terrorism-related concerns).[110] Once the refugee officer reaches an admissibility determination, all completed case files are reviewed by a USCIS supervisor for legal sufficiency and to ensure that the interviewing officer appropriately considered security check results.[111]

D. Refugees Whose Applications Have Been Approved by USCIS Are Vetted Again Upon Travel to and Arrival in the United States

After USCIS approval, refugees who are scheduled for travel to the United States receive additional screening before entering the country. This screening is performed by U.S. Customs and Border Protection, which receives a manifest of inbound refugees eight days prior to their arrival.[112] This manifest allows the agency to perform additional vetting tests and background checks.[113]

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[110] *GAO Report*, *supra* note 51, at 38.

[111] *Id.* at 38–39.

[112] *USCIS Fact Sheet*, *supra* note 59, at 5

[113] *Id.*

Upon arrival in the United States, the agency inspects all refugees at one of seven domestic airports designated to receive refugees to make a final determination as to whether the refugee is finally admitted.[114]

CONCLUSION

Contrary to the premise of Executive Order No. 13780, refugees seeking resettlement in the United States are subjected to the government's most rigorous vetting procedures to ensure that they do not pose a threat to our national security. By allowing these refugees into the United States, our country honors its longstanding tradition of providing safe haven to the persecuted and leading the international community in the protection of refugees. The refugee-related provisions of Executive Order No. 13780 abandon that history and impede USRAP's humanitarian mission.

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[114] *GAO Report*, *supra* note 51, at 17–18.

Dated: September 7, 2017

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DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals For the Fourth and Ninth Circuits

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief addresses the second question accepted for review by the Court:

> Whether Executive Order No. 13,780's temporary suspension of entry of those from six Muslim-majority countries violates the Establishment Clause.

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted, with consent of the parties,[1] on behalf of the National Education Association ("NEA"). NEA is the nation's largest professional association of educators representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation's public schools.

NEA has long supported equal educational opportunity for all students in our nation's public schools. NEA members work every day in their classrooms and schools to ensure that every student, no matter their race, religion, or national origin, receives a quality education that will allow them to grow into productive members of our democratic society. The provision of a quality education depends on many factors, but most fundamentally on ensuring that every student is treated equally and with respect. For that reason, the NEA's highest governing body has affirmed its unequivocal belief that "discrimination and stereotyping based on . . . religion must be eliminated . . . in all educational settings." NEA Resolution B-14 ("Racism, Sexism, Sexual Orientation, and Gender Identification Discrimination"), https://www.nea.org/assets/docs/Resolutions_2017_NEA_Handbook.pdf.

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[1] Letters of consent are on file with the Clerk. *Amicus* states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

Educators put that belief into practice every day. They work assiduously to "[i]ncrease respect, understanding, acceptance, and sensitivity" among all of their students, including the many Muslim children in our country's schools. *See id.* at B-14(a).

The atmosphere created by Executive Order No. 13,780 gives oxygen to the fires of bias, bullying, and discord. Presidential statements derogating members of the Muslim faith are mimicked by young, impressionable students. Peers turn on peers. Educators are working to re-affirm an educational environment that is "free of all forms of bullying including . . . psychological bullying" in recognition that "bullying can affect the entire school community." *Id.* at I-30 ("Bullying"). The interests at stake here—respect and fairness for our Muslim students, co-workers, friends, and neighbors—are core to NEA's mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Executive Order No. 13,780 violates the Constitution's Establishment Clause by disfavoring a religious group. The anti-Muslim animus behind the Executive Order is evidenced by the extensive record of President Trump's derogatory statements about Muslims and his stated intent to ban immigration based on religion. The Executive Order is the "Muslim ban" the President promised. The Respondents have persuasively explained why the Executive Order should be struck down. *Amicus* writes separately to inform the Court of the impact of President Trump's discriminatory rhetoric on the 1.3 million Muslim children in schools across the country. If the Executive

Order is upheld, the stigma this vulnerable population already has suffered due to anti-Muslim sentiment may become indelible.

As an organization that represents millions of educators, *Amicus* recognizes first-hand the impact that the words and actions of adults have on children. These models for behavior come from many sources—principals, parents, public figures—but one can scarcely conjure a more powerful and pervasive voice than that of the U.S. President, whose sayings and actions are part of U.S. history and so are studied by schoolchildren. "The White House," said President Theodore Roosevelt, "is a bully pulpit." Edward S. Corwin, *The President: Office and Powers* 267 (3d ed., 1948). President Franklin Roosevelt noted that the Presidency "is not merely an administrative office. That is the least part of it. It is pre-eminently a place of moral leadership." *Roosevelt on the Presidency*, N.Y. Times, Nov. 13, 1932. Whether issued from the Oval Office or Twitter, the statements of President Trump make a strong impression on children. And his anti-Muslim vitriol, repeatedly stated and widely reported, teaches a damaging lesson to America's children. Namely, harassment and discrimination against Muslims is not only acceptable, it is encouraged by the most powerful person in the country, their President.

This has real world implications, as evidenced by the striking increase in hate crimes against Muslims since the beginning of the presidential election season. Sadly, schools have not been immune to this increase in discrimination and hatred. Muslim students are far more likely to suffer bullying and discrimination in schools than other students. This harassment and discrimination not only harms targeted students profoundly, it degrades the educational environment for all students. When discrimination against Muslims is perpetuated and sanctioned by the government, Muslim students are stigmatized and receive a strong message that they are not entitled to equal respect. Accordingly, *Amicus* urges this Court to strike down the Executive Order that would cement such religious discrimination as a violation of the Establishment Clause.[2]

I. The Court has recognized the powerfully damaging stigma imposed on children by unconstitutional religious preference.

A core tenet of the First Amendment, one made clear by the Court time and again, is that government "may not be hostile to any religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). This prohibition is "the clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And when religious preference or discrimination is nonetheless endorsed by the government, it is nowhere felt more acutely than in the schoolhouse by children. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools").

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[2] To provide the Court with an understanding of the extent to which anti-Muslim rhetoric and actions have tainted our public schools, *Amicus* has interviewed public school educators throughout the country. The educators interviewed include high school, middle school, and elementary school teachers, as well as school counselors, who work in a variety of environments—from suburban to rural to urban.

We need look no further than *Brown v. Board of Education* for this foundational understanding:

> "To separate [black students] solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 494 (1954). A discriminatory policy harms students not just immediately but by the powerful, lasting, and damaging message it sends students as to their worth and value in society.

Muslims have been singled out in negative statements by the President and targeted by a punitive Executive Order. Many Muslim students will understandably take the President's statements and his actions to mean their country and community view them as inferior. The resulting psychosocial damage of such discriminatory stigmatization, as the Court in *Brown* observes, may never be completely undone.

The Court again recognized the stigmatizing message communicated by state-endorsed discrimination, and the particular respect in which children are uniquely vulnerable, when considering the Defense of Marriage Act:

> "DOMA undermines both the public and private significance of state-sanctioned same-sex marriag-

> es; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage."

United States v. Windsor, 133 S. Ct. 2675, 2694 (2013). This message of unworthiness "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* Separated out for different treatment, children raised by same-sex couples "suffer the stigma of knowing their families are somehow lesser." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015). Federal policies effectuating discrimination "harm and humiliate" children associated with the targeted group. *Id.* at 2601.

After Donald Trump announced his candidacy for President in June 2015, he made numerous disparaging comments about Muslims. This continued throughout his campaign and into his presidency. *See Amicus Curiae Brief of the Roderick and Solange MacArthur Justice Center* at 6-26. The 1.3 million Muslim children[3] in the United States have heard President Trump refer to them as a "problem,"[4] group them as terrorists,[5] and describe them as filled with "tremendous hatred."[6] Repeatedly, they have been exposed to public statements by President Trump that Muslims like themselves should be registered in a government database[7] and that no one sharing their religion should be allowed into the country.[8] A week into the Presidency, following this barrage of anti-Muslim statements, the first version of the Executive Order issued. Executive Order No. 13,769 (revoked and replaced by challenged Executive Order No. 13,780 on March 6, 2017). In an obvious reference to his campaign promise of a "Muslim ban," the President stated "we all know what [the Executive Order] means." *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173. The challenged Executive Order, now in its second iteration, taken together with its predecessor and the barrage

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[3] *U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream*, Pew Research Center (Jul. 26, 2017), http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/#how-many-muslims-are-there-in-the-united-states-and-how-do-we-know (reporting demographic estimate of the number of U.S. Muslims, including the number of children, based on survey data).

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[4] Donald J. Trump (@realDonaldTrump), Twitter (Dec.10, 2015, 4:49 AM), https://twitter.com/realDonaldTrump/status/674934005725331456; Donald J. Trump (@realDonaldTrump), Twitter (Dec. 10, 2015, 5:00 AM), https://twitter.com/realDonaldTrump/status/674936832010887168; Donald J. Trump (@realDonaldTrump), Twitter (Dec. 10, 2015, 5:21 PM), https://twitter.com/realDonaldTrump/status/675123192864899072; CNN, *Donald Trump Anderson Cooper Interview Q&A 2/4/16*, YouTube (Feb. 4, 2016), https://www.youtube.com/watch?v=uW9UlMqJtro (minutes 18:42 to 18:46).

[5] *Id.*

[6] Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us'*, CNN (Mar. 10, 2016, 5:56 PM), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/; *Transcript of Republican Debate in Miami, Full Text*, CNN (Mar. 15, 2016, 3:11 PM), http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/.

[7] Hunter Walker, *Donald Trump Has Big Plans for 'Radical Islamic' Terrorists, 2016 and 'That Communist' Bernie Sanders*, Yahoo News (Nov. 19, 2015), https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html; Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015, 9:27 AM), http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716; ABC 33/40, *Donald Trump in Birmingham: Full Speech at the BJCC* (Nov. 21, 2015), https://www.youtube.com/watch?v=IgvPoFo1zPY (minutes 43:11 to 43:32); Jim Otte, *Donald Trump in Ohio: U.S. Has Become 'Soft, Weak,'* Dayton Daily News (Nov. 23, 2015, 10:25 PM),

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[8] *Donald J. Trump Statement on Preventing Muslim Immigration*, Trump-Pence (Dec. 7, 2015), https://web.archive.org/web/20170301013409/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on Mar. 1, 2017); Donald J. Trump (@realDonaldTrump), Twitter (Dec. 7, 2015, 2:32 PM), https://twitter.com/realDonaldTrump/status/673993417429524480; Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'* Wash. Post (Dec. 7, 2015, 7:43 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/; MSNBC, *Donald Trump on Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc (minutes 14:58 to 15:14); *Transcripts: Exclusive Interview with Donald Trump*, Anderson Cooper 360 Degrees (Mar. 9, 2016, 8:00 PM), http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html.

of hateful statements by President Trump, is inevitably seen by students as government-endorsed religious discrimination against Muslims. As such, it harms and humiliates Muslim children by telling all the world they are unworthy. Should the Court uphold the Executive Order, it will affect students' hearts and minds in a way unlikely ever to be undone.

II. Bias-based harassment and discrimination against children who are Muslim or perceived to be Muslim has significant negative consequences.

a. Since the presidential election campaign began, hate crimes and discrimination against Muslims, including children, have surged.

Since Donald Trump announced his candidacy for President in June 2015, our nation has seen a dramatic rise in hate crimes against Muslims. The FBI reported that hate crimes against Muslims increased by 67% from 2014 to 2015.[9] Since the beginning of 2015, hate crimes against Muslims are at the highest level since the aftermath of September 11, 2001. Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. Times (Sept. 17, 2016), https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html?mcubz=1 (stating that hate crimes against American Muslims were up 78% over 2015 and that attacks on those perceived as Arab increased even more dramatically). In the five days immediately following then-candidate Trump's call for a shutdown of Muslims entering the United States, the frequency of anti-Muslim hate crime increased 87.5% compared to the previous five days, and included multiple assaults and two fire bombings. *See Special Status Report: Hate Crime in the United States*, Center for the Study of Hate & Extremism, California State University, San Bernardino (2016), at 15-19, 26-33, https://csbs.csusb.edu/sites/csusb_csbs/files/SPECIAL%20STATUS%20REPORT%20Final%20Draft.pdf.

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[9] *See* FBI 2015 Hate Crime Statistics, https://ucr.fbi.gov/hate-crime/2015; Mazin Sidahmed, *FBI Reports Hate Crimes Against Muslims Surged 67% in 2015*, The Guardian (Nov. 14, 2016), https://www.theguardian.com/us-news/2016/nov/14/fbi-anti-muslim-hate-crimes-rise-2015.

The Executive Order challenged here, which President Trump himself has described as the "watered down, politically correct version" of the initial Executive Order,[10] has done nothing to abate this crisis. Arson, vandalism, and threats have been directed at an average of nine mosques each month in 2017. Nancy Coleman, *On Average, 9 Mosques Have Been Targeted Every Month This Year*, CNN (Aug. 7, 2017, 3:38 PM), https://amp.cnn.com/cnn/2017/03/20/us/mosques-targeted-2017-trnd/index.html.

These numbers do not reflect the many incidents targeting those perceived to be Muslims, such as

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[10] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:29 AM), https://twitter.com/realdonaldtrump/status/871675245043888128.

Sikhs,[11] non-Muslim South Asians,[12] Middle Easterners,[13] and others, whose harassment is driven by anti-Muslim animus even though the harasser has inadvertently targeted the wrong individuals. *See* Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. Islamic & Near E. L. 121, 144 (2008).

Unfortunately, the schoolhouse walls do not shield Muslim children, or those perceived to be Muslim, from hate crimes and discrimination. Overall, Muslim students report bullying four times more than other students. *See* Dalia Mogahed & Youssef Chouhoud, *American Muslim Poll 2017: Muslims at the Crossroads*, Institute for Social Policy and Understanding at 4, 12 (2017), https://www.ispu.org/wp-content/uploads/2017/06/AMP-2017_Full-Report.pdf. A 2015 survey of California Muslim students found that 55% were subject to some type of bullying based on religious identity. *Misla-*

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[11] Artemis Moshtaghian, Huizhong Wu & Susannah Cullinane, *Sikh Man's Shooting in Wash. Investigated as Hate Crime*, CNN (Mar. 6, 2017, 8:18 AM), http://www.cnn.com/2017/03/05/us/washington-sikh-shooting/index.html.

[12] Sangay K. Mishra, *An Indian Immigrant is Murdered in Kansas. It's Part of a Spike in Hate Crimes Against South Asians*, Wash. Post (Mar. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/07/the-kansas-murder-of-an-indian-immigrant-is-part-of-a-spike-in-hate-crimes-against-south-asians/?utm_term=.5dc522e4e6d6.

[13] Kelly Weill, *'Get Out of America': Middle Eastern Restaurant Attacked in Potential Hate Crime*, The Daily Beast (Mar. 12, 2017, 8:00 PM), http://www.thedailybeast.com/get-out-of-america-middle-eastern-restaurant-attacked-in-potential-hate-crime.

beled: The Impact of School Bullying and Discrimination on California Muslim Students, Council on American-Islamic Relations California at 4 (2015), https://ca.cair.com/sfba/wp-content/uploads/2015/10/CAIR-CA-2015-Bullying-Report-Web.pdf. Another study found that 70% of American Muslim youth have experienced negative reactions due to their religious beliefs and practices. Sameera Ahmed, *Adolescents and Emerging Adults*, *in Counseling Muslims: Handbook of Mental Health Issues and Interventions* 251, 274 (Sameera Ahmed and Mona M. Amer eds., 2012). And in 2016, the Council on American-Islamic Relations recorded 209 incidents of anti-Muslim bias targeting students. *The Empowerment of Hate: 2017 Civil Rights Report*, Council on American-Islamic Relations at 23 (2017), http://islamophobia.org/images/2017CivilRightsReport/2017-Empowerment-of-Fear-Final.pdf. A Muslim educator interviewed for this brief noted that all three of her own children had been bullied in school for being Muslim.

While Muslim students already bore the brunt of higher levels of discrimination and bullying than other students, things have worsened significantly since President Trump's campaign and election. Educators across the country have reported on this "Trump effect" in their schools, which has included the harassment and bullying of Muslim students as well as an increase in discriminatory anti-Muslim views. One high school teacher interviewed for this brief regularly conducts an anonymous classroom exercise on stereotypes. She relayed that prior to the election, no anti-Muslim stereotypes had ever been identified by her students. However, this past year, there were multiple comments submitted, including stereotypes that Muslims are terrorists, they are not to be trusted, and they may be disloyal to the U.S.

In a November 2016 survey of 10,000 educators, eighty percent reported increased levels of anxiety by marginalized students, including Muslims. *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools*, Southern Poverty Law Center (Nov. 28, 2016), https://www.splcenter.org/20161128/trump-effect-impact-2016-presidential-election-our-nations-schools. An interviewed educator echoed this finding, speaking of the fear and nervousness of an Arab-American student around the election and noting that children were frightened by the climate of intolerance. Multiple interviewed educators reported a noticeable uptick in hateful language and discriminatory comments among students. An April 2017 survey supports this observation, finding that half of teachers said that bullying related to politics had increased and thirty percent specifically noting increased bullying based on race and ethnicity or immigration and language. Madeline Will, *Survey: Teachers Talk Politics to Students, Despite Divisive Atmosphere*, Education Week (April 4, 2017), http://www.edweek.org/ew/articles/2017/04/05/survey-national-politics-causing-classroom-divisions.html?print=1.

Incidents abound of Muslim and Middle Eastern students being called ISIS, terrorists, or having hijabs (religious head coverings) pulled off by other students during the 2016 election season and beyond. *See*, *e.g.*, Kristina Rizga, *The Chilling Rise of Islamophobia in Our Schools*, Mother Jones (Jan. 26, 2016, 11:00 AM), http://www.motherjones.com/politics/2016/01/bullying-islamophobia-in-american-schools/. Interviewed educators reported that female students wearing hijabs have been bullied at school since the start of the election. One educator stated that after the first iteration of this Executive Order was announced in January 2017, there were multiple incidents of students ripping hijabs off the heads of female Muslim students at her school. In a significant number of anti-Muslim incidents around the country, students have specifically invoked President Trump's name or his message to bully a classmate. Albert Samaha, Mike Hayes & Talal Ansari, *The Kids are Alt-Right*, BuzzFeed News (June 6, 2017, 11:55 AM), https://www.buzzfeed.com/albertsamaha/kids-are-quoting-trump-to-bully-their-classmates?utm_term=.jqpP84w7G#.tc2QDk4qy (substantiating reports submitted to a ProPublica database tracking hate crimes and bias incidents). And educators interviewed for this brief stated that students who are not assumed to be Muslim based on their appearance, such as Bosnians, are now afraid to identify as Muslim or be open about their religious identity.

b. Bullying, harassment, and discrimination cause significant negative harm to the victims.

Students who face discrimination and are bullied because of their actual or perceived Muslim identity suffer significant negative effects. In general, children who are bullied suffer from negative health consequences and decreased academic achievement. *See Effects of Bullying*, U.S. Dep't. of Health & Human Services, https://www.stopbullying.gov/

at-risk/effects/index.html. The negative health impacts of bullying include depression, anxiety, changes in sleep and eating patterns, and increased feelings of sadness and loneliness.[14] Children who have been bullied are also at higher risk for problems like colds, headaches, and are more likely to take up smoking. Dieter Wolke & Suzet Tanya Lereya, *Long-term Effects of Bullying*, 100 Arch. Dis. Child. 879, 879 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4552909/. The negative effects on academic achievement are reflected in drops in GPA and standardized test scores and increased rates of truancy, absenteeism, and drop-outs. *See Effects of Bullying.*

When children are bullied or harassed because of discriminatory animus aimed at their Muslim faith or Middle Eastern ancestry, children suffer more significantly than from generalized harassment, with worse mental health and substance abuse levels, weaker academic performance, and higher rates of truancy. Stephen T. Russell et al., *Adolescent Health and Harassment Based on Discriminatory Bias*, 102 Am. J. Pub. Health, 493, 493 (2012). Arab-American youth who have experienced prejudice and discrimination feel less competent academically, have lower self-esteem,[15] and have higher rates of stress, depression, anxiety, and delinquency.[16] Specifically, "being called a terrorist, having a hijab pulled off and other acts of bullying can have a negative impact on students' academic performance, mental health and physical health." Rebecca A. Clay, *Islamophobia*, 48 Monitor on Psych. 34, 34 (2017), http://www.apa.org/monitor/2017/04/islamophobia.aspx. One educator interviewed for this brief stated that since the election, Muslim students, particularly female students, have become quiet and withdrawn in her classroom. Another educator expressed concern about the emotional development of her Muslim students, noting that students cannot fully develop their identities when they live in fear of stereotypes and what others may think of them based on their religion.

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[14] *Effects of Bullying* (stating that children who are bullied are more likely to experience depression, anxiety, increases in sadness and loneliness, and health complaints); Dieter Wolke and Suzet Tanya Lereya, *Long-term Effects of Bullying*, 100 Arch. Dis. Child. 879, 879 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4552909/ (children who were victims of bullying are at higher risk for anxiety disorder, depression, and thoughts of self-harm and suicide); Xiaoyan Zhang et al., *The Impact of School Social Support and Bullying Victimization on Psychological Distress among California Adolescents*, 14 Cal. J. Health Promot. 56, 56 (2016) (adolescents who are victims of bullying suffer from various psychological problems like anxiety and depression, are twice as likely to suffer from serious psychological distress compared to others, and are associated with a higher risk of suicide).

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[15] Rhonda Tabbah, Antoinette Halsell Miranda & Joe E. Wheaton, *Self-Concept in Arab American Adolescents: Implications of Social Support and Experiences in the Schools*, 49 Psych. in the Sch. 817, 817 (2012).

[16] Sawssan R. Ahmed, Maryam Kia-Keating & Katherine H. Tsai, *A Structural Model of Racial Discrimination, Acculturative Stress, and Cultural Resources Among Arab American Adolescents*, 48 Am. J. Cmty. Psych. 181, 186 (2011); Lama Z. Khouri, *On Belonging: The American Adolescent of Arab Descent*, 72 J. Clinical Psych.: In Session 818, 819 (2016).

c. Anti-Muslim bias degrades school climate, mental health, and academic achievement for all students.

Anti-Muslim bullying and harassment harms all students, not only those targeted. A student's personal development and academic achievement greatly depend on a positive school climate, consisting of interpersonal relationships among students, teachers, and administrators, all of which combine to set the norms, values, and expectations at school. *See* Amrit Thapa et al., *School Climate Research Summary,* Nat'l Sch. Climate Ctr. at 3-4 (2012), https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf. The social, emotional, and physical safety of students make up critical elements of a positive school climate. *See id.* at 4. If the safety of one group of students is threatened by increased discrimination, all efforts to create a healthy school climate are compromised.[17] "In schools without supportive norms, structures, and relationships, students are more likely to experience violence, peer-victimization, and punitive disciplinary actions, often accompanied by high levels of absenteeism, and reduced academic achievement." Amrit Thapa et al. at 4. Conversely, improving school climate is associated with decreased aggression and violence and increased academic achievement. *See* David Osher et al., *Improving Academic Achievement Through Improving School Climate and Student Connectedness* at 5-6 (2009) (finding that a positive change in school climate is related to significant gains in student scores on statewide achievement tests).

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[17] *See, e.g.*, Wanda Cassidy & Margaret Jackson, *The Need for Equality in Education: An Intersectionality Examination of Labeling and Zero Tolerance Practices*, 40 McGill J. Educ. 435, 438 (2005) ("children who experience discrimination on the basis of race, gender, class, disability, and/or sexual orientation may suffer from more than one form of discrimination. Those factors can be seen to intersect in ways which compound rather than simply add together in final impact. And, while the child may experience multiple levels of discrimination, multiple levels of protection may not be provided by the school.").

Witnesses to bullying also suffer. School climate is inextricably tied to bullying because such harassment inflicts severe physical and psychological harm on not only the victims of bullying, but also the students who witness aggressive behavior and the aggressors themselves. *See* Daniel J. Flannery et al., *Impact of Exposure to Violence in School on Child and Adolescent Mental Health and Behavior*, 32 J. Cmty. Psych. 559, 570 (2004) ("Where school violence is prevalent, . . . [t]he entire school suffers, not just perpetrators and victims."). "Observing victimization can negatively impact psychological functioning even in cases where students themselves have not been victimized." Ian Rivers et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 Sch. Psych. Q. 211, 218 (2009). The elevated mental health risks for witnesses to bullying can be due to empathy for the victim, fear that they too may be victimized, or the cognitive dissonance resulting from their inaction despite a desire to intervene. *See id.* at 220.

The perpetrators of bullying may also suffer long-term effects, such as greater stress, aggression, and poorer health behaviors in adulthood. *See* Karen A.

Matthews et al., *Bullying and Being Bullied in Childhood Are Associated with Different Psychosocial Risk Factors for Poor Physical Health in Men*, 28 Psych. Sci. 808, 815 (2017). Young adults who were both bullies and victims (bully/victims) similarly show increased levels of anxiety and depressive disorders, antisocial personality disorder, and suicidality. *See* William E. Copeland et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, 70 JAMA Psych. 419, 424 (2013) ("These [negative mental health] effects were maintained even after accounting for pre-existing psychiatric problems or family hardships.").

When students feel depressed, anxious, angry, embarrassed, or scared as a result of bullying, they are less engaged and committed to schoolwork. *See* Amrit Thapa et al. at 4; *see also* Flannery, *supra*. "Students have reported academic problems and an inability to learn in school, and some students have even refused to go to school at all because of harassment and violence that occurs in the school setting." Flannery, *supra*. Academic achievement is dependent on students feeling safe at school, and students feel safer in environments where diversity is respected. *See* Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 Psych. Sci. 393, 398 (2006) (finding that student diversity is associated with feelings of safety and social satisfaction in school). Interviewed educators confirmed these findings, discussing the need for students to feel safe and valued at school and their own efforts to foster a healthy school climate to benefit all students.

In addition, the ability to freely engage in classroom discussion is impacted when certain groups of students feel unable to contribute. "[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotations omitted) (holding that the educational benefits of diversity are a compelling government interest). One educator interviewed stated that Muslim students were reluctant this year to share with their classmates regarding their faith and traditions. In previous years, Muslim students would discuss events such as Ramadan or the Eid holiday in the classroom, but that no longer occurs. Another educator commented that since the election, her Muslim students are quieter and less likely to participate and observed that as a result, the entire classroom loses a valuable opportunity for students to learn from each other.

CONCLUSION

If the Court condones the President's stigmatization of Muslims by upholding the Executive Order, it will further damage school climates and increase the risk to the mental health and academic achievement of students across the country. A policy of banning all travelers from six Muslim-majority countries, a stance rooted in anti-Muslim animus, sends a strong message to Muslim and Middle Eastern students. They understand that such a policy means that they are not worthy of society's equal respect and that they are viewed as a source of violence and terrorism who ought to be feared by the larger community. The "necessary consequence" of such policies is to demean and stigmatize these students. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). If this Court upholds this Executive Order, hundreds of thousands of children will throughout their lives "suffer the stigma of knowing" that in the eyes of the state, they are "somehow lesser." *See id.* at 2600.

This stigmatization not only negatively impacts Muslim students, but it creates a negative school climate and hostile learning environment for all students. *Amicus* NEA respectfully requests that the Court hold that Executive Order No. 13,780 violates the Constitution's Establishment Clause.

Respectfully submitted,

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In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

Brief of *Amici Curiae* National Security Experts Andrew C. McCarthy, Center for Security Policy, Frank J. Gaffney, Jr., Dr. Robert J. Shillman, Admiral James "A Lyons, Lieutenant General William G. Boykin, and Ambassador Henry F. Cooper Supporting Petitioners

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QUESTIONS PRESENTED

The President has broad constitutional and statutory authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the nation's interest. Pursuant to this authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that order suspends for 90 days the entry of foreign nationals from six countries that were previously designated by Congress or the Obama administration as presenting heightened terrorism-related risks, subject to case-by-case waivers. Respondents challenge the President's authority to issue this executive order.

1. Whether Respondents' challenge to the temporary suspension of entry of aliens abroad is justiciable.

2. Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.

3. Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad.

4. Whether the challenges to Section 2(c) became moot on June 14, 2017.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae* National Security Experts Andrew C. McCarthy, Center for Security Policy, Frank J. Gaffney, Jr., Dr. Robert J. Shillman, Admiral James "Ace" Lyons, Jr., U.S. Navy Retired, Lieutenant General William G. Boykin, U.S. Army Retired, and Ambassador Henry F. Cooper (collectively referred to as "*Amici*") respectfully submit this brief in support of Petitioners.[1]

Andrew C. McCarthy is the author of two *New York Times* bestsellers, ***Willful Blindness: A Memoir of the Jihad*** (Encounter Books 2008), and *The Grand Jihad: How Islam and the Left Sabotage America* (Encounter Books 2010). He is one of the nation's most prominent voices on legal and national security issues.

For eighteen years, Mr. McCarthy was an Assistant United States Attorney in the Southern District of New York. From 1993 through 1995, he led the prosecution against the "Blind Sheikh," Omar Abdel Rahman and his jihadist cell for waging a terrorist war against the United States—a war that included the 1993 World Trade Center bombing and a plot to bomb New York City landmarks. During the last five years of his tenure, he was the chief assistant U.S. attorney in charge of the Southern District's satellite in White Plains. During that time, he was also heavily involved in the investigation of the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Following the 9/11 attacks, he supervised the Justice Department's Command Post near Ground Zero in New York City. In 2004, he served at the Pentagon as a Special Assistant to the Deputy Secretary of Defense. As a direct result of his experience and expertise, Mr. McCarthy has testified before Congress on various national security issues.

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

The Center for Security Policy (CSP) is a Washington, D.C.-based, nonprofit policy research organization dealing with issues relating to defense and foreign policy. CSP provides analysis of such national security matters for policy-makers, legislators, the media, and the general public. The founder and president of CSP, Frank J. Gaffney, Jr., acted under President Ronald Reagan as the Assistant Secretary of Defense for International Security Policy, the senior position in the Defense Department with responsibility for policies involving nuclear forces, arms control, and U.S.-European defense relations.

Since the terrorist attack on 9/11, Mr. Gaffney has directed CSP in focusing much of its resources on the underlying enemy threat doctrine known to Islamic terrorists as sharia (*i.e.*, authoritative Islam's political, military and legal doctrine and governing system arising therefrom).

The Center for Security Policy's specific interest in this case is on behalf of policy and national security professionals who call upon CSP to assist in crafting legislative and regulatory tools to counter the threat from Islamic terrorists who would exploit ill-enforced immigration codes and inadequately secured borders.

Dr. Robert J. Shillman is the Founder, Chairman and Chief Culture Officer of Cognex Corporation, the world's leading supplier of machine vision systems. Prior to founding this global company, Dr. Shillman held faculty positions in the departments of Electrical Engineering and Computer Science at the Massachusetts Institute of Technology and at Tufts University. He holds a B.S.E.E. from Northeastern University, and an M.S.E.E. and a Ph.D. from the Massachusetts Institute of Technology where his doctoral studies were in the field of machine vision and artificial intelligence. As a U.S. business leader and innovator, Dr. Shillman has changed the way industry operates globally, putting him and his company in the midst of international affairs with global operations. As a result of this first-hand experience, Dr. Shillman has developed a keen interest and expertise in the threat that Islamic terrorism poses to domestic and international business interests. To that end, Dr. Shillman serves as a board member for numerous philanthropic organizations that address this national and international threat, including The Israel Institute of Technology, The Friends of the Israel Defense Forces, and The David Horowitz Freedom Center, among others.

Admiral James "Ace" Lyons, Jr., U.S. Navy Retired, is President/CEO of LION Associates LLC, a premier global consultancy providing technical expertise in the areas of international marketing and trade, enterprise risk including anti-terrorism site and port security, foreign policy and security affairs along with defense and commercial procurement. Admiral Lyons has served on the Advisory Board to the Director of the Defense Intelligence Agency and is a consultant to Lawrence Livermore National Laboratory on issues of counter terrorism.

During his thirty-six years as an officer in the U.S. Navy, Admiral Lyons served as Commander in Chief of the U.S. Pacific Fleet, the largest single military command in the world. He also served as Senior U.S. Military Representative to the United Nations. As the Deputy Chief of Naval Operations from 1983 to 1985, Admiral Lyons was principal advisor on all Joint Chiefs of Staff matters and was the father of the Navy Red Cell, an anti-terrorism group comprised of Navy Seals he established in response to the Marine Barracks bombing in Beirut. Admiral Lyons was also Commander of the U.S. Second Fleet and Commander of the NATO Striking Fleet which were the principle fleets for implementing the Maritime Strategy.

Admiral Lyons has been recognized for his distinguished service by the United States and several foreign governments. He is a graduate of the U.S. Naval Academy and has received post graduate degrees from the U.S. Naval War College and the U.S. National Defense University.

Lieutenant General William G. Boykin, U.S. Army Retired, served as the United States Deputy Undersecretary of Defense for Intelligence under President George W. Bush from 2002 to 2007. During his thirty-six years in the military, General Boykin served thirteen years in the Delta Force and was involved in numerous high-profile missions, including the 1980 Iran hostage rescue attempt and the 1992 hunt for Pablo Escobar in Columbia. General Boykin also served at the Central Intelligence Agency as Deputy Director of Special Activities, and from 1998 to 2000, he was the Commanding General, U.S. Army Special Forces Command at Fort Bragg, North Carolina. General Boykin's personal decorations include, among others, the Defense Distinguished Service Medal, the Bronze Star Medal, and the Purple Heart.

Ambassador Henry F. Cooper was President Ronald Reagan's Chief Negotiator at the Geneva Defense and Space Talks with the Soviet Union and Strategic Defense Initiative (SDI) Director during the George H.W. Bush administration. Previously, he served as the Assistant Director of the Arms Control and Disarmament Agency, Deputy Assistant USAF Secretary and Science Advisor to the Air Force Weapons Laboratory. In the private sector, he was Chairman of Applied Research Associates, a high technology company; member of the technical staff of R&D Associates and Bell Telephone Laboratories; a Senior Associate of the National Institute for Public Policy; Visiting Fellow at the Heritage Foundation; and Engineering Mechanics Instructor at Clemons University.

SUMMARY OF ARGUMENT

Amici do not intend to repeat the same legal arguments presented by the parties regarding the President's constitutional and statutory authority to issue the challenged executive order. That authority is well established. Rather, the purpose of this brief is to provide a policy justification that not only supports the President's actions here but also justifies and supports the ultimate policy goal of protecting our nation from aliens who have the potential and propensity to do harm to our national security interests—a policy that would include "extreme vetting" for Islamic terrorists. And, as argued below, the proper scope and breadth of this national security policy is ultimately for Congress and the President to decide; it is not the province of the judiciary to say otherwise.

ARGUMENT

I. THE CONSTITUTION DOES NOT PREVENT THE PRESIDENT FROM ISSUING ORDERS TO RESTRICT THE ENTRY OF ALIENS WHO HAVE THE PROPENSITY TO HARM THE UNITED STATES NOR DOES IT GIVE THE JUDICIARY THE AUTHORITY TO SAY OTHERWISE.

The President's executive order proclaimed temporary restrictions (the main one, for 90 days) on travel to the United States by the nationals of six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Those countries, along with Iraq (cited in the President's original executive order, but not the revised one), had previously been singled out by Congress and the Obama administration not because they are

Muslim-majority countries, but because (a) the presence or promotion of terrorism in their territories makes their nationals suspect and (b) their anti-Americanism and/or dysfunctional governments render it impossible to conduct background checks on visa applicants.

As an initial matter, what has been called the "travel ban" is not a ban. It is a very *temporary* travel restriction—to last no more than four months, and in some instances just 90 days—while the administration works out new vetting procedures for immigrants, non-immigrant aliens, refugees, and asylum seekers. In imposing the temporary ban, the President cited national-security needs and relied on a statute giving him sweeping authority to issue temporary restrictions.

The primary issue at stake in this litigation, however, is not necessarily the executive order itself. It is vetting. And concurrent with that, it is who gets to decide what "vetting" is necessary to protect our national security. Each executive order was conceived as a temporary step, a "hold in place" measure while the permanent solution, *vetting*, was carefully crafted and ultimately implemented.

As a result of this litigation, however, the temporary step has not only overwhelmed the permanent solution, it has made the permanent solution much more difficult, perhaps impossible, to achieve. Consequently, the scope of this Court's decision here will have an impact on the President's ability to protect our national security interests as he (and Congress) sees fit. At the end of the day, however, it is not the role of the judiciary to intercede in such matters, and this Court should clearly say so.

The lower courts struck down the executive order not because it transgressed the theoretical constitutional rights of lawful permanent-resident aliens, immigrant visa holders, or state universities. The judges struck it down because they have a *policy objection* to the notion of subjecting Muslims to heightened immigration scrutiny. That is, they have a *policy objection* to Government recognition of the nexus between Islamic scripture and terrorism committed by Muslims.

Thus, for the lower courts, the law is not a corpus of constitutional and statutory principles to be applied. It is a pliable weapon for achieving policy goals, enabling will-to-power to masquerade as a "legal process." No tweaking of an executive order nor a permanent vetting solution will overcome that.

Tweaking the executive order is not going to bring the lower courts around in a way that will ultimately permit the President to implement a permanent vetting solution that will in fact promote our national security interests. Indeed, under the current judicial climate and absent clear guidance from this Court, there will likely be no way to craft an order restricting immigration from Muslim countries that will satisfy the lower courts no matter how rife with jihadism the countries are or how manifest it is that their dysfunctional or anti-American regimes make visa background checks impossible. As a result, *Amici* contend that perhaps the most important objective the Court can achieve through this litigation is to put the lower courts back on track and in their proper place, particularly when it comes to policy affecting national security.

Indeed, the parties are not involved in a real, bona fide legal dispute, as if a few modifications in response to the lower courts' express legal objections were going to make their implacable policy objection go away. It was never going to work that way.

The lower courts were never going to grapple with the four corners of the executive order in any serious way, or the undeniable, unambiguous, sweeping legislative authority vested in the President to restrict alien entry into the United States. Nor were the lower courts prepared to genuinely accept the legal reality that non-immigrant aliens outside the United States do not have constitutional rights or the fact that our system makes border security against foreign threats the responsibility of the accountable political branches, not the unaccountable judiciary.

Indeed, what we have seen in the courts below is politics of a most demagogic kind, not legal analysis. Consequently, what the lower courts offer instead of a proper legal analysis is a dark theory of purportedly rabid anti-Muslim bias, cobbled together by parol evidence of campaign-trail rhetoric.

Make no mistake, the ultimate and *legitimate* national security policy goal here is to achieve a screening system that *vets for Islamic radicalism*. However, how do you ever achieve this goal if, in order to satisfy a judiciary that is hostile to your policy objective in the first instance, you are forced to disavow a purpose to subject alien Muslims to heightened scrutiny?

Here is the inescapable fact: The United States is in a defensive war against what is imprecisely called "radical Islam." The war proceeds on two tracks: the kinetic militancy of jihadists, and the cultural challenge of anti-Western, anti-constitutional Islamic law and mores. The ideology that catalyzes both tracks is sharia supremacism. The implementation and spreading of sharia, classical Islam's societal structure and legal code, is the rationale for all jihadist terror and of all the Islamist cultural aggression that slipstreams behind it.

The dividing line is sharia supremacism. On one side of it we find patriotic, pro-American Muslims who are spiritually devout but reject the imposition of sharia on civil and political life. On the other side are the Islamists—the sharia supremacists. The challenge posed by the latter is not merely that some percentage of them are jihadists; it is that as a population—or as enclaves that take hold in the West—they are assimilation-resistant, and their ideological havens will breed the jihadists of the future while stifling the Constitution in the here and now.

The Government must vet for this. Indeed, that is, we suggest, what the majority of the American people want: Muslims who embrace our way of life invited in and Muslims who threaten our way of life kept out. But you cannot achieve that objective without subjecting Muslim aliens to more-extensive inspection (*i.e.*, *extreme vetting*). As noted, the executive order is only the first step toward achieving the ultimate policy objective. And should this first step be removed by the courts, it is most likely that the ultimate policy objective (and thus the security it provides to the American people) will be thwarted by these very same courts. That would be a national tragedy.

Of course, it is unfortunate that innocent, pro-American Muslims have to be put through more paces than other aliens. But it is not quite as unfortunate as the incontestable fact that inadequately vetted Muslims commit mass-murder attacks. While some of the innocent, pro-American Muslims will resent the heightened scrutiny (though many will see the need for it), those who are eventually admitted to our country will be safer because of it—a matter of no small consequence since peaceful Muslims, more than any other group, are killed and persecuted by jihadists and other sharia supremacists. In any event, though, the security burden has to be imposed on someone, and as between Americans and aspiring Muslim immigrants, it is less the responsibility of Americans than of alien Muslims that Islam endorses war and conquest. The United States didn't create this problem.

This is the vetting that the lower courts are determined to prevent. They would have us believe that the Constitution is a suicide pact: that alien Muslims somehow have an Establishment Clause right against enhanced inspection and thus an immigration system that has always vetted against totalitarian political ideologies cannot vet against *this one*, sharia supremacism, because it shrouds itself in religion.

The Government will never accomplish its legitimate policy objective by denying that Islam is at the heart of the matter because that is what the judiciary demands, and it is quite likely that the judiciary knows that. The consequences are grave. The lower courts' rulings against the executive order empower both radical Islam and judicial imperialism.

The combination portends lasting damage to the United States.

The executive order was never an end in and of itself. It is a means to a vital end. That end is a vetting system that enables our security services to distinguish pro-Western Muslims from sharia supremacists. That's the goal. The executive order was conceived as a temporary pause while the vetting system took shape.

As we noted above, in order to install the vetting system we need, the challenge of Islam must be confronted head-on and without apology. That is unavoidable. If this Court decides this case in a way that gives credence to the lower courts' policy objections, then it is over. The proper vetting will never be allowed to take place.

There is a single political battle that must be won in this Court—an unfortunate battle because the courts have usurped for themselves the power to intercede in this policy dispute—in order for the Government to achieve its ultimate policy objective and thus provide for our national security. And that battle is this: The Court must recognize that Islam, while it has plenty of diversity, has a mainstream strain—sharia supremacism—that is less a religion than it is *a totalitarian political ideology* hiding under a religious veneer.

Intellectually, this should not be a difficult thing to do. Sharia supremacism does not accept the separation of religion from political life (which is why it is lethally hostile to reform-minded Muslims). It requires the imposition of classical, ancient sharia-centered law, which prohibits individual liberty (particularly freedom—of religion, of speech, and in economic affairs). It systematically discriminates against women and non-Muslims. It is cruel in its enforcement. And it endorses violent jihad to settle political disputes (since such disputes boil down to whether sharia is being undermined—a capital offense).

What we have just outlined is not a "theory." Quite apart from the fact that sharia supremacism is the subject of numerous books, studies,[2] public-opinion polls, and courtroom prosecutions, one need only look at life in Saudi Arabia and Iran, societies in which the regime imposes sharia. Indeed, one need only look at the State Department's warnings to Americans who travel to Saudi Arabia.[3] These warnings include the following:

> **Criminal Penalties:** You are subject to local laws. If you violate local laws, even unknowingly, you may be expelled, arrested, imprisoned, subject to physical punishments, or even executed. Penalties for the import, manufacture, possession, and consumption of

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[2] Indeed, a relatively recent peer-reviewed study conducted in the United States revealed the statistically relevant correlation between sharia adherence and the propensity to preach and to propagate violent jihad against the West. *See* Mordechai Kedar & David Yerushalmi, *Correlations Between Sharia Adherence and Violent Dogma in U.S. Mosques*, V Perspectives on Terrorism 81-138 (2011), at http://www.terrorismanalysts.com/pt/articles/issues/PTv5i5.pdf (last visited Aug. 10, 2017).

[3] *See* https://travel.state.gov/content/passports/en/alertswarnings/saudi-arabia-travel-warning.html (last visited Aug. 9, 2017).

alcohol or illegal drugs in Saudi Arabia are severe. Convicted offenders can expect long jail sentences, heavy fines, public floggings, and/or deportation. The penalty for drug trafficking is death. . . .

Faith-Based Travelers: Islam is the official religion of the country and pervades all aspects of life in Saudi Arabia.

- Saudi authorities do not permit criticism of Islam, religious figures, or the royal family.
- The government prohibits the public practice of religions other than Islam. Non-Muslims suspected of violating these restrictions have been jailed. Church services in private homes have been raided, and participants have been jailed.
- Muslims who do not adhere to the strict interpretations of Islam prevalent in much of Saudi Arabia frequently encounter societal discrimination and constraints on worship.
- Public display of non-Islamic religious articles, such as crosses and Bibles, is not permitted.
- Non-Muslims are forbidden to travel to Makkah (Mecca) and Medina, the cities where two of Islam's holiest mosques are located. . . .

LGBTI Travelers: Same-sex sexual relations, even when they are consensual, are criminalized in Saudi Arabia. Violations of Saudi laws governing perceived expressions of, or support for, same sex sexual relations, including on social media, may be subject to severe

> punishment. Potential penalties include fines, jail time, or death.

The State Department guidance suggests that readers consult the International Religious Freedom Report produced in 2015 by State's Bureau of Democracy, Human Rights and Labor. *See* https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper (last visited Aug. 9, 2017). This report relates the brutal punishments meted out by some Islamic countries—not jihadists organizations, but governments in Muslim-majority countries—for blasphemy and apostasy. The paragraph on Saudi Arabia is noteworthy:

> In Saudi Arabia, media and local sources reported that the General Court in Abha sentenced Palestinian poet Ashraf Fayadh to death for apostasy in November, overturning a previous sentence of four years' imprisonment and 800 lashes (the death sentence was subsequently overturned in February 2016 and a sentence of eight years' imprisonment and 800 lashes imposed). Officials from the Committee for the Promotion of Virtue and Prevention of Vice initially arrested Fayadh in August 2013, after reports that he had made disparaging remarks about Islam. In a separate incident in January, authorities publicly lashed Raif Badawi 50 times in accordance with a sentence based on his 2013 conviction for violating Islamic values, violating sharia, committing blasphemy, and mocking religious symbols on the Internet.

Nevertheless, what is simple to establish intellectually is difficult as a practical matter in light of the judiciary's willful blindness. The lower courts essentially maintain that Islam may not be parsed into different strains. For legal purposes, they insist it is a monolith that is protected by religious-liberty principles, notwithstanding that sharia supremacists themselves would destroy religious liberty. Perversely, then, they argue that the First Amendment is offended by national-security measures against anti-American radicals who would, given the chance, eviscerate the protections of the First Amendment in favor of sharia.

It is essential that this Court understands the political nature of sharia supremacism. Our law has a long constitutional tradition, rooted in the natural and international law of self-defense, of excluding aliens on the basis of radical, anti-American political ideology. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (upholding deportation orders of former Communist Party members and stating, "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); *see also Reno v. Flores*, 507 U.S. 292, 305-06 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'") (internal quotations and citations omitted). Thus, if sharia supremacism is properly understood to be a political ideology—even a religious political ideology—the

Government has no obstacle to banning alien adherents of a doctrinal cause that both inspires the terrorists of today and, wherever it is allowed to take root, produces the terrorists of tomorrow.

There is no question that we also have a strong commitment to religious freedom. However, if the Court's conclusion is that sharia supremacism equals Islam, equals religion, equals immunity from governmental protective measures, then the Constitution really will have become a suicide pact. We will have decided that anti-constitutional sharia radicals are just as welcome as any other law abiding, patriotic Muslims.

May the Government legally vet for sharia supremacism? Not only is it lawful to engage in such vetting, *see, e.g., id.*, it must do so lest we surrender our national security to the policy choices of unelected judges. To reject such vetting not only will permit trained terrorists to infiltrate refugee populations and thus enter our borders. It would precipitate the resistance of sharia supremacism to Western assimilation, which inevitably leads to the phenomenon of sharia enclaves and to the creation of the conditions in which the jihadists of tomorrow are bred. Europe is experiencing this self-destructive phenomenon now. Vetting is what we absolutely have to do to protect the country. And even then, the threat from the six cited countries is less severe than from other cauldrons of sharia supremacism that are not covered in the executive order. Indeed, as noted, the executive order is simply a first step toward advancing our national security interest: to ensure that adherents to a radical political ideology rooted in Islamic scripture are lawfully kept out of our country.

Unfortunately, as this litigation has exposed, the courts are no longer constrained in the exercise of their power. They are no longer the peer judicial branch of a government of divided powers, in which each branch respects the constitutional authorities and competencies of the others. The courts now claim supremacy over the two political branches. And this was done gradually by dismantling the separation-of-powers doctrine and structure we inherited from the Framers. *See, e.g., INS v. Chadha*, 462 U.S. 919, 946 (1983) ("We have recently noted that '[the] principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

This doctrine always held that the judiciary did not intrude on matters like immigration, national security against foreign threats, and war fighting—matters constitutionally committed to the branches politically accountable to the voters whose lives are at stake. Under the new dispensation, it is not the *Constitution* but the *judiciary* that determines the legitimacy of executive and legislative action in defense of the nation.

When this Court ignores the settled jurisprudence of judicial modesty (what we might call, "know your place"), it permits the lower courts to do the same. Thus did the lower courts in neutering the executive order ignore binding Court precedent, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which prohibits federal courts from second-guessing executive discretion in the immigration context. *See, e.g., id.* at 766 ("The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.") (internal quotations and citation omitted). *Mandel* should have compelled a ruling in favor of Petitioners. Instead, Fourth Circuit Chief Judge Gregory, for example, declared robed oligarchy: There can be no judicial "abdication" in situations where "constitutional rights, values, and principles are at stake." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 587 (4th Cir. 2017). Simply stated, that is a breathtaking claim of power to act any time a judge sees fit, for whatever "value" he or she chooses to vindicate.

And the judges' values tend not to be the values of the electorate. By electing President Trump, the voters demonstrated that they value American national security. The judiciary, however, values a new, aggressive, and indiscriminate protection of religion—provided that the religion is Islam. The voters' value is a trifle. The judges' value is transformed into a right of Muslim immigration, derived from the new, judicially manufactured right of America-based Muslims not to have their self-esteem bruised.

In the final analysis, without taking Islam into account—that is, without sorting anti-American sharia supremacists from pro-American Muslims supportive of the Constitution—there is no way to restrict the entry of Muslims who would increase the threat of jihadism and undermine our society. Consequently, if the courts are permitted to interpose their policy preferences—that is, if the Government cannot vet for sharia supremacism—there is little point in what the Government calls "extreme vetting," which is the goal of the national security policy at stake. And if that is the result, then the courts have, by judicial fiat, become the policymakers for national security, thereby undermining our security and our Constitution in the process.

CONCLUSION

The judgments of the Fourth and Ninth Circuits should be reversed.

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OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAIʻI, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF NEW YORK UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae New York University ("NYU" or the "University") is an institution of higher learning headquartered in New York City, with campuses on nearly every continent. A critical component of NYU's global mission is to create an environment that fosters achievement borne of the free exchange of ideas and information. By welcoming and engaging students and scholars from the broadest range of backgrounds and nationalities, NYU is able to advance that mission.

As a global university centered in New York City—one of the world's most internationally diverse cities—NYU has a vital interest in the proper administration, within constitutional limits, of the immigration laws of the United States. NYU is deeply concerned that the Executive Order issued by the President on March 6, 2017, titled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), like its immediate predecessor, exceeds those limits. If allowed to stand, it would impair unique educational opportunities that NYU is otherwise able to provide, and thus inflict harm on the University, on its constituents and on the community at large. This Court implicitly recognized in its June 26, 2017 decision granting certiorari the importance of relationships between entities like NYU and foreign nationals whom the Executive Order would seek to bar. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) ("An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded.").[1]

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[1] The parties consent to the filing of this brief, which authorizes NYU to file it pursuant to Sup. Ct. R. 37. Petitioners have

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Thousands of prospective students apply to NYU every year, seeking the opportunity to study at one of the most internationally diverse universities in the world. At the core of NYU's institutional mission are the twin aims of providing an exceptional academic experience for its students and fostering world-class international scholarship. NYU has invested significant resources in developing an environment in which its diverse student body and faculty can thrive, for the benefit of the academic community, the United States, and the world. Implementation of the Executive Order would significantly undermine these efforts.

By obstructing the entry of international students, faculty and other scholars into the United States based solely on their having come from one of the Muslim-majority countries singled out for adverse treatment in the Executive Order—without any reason to believe that these individuals are involved in any terrorist activity—the Order would gratuitously and unlawfully encumber NYU's ability to conduct its many international programs, which rely on input from faculty and students from the affected countries; impair NYU's ability to transmit its strongly-held values abroad; and obstruct its ability to provide to all of its students the educational benefits that

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filed a blanket letter of consent. Respondents' consent is being filed herewith. No counsel for a party authored this brief in whole or in part, and no party, or counsel for a party, contributed money intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its constituents or its counsel contributed money intended to fund the preparation or submission of the brief.

flow from a fully diverse student body and faculty. For these reasons, among others, this Court should find that the Executive Order exceeds the President's statutory authority under the INA and violates the Constitution, and affirm the decisions of the courts below.

ARGUMENT

I. A Diverse International Community is Critical to NYU's Identity and Mission.

NYU is a "Global Network University," with campuses around the world, including in Africa, Asia, Europe, North America, and South America.[2] These campuses offer all NYU students a range of multi-disciplinary opportunities for research, teaching and scholarly collaboration. In addition to developing its own campuses, NYU has partnered with numerous schools worldwide both to create educational opportunities for international students and scholars,[3] and to expose its domestic students to the vast wealth of experience and knowledge that can be gained by traveling, researching and studying abroad.[4]

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[2] *See* NYU, *The Global Network, available at* https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-university/organization-and-administration/the-global-network.html.

[3] *See Global Academic Partnerships and affiliations*, NYU (March 2, 2016), *available at* https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations.html (describing global partnerships and affiliations with schools for the humanities, business, medicine, sociology, anthropology, and the arts, located in Accra, Berlin, Buenos Aires, Florence, London, Madrid, Paris, Prague, Sydney, Tel Aviv, and Washington D.C.); *see also Update on Faculty Engagement and Academic Development at the Global Sites (6/11/15 Memo)*, NYU (June 11, 2015), *available at* https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations/memos/

Attracting to the United States international students and scholars from a wide variety of backgrounds is intrinsic to NYU's success as an educational institution. To that end, NYU has made it a priority to "embrace diversity among faculty, staff and students to ensure a wide range of perspectives, including international perspectives, in the educational experience."[5] Its efforts have been highly successful—in 2015-2016, NYU hosted more international students and scholars than any other university in the United States—approximately 15,000 international students and more than 1,200 international scholars,[6] constituting more than a third of NYU's graduate student population, and nearly a fifth of its undergraduate population. The most creative, talented, and industrious members of communities all over the world have at one time called NYU home.[7]

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faculty-engagement-june-2015.html (detailing the growth of new collaborative programs with faculty, students and departments at partnership and affiliate schools).

[4] *See, e.g.*, NYU International Exchange Program, NYU, https://www.nyu.edu /academics/studying-abroad/exchange/internationalexchange.html; Stern IBEX (International Business Exchange), NYU, https://www.nyu.edu/academics/studying-abroad/exchange/stern-ibex-international-business-exchange.html.

[5] NYU Mission Statement, *available at* www.nyu.edu/about.

[6] NYU Office of Global Services, *Annual Report: September 1, 2015 - August 31, 2016*, *available at* http://www.nyu.edu/content/dam/nyu/globalServices/documents/annualreport/annual%20report.pdf.

[7] Many NYU alumni from foreign countries have gone on to become leaders in their communities. To take but a few examples,

NYU's presence in New York City has itself played an integral role in the University's ability to achieve its international mission, proudly "tak[ing] its name and spirit from one of the busiest, most diverse and dynamic cities of all."[8] Millions of immigrants have come to New York as the first step toward making a life in the United States,[9] believing that the Statue of Liberty in fact welcomes the "huddled masses yearning to breathe free . . . ."[10] New York is home to millions of foreign-born residents—more than a third of the City's population.[11] The City has long served as a hub of international commerce, cultural exchange

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NYU alumni Shimon Peres, the ninth President of Israel, and former Egyptian vice president Mohammed Mustafa ElBaradei, both won the Nobel Peace Prize for their contributions to the region targeted by the Executive Order. Working with fellow NYU School of Medicine alumnus Jonas Salk, Albert Sabin developed oral polio vaccines that played a key role in substantially eradicating the disease. More recently, Eric Richard Kandel, who also attended NYU's School of Medicine, was awarded a Nobel Prize in Physiology or Medicine for discoveries that paved the way to the modern understanding of memory formation.

[8] NYU Mission Statement, *available at* www.nyu.edu/about.

[9] From 1892 to 1954 alone, over twelve million immigrants came to the United States through Ellis Island. *See* Ellis Island History, www.libertyellisfoundation.org/ellis-island-history.

[10] Emma Lazarus, "The New Colossus," Liberty State Park (1883) *available at* http://www.libertystatepark.com/emma.htm (last accessed September 5, 2017).

[11] Thomas P. DiNapoli, "The Role of Immigrants in the New York City Economy," New York State Comptroller Report 7-2016 (Nov. 2015), *available at* https://osc.state.ny.us/osdc/rpt7-2016.pdf ("Nearly three-quarters of the 4.4 million immigrants in New York State live in New York City . . . .").

and diplomacy. Its international influences are woven into the fabric of everyday life experienced by NYU's students and scholars,[12] and its spirit infuses and amplifies NYU's culture of embracing diversity.

NYU's mission and values are embodied in the words of its current president, Dr. Andrew Hamilton, himself an immigrant. In a letter to the NYU community addressing the January 27, 2017 Executive Order that preceded the Executive Order now at issue in these proceedings, Dr. Hamilton articulated the importance of free movement across borders in pursuit of scholarship and the harm arising from its unwarranted obstruction:

> As a scientist who studied and worked in four countries before becoming a citizen of the U.S., I know how important it is to be able to move across borders in peaceful pursuit of one's scholarship. I know, too, more than most given my background and my field, how much goodwill the U.S. earns for itself through the openness of its education system and how widely those who study here can spread American values.

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[12] *Students Share International Experiences at Global Engagement Symposium*, NYU Arts & Liberal Studies (March 20, 2015), *available at* http://liberalstudies.nyu.edu/content/nyu-as/liberalstudies/news_and_events/students-share-international-experiences-at-global-engagement-sy.html ("[Students] presented on experiences that included installing a solar electricity system in a Nicaraguan village, independent research into NYU London's history as the headquarters of a musicians' club, and writing a policy report on asylum seekers in Tel Aviv.") (One student commented: "One of the main reasons I decided to study at NYU was the opportunity for global experiences.").

> And I know, as well, that these developments are not just a matter of disrupted educational plans or lost opportunities or even damage to the academic enterprise; beyond all that, this order harms one of the most admired and cherished of American principles—religious non-discrimination itself.[13]

II. The Executive Order Significantly Harms NYU and Its Constituents.

By indiscriminately targeting individuals from the Muslim-majority countries of Iran, Libya, Somalia, Sudan, Syria, and Yemen without any basis to believe that such individuals pose the slightest threat to the national security of the United States, the Executive Order improperly compromises the diversity that is central to NYU's identity and mission. Approximately 120 NYU students and ten scholars at the New York City campus alone come from the six Muslim-majority countries specified in the Executive Order. Many others from those countries would be discouraged or prevented by the Executive Order from joining them at NYU.

Courts have long emphasized the importance of promoting diversity and freedom in educational environments, recognizing that, due to the classroom's vital role as a "marketplace of ideas," constitutional protections are "nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). "The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* (internal citation and quotation marks omitted).

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[13] Letter from Dr. Andrew Hamilton to NYU Community (Jan. 29, 2017), *available at* http://www.nyu.edu/about/leadership-university-administration/office-of-the-president/communications/the-recent-executive-order-on-immigration.html.

Diversity similarly "helps break down racial stereotypes, and enables [students] to better understand" those with different backgrounds. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). As a result, diversity helps impart the "skills needed in today's increasingly global marketplace" by "expos[ing] [students] to widely diverse people, cultures, ideas, and viewpoints." *Id.*; *see also Keyishian*, 385 U.S. at 603. Recognizing these benefits, the Supreme Court has held that the Constitution protects a school's "right to select those students who will contribute the most to the 'robust exchange of ideas . . . .'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) (recognizing compelling governmental interest in "the educational benefits that flow from a diverse student body"); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (recognizing a school's ability to assert harm on behalf of its students, including harm to the university's ability to accomplish its global mission).

By its very nature and goals, implementation of the Executive Order would threaten that constitutionally protected diversity. *See Fisher*, 133 S. Ct. at 2417; *Grutter*, 539 U.S. at 328 (observing that a school's "educational judgment that such diversity is essential to its educational mission is one to which we defer"); *Bakke*, 438 U.S. 265 at

313; *see also Bery v. City of N.Y.*, 97 F.3d 689, 694 (2d Cir. 1996) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2948, at 440 (1973)).

The harm that will flow from the Executive Order is in any case manifest. By targeting the populations of six Muslim-majority nations for exclusion from the United States, the Executive Order will hinder NYU's efforts to expose international students and scholars to a broad array of ideas and influences. This cross-cultural exchange buttresses key democratic traditions, such as free speech, a free press,[14] free and fair elections, and freedom of assembly.[15] By fostering a culture of international exchange and dialogue, rather than fear and hatred, NYU's international programs thus combat radicalization.[16] Reducing this cross-cultural exchange will deprive NYU of opportunities to share those key democratic traditions with students from abroad.[17] And in doing so, the Executive Order will diminish the global reach of American universities and risk robbing the nation, and the world, of their potential contributions.

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[14] Indeed, many NYU graduates of the Near Eastern Studies program have gone on to be respected journalists, helping shape the thoughts for millions of readers about life and culture in the affected regions. Jared Malsin, who graduated from NYU's Near Eastern Studies in 2010, is *TIME* magazine's Middle East bureau chief, and former West Bank and Gaza Palestinian news agency Ma'an chief English editor. *See About – Jared Malsin*, *available at* http://jaredmalsin.com/about.html. Habib Battah, who graduated from NYU's Near Eastern Studies and Global Journalism program in 2010, is a prominent journalist in *Al Jazeera* covering terrorism in the Middle East among other events. *See* Habib Battah Profile, Al Jazeera, *available at* http://www.aljazeera.com/profile/habib-battah.html.

[15] *See, e.g.*, United Nations Security Council Resolution 2178, adopted in September 2014, http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf (highlighting the need for "quality education for peace that equips youth with the ability to engage constructively in civic structures and inclusive political processes").

Beyond its impact on the NYU community's ability to disseminate important shared values, the Executive Order threatens NYU's own diverse international community, harming the University's current and prospective students, scholars, and faculty. In addition to the day-to-day cultural exchange that occurs at a diverse university,

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[16] *See, e.g.*, *Preventing Violent Extremism Through Promoting Inclusive Development, Tolerance and Respect for Diversity*, United Nations Development Programme 11 (2016) (identifying as one strategy to prevent violent extremism "[p]romoting respect for human rights, diversity and a culture of global citizenship in schools and universities"); *see also* Marta Mikilikowska, "Development of anti-immigrant attitudes in adolescence: The role of parents, peers, intergroup friendships, and empathy," British Journal of Psychology (2017), *available at* http://onlinelibrary.wiley.com/doi/10.1111/bjop.12236/abstract (showing that adolescents with immigrant friends are "less affected by parents and peers' prejudice than youth without immigrant friends").

[17] *See, e.g.*, *Study Away in the US and Around the World*, Studying Abroad | NYU, *available at* https://www.nyu.edu/academics/studying-abroad.html (video testimonials of NYU students studying abroad) ("Regardless of where you go, you're going to experience, you know, a beautiful city and a beautiful place, you are going to meet new people, you are going to have new experiences and opportunities, you are going to grow personally, you are going to grow academically, and you're going to come back a better person.").

NYU has many programs that facilitate the understanding of other cultures, such as the Hagop Kevorkian Center ("the Center"), which focuses on Near Eastern studies and was created "to foster the interdisciplinary study of the modern and contemporary Middle East and to enhance public understanding of the region."[18] To achieve this goal, it hosts events exploring topics such as "current events and policy issues relating to the Middle East,"[19] some of which include discussions relating specifically to the six countries affected by the Executive Order.[20] The Center also collaborates with "nearly 100 teachers from public and private schools across the New York metropolitan area to participate in Center-sponsored workshops on the Middle East," which allow Center-affiliated faculty to "share expertise on the Middle East with journalists and government agencies on a regular basis and discuss current events and policy issues at university and community events."[21] These programs are vital to public awareness, which is crucial to NYU's ability to serve as an educational institution "fitting for all and graciously open to all."[22]

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[18] *About*, Hagop Kevorkian Center for Near Eastern Studies, NYU, *available at* http://neareaststudies.as.nyu.edu/page/about.

[19] *Id.*

[20] *See* http://neareaststudies.as.nyu.edu/page/upcomingevents/. For example, a discussion about misrepresentation of Muslims in western and European media is planned for September 18. *See Media, Misrepresentation, and the Middle East: A Conversation with the Editors of Mufta.org*, New York University, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/muftah.html. A documentary about Iran's first woman filmmaker will be shown on September 28. *See* Shahrzaad's Tale/Film Screening and Discussion with Shahin Parhami and Golbarg Rekabtalaei, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/IranianStudiesInitiative1.html. Hossein Bashiriyeh, key driver of democratic reform in Iran, will host a talk on October 12. *See In Conversation with Hossein Bashiriyeh*, New York University, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/IranianStudiesInitiative11.html. A discussion of *We Crossed a Bridge and it Trembled: Voices from Syria*, a book of testimonials of native Syrians' experience of the Arab Spring, will take place on October 24. *See We Crossed a Bridge and it Trembled: Voices from Syria*, New York University, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/voicesfromsyria.html.

From the joint master's degrees offered by the Center, to the graduate programs offered by the Middle Eastern and Islamic Studies program, the value of NYU's educational opportunities is substantially predicated on the quality and diversity of its faculty and students. The Executive Order would interfere with numerous on-campus programs like these, which are central to creating an environment of intellectual and cultural exchange, and thus heightened international awareness and understanding, at a time when such understanding is more important than ever.[23]

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[21] *Id.*

[22] *See* NYU Mission Statement, *available at* www.nyu.edu/about.

[23] *See, e.g.*, Nassir Abdulaziz Al Nasser (High Representative for United Nations Alliance of Civilizations), *UNOAC | Remarks | Parliamentary Assembly of the Mediterranean* (February 23, 2017), *available at* https://www.unaoc.org/2017/02/remarks-11th-plenary-session-parliamentary-assembly-of-the-mediterranean/ (commenting on the rise "of violence and xenophobia against minorities" and remarking that "inclusiveness has become a prerequisite for peaceful society" when it comes to "migration laws," and that "[p]romoting and strengthening dialogue is an essential tool to prevent and defeat violent and extremist ideologies").

Finally, all students suffer when the diversity of ideas and backgrounds to which they are exposed is diminished. *See* ***Fisher***, 133 S. Ct. at 2417. Unchecked, the Executive Order will have a direct and immediate impact on the large number of international students and scholars who wish to become affiliated with NYU or to participate in NYU academic conferences in their fields.[24] Prospective students who have yet to enroll will be delayed or entirely prevented from beginning their academic careers.

The Executive Order would deny students and scholars of vast untapped potential the success of which they are capable, harming them, the NYU community, and ultimately the world as a whole. For example, Shadi Heidarifar, a prospective graduate student who was accepted to schools worldwide but wanted to study in the United States, was not able to attend classes at NYU with worldwide leaders in her field.[25] Ms. Heidarifar has written that because of the January 27, 2017 Executive Order, her "entire future [was] destroyed in one second."[26] After saving money for the application fees "that a whole family could live [on] for a month," Ms. Heidarifar's dreams of studying at NYU were shattered.[27] Ms. Heidarifar is now enrolled at the University of Western Ontario, in Canada.[28] As a direct result of the Executive Order, universities like NYU will be deprived of diverse, capable students who have the potential to contribute to the universities they attend and the world as a whole.

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[24] "MEIS Statement on Executive Order to Limit Entry of Middle Eastern Refugees and Immigrants," MEIS | New York University, *available at* http://meis.as.nyu.edu/object/statement_executive_order.

[25] *See* Samantha Michaels, *I'm an Iranian Woman Whose Dream Is to Study in America. Here's My Message for Trump.*, Mother Jones (Jan. 29, 2017), http://www.motherjones.com/politics/2017/01/iranian-student-trump-immigration ("We Iranian students strongly believe that diversity in ethnicity, race, religion, and color is one of the greatest strengths of the United States. And Trump's Muslim ban will destroy this.").

[26] *Id.*

An integral part of the "business of a university [is] to provide that atmosphere most conducive to speculation, experiment, and creation." *Bakke*, 438 U.S. at 305 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)). To preserve for NYU and its students and scholars the constitutionally protected benefits of diversity and the free exchange of ideas, and to eliminate the discriminatory exclusion from the United States of persons from Muslim-majority countries, this Court should affirm the decisions of the courts below.

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[27] *Id.*

[28] Sana Malik, "'I'm accepted here.' Meet 4 students choosing Canada post Brexit and Trump," CBC/Radio-Canada (June 15, 2017) *available at* http://www.cbc.ca/2017/i-m-accepted-here-meet-4-students-choosing-canada-post-brexit-and-trump-1.4158965 ("The travel ban made me feel I would not get a visa for the U.S. on time. Instead, I will start my MA at the University of Western Ontario in September . . . . I hope every nation and government understands that people in the six nations and Iran are not involved in terrorism. We are not a threat to the national security of any country.").

III. The Executive Order Has the Same Unlawful Policy Outcomes as Its Predecessor, In Violation of the Constitution and the Immigration and Nationality Act.

The Executive Order recites that its aim is to "replace" Executive Order 13769, signed January 27, 2017, and respond to judicial orders granted against the earlier Order by "exclud[ing] from the suspensions categories of aliens that have prompted judicial concerns and . . . clarif[ying] or refin[ing] the approach to certain other issues or categories of affected aliens."[29] The Executive Order made various changes to the practices to be implemented under the prior Order, including removing Iraq from the list of countries whose nationals are subject to the 90-day suspension of unrestricted entry.[30] But it nonetheless suffers from many of the same defects as the prior Order, and is animated by the same unlawful, discriminatory intent.

A. The Executive Order Violates the Establishment Clause.

Because it discriminates against individuals based on their religion and reflects a clear animus towards Muslims, the Executive Order violates the Establishment Clause of the Constitution. The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005)

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[29] Executive Order § 1(i).

[30] *See id.* § 2(c).

(considering the "historical context" of the government act and the "specific sequence of events leading to [its] passage") (internal citation omitted).[31]

The administration would have the Court apply the highly deferential standard articulated in *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), and *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015), that only a "facially legitimate and bona fide reason" need be offered to justify certain federal immigration policies. *Mandel*, 408 U.S. at 769. Application of that standard was rejected by the Ninth

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[31] For similar reasons, the Executive Order violates the Constitution's Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Fourteenth Amendment's equal protection clause to the federal government through the Fifth Amendment). Discrimination against a protected class on the basis of overt animus is the most obvious and fundamental abuse of government authority against which the Equal Protection Clause was created to protect. *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."). As such, classifications based on religion or national origin are scrutinized to the highest degree. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (national origin); *Larson*, 456 U.S. at 244 (religion). A law may fail to withstand scrutiny even if discrimination is not "the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (internal citation omitted). "[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Hassan v. City of New York*, 804 F.3d 277, 290 n.2 (3d Cir. 2015) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in the judgment) (alterations in original, internal quotation marks omitted)).

Circuit in its decision below.[32] *See Hawaii v. Trump*, 859 F.3d 741, 769 n.9 (9th Cir. 2017).

Even assuming the *Mandel* standard did apply here, it would not foreclose judicial inquiry into improper purpose. Though deferential, *Mandel* nonetheless requires that there be a "bona fide" policy justification. As the Fourth Circuit majority opinion recognized, determining whether a justification is bona fide in turn requires consideration of the purpose of the challenged state action. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590 (4th Cir. 2017); *see also* Bona Fide, Black's Law Dictionary 223 (4th rev. ed. 1968) ("bona fide" reason is given "sincerely," "honestly," and "with good faith."). There were no allegations in *Mandel* that the reason to exclude the communist speaker was not bona fide. Accordingly, that case dealt solely with facial legitimacy. 408 U.S. at 755, 768 n.7 (noting that all communists were subjected to the same provision). And Justice Kennedy's controlling concurrence[33] in *Din* noted that "an affirmative showing of bad faith," when alleged with sufficient particularity, as here, could overcome deference to a governmental decision. 135 S. Ct. at 2141.[34] This approach also comports with more recent applications of *Mandel* and *Din*, where courts have admonished claimants for failing to allege bad faith—comments that would be non sequiturs if no such allegation could overcome deference. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1173 (9th Cir. 2016) (rejecting claim of racial discrimination because the plaintiff did "not plausibly establish that the decision . . . was made on a forbidden racial basis"); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide").

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[32] The *Mandel* standard has previously been applied only when reviewing an executive officer's decision to deny a visa. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). As the Ninth Circuit recognized, *Hawaii*, 859 F.3d at 769 n. 9 (9th Cir. 2017), *Mandel* is applicable only when the challenge is to claimed *misuse* of delegated authority, *Mandel*, 408 U.S. at 770 ("We hold that when the Executive exercises this power . . . *negatively*," "courts will not look behind the exercise of that discretion") (emphasis added), or when there is a constitutional challenge to a visa denial on the basis of congressionally enumerated standards, *id.* at 769-70—not when the challenge is to action *exceeding* delegated authority. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (addressing merits of claim that executive order exceeded authority under the INA without applying *Mandel*).

As described more fully below, the Executive Order clearly discriminates against Muslims. *See* Section C, *infra*. That Petitioners are able to concoct a purportedly bona fide justification for its existence does nothing to change this result. Even assuming the high bar of *Mandel* applies here, the evidence before the Court demonstrates that bar has been met and exceeded.

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[33] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

[34] Although *Din* recognized that an affirmative showing of bad faith could nullify an executive action, the facts of that case did not address that question, as there was no allegation of bad faith, and the Court recognized that that Petitioner's admission that he "worked for the Taliban" provided "at least a facial connection to terrorist activity." 135 S. Ct. at 2141.

B. The Immigration and Nationality Act Limits Executive Authority to Engage in Discriminatory Conduct.

The Executive Order, like its predecessor, contravenes the letter and intent of the Immigration and Nationality Act of 1965 (the "INA"), exceeding the scope of presidential authority under that statute. The INA was enacted at the height of the civil rights movement, to dismantle the then-current system of national-origin quotas, which the nation's leaders believed to be "contrary to our basic principles as a nation."[35] The INA's legislative history shows that its intent was to "remove from our law a discriminatory system of selecting immigrants that is a standing affront to millions of our citizens."[36] Section 202 of the INA effectuates that intent by prohibiting discrimination in admissions on the basis of national origin. *See* 8 U.S.C. § 1152(a)(1)(A) (with limited statutory exceptions, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."); *see, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469 (D.C. Cir. 1995) (holding that Congress, in enacting Section 202, "unambiguously directed that no nationality-based discrimination shall occur").

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[35] 111 Cong. Rec. 24,225 (1965) (statement by Senator Edward M. Kennedy). *See also id.* at 21, 778 (statement of Representative Paul Krebs that immigration rules based on national origin were "repugnant to our national traditions," and that "we must learn to judge each individual by his own worth and by the value he can bring to our Nation").

[36] Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, on H.R. 7700 and 55 Identical Bills, 88th Cong. 901-02 (1964), reprinted in 10A Oscar Trelles & James Bailey, Immigration and Nationality Acts: Legislative Histories and Related Documents, doc. 69A (1979) 410 (remarks of Attorney General Robert Kennedy).

The President's authority under INA Section 212(f) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," *see* 8 U.S.C. § 1182(f), is subject to at least three important limitations. *First*, any presidential proclamation under Section 212(f) requires a legitimate finding that "the entry of [the suspended] aliens or . . . class of aliens into the United States would be detrimental to the interests of the United States." *Id. Second*, Section 212(f) is circumscribed by Section 202's express and later-enacted prohibition against discrimination on the basis of national origin.[37] And *third*, Section 212(f) is a limited delegation of Congress's power to make immigration laws. *See generally* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (the formulation of immigration policies is

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[37] When there is a conflict between two provisions of a statute, the provisions should, whenever possible, be construed to give effect to both provisions. *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must "fit, if possible, all parts into an harmonious whole.").

"entrusted exclusively to Congress"). Since it is derived from Congressional authority, Section 212(f)'s delegation of authority — like Congress's power itself — is necessarily circumscribed by the Constitution.[38] *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress's power to create immigration law is "subject to important constitutional limitations"); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (the Court declined to find in the Secretary of State's facially unlimited authority to set rules governing the grant and issuance of passports an "authority" that would "trench . . . heavily" on fundamental rights, overturning the Secretary's denial of two passport applications as ultra vires); *United States v. Witkovich*, 353 U.S. 194, 199 (1957) (the facially unlimited power of the Attorney General to obtain, *inter alia*, any information from any alien subject to a final order of deportation was implicitly limited to certain relevant topics, where the broad reading proposed by the government would call into question the statute's constitutionality, and the context and legislative history of the statute did not provide unambiguous evidence that Congress intended to give the Attorney General unbridled authority). Because, as the Executive Order demonstrates, actions taken pursuant to an overbroad construction of Section 1182(f) authority can encroach on core constitutional values, presidential authority under INA Section 212(f) is necessarily subject to implicit constitutional limitations, in addition to the explicit limitations in Section 212(f) itself and in Section 202.[39]

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38. Section 202's prohibition of discrimination on the basis of national origin further limits Congress' delegation of authority to the President in INA Section 215(a)(1). *See* 8 U.S.C. § 1185(a)(1).

39. In fact, the balance of Section 212—particularly subsection (a)(1–10), which define "[c]lasses of aliens ineligible for visas or

As shown below, the Executive Order exceeds the bounds of Presidential authority under INA Section 212(f) by violating the Constitution, Section 202's unambiguous prohibition against discrimination on the basis of national origin, and INA Section 212(f)'s own requirement that an exercise of presidential authority under that section be justified by a legitimate finding that the admission of a suspended class of individuals is against the interests of the United States.

C. The Executive Order's Text and History Reveal that the Executive Order Violates the Constitution and the INA.

The Executive Order violates both the Constitution and the INA because it arbitrarily singles out six Muslim-majority countries as targets for its ban. This invidious discrimination is apparent from the text of the Executive Order itself, its history, and the unsubstantiated pretext offered to support it.

The plain text of the Executive Order's 90-day suspension of entry by nationals of the six countries discriminates against Muslims on the basis of their religion because it singles out these Muslim-majority countries without a plausible basis for doing so. The text of the order further violates the Constitution's Establishment

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admission" including on the basis of "prepar[ation] or plan[ning of] a terrorist activity," engagement in activities that would have "potentially serious adverse foreign policy consequences for the United States," or "[a]ssociation with terrorist organizations"—further suggests that Congress did *not* intend for the President to be able to use his Section 212(f) authority to discriminate on the basis of national origin, even in the purported or actual name of national security. *See* 8 U.S.C. § 1182.

Clause and Equal Protection Clause, as well as Section 202's prohibition against discrimination based on national origin. The President's denial that the Executive Order is a Muslim ban is belied by his own repeated characterization of the ban as well as by its impact: each of the targeted countries has a Muslim population of 90% or more.[40] Three of the countries—Iran, Somalia, and Yemen—have Muslim populations of more than 99%.[41]

The Executive Order's disparate impact on Muslims betrays its unconstitutionality.[42] But further, the Executive Order overtly discriminates against Muslims by exploiting and perpetuating unfounded and harmful stereotypes. The Order invokes "honor killings"[43] and "radicalized" foreign nationals.[44] These terms are not neutral, but carry very specific meanings aimed at a faith "singled out for discriminatory treatment." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 538 (1993) (holding that use of allegedly neutral terms "sacrifice" and "ritual" were evidence of singling out a particular religion in violation of the Establishment Clause).[45]

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[40] Pew Research Ctr., "The Global Religious Landscape: a Report on the Size and Distribution of the World's Major Religions as of 2010," 47-50 (2012), https://goo.gl/HVoVJI (Libya is 96.6% Muslim, Syria 92.8%, and Sudan 90.7%).

[41] *Id.*

[42] *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (disparate impact, while not determinative, "may for all practical purposes demonstrate unconstitutionality [under the Equal Protection Clause] because" in some cases the challenged action is "very difficult to explain" in terms not reflecting unconstitutional discriminatory intent).

[43] Executive Order § 11(iii).

[44] *Id.* § 11(ii).

The call for public reporting of "honor killing" is a thinly-veiled attempt to paint Muslim men as domestic abusers.[46] This blatant stigmatization of Muslims runs afoul of the Establishment Clause and Equal Protection Clause. *See Hialeah*, 508 U.S. at 538; *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."). It also reveals how the Executive Order does not satisfy INA Section 212(f)'s requirement of a "legitimate finding" that the admission of a suspended class of individuals is against the interests of the United States. Domestic violence is a serious problem for people of all faiths and backgrounds, not just those from the six Muslim-majority countries.[47]

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[45] That the language of the Executive Order is targeted against people of the Muslim faith becomes even more evident when one considers the leaked draft of the January 27, 2017 Executive Order, which included the phrase "violent religious edicts"—a transparent attempt to disparage Muslims as barbaric. Daniel M. Kowalski, *Executive Order: Protecting the Nation from Terrorist Attacks by Foreign Nationals – White House (Draft, Unsigned, Undated)*, Lexis Nexis Legal Newsroom (Jan. 25, 2017), *available at* https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2017/01/25/executive-order-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals-white-house-draft-unsigned-undated.aspx?Redirected=true ("We cannot . . . admit into our country . . . those who would place violent religious edicts over American law.").

[46] Executive Order § 11(iii) (calling for the Attorney General "to collect and make publicly available . . . information regarding the number and types of gender- based violence against women, including so-called 'honor killings,' in the United states by foreign nationals"); *see also* Leti Volpp, *Trump's mention of 'honor killings' betray the truth of his 'Muslim ban'*, The Hill (Feb. 22, 2017), *available at* http://origin-nyi.thehill.com/blogs/pundits-blog/immigration/320632-trumps-mention-of-honor-killings-betray-the-truth-of-his ("Honor killings stand in for the idea of Muslim barbarity. Their invocation in the executive order helps make apparent that the 'foreign nationals' whose entry poses a terrorist threat are Muslim."); Emma Green, Trump's 'Honor Killing' Tracking System Could Exacerbate Domestic Violence, The Atlantic (Mar. 7, 2017), *available at* https://www.theatlantic.com/politics/archive/2017/03/honor-killings-trump/518766/ ("The term itself is loaded: It suggests that homicide can be religiously justified. But "'honor killing' has nothing to do with Islam," argued Aisha Rahman, the executive director of Karamah, a research and advocacy organization that works on issues of gender

In addition to being reflected in its text, the Executive Order's unconstitutional and illegal invidious discrimination is confirmed by a review of its history, including statements made by the President and others regarding its purposes. *See Hawai'i v. Trump*, No. 17-

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equity in Islam. "In Islamic law, there's nothing that's even called 'honor killing.'").

[47] *See, e.g., National Intimate Partner and Sexual Violence Survey 2010 Summary Report*, National Center for Injury Prevention and Control Division of Violence Prevention 40 (2010), *available at* https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf (finding domestic violence occurs against intimate partners across all races and ethnicities). Particularly when one takes into account the frequency of hyper-masculinity killings, "honor killings" are more a matter of verbiage than a culturally distinct category of crime. *See* Soraya Chemaly, Mass Killings in the US: Masculinity, Masculinity, Masculinity, The Huffington Post, Blog (Oct. 5, 2015), *available at* http://www.huffingtonpost.com/soraya-chemaly/mass-killings-in-the-us-w_b_8234322.html (noting that "[d]uring the last 30 years, all but one of the mass murders in the U.S. was committed by men, 90 percent of whom were white," and finding that mass killings disproportionately target women and are motivated partially by anti-feminist sentiment).

00050, 2017 WL 1167383, at *6 (D. Haw. Mar. 29, 2017) (Where the "'historical context' and the 'specific sequence of events leading up to' the adoption of the challenged Executive Order [is] as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context.") (internal citation omitted). Although the current Executive Order was supposedly written to address the illegalities and deficiencies of its predecessor, White House Advisor Stephen Miller has admitted that the changes "are mostly minor, technical differences," and "[f]undamentally, [it will be] the same, basic policy outcome for the country."[48] Much like the original,[49] the revised Executive Order is steeped in a background of the President's discriminatory statements that, without any evidence whatsoever, perpetuated the stereotype that people of Muslim faith are largely terrorists seeking to harm the United States.[50] President

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[48] Taylor Link, *Stephen Miller admits the new executive order on immigration ban is same as the old*, SALON (Feb. 22, 2017), *available at* http://www.salon.com/2017/02/22/stephen-miller-admits-the-new-executive-order-on-immigration-ban-is-same-as-the-old/.

[49] *See, e.g.*, *Washington*, 847 F.3d at 1167 ("statements by the President about his intent to implement a 'Muslim ban'" and evidence that the original Executive Order represented the effectuation of that intent undermined the Government's likelihood of success on appeal of injunction of the original Executive Order).

[50] *See, e.g.*, Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA Today (May 8, 2017), *available at* https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/ (campaign website calling for a "shutdown of Muslims entering the United States" taken down May 8, 2017); Interview of Donald Trump on CBN News, YouTube (Apr. 11, 2011), https://m.youtube.com/

Trump has repeatedly called for: shutting down mosques in the United States,[51] suspicionless surveillance of Muslims in mosques,[52] a registry for all practicing Muslims,[53] racial profiling of all Muslims,[54] and a total ban of Muslims coming to the United States.[55]

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watch?v=fWzDAvemJG8 (arguing that there is a "Muslim problem" in the United States, and suggesting that the Koran teaches a "very negative vibe" and "tremendous hatred").

[51] *See, e.g.*, Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), http://www.politico.com/story/2015/11/trump-close-mosques-216008.

[52] *See, e.g.*, Lauren Carroll, *In Context: Donald Trump's comments on a database of American Muslims*, Politifact (Nov. 24, 2015), http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/.

[53] Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015), *available at* http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716. On December 21, 2016, more than a month after being elected President, Mr. Trump responded to a question about whether he was rethinking his plan for a Muslim registry by stating: "You know my plans all along, and I've been proven to be right." Video, Trump: 'You've known my plans' on proposed Muslim ban, Wash. Post (Dec. 21, 2016), *available at* https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html.

[54] Transcript, Face the Nation, CBS News (Jun. 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/.

[55] Ed Pilkington, *Donald Trump: Ban All Muslims Entering US*, The Guardian (Dec. 7, 2015), *available at* https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting. Petitioners'

The administration's attempts to cloak this discriminatory intent in neutral language are unavailing.[56] In July 2016, then-candidate Trump telegraphed his aim to disguise the language of the Muslim ban to pass legal muster, when he noted that he would henceforth refer to the Muslim countries on the basis of geographic location rather than religious majority, because "[p]eople were so upset when [he] used the word Muslim."[57] Rather

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assertion that these comments like these are a product of a candidate running for office rather than a President who took an oath to uphold the constitution is belied by the fact that these comments have continued as recently as August, 2017. *See, e.g.*, Donald J. Trump, Twitter (Aug. 18, 2017), https://twitter.com/realDonaldTrump/status/898531481185689600 ("Radical Islamic Terrorism must be stopped by whatever means necessary!"); *see also infra* pp. 20-21.

56. Petitioners' contention (Petitioners' Mem. at 48) that the judicial branch lacks any power to review the national-security conclusions or "predictive judgments" of the President, and should therefore ignore the weight of evidence that reveals the discriminatory intent that motivated the Executive Order, has no foundation in law and would be illogical here. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (the "political branches" lack "the power to switch the Constitution on or off at will"); *Zadvydas*, 533 U.S. at 695 (2001) (emphasizing that the power of the political branches over immigration "is subject to important constitutional limitations"); *INS v. Chadha*, 462 U.S. 919, 943 (1983) (rejecting the argument that Congress has "unreviewable authority over the regulation of aliens," and affirming that courts can review "whether Congress has chosen a constitutionally permissible means of implementing that power"). Judicial review of the Executive Order and the discriminatory intent that motivated it is entirely proper here, and should include all statements made by the President and his associates that shed light on its purpose and intent.

57. Donald Trump Remarks in Manchester, New Hampshire, C-SPAN (Jun. 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers- remarks-national- security-threats.

than a "rollback" of previous calls for a Muslim ban, President Trump has characterized the administration's new approach as an "expansion" of his prior rhetoric.[58] A prominent advisor to the Trump campaign, Rudolph W. Giuliani recounted that President Trump wanted a "Muslim ban" and had requested that Mr. Giuliani assemble a commission to show him "the right way to do it legally."[59] Even recently, the President has affirmed, and in fact doubled down on the same rhetoric, repeatedly characterizing the Executive Order as a ban—not a temporary pause, as Petitioners assert:

- On April 26, 2017, the President stated, "the Ninth Circuit rules against the ban . . . ridiculous."[60]
- On June 3, 2017, the President stated, "We need the Travel Ban as an extra level of safety!"[61]
- On June 5, 2017, the President stated, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is,

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[58] *Id.*

[59] *Trump asked for a 'Muslim Ban,' Giuliani says – and ordered a commission to do it 'legally,'* Wash. Post (Jan. 29, 2017), *available at* https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a- muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it- legally/?utm_term=.82e451dca6b8.

[60] Donald J. Trump, Twitter (April 26, 2017), https://twitter.com/realDonaldTrump/status/857177434210304001.

[61] Donald J. Trump, Twitter (June 3, 2017), https://twitter.com/realDonaldTrump/status/871143765473406976.

a TRAVEL BAN!"[62] The President then reiterated this point not once, but twice in the same day. He stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."[63] Less than three hours later, he stated, "we need a TRAVEL BAN . . . not some politically correct term that won't help us protect our people."[64]

- On June 13, 2017, the President stated, "the 9th Circuit did it again - Ruled against the TRAVEL BAN."[65]

- Most recently, on August 17, 2017, the President again promoted the same anti-Muslim propaganda repeated throughout the campaign that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood: "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"[66]

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[62] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871674214356484096.

[63] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

[64] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871899511525961728.

[65] Donald J. Trump, Twitter (June 13, 2017), https://twitter.com/realDonaldTrump/status/874578159676665857.

[66] Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088.

Plainer evidence of animus against Muslims would be difficult to find. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.").[67]

The administration's proffered interest in securing our borders is also merely pretextual, as the Order is both under and over inclusive. A statute or rule that is under- and over-inclusive in burdening a constitutionally protected interest is not narrowly tailored to achieve a compelling state interest, as required to satisfy the Establishment and Equal Protection Clauses. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 904 (1995). The Executive Order recites that its purpose is to "protect" its "citizens from terrorist attacks," and asserts that the targeted countries were identified as presenting "heightened concerns about terrorism and travel to the United States."[68] Yet by excluding hundreds of thousands of innocent refugees without a whiff of suspicion that they pose any danger, the Executive Order is wildly over-inclusive. *See Romer*, 517 U.S. at 632 (law failed rational basis review where "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects"). The Executive Order does not provide any process to determine whether potential immigrants or refugees pose a threat. It simply denies them the opportunity even to apply for admission based on their country of origin.

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[67] Even if this was not the purpose, the indisputable perception of sect favoritism violates the Establishment Clause. *See McCreary*, 545 U.S. at 883 (O'Connor, J., concurring) (finding violation of Establishment Clause because of "unmistakable message of endorsement to the reasonable observer"); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). And the public perception of the original Executive Order is clear: it is a Muslim ban. *See* Public Policy Polling, *After 2 Weeks, Voters Yearn For Obama* 1, 4 (Feb. 2, 2017) (finding in poll conducted on January 30-31, 2017 that "52% of voters think that the order was intended to be a Muslim ban, to only 41% who don't think that was the intent"), https://goo.gl/1L5psC. *See also CNN/ORC Int'l Poll* 9 (Feb. 3, 2017) (55% think the Executive Order "is a ban on Muslims"), https://goo.gl/0xE98B. Although public polling regarding the new ban has not been conducted, "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the [policy] arose." *McCreary*, 545 at 866 (internal citation omitted).

Furthermore, the Executive Order is dramatically under-inclusive. Despite the proffered interest in security, the Executive Order does not include on its list of affected countries any of the home countries of the perpetrators of the September 11th, 2001 attacks.[69] Nor does it include countries connected to the perpetrators of more recent domestic attacks in San Bernardino, New Jersey, New York, Orlando, or Boston.[70] Tellingly, the Executive Order does not include any of the majority-Christian nations that are listed by the State Department as "terrorist safe havens."[71] *See Larson*, 456 U.S. at 244 ("[T]his Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can pass laws which aid one religion or that prefer one religion over another.") (internal citation and quotation marks omitted). That the Executive Order so clearly picks and chooses among countries whose residents could threaten the United States reveals that the administration's proffered interest is a pretext for discrimination against people of the Muslim faith, and is therefore invalid. *See Hialeah*, 508 U.S. at 543.

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[68] Executive Order § 1(a)-(b).

[69] Pamela Engel, *Trump's immigration ban doesn't include the country most of the 9/11 hijackers came from*, Business Insider (Jan. 30, 2017), http://www.businessinsider.com/trumps-muslim-ban-saudi-arabia-911-2017-1 ("[T]he [initial] executive order doesn't apply to *any* of the countries where the 9/11 attackers were from.") (emphasis in original).

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[70] Eric Levenson, *How many fatal terror attacks have refugees carried out in the US? None*, CNN (Jan. 29, 2017), *available at* http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/.

[71] Chapter 5: Terrorist Safe Havens (Update to 7120 Report), U.S. Dept. of State, *available at* https://www.state.gov/j/ct/rls/crt/2015/257522.htm.

CONCLUSION

For the foregoing reasons, the Executive Order exceeds the scope of presidential authority under the INA and violates the Equal Protection and Establishment Clauses of the Constitution. This Court should therefore affirm the decisions of the courts below.

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Supreme Court of the United States

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DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE OF HAWAI'I, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR THE STATES OF NEW YORK, ILLINOIS, CALIFORNIA, CONNECTICUT, DELAWARE, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' challenges to §§ 2(c), 6(a), and 6(b) of Executive Order No. 13,780 are justiciable.

2. Whether §§ 2(c), 6(a), and 6(b) of the Order violate the Establishment Clause and exceed the President's authority under the Immigration and Nationality Act.

3. Whether the nationwide scope of the preliminary injunctions is proper.

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INTEREST OF THE AMICI STATES AND SUMMARY OF ARGUMENT

These consolidated cases challenge the legality of certain provisions of Executive Order No. 13,780, which among other things imposed a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries, suspended the U.S. Refugee Admissions Program, and lowered the Program's refugee cap.[1] Two district courts entered preliminary injunctions against enforcement of the disputed provisions of the Order, and the injunctions were affirmed by the United States Courts of Appeals for the Fourth and Ninth Circuits. Amici States New York, Illinois, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in support of plaintiffs-respondents, who seek affirmance of those decisions.[2] Amici States submit this brief to explain the ways in which the States are particularly harmed by the Executive Order, and to show that these state harms are cognizable under both the Establishment Clause of the First Amendment and the Immigration and Nationality Act (INA), that States as well as private parties have standing to challenge the Order on these grounds, and that the pervasive nationwide harm inflicted and threatened by the Order makes nationwide injunctive relief appropriate.

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[1] Executive Order No. 13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[2] The amici States file this brief pursuant to Supreme Court Rule 37.4.

Amici have a strong interest in respondents' challenges to the Order, and to its travel ban in particular, which has already caused—and absent the continuation of the injunctions, will continue to cause—substantial harm to our universities, hospitals, businesses, communities, and residents. Like plaintiffs here, many of the amici States have brought suits challenging this Executive Order and its January 27 predecessor[3] on the grounds that certain provisions of those Orders violate the Establishment Clause of the First Amendment and various other constitutional and statutory provisions.[4] Most of the amici States have also previously filed briefs as amici curiae in both of the cases now before this Court.[5]

Absent the injunctions at issue here, enforcement of the disputed provisions of the Order will cause immediate and concrete harms to the sovereign, quasi-sovereign, and proprietary interests of States, including the amici States submitting this brief. Indeed, some of these harms have already occurred as a result of the provisions being challenged here and similar provisions set forth in the initial January 27 Executive Order. While the amici States differ in many ways, all benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and businesspeople. The disputed provisions of the Order have significantly disrupted the ability of our States' public colleges and universities to recruit and retain students and faculty, impairing academic staffing and research needs, and causing the loss of tuition and tax revenues, among other costs. The Order has also disrupted the provision of medical care at the States' hospitals and harmed our science, technology, finance, and tourism industries by inhibiting the free exchange of information, ideas, and talent between the six designated countries and our States, causing long-term economic and reputational damage. In addition, the Order's travel ban and exclusion of refugees made it more difficult for the States to effectuate our own constitutional and statutory policies of religious tolerance and nondiscrimination.

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[3] Executive Order No. 13,769 (Jan. 27, 2017), 82 Fed. Reg. 8,977 (Feb. 1, 2017).

[4] Many of the amici States challenged this Executive Order in *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. 2017) (stayed pending appeal in *Hawaii v. Trump*). They challenged the predecessor Order in *Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855 (E.D. Va. 2017).

[5] Va. Amicus Br. (15 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 12, 2017); N.Y. Amicus Br. (15 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 12, 2017); Ill. Amicus Br. (15 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (15 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

The harms that the Order has caused and threatens to cause amici States and their residents are representative of the injuries experienced by respondents here. And those injuries underscore respondents' standing to sue and the appropriateness of the preliminary relief ordered by the courts below.

First, in addition to violating the Establishment Clause rights of individuals, the disputed provisions of the Order have resulted in cognizable injuries to sovereign interests of the States that the

Establishment Clause protects. The disputed provisions have the purpose and effect of implementing a federal anti-Muslim policy—and that, in turn, interferes with amici States' efforts to combat religious discrimination within their borders. The injury inflicted on the States is especially salient at our institutions of higher education, where § 2(c) interferes with the recruitment and retention of students and faculty alike.

Second, the Order has injured rights conferred on the amici States and others by the INA. As to the States, the Order has impermissibly interfered with the process that Congress has set forth for our public colleges, universities, and hospitals—as employers—to petition for the approval of prospective employees' entry into the United States.

Finally, the nature of these violations and all of the substantial and systemic harms to the States' myriad interests supports the nationwide injunctions issued here. The preliminary injunctions entered by the district courts in these cases, as modified by this Court's June 26 decision, have provided critical protection to the state interests endangered by the disputed provisions of the Order and have mitigated the extent of the harms outlined above. But the possibility that the Order may ultimately be enforced continues to deter potential students, faculty, tourists, business travelers, and others from making plans to travel to the United States, and thus continues to threaten harm to the interests of the amici States. The amici States therefore urge this Court to affirm the injunctions in their entirety.

ARGUMENT

I. The Executive Order Has Harmed the States

A. Harms to States' Proprietary Interests

The disputed provisions of the Order block the entry of all refugees, as well as nationals from the six designated countries who seek to be students and faculty at our public universities, physicians and researchers at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here as tourists or for family visits. These provisions thus harm the work of our state institutions and adversely affect our state treasuries.[6] Indeed, defendants do not dispute that these harms have occurred. See *infra* at 18.

Harms to State Colleges and Universities. State colleges and universities rely on faculty and students from across the world. For example, "top-ranked research institution[s]," such as the University of Massachusetts, "*must hire* qualified research faculty from around the world to continue [their] significant research enterprise."[7]

By interfering with the entry of faculty and scholars from the six designated countries, the disputed provisions of the Order have seriously disrupted our public institutions' ability to meet academic staffing needs, resulting in increased administrative burdens and the expenditure of additional university resources. The announcement of the travel ban created serious doubt as to whether researchers from the designated countries would be able to obtain the visas they needed to timely assume positions they had accepted with public universities in the amici States, and as to whether they would still be willing to take the positions.[8] Public universities thus had to engage in additional negotiations with scholars who were concerned about moving to the United States in the shadow of the travel ban.[9] Furthermore, the timing of the ban—coinciding with the peak faculty hiring season—made it practically impossible for institutions to interview and hire new candidates from the six designated countries for the 2017-18 academic year, because § 2(c) purported to bar those individuals from entering the United States.[10]

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[6] All of the amici States support the legal arguments put forth in this brief, although not every specified harm occurs in every State. For example, almost all amici States operate state hospitals, but Delaware does not.

[7] Decl. of Deirdre Heatwole, Ex. A, ¶ 8 (University spent over $650 million last year in its research endeavors). All declarations cited in this brief are attached as exhibits to Illinois' Amicus Br., *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125.

The ability of state universities to retain their existing foreign faculty has also been compromised. For example, the University of Massachusetts employs, across a range of academic departments, approximately 130 foreign nationals from the affected countries who are neither U.S. citizens nor lawful permanent residents.[11] And the University of Maryland relies on over 200 graduate students, postdoctoral fellows, and faculty from the designated countries to staff its scientific research laboratories; the loss of any one of these highly-trained employees "will disrupt work and delay progress for an entire lab."[12] Those whose visas expire during the term of § 2(c) (or any possible extension of the travel ban) will face obstacles to renewal that could jeopardize not only their employment but also any grant funding and scientific research projects that depend on their work. And those whose visas remain valid may be unwilling to take the risk of participating in professional or personal obligations that require travel outside the United States, and will face the hardship of being unable to receive visits from their parents, spouses, children, and other relatives.[13]

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[8] Decl. of Michael F. Collins, Ex. C, ¶ 9; Decl. of Vita C. Rabinowitz, Ex. B, ¶ 21.

[9] *See, e.g.*, Rabinowitz Decl. ¶ 21.

[10] Heatwole Decl. ¶¶ 8-10.

[11] *Id.* ¶¶ 4-5.

The foreign-national faculty employed by or recruited by our state universities typically have specialized expertise that cannot easily be replaced. Universities that are delayed in or prevented from recruiting international faculty and related staff thus suffer significant financial and reputational harm, including delayed or lost federal funding for research efforts.[14] Our educational institutions have needed to expend considerable amounts of scarce university resources (up to thousands of dollars per campus) to make contingency plans for filling the unexpected gaps in faculty rosters caused by the exclusion or possible departure of scholars from the six designated countries. There is no guarantee, moreover, that our universities will be able to meet all of their needs.[15]

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[12] Decl. of Ross D. Lewin, Ex. F, ¶ 8.

[13] Heatwole Decl. ¶¶ 10, 15, 18; Rabinowitz Decl. ¶ 21; Collins Decl. ¶¶ 9, 13-14; Lewin Decl. ¶¶ 4, 8; *see also* Decl. of Margaret Everett, Ex. H, ¶¶ 12-13 (visiting researcher who was an Iranian national unable to return from a family visit outside the country to complete his important research at Portland State University).

[14] Heatwole Decl. ¶¶ 8, 10, 18-19; Collins Decl. ¶ 9.

Similarly, by disrupting the ability of these institutions to recruit and retain foreign students from the designated countries, the Executive Order has imperiled hundreds of millions of tuition dollars and other revenue generated from such students, as well as important academic research projects. Before the travel ban was announced, the public colleges and universities of the amici States had enrolled thousands of students from the six designated countries for the 2016-17 academic year. For example, the University of California's six largest campuses had over 400 such undergraduates, graduate students, and medical residents.[16] The University of Illinois, the University of Massachusetts, and the State University of New York each had approximately 300 such students in undergraduate and/or graduate programs.[17] And Oregon State University and

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[15] Heatwole Decl. ¶¶ 10-11, 16; Collins Decl. ¶¶ 4-5, 9-10; Decl. of Marcellette G. Williams, Ex. D, ¶¶ 8-9.

[16] Information provided to the California Attorney General's Office in April 2017 by the Institutional Research and Academic Planning Division of the University of California and by the Assistant Vice Chancellor of International and Off-Campus Programs at the California State University System.

[17] Williams Decl. ¶ 3 (Massachusetts figures). Other figures provided in early 2017 to the Illinois Attorney General's Office by the general counsel of the University of Illinois and to the New York Attorney General's Office by the general counsel of the State University of New York.

Washington State University each had approximately 160 such students.[18]

Likewise, before the ban, the amici States' colleges and universities had already made numerous offers of admission for the 2017-18 academic year to students from the affected countries and—but for § 2(c)'s interference with their continuing admissions process—might have admitted many more.[19] Some students from the six designated countries have withdrawn applications, while others have had to abandon entirely their plans to enroll in our university programs due to the ban. As a result, our public educational institutions have had to incur substantial administrative and other costs to fill the gaps left by students who can no longer accept offers of admission or attend.

While public colleges and universities are always subject to federal immigration law and policy, § 2(c) injured them unexpectedly, by upending with no advance notice the established framework around which they have designed their enrollment processes.[20] This has left seats unfilled, tuition dollars irretrievably lost, and important academic programs and research projects in peril.

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[18] Decl. of Ronald L. Adams, Ex. E, ¶ 8; Decl. of Asif Chaudhry, Ex. J, ¶ 5.

[19] Heatwole Decl. ¶¶ 14, 17 (University of Massachusetts had extended at least 40 such offers and has had to take into account the effect of § 2(c) in considering other applications).

[20] *Id.* ¶¶ 15, 17; *see also* Sam Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017) (internet) (University of Massachusetts and others have had to "shift[ ] their recruitment strategies to avoid a talent drought"). (For authorities available on the internet, full URLs are listed in the table of authorities.)

For example, ten Iranian students admitted to the Ph.D. program in civil engineering at the University of Illinois at Chicago in 2017 were blocked from enrolling due to the travel ban.[21] Not only did the university bear the financial loss of the tuition and other revenue these students would have brought in—and which could not be replaced by admitting other candidates at that late stage—but because these ten students constituted roughly half of the department's newly admitted doctoral students, some of the department's research projects are also in jeopardy.[22] At the University of Washington, 28 graduate students from the designated nations had been admitted for the Fall 2017 term, but several students withdrew their applications and others may be unable to matriculate, leaving additional seats unfilled.[23] This is of particular concern for some of the University's programs which "need to have all of their [graduate seats] filled each year in order to meet their program budgets."[24] Oregon stands to lose tuition revenue from 13 international students admitted to Portland State University in 2017 from the designated countries whose seats could not be filled if they were unable to enroll.[25]

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[21] Miles Bryan, *10 Prospective UIC Students Ineligible to Enroll Due to Travel Ban*, WBEZ News (Mar. 6, 2017) (internet).

[22] *See id.*

[23] Decl. of David Eaton, Ex. G, ¶¶ 3-5 and exhibits.

[24] *Id.* ¶ 4.

[25] Everett Decl. ¶¶ 15-16.

Application of § 2(c) also seriously jeopardizes the continued enrollment in our state colleges and universities of current students from these nations, by preventing them from traveling for research, conferences, and family visits.[26] Because only single-entry visas are permitted for two of the countries, and because the required visas are valid only for relatively short periods, most students need to apply for new visas during the course of their academic studies.[27] In other words, foreign students on single-entry visas who have relied on the existing preliminary injunctions—whether to return home to visit family, conduct research in other countries, or travel abroad for other reasons—face the prospect of being denied a visa to reenter the United States if enforcement of the ban is permitted.[28] Moreover, even if such students decide to put off their own travel, they will still face the hardship of being unable to receive visits from their parents, spouses, children, and other relatives.

The preliminary injunctions as modified by this Court currently protect these students' rights to receive such family visits as well as their ability to return and resume their studies here if they themselves travel. But those protections would be lost if the injunctions were vacated and the travel ban were reinstated. Students from the six countries would then experience renewed pressure to cancel their enrollment in programs that exceed their visa duration periods, given that they can have no confidence that their visas will be renewed to enable them to complete their studies, particularly if any new and possibly expanded travel ban is implemented.[29]

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[26] Chaudhry Decl. ¶¶ 5-8 (describing specific cases of Washington State University students and faculty from the designated countries); Decl. of Hassan Ghasemzadeh, Ex.I, ¶ 1 of exhibit A (same).

[27] U S. Dep't of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country* (internet) (search by country and visa types F and M).

[28] Williams Decl. ¶¶ 7, 9 (University of Massachusetts doctoral student who traveled to designated country to get married and was unable to return); Adams Decl. ¶ 12 (similar experience of student at Oregon State University); Lewin Decl. ¶ 5 (concern that ban would delay visa renewal of University of Maryland student "impeding his academic progress and the University research in which he is engaged").

Section 2(c) has also harmed and will continue to harm our educational institutions' core missions of excellence in education and scholarship. The loss of students, scholars, and faculty from the affected nations not only impairs important academic and medical research at our States' universities and colleges, but also inhibits the free exchange of information, ideas, and talent that is so essential to academic life and our state universities' missions.[30]

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[29] Although the Executive Order gives consular officers discretion to waive the travel ban in individual cases, the discretionary nature of the review process means such individuals have no assurance of re-admission. The Order does not describe the process for applying for a waiver, specify a time frame for receiving a waiver, or set any concrete guidelines for issuance of a waiver beyond providing a list of circumstances in which waivers "could be appropriate." Order § 3(c). And there is no guarantee that a waiver will be issued because the ultimate decision on whether to issue it lies solely within a consular official's discretion. *See id.*

[30] Heatwole Decl. ¶¶ 3, 8, 18; Williams Decl. ¶¶ 2, 8, 11-12; Lewin Decl, ¶¶ 4, 8, 12-13; Everett Decl. ¶¶ 3-4; *see also* Rabinowitz Decl. ¶¶ 4, 22 (public university in New York seeks to provide its students "global perspectives" and expose them "to

Harms to State Hospitals and Medical Institutions. Section § 2(c) has created staffing disruptions in state hospitals and medical institutions, which employ physicians, medical residents, research faculty, and other professionals from the designated countries. For example, the University of Massachusetts Medical School has extended job offers that have already been accepted by two medical professionals from the designated countries. But the university and these would-be employees are still waiting for visas to be approved and are uncertain if and when the contemplated employment can begin.[31]

Similar disruption has also occurred in the context of medical residency staffing at public hospitals. Medical residents often provide crucial services, such as caring for some of the most underserved populations in our States.[32] They are assigned to our state university hospital residency programs through a computerized "match" that, after applications and interviews, ranks and assigns residency candidates to programs nationwide; programs and candidates are advised of match results in the spring of each calendar year and all new residents begin their positions on July 1.[33]

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different cultures and ideas"); Heatwole Decl. ¶¶ 15, 19 ("[h]igher education is very much international in nature" and part of university mission is "to teach and support a diverse student body, enriched by a culture of inclusiveness").

[31] Collins Decl. ¶ 9.

[32] See *infra* at 19-20 & accompanying notes; *see also* Collins Decl. ¶ 8 (state hospital "relies on [r]esidents as part of their patient care workforce").

[33] Collins Decl. ¶ 6.

Many state university residency programs regularly match with residents from the six designated countries. For instance, before the revised Order, the University of Massachusetts residency program had already interviewed—and was considering ranking—residency applicants from the designated countries.[34] If a program's matched residents are precluded from obtaining a visa under § 2(c), the program risks having an insufficient number of residents to meet staffing needs.[35] The 2017 match took place on March 17, one day after the revised Executive Order was scheduled to take effect.[36] And now, "[a]s many as several hundred doctors from the six [designated countries] will not be able to begin medical residencies" for which they have matched unless waivers are granted.[37]

In addition, if current residents who are nationals of the designated countries cannot renew or extend their visas—as § 2(c) threatens—state university residency programs will be unable to continue to employ them; these multi-year programs will then be left with unfilled positions, and further staffing gaps will result.[38] State medical institutions that have relied on accepted offers of employment from professionals in the designated countries are likewise facing unexpected and critical staffing shortages, additional costs, and administrative burdens, as those professionals cannot or will not take up the offered positions. These disruptions have translated to uncertainty in residency training programs as well as threats to the provision and quality of health care services.[39] And because patients at our medical facilities must be cared for, our facilities must quickly adapt to any staffing complications resulting from § 2(c)—and spend precious time and resources preparing to do so.[40]

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[34] *Id.*; *see also* Decl. of Tim Johnson, Ex. M, ¶ 13 (New York hospitals also considered such applicants).

[35] Collins Decl. ¶¶ 7-8; *see also* Decl. of Eric Scherzer, Ex. L, ¶ 16 (ban will have "significant negative impact" and "will result in lower ranked medical students working in New York's hospitals").

[36] Collins Decl. ¶ 6.

[37] Petulla, *supra* n.20 (figure reported by the Association of American Medical Colleges).

[38] *See, e.g.*, Scherzer Decl. ¶ 7 (second-year internal medicine resident at one of New York's public hospitals was unable to

Diminished Tax Revenues and Broader Economic Harms. In addition to losing the tuition,[41] room and board, and other fees paid by students at our public universities, amici States have also suffered other direct and substantial economic losses as a result of the disputed provisions of the Order. Every foreign student (whether attending a public or private college or university), every tourist, every business visitor, and every refugee arriving in our States contributes to our economies through their purchases of our goods and services and the tax receipts that their presence generates. Despite the present preliminary injunctions, over the past nine months the

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return to his position when he was denied reentry into the United States after a family visit in Sudan).

[39] See *infra* at 20-21 and accompanying notes.

[40] Scherzer Decl. ¶ 14 ("Even the shortage of one physician can have a significant impact on a safety-net hospital and the patients they treat.").

[41] International students typically pay higher, non-resident tuition rates. *See, e.g.*, Adams Decl. ¶ 6.

Executive Order and its predecessor have either blocked or dissuaded thousands of individuals—potential consumers all—from entering the amici States, thereby eliminating the significant tax contributions those individuals would have made. That lost revenue will never be recovered and the lasting economic damage cannot be undone, even if respondents ultimately prevail.

The contribution of foreign students alone to our States' economies is immense. A survey by the Institute of International Education conducted in the months following the issuance of the travel ban found that "more than 15,000 students enrolled at U.S. universities during 2015-16 were from the [six] countries named in [the revised Executive Order]"; more than half of those students attended institutions in the amici States and Hawaii; and, nationwide, "these students contributed $496 million to the U.S. economy, including tuition, room and board and other spending."[42] For example, in both New York and Illinois, nearly 1,000 foreign nationals from the designated countries were studying on temporary visas in 2015-16 in each State, and they collectively contributed approximately $30 million to each State's economy.[43] And such figures do not even begin to account for the indirect economic benefits to our States, such as the contributions of international students and scholars to innovation in academic and medical research.

Tourism dollars are also a critical component of amici States' economies. As a result of the travel ban, an estimated 4.3 million fewer tourists are expected to visit the United States this year, resulting in $7.4 billion in lost revenue; and in 2018, those numbers will increase to 6.3 million fewer tourists and $10.8 billion in lost revenue.[44] This reduction results from trips not made either because they were prohibited by the parts of the ban that were not enjoined, or because individual travelers were deterred by fear that the injunction would be lifted. One industry analysis has concluded that the "travel ban could cost the U.S. economy more than $18 billion and about 107,000 jobs."[45] And the travel ban's broader chilling effect on tourism seems likely to continue. While the nationwide preliminary injunctions issued in these cases may have helped to slow the losses in tourism revenue, travel industry experts have nevertheless cautioned that "uncertainty about the Trump Administration's policies could discourage foreign visitors in the months ahead."[46] This is hardly surprising in view of the Administration's clear message to the world that foreign visitors—particularly those from certain regions, countries, or religions—are unwelcome.

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[42] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

[43] *See id.* at app. 1.

The Executive Order has also already inflicted profound economic harm on the amici States, which depend in large part on remaining internationally competitive destinations for companies in the science, technology, finance, health care, and other industries, as well as for entrepreneurs. Even a temporary disruption in our ability to attract such individuals and entities places the institutions and businesses in our States at a competitive disadvantage in the global marketplace, particularly where the excluded individuals possess specialized skills or training. For example, in just the first week after announcement of the Administration's initial travel ban, $185 million in business traveler reservations was lost.[47] The message of intolerance and uncertainty conveyed by the Order therefore threatens amici States' ability to continue attracting and retaining the foreign professionals, entrepreneurs, and companies that are vital to our economies.

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[44] *See* Abha Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet).

[45] Jeff Glueck, *Coming to America?*, Foursquare Direct, Medium (blog post) (May 24, 2017) (internet).

[46] Alana Wise, *Travel to the United States Rose in April, But Industry Remains Wary*, Reuters (June 6, 2017) (internet).

Although defendants assert (Defs. Br. 34) that all the aforementioned "alleged injuries" were "speculative, not actual or imminent, when respondents filed suit," declarations from affected businesses and state institutions show that the myriad harms to the States began to occur the moment that the travel ban was announced; moreover, as detailed above, those harms are both particularized and well-documented. Thus, as the experience of the amici States shows, the Establishment Clause and INA violations at the heart of the Executive Order have directly caused widespread injuries to the States, well beyond just those incurred by its application to any particular foreign national (*id.*).

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[47] Brad Tuttle, *"Trump Slump" Could Mean Well Over $10 Billion Per Year in Lost Tourism Revenues*, Time (Mar. 2, 2017) (internet).

B. Harms to States' Sovereign and Quasi-Sovereign Interests

The harms inflicted on the States by the disputed provisions of the Order extend further than the proprietary interests described above, and include injuries to our sovereign interests.

Decreased Effectiveness of Our Anti-Discrimination Laws. The amici States have exercised their sovereign prerogatives to adopt constitutional provisions and enact laws that protect their residents from discrimination. For example, our residents and businesses—and, indeed, many of the amici States ourselves—are prohibited by such state enactments from taking national origin and religion into account when determining to whom they can extend employment and other opportunities.[48] The disputed provisions of the Order interfere with the effectiveness of these laws by encouraging discrimination against Muslims in general, and nationals of the six designated countries in particular.

Harms to Residents Seeking Medical Care. The Executive Order will harm residents seeking medical care in our States, particularly those in underserved communities. In New York, safety-net hospitals—which include all public acute care hospitals, the entire New York City Health and Hospitals system, and most of the hospitals in Brooklyn, Queens, and the Bronx—rely heavily on foreign national physicians.[49] Indeed, many foreign national physicians work in the primary care field at a time when primary care physicians are in short supply in many areas across the country.[50]

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[48] *See, e.g.*, Cal. Const. art. I, §§ 4, 7-8, 31; Cal. Gov't Code §§ 11135-11137, 12900 et seq.; Cal. Civ. Code § 51(b); Conn. Gen. Stat. § 46a-60; Ill. Const. art. I, §§ 3, 17; 740 ILCS 23/5(a)(1); 775 ILCS 5/1-102(A); 775 ILCS 5/10-104(A)(1); 5 Maine Rev. Stat. Ann. §§ 784, 4551-4634; Md. Code Ann., State Gov't § 20-606 Mass. Gen. L. ch. 151B, §§ 1, 4; Mass. Gen. L. ch. 93, § 102; N.M. Const. art. II, § 11; N.M. Stat. Ann. § 28-1-7; Or. Rev. Stat. § 659A.006(1); R.I. Gen. Laws § 28-5-7(1)(i); 9 Vt. Stat. Ann. §§ 4500-4507; 21 Vt. Stat. Ann. § 495; Wash. Rev. Code § 49.60.030(1).

At least 7000 physicians practicing in the United States attended medical school in one of the six designated countries, and these physicians provide 14 million appointments a year, 2.3 million of which are in areas with "a shortage of medical residents and doctors."[51] When residents or physicians from the designated countries are unable to commence or continue their employment at public hospitals, those staffing disruptions will result in serious risks to the quality of our States' health care services and put the public health of our communities at risk.[52] Researchers have concluded that the Order is "likely to hurt the health of millions of Americans . . . who rely on physicians trained in" the designated countries.[53]

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[49] Scherzer Decl. ¶¶ 10-12.

[50] *Id.* ¶¶ 11, 13; *see also* Decl. of Marc Overbeck, Ex. P, ¶¶ 2-7.

[51] Immigrant Doctors Project, https://immigrantdoctors.org; Decl. of Tim Johnson, Ex. M, ¶ 4 ("Physician trainees are an integral part of New York's health care workforce . . . caring for many underserved New Yorkers [in] great need"); *see also* Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia,* FiveThirtyEight (Mar. 6, 2017) (internet); Decl. of Mitra Akhtari, Ex. Q, ¶¶ 13-17.

[52] See *supra* at 13-15 and accompanying notes.

Harms to Refugee Resettlement. Sections 6(a) and 6(b) of the Order hinder the efforts of the amici States to carry out their commitments to help resettle and assist refugees admitted under the U.S. Refugee Program established by Congress. For example, between 2012 and 2015, California accepted 23,393 refugees, including 5,668 from Iran, 225 from Syria, and 119 from Sudan.[54] In Fiscal Year 2016, California resettled 1,450 Syrian refugees, more than any other State.[55] In that same time period, New York resettled a total of 5,028 refugees, including 640 from Syria and 819 from Somalia.[56] And in 2016, Illinois resettled 794 refugees from four of the six designated countries (Iran, Somalia, Sudan, and Syria) in Chicago alone.[57]

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[53] Akhtari Decl. ¶ 5; *see also* Maryam Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, The Intercept (Aug. 17, 2017) (internet) (foreign physicians "take care of the sickest of the sick and the poorest of the poor," many have pledged to work in areas designated as "medically underserved," and without them "the U.S. healthcare system would simply collapse, with the pain felt most acutely in rural areas").

[54] U.S. Dep't of Health & Human Services, Administration for Children & Families, Office of Refugee Resettlement, *Refugee Arrival Data* (Nov. 24, 2015) (internet).

[55] Hannah Albarazi, *California Leads the Nation in Resettlement of Syrian Refugees*, CBS SF Bay Area (Sept. 29, 2016) (internet).

[56] New York State Office of Temporary & Disability Assistance, Bureau of Refugee & Immigrant Assistance (BRIA), BRIA Population Data for FFY 2016 (internet).

[57] U.S. Dep't of State, Bureau of Population, Refugees & Migration, Office of Admissions, *Refugee Processing Center: Interactive Reporting* (internet).

By suspending the Refugee Program, the Executive Order has stranded thousands of refugees—who have already been extensively vetted—in crisis zones, in many cases isolating them from family members who are already in the United States. And the Order indefinitely excludes tens of thousands of otherwise eligible refugees by reducing the cap on refugee admission for Fiscal Year 2017 by more than half, from 110,000 to 50,000. *See* Order § 6(b).

Not only do these exclusions obstruct the States' interests in resettling refugees who may have ties to our residents and communities, but they also result in proprietary harms to the States, which receive grants and other financial assistance from the federal government for each refugee they take in. *See* 45 C.F.R. pt. 400. For example, New York State's Office of Temporary and Disability Assistance receives federal funding in respect of the assistance that New York's Refugee Services Programs provide "to refugees and their families in achieving economic and social self-sufficiency."[58] Refugees residing in our States contribute to our economies in other ways too, including payment of taxes, purchases of goods and services, and employment in our businesses and community institutions. In addition, the private organizations in our States that help resettle refugees now face crippling reductions in staffing and resources because their funding is likewise allocated on a per-arrival basis.[59]

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[58] New York State Office of Temporary & Disability Assistance, *Refugee Services* (internet); *see also* U.S. Dep't of Health & Human Services, Administration for Children & Families, Office of Refugee Resettlement, *State of New York – Programs and Services by Locality* (Nov. 18, 2015) (internet).

II. Harms Caused By the Order Are Cognizable Under the Establishment Clause

Defendants assert (Defs. Br. 33-34) that the States have no cognizable Establishment Clause interests, but that claim is flatly contradicted by the original meaning and purpose of the Clause. One of the original purposes of the Clause was to prevent the federal government from forcing its religious preferences upon the States.[60] As Justice Thomas has noted, in this regard the Establishment Clause was designed to serve as "a federalism provision." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment); *see also Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1836 (2014) (Thomas, J., concurring) ("[T]he States are the particular beneficiaries of the Clause."). To be sure, the States' original power over religious matters was later limited by the Fourteenth Amendment's Due Process and Equal Protection Clauses. *See Everson v. Board of Educ.*, 330 U.S. 1 (1947). And the defendants are correct (*see* Defs. Br. 33) that States are no longer free to establish official churches. But the Constitution continues to protect state efforts to welcome diverse religious groups and combat religious discrimination, including through enforcement of our own state anti-discrimination laws.

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[59] Decl. of Eva Hassett, Ex. N, ¶¶ 10-11, 17-25; Decl. of David Duea, Ex. O, ¶ 9.

[60] *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States*, § 1879, at 633-34 (5th ed. 1891); Akhil Amar, *The Bill of Rights* 32-42 (1998); Amar, *supra*, at 246-257.

The disputed provisions of the Order are tainted by anti-Muslim animus in violation of the Establishment Clause. As respondents explain (*see* Hawaii Br. 52-60; IRAP Br. 37-40, 43-50, 55-56), the Order establishes this animus as federal policy and paves the way for a religious test for entry to the United States. Numerous statements by the President and his close advisors both before and after the election (*see* Hawaii Br. 5-10; IRAP Br. 1-4; J.A. 219-222) make clear that both § 2(c) and § 6 of the Order seek to make good on the President's promise of a "Muslim ban," thereby affecting the religious makeup of our States and communities. All of these statements were directly related to banning Muslim immigration, and in many cases were virtually contemporaneous with the issuance of this Executive Order and its predecessor. As the Fourth Circuit correctly recognized, the "sheer number of statements, their nearly singular source, and the close connection they draw" between the proposed Muslim ban and the Orders, "taken together, provide direct, specific evidence of what motivated" them—the President's "desire to exclude Muslims from the United States," as well as his "intended means of effectuating the ban by targeting majority-Muslim nations instead of Muslims explicitly" (J.A. 222).[61]

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[61] Unlike a statute, which is the act of a collective body, and therefore presents some difficulties in discerning legislative intent from the statements of individual legislators, the Executive Orders at issue here are the acts of a single official, and there is no such barrier to treating the President's statements as probative of his intent in promulgating those Orders.

By unlawfully injecting religious bias into our Nation's immigration policy, the Order impairs the constitutionally protected interest that the amici States and Hawaii possess in prohibiting religious discrimination and maintaining welcoming communities where people of all faiths or no faith feel welcome. It does so not only by excluding large numbers of Muslims, but also by contributing to an environment of fear and insecurity among our residents that runs counter to the amici States' deeply held commitment to inclusiveness and equal treatment.[62]

Moreover, blocking the admission of individuals based on their religious beliefs has a substantial harmful effect on amici States and Hawaii by, among other things, reducing tax revenues—an effect which by itself is sufficient to establish standing. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 449-50 (1992); *see also Washington v. Trump*, 847 F.3d 1151, 1160-61 (9th Cir. 2017) (holding Washington and Minnesota had sufficiently "alleged harms to their proprietary interests traceable to the [January] Executive Order" to confer standing for purposes of States' constitutional challenge), *reconsideration en banc denied*, 853 F.3d 933, *amended and superseded by*, 858 F.3d 1168 (9th Cir. 2017).

While the States have until now not had occasion to assert this Establishment Clause interest against the federal government, that proves only that the federal government has rarely—if ever before—taken action that so plainly violates the States' rights under the Clause. In these extraordinary circumstances, Hawaii and the amici States have standing to protect their own interests by vindicating the structural dictates of the Establishment Clause. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

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[62] See *supra* at 19 & n.48; *see also* Janice Williams, *Under Trump, Anti-Muslim Hate Crimes Hate Crimes Have Increased at an Alarming Rate*, Newsweek (July 17, 2017) (internet) (91% increase in anti-Muslim hate crimes in the country in the first half of 2017 as compared to same time period in 2016).

III. Harms Caused By the Order Are Cognizable Under the Immigration and Nationality Act.

To press a statutory claim, a plaintiff must show among other things that the interests the plaintiff seeks to vindicate "fall within the zone of interests protected by the law invoked." *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal quotation marks omitted). As the Ninth Circuit correctly held, Hawaii's "interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA" (J.A. 1188-1189), a statute that contains numerous provisions governing the admission of foreign-national students, scholars, and faculty into the United States on temporary nonimmigrant visas[63] or employment-based immigrant visas.[64]

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[63] *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(F)(i) (students pursuing a full course of study, commonly known as the "F-1" category); 1101(a)(15)(H)(i)(b) (aliens in specialty occupations, commonly known as the "H-1B" category); 1101(a)(15)(J) (students, scholars, medical residents, and others in fields of specialized knowledge and skill, commonly known as the "J-1" category); 1101(a)(15)(O)(i) (aliens with extraordinary abilities in the sciences, arts, education, business, or athletics, commonly known as the "O-1" category).

[64] *See, e.g.*, 8 U.S.C. §§ 1153(b)(1)(A) (aliens with extraordinary abilities in the sciences, arts, education, business

Indeed, our state colleges and universities are in many cases the entities petitioning for approval of a potential employee's entry into the United States, bringing them directly within the ambit of the INA. As employers, our universities sponsor and file employment-based immigrant or non-immigrant/ temporary worker petitions with U.S. Citizenship and Immigration Services on behalf of certain of our prospective employees.[65] Only after the employer's petition is approved can the prospective employee apply for and receive a work visa. In some cases, the INA also requires the employer to obtain an approved labor certification from the U.S. Department of Labor, *see* 8 U.S.C. § 1182(5)(A), before filing a petition.[66]

Section 2(c) of the Order, by interfering with this process, has substantially disrupted the ability of our public institutions to meet their academic staffing needs, resulting in increased administrative burdens and the expenditure of additional university

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or athletics); 1153(b)(1)(B) (outstanding professors or researchers); 1153(b)(2) (professionals holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business); 1153(b)(3)(A)(ii) (professionals with baccalaureate degrees); *see also* U.S. Dep't of State, 9 Foreign Affairs Manual 502.4, *Employment-Based [Immigrant Visa] Classifications* (internet).

[65] *See* U.S. Dep't of State, *Temporary Worker Visas, Categories and Overview* (internet); U.S. Customs & Immigration Servs., *Temporary (Nonimmigrant) Workers* (internet); U.S. Dep't of State, *Employment-Based Immigrant Visa, Categories and Overview* (internet).

[66] *See* U.S. Customs & Immigration Servs., *Permanent Workers* (internet); U.S. Dep't of State, *Employment-Based Immigrant Visa, Categories and Overview* (internet); U.S. Dep't of State, *Temporary Worker Visas, Categories and Overview* (internet).

resources. See *supra* at 5-8. The Order has also caused the wastage of some of the funds that the amici States have spent preparing visa petitions for employees or prospective employees, by barring or threatening to bar those persons from entry. For example, in order to support the retention and recruitment of faculty and other personnel, the State University of New York provides legal and financial support for the immigrant and nonimmigrant work petitions of certain prospective employees, including teaching faculty, researchers, physicians, and other qualified health professionals.[67] Specifically, the University will "provide assistance . . . in the preparation of employment-based petitions and applications for nonimmigrant categories such as the H-1B Temporary Worker, O-1 Extraordinary Ability and the TN-1 NAFTA categories."[68] In addition to such "employment sponsorship," the University also provides "related financial support for standard processing, government filing fees and [other related] costs."[69] And for those working under employment-based immigrant visas, the University will help "prepare petitions and applications" for "permanent residence based on University employment."[70]

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[67] *See* State Univ. of N.Y. (SUNY), Legal and Financial Support for Immigration Petitions Policy, Doc. No. 8500, §§ I(C), II(A) (internet).

[68] *Id.* § I(C). Although an employer may in some cases itself file a petition on behalf of a prospective employee under the TN NAFTA category, in other cases the employee applies directly. *See* U.S. Customs & Immigration Servs., *TN NAFTA Professionals* (internet).

[69] SUNY, Immigration Petitions Policy, *supra*, § II(A); *see also id.* §§ III(F)(1), (2).

Because state universities acting as employers are direct and necessary participants in the INA's scheme for the filing of employment-based petitions, they fall within the zone of interests of the statute. And as employers, they have suffered concrete injuries as a result of § 2(c). Defendants' only argument in this regard is a conclusory assertion (Defs. Br. 34-35) that Hawaii has no cognizable interest under the INA "in the federal government's determination whether to allow an alien abroad to enter the United States." While States certainly understand that there is no absolute right to the issuance or renewal of a particular individual's visa, our state institutions—like other employers of foreign nationals—have come to rely on a degree of predictability in the visa system in making their critical faculty hiring and student admissions decisions, including an expectation that visa determinations will be free from discriminatory animus. *See* 8 U.S.C. § 1152(a)(1)(A) ("[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence"). All of this was abruptly upended by § 2(c), injuring the States' statutorily protected interests.

Accordingly, defendants are simply mistaken in asserting (Defs. Br. 34) that Hawaii falls outside the INA's zone of interests and thus lacks standing to assert its statutory challenge. *See Bank of America*

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[70] *Id.* § I(C). The University does not itself prepare and file student petitions, but it does provide "advice and assistance to international students and scholars through . . . the University's F-1 Student and J-1 Exchange Visitor programs." *Id.*

Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1303 (2017) (plaintiff City of Miami had standing to assert statutory claim where injuries were "*arguably* within the zone of interests" protected by the statute) (emphasis in original and internal quotation marks omitted).

IV. The Injuries to Public Interests Throughout the Country Support the Issuance of Nationwide Preliminary Injunctions in These Cases

The actual and threatened harms to the amici States (see *supra* Point I) exemplify the public interests affected by the Order and demonstrate the appropriateness of restraining the Order's disputed provisions nationwide. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As this Court has long recognized, district courts exercising their equity jurisdiction enjoy broad and "sound discretion to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (internal quotation marks omitted). Indeed, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than . . . when only private interests are involved." *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (recognizing where "there has been a systemwide impact [there may be] a systemwide remedy").

Affirmance of the preliminary injunctions is necessary to provide relief from the disruption and uncertainty the Executive Order has caused, and to avoid the further harms that will be experienced by the amici States, our institutions, and our residents if the preliminary injunctions are vacated or narrowed. Indeed, until this Court makes clear that religious animus has no place in federal immigration policy, the prospect that a new entry ban could be ordered will continue to deter future travel by foreign nationals to the United States long after the current Executive Order's expiration date.[71] More specifically, as long as an entry ban based on religious animus remains in effect, state universities and colleges will continue to have difficulties recruiting and retaining the faculty and students that their programs require. Many students from the six designated countries may choose not to apply to colleges and universities in the United States in the coming years,[72] or not to accept offers of admission from those educational institutions.

Indeed, the climate of uncertainty and discrimination created by the Executive Order already appears to have deterred applications and acceptances from around the world. Forty percent of colleges surveyed report a drop in applications from foreign students in the wake of both the original and revised Executive

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[71] *See, e.g.*, Donald Trump (@realDonaldTrump), Twitter (Sept. 15, 2017 3:54 a.m. PT) (internet) ("The travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!"); *see also* Order §§ 2(a)-(f) (establishing process for expanding the ban).

[72] The University of Washington, for instance, has received various communications from prospective students from the affected countries expressing anxiety about applying in light of the travel ban. Eaton Decl. ¶ 5 & exhibit 2; *see also* Chaudhry Decl. ¶ 9 (international applications for Washington State University's special education teacher certification program down from 63 in 2016 to only 10 in 2017).

Orders.[73] Graduate departments in science and engineering have reported that "international student applications for many programs declined by 20 to 30 percent for 2017 programs."[74] Additionally, 80% of college registrars and admissions officials surveyed have serious concerns about their future application yields from international students.[75] And 46% of graduate deans have reported "substantial" declines in admission yields for international students.[76] Not surprisingly, countries that are perceived as more welcoming—such as Canada, the United Kingdom, Australia, and New Zealand—have already seen a jump in applications following issuance of the Orders.[77] Similarly, until this Court affirms the nationwide preliminary injunctions at issue here, the uncertainty the Executive Order creates will continue to act as a drag on our States' medical residency programs. For example, in New York, the uncertainty created by both the Orders has had a "profound chilling effect on international medical students applying to New York hospitals' residency programs and [will be] a major disincentive for hospitals to select foreign nationals for [their] programs."[78]

Only a clear statement of the Executive Order's unlawfulness will allow our States, universities, hospitals, and businesses—and the people they serve—to move past the Order and the harm, disruption, and uncertainty it has unleashed.

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[73] Kirk Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, Nat'l Pub. Radio (Apr. 7, 2017) (internet).

[74] Petulla, *supra*.

[75] Carapezza, *supra*.

[76] Hironao Okahana, *Data Sources: Admissions Yields of Prospective International Graduate Students: A First Look* (Council of Graduate Schools, June 2017) (internet).

[77] Carapezza, *supra*.

[78] Scherzer Decl. ¶ 15; *see also* Johnson Decl.¶¶ 13-14.

CONCLUSION

The judgments of the Courts of Appeals should be affirmed.

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RECORD
AND
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Nos. 16-1436 & 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, et al.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES et al.,
Petitioners,
v.
STATE OF HAWAII, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF 161 TECHNOLOGY COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are 161 of the Nation's leading technology companies. *Amici* produce iconic goods and services that touch nearly every aspect of our lives—from business and finance to recreation and communication. Together, *amici* employ millions of Americans and contribute significantly to our country's economy. A complete list of *amici* is set forth in Appendix A.[1]

Amici are gravely concerned about the adverse effects of the Executive Order challenged in this case. As *amici* explain below, the Order makes it more difficult for them to hire the very best talent, to send their employees abroad, to grow their operations, and, fundamentally, to compete in the global economy. *Amici* believe that the Order will therefore stifle the Nation's economic growth and global competitiveness. *Amici* raised these concerns before the courts below.

Many of *amici*'s own stories reflect the benefits that immigrants bring to the Nation. Many of *amici* were founded by immigrants, virtually all employ immigrants, and every *amicus* recognizes that the American economy, and the Nation as a whole, thrives when it welcomes immigrants with properly calibrated policies.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of *amicus curiae* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

America proudly describes itself as "a nation of immigrants." *Foley* v. *Connelie*, 435 U.S. 291, 294 (1978). We are: in 1910, 14.7% of the population was foreign born; in 2010, 12.9%.[2] A quarter of us have at least one parent who was born outside the country.[3] Close to half of us have a grandparent born somewhere else.[4] Nearly all of us trace our lineage to another country.

President Reagan, rededicating the Statue of Liberty in 1986, said "which of us does not think of * * * grandfathers and grandmothers, from so many places around the globe, for whom this statue was the first glimpse of America? * * * [A] special kind of people from every corner of the world, who had a special love for freedom and a special courage that enabled them to leave their own land, leave their friends and their countrymen, and come to this new and strange land to build a New World of peace and freedom and hope." Remarks at the Opening Ceremonies of the Statute of Liberty Centennial Celebration (July 3, 1986), https://goo.gl/1qwq5N.

The "contributions of immigrants," then-Senator John F. Kennedy explained, "can be seen in every aspect of our national life." John F. Kennedy, A Nation of Immigrants 4 (1958). "We see it in religion, in politics, in business, in the arts, in education, even in athletics and in entertainment." *Id.* There is "no part of our nation," he recognized, "that has not been touched by our immigrant background." *Id.*

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[2] Elizabeth Grieco, U.S. Census Bureau, *The Foreign-Born Population in the United States* 3 (2012), https://goo.gl/PZ3pnE.

[3] Pew Research Center, *Second-Generation Americans: A Portrait of the Adult Children of Immigrants* 8 (Feb. 7, 2013), https://goo.gl/SRaXxc.

[4] Gallup, *Majority of Americans Identify Themselves as Third Generation Americans* (July 10, 2001), https://goo.gl/o7PRxv.

President Lincoln, after signing into law the Act to Encourage Immigration, explained that immigration is "one of the principal replenishing streams which are appointed by Providence" to better the Nation—and therefore requires "effective national protection." Abraham Lincoln, Fourth Annual Message (Dec. 6, 1864), https://goo.gl/znf3iC.

Indeed, immigrants make many of the Nation's greatest discoveries and create some of the country's most innovative and iconic companies. Immigrants are among our leading entrepreneurs, politicians, artists, and philanthropists. The experience and energy of people who come to our country to seek a better life for themselves and their children—to pursue the "American Dream"—are woven throughout the social, political, and economic fabric of the Nation.

For decades, stable U.S. immigration policy has embodied the principles that we are a people descended from immigrants, that we welcome new immigrants, and that we provide a home for refugees seeking protection. At the same time, America has long recognized the importance of protecting ourselves against those who would do us harm. But it has done so while maintaining our fundamental commitment to welcoming immigrants—through increased background checks and other controls on people seeking to enter our country.[5]

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[5] "In the decade since 9/11," immigration policy has incorporated, among other things, "major new border security and law enforcement initiatives, heightened visa controls and screening

On January 27, 2017, "[o]ne week after inauguration and without interagency review" (J.A. 1166), President Donald J. Trump signed Executive Order 13,769. See 82 Fed. Reg. 8977 (2017) ("First Executive Order"). That Order altered immigration policy in significant respects: it barred nationals of seven countries—Syria, Libya, Iran, Iraq, Somalia, Yemen, and Sudan—from entering the United States for at least 90 days (*id.* § 3(c)), with the possibility of expansion to additional countries (*id.* § 3(e)-(f)), and it gave the Secretaries of State and Homeland Security discretion to issue visas to affected nationals "on a case-by-case basis" (*id.* § 3(g)).

The First Executive Order "took immediate effect, causing great uncertainty as to the scope of the order." J.A. 1167. Even "federal officials themselves were unsure as to the scope of EO1, which caused mass confusion at airports and other points of entry." *Ibid.* After "[i]ndividuals, organizations, and states across the nation challenged the First Executive Order in federal court" (*id.* 174), it was enjoined on the basis of a number of constitutional and statutory defects.

On March 6, 2017, President Trump rescinded the First Executive Order and issued Executive Order 13,780. See 82 Fed. Reg. 13209 (2017) ("the Order"). The new Order bans nationals from six countries for 90 days beginning on March 16—the same

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of international travelers and would-be immigrants, the collection and storage of information in vast new interoperable databases used by law enforcement and intelligence agencies, and the use of state and local law enforcement as force multipliers in immigration enforcement." Muzaffar Chishti & Claire Bergeron, Migration Pol'y Inst., *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape* (Sept. 8, 2011), https://goo.gl/6rdagt.

countries as the first order, omitting Iraq, but subjecting nationals from Iraq to especially intensive scrutiny. Order §§ 2(c), 4. The Order's ban may be extended beyond 90 days and expanded to new countries deemed, based on unspecified criteria, not to provide sufficient information to the United States. *Id.* § 2(e)-(f). Any waiver from the ban remains subject to the largely unconstrained discretion of U.S. Customs and Border Protection. *Id.* § 3(c).

The Order effects a significant shift in the rules governing entry into the United States, and is inflicting substantial harm on American companies, their employees, and the entire economy. It hinders the ability of American companies to attract talented employees; increases costs imposed on business; makes it more difficult for American firms to compete in the international marketplace; and gives global enterprises a new, significant incentive to build operations—and hire new employees—outside the United States.

The Order also exceeds the President's authority under the Nation's immigration laws. To bar a class of aliens from the United States, the President must reasonably determine that their entry would be detrimental to the Nation, and then craft an order that reasonably addresses any threat that those individuals might pose. The Order here falls far short of these requirements—it neither explains why the targeted individuals' entry would be detrimental to the United States nor imposes reasonable restrictions.

For example, Congress has enacted detailed standards to prevent entry of terrorists into our country. The Order, "with vague words of national security" (J.A. 171), overrides those standards without any explanation, let alone sufficient justification.

Nor did the executive branch engage in the notice-and-comment procedures necessary before imposing sweeping, long-term changes on the Nation's immigration system.

Moreover, Congress in 1965 prohibited discrimination in immigration decisions on the basis of national origin precisely so that the Nation would not shut its doors to immigrants based on where they come from—but the Order does just that. It would turn the clock back and restore the national-origins system that Congress expressly abolished.

The Court accordingly should affirm the judgments below barring enforcement of the Order.

ARGUMENT

I. Immigration Drives American Innovation And Economic Growth.

The tremendous impact of immigrants on America—and on American business and the entire American economy—is not happenstance. People who choose to leave everything that is familiar and journey to an unknown land to make a new life necessarily are endowed with drive, creativity, determination—and just plain guts. The energy they bring to America is a key reason why the American economy has been the greatest engine of prosperity and innovation in history.

A. Immigrants are leading entrepreneurs. "The American economy stands apart because, more than any other place on earth, talented people from around the globe want to come here to start their businesses." P'ship for a New Am. Econ., *The "New American" Fortune 500*, at 5 (2011), http://goo.gl/-yc0h7u. Indeed, "[i]mmigrants continue to be a lot more likely than the native-born to become entrepreneurs." Robert W. Fairlie et al., Ewing Marion Kauffman Found., *The 2016 Kauffman Index: Startup Activity* 7 (Aug. 2016), https://goo.gl/6Wr5Mc.

Some of these businesses are large. "Immigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars"—so-called "unicorns"—"and are key members of management and product development teams in over 70 percent (62 of 87) of these companies." Stuart Anderson, Nat'l Found. for Am. Pol'y, *Immigrants and Billion Dollar Startups* 1 (Mar. 2016), https://goo.gl/Mk7iJM (emphasis added). Immigrants or their children founded more than 200 of the companies on the Fortune 500 list, including Apple, Kraft, Ford, General Electric, AT&T, Google, McDonald's, Boeing, and Disney. P'ship for a New Am. Econ., *supra*, at 1-2. Collectively, these companies generate annual revenue of $4.2 trillion and employ millions of Americans. *Id.* at 2.

Many of these businesses are small. "While accounting for 16 percent of the labor force nationally and 18 percent of business owners, immigrants make up 28 percent of Main Street business owners." Americas Soc'y & Council of the Americas, *Bringing Vitality to Main Street* 2 (2015), https://goo.gl/i9NWc9. These are "the shops and services that are the backbone of neighborhoods around the country." *Id.* In 2011, immigrants opened 28% of all new businesses in the United States. See P'ship for a New Am. Econ., *Open For Business: How Immigrants Are Driving Small Business Creation in the United States* 3, Aug. 2012, https://goo.gl/zqwpVQ.

Immigrant entrepreneurs come from all parts of the world. In 2014, "19.1 percent of immigrants from the Middle East and North Africa were entrepreneurs." New Am. Econ., *Reason for Reform: Entrepreneurship* 2 (Oct. 2016), https://goo.gl/QRd8Vb.

Immigrants also fuel the growth of the economy as a whole. "When immigrants enter the labor force, they increase the productive capacity of the economy and raise GDP. Their incomes rise, but so do those of natives." Pia Orrenius, George W. Bush Inst., *Benefits of Immigration Outweigh the Costs*, The Catalyst (2016), https://goo.gl/qC9uOc. Immigrants thus create new jobs for U.S. citizens "through the businesses they establish * * * [and] play an important role in job creation in both small and large businesses." U.S. Chamber of Commerce, *Immigration: Myths and Facts* 3 (2016), https://goo.gl/NizPEQ.

Immigrants are also innovators. Since 2000, more than one-third of all American Nobel prize winners in Chemistry, Medicine, and Physics have been immigrants. *See* Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016), http://goo.gl/RILwXU. Among individuals with advanced educational degrees, immigrants are nearly three times more likely to file patents than U.S.-born citizens. Michael Greenstone & Adam Looney, The Hamilton Project, *Ten Economic Facts About Immigration* 11 (Sept. 2010), https://goo.gl/3zpdpn. By one estimate, non-citizen immigrants were named on almost a quarter of all U.S.-based international patent applications filed in 2006. Vivek Wadhwa et al., *America's New Immigrant Entrepreneurs* 4 (Jan. 4, 2007), https://goo.gl/wCIySz. And children of immigrants made up 83% of the top-performing students in the well-known Intel high school science competition. Stuart Anderson, Nat'l Found. for Am. Pol'y, *The Contributions of the Children of Immigrants to Science in America* 1-3, 5, 12 (Mar. 2017), https://goo.gl/7noMyC.

Indeed, inventions and discoveries by immigrants have profoundly changed our Nation. Some, like alternating current (Nikola Tesla), power our world. Others, like nuclear magnetic resonance (Isidore Rabi) and flame-retardant fiber (Giuliana Tesoro), save lives. And yet others, like basketball (James Naismith), blue jeans (Levi Strauss), and the hot dog (Charles Feltman), are classic Americana.

B. America's success in attracting and incorporating immigrants into our society is unrivaled in the world.

To be sure, America has in the past deviated from this ideal. Woodrow Wilson in 1902 decried the immigration to the United States of "multitudes of men of the lowest class from the south of Italy and men of the meaner sort out of Hungary and Poland, men out of the ranks, where there was neither skill nor energy nor any initiative of quick intelligence; and they came in numbers which increased from year to year, as if the countries of the south of Europe were disburdening themselves of the more sordid and hapless elements of their population." 5 Woodrow Wilson, A History of the American People 212-213 (1902).

The Immigration Act of 1917 (also known as the Literacy Act) barred immigration from parts of Asia. And in 1924, the Johnson-Reed Act significantly restricted Italian and Jewish immigration to the United States in an effort to "preserve the ideal of U.S. homogeneity." U.S. Dep't of State, Office of the Historian, *The Immigration Act of 1924 (The Johnson-Reed Act)*, https://goo.gl/5foFNZ. See also *Mojica* v. *Reno*, 970 F. Supp. 130, 145 (E.D.N.Y. 1997) (Weinstein, J.) ("It is well known that prejudice against the Irish, the Chinese, the Japanese, the Italians, the Jews, the Mexicans and others emerged as these groups emigrated in substantial numbers.").

But the march of time has discredited these laws and policies. Since World War II, American immigration policy has been one of "tolerance, equality and openness" in which "the United States has revived its traditional rhetoric of welcome—and matched its words with action." *Id.* (quotation omitted).

In 1965, Congress enacted the Immigration and Nationality Act (INA). That law, which established the immigration framework that remains in place today, eliminated the policy of national quotas. In signing the INA, President Johnson stated:

> America was built by a nation of strangers. * * * And from this experience, almost unique in the history of nations, has come America's attitude toward the rest of the world. We, because of what we are, feel safer and stronger in a world as varied as the people who make it up—a world where no country rules another and all countries can deal with the basic problems of human dignity and deal with those problems in their own way.

Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965).

These principles have defined American immigration policy for the past 50 years. The beneficiaries are not just the new immigrants who chose to come to our shores, but American businesses, workers, and consumers, who gain immense advantages from immigrants' infusion of talents, energy, and opportunity.

II. The Order Harms The Competitiveness Of American Companies.

The Order abandons the principles that have undergirded U.S. immigration policy for more than half a century—clear, settled standards and constrained discretion. It introduces sudden changes without an opportunity for affected parties to inform decisionmakers of the consequences of those changes before their adoption, provides unclear standards for implementation, and leaves entirely to individual officers' discretion the exercise of case-specific waiver authority.

The Order will make it more difficult and expensive for U.S. companies to recruit, hire, and retain some of the world's best employees. It will disrupt ongoing business operations—making it harder for U.S. companies to compete in today's global markets. And it will inhibit investment in the United States. That will inflict significant harm on American business, innovation, and economic growth.[6]

A. The Order establishes a system of "case-by-case" exceptions from its ban on nationals from six countries, but leaves the application of those exceptions to the discretion of Customs and Border Protection—setting forth a non-exhaustive list of circumstances in which such exceptions "*could be* appropriate." Order § 3(c) (emphasis added). Because individual immigration officers retain broad discretion in issuing these individual-by-individual exceptions, it is unclear what exemptions will be actually be given, or why—and whether that authority is being exercised fairly and without discrimination or favoritism.

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[6] Several major companies reported substantial disruptions from the First Executive Order. *E.g.*, Letter from Bradford L. Smith, President and Chief Legal Officer, Microsoft, to John F. Kelly, Sec'y of Homeland Sec., and Rex W. Tillerson, Sec'y of State, at 5 (Feb. 2, 2017), https://goo.gl/AZtcFV; Jonathan Shieber, *Apple CEO Tim Cook Sent an Email to Employees about the Immigration Ban*, TechCrunch (Jan. 28, 2017), https://goo.gl/qzXDJO.

Even more important, the Order provides that the ban, and its accompanying standardless exception process, may be expanded to include an unspecified number of additional countries if those nations do not provide information the Secretary of State deems necessary to approve visas. See Order § 2(e)-(f). The Department of Homeland Security purportedly "has already identified more than a *dozen* countries whose nationals could be blocked from traveling to the United States" on this basis.[7] Individuals and businesses thus face the significant risk that new, as-yet-unidentified countries will be added to the ban—all without any governing standard. And, given that the second Order expanded on the time period of the first, nothing prevents a further extension.[8]

The Order will have the immediate, adverse consequences of making it far more difficult and expensive for U.S. companies to hire the world's best talent and compete effectively in the global marketplace. Businesses and employees have little incentive to go through the laborious process of sponsoring or obtaining a visa, and relocating to the United States, if an employee may be unexpectedly halted at the border. Skilled individuals will not wish to immigrate to this country if they may be cut off without warning from their spouses, grandparents, relatives, and friends—they will not pull up roots, incur significant economic risk, and subject their family to considerable uncertainty to immigrate to the United States in the face of this instability.[9] The Order therefore significantly disadvantages U.S. companies in the global competition for talent.[10]

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[7] Gopal Ratnam, *Trump's Travel Order Opens Door to Targeting More Countries*, Roll Call (Mar. 15, 2017) (emphasis added), https://goo.gl/6bFYHm.

[8] Indeed, as the government notes, President Trump has already extended—by memorandum—the ban for 90 days past when any injunctions against the Order are lifted or stayed. Pet. Br. 37.

B. The Order's bans on travel also will significantly impair day-to-day business. The marketplace for today's businesses is global. Companies routinely send employees across borders for conferences, meetings, or job rotations, and invite customers, clients, or users from abroad. Global mobility is critical to businesses whose customers, suppliers, users, and workforces are spread all around the world.[11]

Global business travel enables employees to develop new skills, take on expanded roles, and stay abreast of new technological or business developments. It also facilitates new markets and business partnerships. Indeed, one study has shown that each additional international business trip increases exports from the United States to the visited country by, on average, over $36,000 per year.[12]

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[9] Seth Fiegerman, *Former Google Exec Calls Trump Travel Ban an 'Enormous Problem,'* CNN Tech (Jan. 30, 2017), https://goo.gl/vNVgLt.

[10] See Brady Huggett, *US Immigration Order Strikes Against Biotech*, Trade Secrets (Feb. 7, 2017), https://goo.gl/OLHfNl.

[11] See, *e.g.*, BGRS, *Breakthrough to the Future of Global Talent Mobility* (2016), http://goo.gl/ZhIxSr; Harv. Bus. Rev., *Strategic Global Mobility* (2014), http://goo.gl/AV3nhJ.

But the Order will mean that many companies and employees (both inside and outside the United States) would be unable to take advantage of these opportunities. The Order will prevent companies from inviting customers to the U.S. and prevent employees from outside the U.S. from traveling here. That is true even for persons or countries not currently covered by the Order because there is no way to know whether or when a given country may be added to the no-entry list.

The Order also could lead to retaliatory actions by other countries, which would seriously hinder U.S. companies' ability to do business or negotiate business deals abroad. U.S. companies' deals have already been threatened.[13]

C. The same authority invoked to justify the Order may be used in the future to impose additional measures that will harm U.S. businesses. For example, once the 90-day suspension period has ended, foreign travelers could be required "to provide cellphone contacts and social-media passwords and answer questions about their ideology, according to Trump administration officials, measures that could intrude into the lives of millions of foreigners."[14] Such requirements would powerfully discourage travel to the United States, and risk exposing to third parties sensitive business information of U.S. companies contained on travelers' devices.

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[12] Maksim Belenkiy & David Riker, *Face-to-Face Exports: The Role of Business Travel in Trade Promotion*, 51 J. Travel Res. 632, 637 (2012). See also Nune Hovhannisyan & Wolfgang Keller, *International Business Travel: An Engine of Innovation?*, 20 J. Econ. Growth 75 (2015).

[13] See, *e.g.*, Jeff Daniels, *Trump Immigration Ban Puts $20 Billion in Boeing Aircraft Sales to Iran, Iraq at Risk*, CNBC (Jan. 30, 2017), https://goo.gl/uT2goG; Tara Palmeri & Bryan Bender, *U.S. Diplomats Warning GE's Major Deals in Iraq at Risk over Travel Ban*, Politico (Feb. 1, 2017), http://goo.gl/nhj9CZ.

D. For all of these reasons, the Order will incentivize both immigration to and investment in foreign countries rather than the United States. Highly skilled individuals will be more interested in working elsewhere, in places where they and their colleagues can travel freely and with assurance that their immigration status will not suddenly be revoked. Other countries have already begun "actively pursuing foreign investors and entrepreneurs, with the aim of increasing investment and creating jobs for the benefit of the national economy." *International Migration Outlook 2017*, Org. Econ. Co-operation & Dev. 46 (41st ed. 2017).

Non-U.S. companies have taken note, too. Multinational companies will have strong incentives, including pressure from their own employees, to base operations outside the United States or to move or hire employees and make investments abroad. Foreign companies will have significantly less incentive to establish operations in the United States and to hire American citizens, because the Order will preclude the ability of those companies to employ their world-class talent within their U.S. subsidiaries. Ultimately, American workers and the economy will suffer as a result.

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[14] Laura Meckler, *Trump Administration Considers Far-Reaching Steps for 'Extreme Vetting,'* Wall St. J. (Apr. 4, 2017), https://goo.gl/D3H1tF.

Of course, the federal government can and should implement targeted, appropriate adjustments to our country's immigration system to enhance the Nation's security. But a broad, open-ended ban—together with the indication that the ban could be expanded to other countries, or that additional, different restrictions could be adopted, without notice—will undermine rather than protect American interests, producing serious, widespread adverse consequences without any reasonable relationship to the goal of making the country more secure.

III. The Order Is Unlawful.

The Order is unlawful for several reasons. We focus on two. *First,* the Immigration and Nationality Act does not authorize the use of Executive Orders to fundamentally change the character of the Nation's immigration laws. *Second,* the Order violates the non-discrimination requirement of Section 1152.

A. Section 1182 does not empower the President to engage in wholesale, unilateral revision of the Nation's immigration laws.

Petitioners rely primarily on the President's power under the INA to "suspend the entry of * * * any class of aliens" whose entry he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). They also point to Section 1185(a), which permits the President to issue "reasonable rules, regulations, and orders" and "limitations and exceptions" for the entry of immigrants and nonimmigrants. Those grants of authority, petitioners claim, give the President unilateral authority to ban any group of aliens, for any reason.

But these statutory provisions do not confer unlimited authority. The text and context of Sections 1182(f) and 1185(a) make clear that an exercise of authority must be reasonable and must be limited to a specific, emergency situation. The Order here exceeds those limitations.

First, the Order purports to ban a group of aliens from the United States without making the requisite finding that such aliens will be detrimental to the interests of the Nation. *Second*, the Order is the polar opposite of a targeted response to an emergency situation. In sixty-five years, no President has ever invoked Sections 1182(f) and 1185(a) to bar the admission into the United States of tens of millions of people, based solely on their nationality, for months—and perhaps years. *Third*, the Order conflicts with the specific statutory provision that establishes standards for preventing entry by terrorists without any reasonable justification for displacing those congressionally enacted standards. And *fourth*, the Order's broad changes to immigration procedures can only be imposed through the rulemaking process.

1. *The Order does not contain a finding sufficient to justify exercise of the President's authority under Section 1182(f).*

The text, context, and history of Section 1182(f) all point to the same conclusion: the Order exceeds the President's authority under the statute because it does not adequately explain why the aliens it bars would harm the United States.

The text of Section 1182(f) is clear: the President may only suspend the entry of aliens if he "finds" that their entry "would be detrimental to the interests of the United States." Congress could not have made it more plain that it did not intend to confer upon the President unbounded power to bar aliens. That Congress required a sufficient finding of detriment before the President may bar a class of aliens is unsurprising, for Congress may delegate power only if "the executive judgment is limited by adequate standards." *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952). An "intelligible principle" must guide the exercise of delegated power. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

For this reason, the Court has consistently identified limits on discretionary authority delegated by Congress, even when confronted with a clause that seems "limitless" when read "in isolation and literally." *United States* v. *Witkovich*, 353 U.S. 194, 198-202 (1957). See, *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) (rejecting the view that "simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice"); *Kent* v. *Dulles*, 357 U.S. 116, 127, 128 (1958) (considering the power to issue passports, the Court observed that the President's authority was "expressed in broad terms," but refused to "impute to Congress * * * a purpose to give [the President] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose").

Here, moreover, the text contains a clear limitation on presidential action: the President's authority is contingent on finding that the specified aliens' entry would be "detrimental to the interests of the United States." A reasonable finding by the President of the requisite "detriment[]" thus "constitute[s] a condition precedent to embarking upon the exercise of regulatory power"—and the President's action is invalid in the absence of such a reasonable determination. *Amoco Oil Co.* v. *Envtl. Prot. Agency*, 501 F.2d 722, 736 (D.C. Cir. 1974). Indeed, courts in a variety of contexts analyze whether the executive branch has reasonably made the findings specified by Congress as prerequisites for executive action. See, *e.g.*, *Mobil Oil Expl. & Producing Se. Inc.* v. *United Distribution Companies*, 498 U.S. 211, 227 (1991); *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980); *United Distribution Companies* v. *F.E.R.C.*, 88 F.3d 1105, 1139 (D.C. Cir. 1996); *Nuclear Info. Res. Serv.* v. *Nuclear Regulatory Comm'n*, 969 F.2d 1169, 1178 (D.C. Cir. 1992); *Ethyl Corp.* v. *Envtl. Prot. Agency*, 541 F.2d 1, 11-12 (D.C. Cir. 1976); *Am. Overseas Airlines, Inc.* v. *Civil Aeronautics Bd.*, 254 F.2d 744, 749 (D.C. Cir. 1958).

The President must therefore meet a standard of reasonableness in exercising his Section 1182(f) authority. *Witkovich*, 353 U.S. at 198-202 (holding that authority to request information that the Attorney General "may deem fit and proper" had an implicit limit of reasonableness). That conclusion accords with the longstanding interpretation of the statute by the Executive Branch. See *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979) (recognizing that any suspension the President makes under Section 1182(f) "must meet the test of 'reasonableness'"); Hawaii Br. 36-37.

In addition, the permissible justifications for the exercise of this authority are limited by the context in which Congress acted when it adopted the language codified in Section 1182(f). Congress drew that text from a series of narrowly drawn wartime statutes, proclamations, and regulations permitting the

President to exclude only limited classes of aliens, for limited periods of time, to address emergency situations. See Hawaii Br. 31-36. That context restricts the circumstances in which the President may employ this authority. *Zemel*, 381 U.S. at 17-18 (statute "must take its content from history"); *Kent*, 357 U.S. at 128 (grounds for refusing passport limited to those that "it could fairly be argued were adopted by Congress in light of prior administrative practice").

The Order transgresses this limitation on presidential authority. It provides barely any justification for why the admission of aliens it bans from the United States—based on nothing more than their national origin—would be detrimental to the Nation. Its express aim is to "protect the Nation from terrorist activities by foreign nationals." Order, pmbl. But "[t]he Order makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." J.A. 1200; *see also id.* at 256 (Keenan, J., concurring).

Certainly there is no reasonable basis to conclude that nearly *every* national of Iran, Libya, Somalia, Sudan, Syria, and Yemen, absent specific evidence to the contrary, will commit terrorist activities upon entry to the United States.[15] Indeed, the ban applies to hundreds of thousands of students, employees, and family members of citizens who have been previously admitted to the United States—and thus who the United States, after careful, individualized review, concluded that their admission to the United States posed no security risk to the Nation.

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[15] Indeed, the administration itself did not think so until it found itself embroiled in litigation. As the Ninth Circuit noted, "a draft report from DHS, prepared about one month after EO1 issued and two weeks prior to EO2's issuance, concluded that citizenship 'is unlikely to be a reliable indicator of potential terrorist activity' and that citizens of countries affected by EO1 are '[r]arely [i]mplicated in U.S.-[b]ased [t]errorism.'" J.A. 1173 (alterations in original). See also Jordan Fabian, *DHS Analysis Found No Evidence of Extra Threat Posed by Travel-Ban Nations: Report*, The Hill (Feb. 24, 2017), https://goo.gl/6jp7FX.

The past history of admitting these individuals is especially important because "[t]here is no finding that present vetting standards are inadequate." J.A. 1198. The Order simply recites well-known facts regarding these countries *as a whole*, ignoring that no alien from these countries admitted to the U.S. has engaged in terroristic activity.

The Order's purported rationale falls short for other reasons. It is both overinclusive and underinclusive: its focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." J.A. 1203 (quotation omitted). And its reliance on the exclusion of several listed countries from the Visa Waiver Program is wholly unconvincing: "[r]ather that setting an outright ban on entry of nationals from those countries, Congress * * * instead required that persons who are nationals of or have recently traveled to these countries enter the United States with a visa." *Id.* at 1204.

It is no surprise that petitioners fall back on a different argument: that the Order is necessary because the government lacks "sufficiently complete and reliable information" about which aliens are likely to engage in terrorism. Pet'r's Br. 47. But "the statutory text plainly requires more than vague uncertainty regarding whether their entry might be detrimental to our nation's interest." J.A. 257 (Keenan, J., concurring). Claimed "uncertainty" cannot constitute a reason for banning 140 million people from the United States based on nothing more than their nationality.

2. *The Order is invalid because of its broad scope and unlimited duration.*

No other President has ever used Section 1182(f) to presumptively prohibit the entry of millions of foreign nationals solely on the basis of their nationality. For that reason as well, the Order is unlawful.

Section 1182(f) is a gap-filler provision, authorizing the President to take targeted action to respond to an emergency situation. *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (explaining that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in [S]ection 1182(a)").

That was the context in which the language contained in Section 1182(f) was enacted. See pages 19-20, *supra*. And it is how past Presidents have employed this authority since 1952, each time issuing a targeted restriction, usually limited to dozens or hundreds of people on the grounds that each affected person had engaged in culpable conduct, such as human trafficking, illegal entry, or corruption. See Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017), https://goo.gl/D0bRkS. This consistent executive branch practice is powerful evidence of the limited reach of the provision, and it is consistent with the context of Section 1182(f)—as one provision in an extraordinarily detailed set of statutory rules, elaborated in administrative regulations, that govern the issuance of visas and entry of aliens.

The Order here deviates from this settled practice. It is broadly applicable—to millions of people; it lasts for at least 90 days, which extends past the time period specified in the initial order, and it may last much longer; and it targets people based on nationality, rather than on the basis of culpable conduct. For this reason as well, the Order is unreasonable and therefore unlawful.

3. The Order conflicts with other provisions of the INA.

The Order also displaces the INA's specific requirements for excluding aliens on the basis that they might commit acts of terrorism. See 8 U.S.C. § 1182(a)(3)(B). That statute—"a complex provision with 10 different subsections" that "cover[s] a vast waterfront of human activity" (*Kerry* v. *Din*, 135 S. Ct. 2128, 2145 (2015) (Breyer, J., dissenting))—provides a detailed scheme for determining when an alien may be excluded based on a potential to commit terrorist acts. Specifically, an alien who has never before engaged in terrorist activities or joined a terrorist organization may be excluded only if the government has a "reasonable ground to believe" that the alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II).

The Order's system of ad hoc waivers turns that provision on its head. Instead of creating a presumption of *admittance* absent any "reasonable ground" to think an alien will commit terrorist activities—as Section 1182(a)(3)(B) requires—the Order creates a presumption of *exclusion* and leaves it to Customs and Border Protection to decide whether an alien has demonstrated, "to the officer's satisfaction," that he or she would not threaten national security. Order § 3(c).

The Order thus eliminates Congress's substantive requirement that there be reasonable grounds to exclude an alien on the basis of the threat of future acts of terrorism. And it does so without even attempting to explain why changed circumstances or other facts make Congress's determinations inadequate to protect the Nation.[16]

As construed by petitioners, therefore, Section 1182(f) would allow the President to rewrite *all* of Congress's detailed rules for when aliens may be excluded, set forth in detail in Section 1182(a). "[T]he statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power." ***Abourezk***, 785 F.2d at 1051. But if the President may ban groups of aliens at will, even for reasons that contradict the standards specified by Congress, he or she could "thereby effectively nullify[] that complex body of law." J.A. 254 (Keenan, J., concurring). See also ***Abourezk***, 785 F.2d at 1057 ("The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28)."); IRAP Br. 51-52.

Indeed, were the Court to uphold the Order here, a President could use Section 1182(f) to rewrite the immigration laws in their entirety, prescribing via executive order an entire new regime—with standards for issuing visas and excluding aliens wholly different from those prescribed by Congress. Section 1182(f) does not, as the government would have it, empower the President to nullify duly enacted immigration laws at will. If it did, such a delegation of authority would pose severe constitutional concerns.

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[16] In addition, Congress in 2015 specifically considered the risk that travelers from these countries might engage in terrorism, and addressed it by exempting them from the visa waiver program. See Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)). That congressional determination, too, is overridden by the Order without any justification or explanation.

4. *The Order is procedurally unreasonable.*

The comprehensive revision of the immigration system effected by the Order—and the executive orders that apparently will follow—improperly circumvents Congress's directive that significant changes in immigration rules be implemented through notice and comment rulemaking.

Sections 2(a) to 2(f) of the Order effectively create a new immigration system pursuant to which the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence determine what unspecified "information" countries must share with the United States in order to allow their nationals to enter this country. Then, these officials may recommend to the President an expansion or extension of the ban on entry to the United States.

In addition, the Order confers effectively unconstrained discretion on consular officers and customs officials to "decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended." Order § 3(c). Other than listing a series of nonexclusive considerations, the Order neither proscribes a procedural mechanism for this exercise of discretion, nor establishes substantive guideposts to govern the exercise of this broad discretion.

Congress expressly identified the need for rulemaking in the INA, authorizing the President to impose "reasonable rules, regulations, and orders." 8 U.S.C. § 1185(a). But no such rulemaking occurred here, notwithstanding the Order's broad applicability. Moreover, while the Administrative Procedure Act does not generally apply to the President's actions (see *Dalton* v. *Specter*, 511 U.S. 462, 469 (1994)), it *does* apply to the subsequent conduct of the Departments of State and Homeland Security, which must ultimately implement the Order.

Rulemaking "foster[s] * * * fairness and deliberation" (*United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001)), and gives "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). See also *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rulemaking process ensures that an agency has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Here, the notice-and-comment process is particularly important given the huge range of individuals and entities affected by these rules, such as families seeking to reunite, or even just to have the opportunity to visit one another; businesses wishing to interact with customers, to enable employees to obtain experience at their home offices in the United States, or to hire individuals with expertise not otherwise available; and cultural institutions planning performances by artists from outside the United States.

For these reasons, Section 1182(f) does not provide a means of circumventing the ordinary rulemaking process for promulgating legal principles of general applicability. Cf. *Texas* v. *United States*, 809 F.3d 134, 177 (5th. Cir. 2015) (requiring use of notice-and-comment rulemaking in immigration context), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

B. The Order violates Section 1152's nondiscrimination requirement.

The Order separately contravenes 8 U.S.C. § 1152(a)(1)(A), which provides that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." "Congress could hardly have chosen more explicit language" to "unambiguously direct[] that no nationality-based discrimination" shall occur with respect to immigration. *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996).

Congress enacted Section 1152 "to eliminate the 'national origins system as the basis for the selection of immigrants to the United States.'" J.A. 1209 (quoting H.R. Rep. No. 89-745, at 8 (1965)). That system, as President Johnson explained, "was incompatible with our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." H.R. Rep. No. 89-745 at 11. Congress replaced the national origins system with "a new system of selection designed to be fair, rational, humane, and in the national interest" (S. Rep. No. 89-748, at 13 (1965)), based largely on "the advantage to the United States of the special talents and skills of the immigrant." H.R. Rep. No. 89-745, at 18.

On its face, the Order discriminates on the basis of nationality and therefore violates Section 1152. Although the Order purports to bar only the entry of designated foreign nationals, "it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries." J.A. 140. That is precisely what Section 1152 prohibits. *Ibid.* Accord *Vayeghan* v. *Kelly*, 2017 WL 396531, at *1 (C.D. Cal. Jan. 29, 2017).[17]

Section 1152 must be understood to constrain the powers granted to the President under Section 1182(f). As the Ninth Circuit explained, Section 1152 was enacted after Section 1182, "and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality." J.A. 1214. See, *e.g.*, *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotation omitted). And Section 1152 also "specifically identifies exemptions from the non-discrimination mandate, implying that unmentioned sections are not exempted." J.A. 1214.

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[17] Although petitioners no longer press this argument, the Order cannot be defended as creating "procedures for the processing of immigrant visa applications" (8 U.S.C. § 1152(a)(1)(B)). Cf. J.A. 1216. That provision, by its terms, confers power upon the Secretary of State, not the President. And the Secretary must exercise that authority in conformity with the provisions of the Administration Procedure Act, including providing notice and opportunity for comment by interested parties. 5 U.S.C. § 553(b)-(c). Cf. *Meina Xie* v. *Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (applying the APA to the Secretary of State's visa processing). More importantly, the Secretary's authority is subject to Section 1152's prohibition on discrimination. It therefore—at most—permits the executive branch to regulate the manner in which foreign nationals can receive visas or enter the United States, but does not authorize a sweeping ban on nationals from six countries.

The government asserts that there is no conflict between the Order and Section 1152 because an alien who is barred under the Order "is denied an immigrant visa because he is ineligible to receive one as someone barred from entering the country," and "not because he is suffering the type of nationality-based discrimination" that Section 1152 prohibits. Pet. Br. 52. That, Judge Wynn explained below, "is nonsensical." J.A. 313 (Wynn, J., concurring). It makes no difference that the aliens who are banned by the Order cannot receive visas because they are barred from entering the United States when the *reason* for that bar is their national origin.

The President may not use Section 1182 to circumvent Congress's express prohibition on nationality-based discrimination by shifting the step in the process at which that discrimination occurs. Congress could not have intended to prohibit discrimination at the embassy, but permit it at the airport gate. Congress instead commanded "that government must not discriminate against particular individuals because of the color of their skin or the place of their birth," because such discrimination "is unfair and unjustified" wherever it occurs. *Olsen* v. *Albright*, 990 F. Supp. 31, 39 (D.D.C. 1997).

In sum, the Order exceeds the President's authority under Section 1182—but even if it does not, it nonetheless violates the ban on nationality-based discrimination codified in Section 1152.[18]

C. This Court can, and must, adjudicate the scope of the President's authority.

"Congress intends the executive to obey its statutory commands and, accordingly, * * * it expects the courts to grant relief when an executive agency violates such a command." *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). For this reason, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)).

It is fundamental that the President's exercise of his statutory powers is not above review by this Court. In *Dames & Moore* v. *Regan*, for instance, the Court addressed claims that President Reagan's executive order suspending certain claims against Iran exceeded the President's statutory powers, holding that the order fell within that authority. 453 U.S. 654, 666-667 (1981). See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544-547 (1950) (reviewing on the merits claims that a presidential proclamation violated two statutes). Respondents here raise a similar claim, arguing that the Order exceeds the President's limited authority under Section 1182(f).

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[18] To be sure, the text of Section 1152 only prohibits discrimination with respect to immigrant visas. But the basic nondiscrimination principle that it embodies is reflected throughout U.S. law. *Olsen*, 990 F. Supp. at 33 (addressing nonimmigrant visas). Section 1182(f) therefore does not confer authority to discriminate on this basis with respect to nonimmigrant visas in the absence of a reasonable justification for displacing this fundamental principle. Such a justification is lacking here.

To be sure, there is a narrow exception to judicial review where a statute gives the President unlimited discretion to make a discrete and specific decision. See *Dalton*, 511 U.S. at 477. This rule reflects the general principle that review is unavailable when a statute is "drawn in such broad terms that in a given case there is no law to apply." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

The President's discretion under Section 1182(f) is not unlimited, as it was in *Dalton*. Instead, the President's authority is constrained by the requirement that he make an adequate finding of detriment, and that he exercise his power under Section 1182 reasonably. Accord *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-188 (1993) (assessing legality of President's exercise of Section 1182(f) authority). The Order is unlawful—and the Court should say so.

Petitioners' invocation of the so-called "consular nonreviewability" doctrine is similarly misplaced. Pet. Br. 24-26. The question here does not involve an individualized, discretionary "decision" by a "consular official" to "issue or withhold a visa." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Rather than any discretionary determination, it is the scope of the President's authority to establish broad standards banning wholesale immigration from certain specified nationalities. Such determinations are reviewable. Cf. *Patel* v. *Reno*, 134 F.3d 929, 932 (9th Cir. 1997) ("The Patels are challenging the consul's authority to suspend their visa applications, not challenging a decision within the discretion of the consul. Therefore, jurisdiction exists to consider whether the consulate has the authority to suspend the visa applications."). And, given that many respondents are not themselves foreign nationals, the harms addressed in this case span far beyond individualized entry or admissions decisions.

To the extent that courts ever hesitate to review statutory claims about individualized consular officer determinations, that has no bearing on the nature of the claims raised here.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2017

APPENDIX

APPENDIX A
LIST OF *AMICI CURIAE*

1. 6Sense Insights, Inc.
2. A Medium Corporation
3. Adobe Systems Incorporated
4. AdRoll, Inc.
5. Affirm, Inc.
6. Airbnb, Inc.
7. Akamai Technologies, Inc.
8. AltSchool, PBC
9. Amazon.com, Inc.
10. Ampush LLC
11. Appboy, Inc.
12. AppNexus Inc.
13. Asana, Inc.
14. Atlassian Corp. Plc
15. Autodesk, Inc.
16. Automattic/WordPress.com
17. Azavea Inc.
18. Big Tooth Ventures
19. Bloomberg L.P.
20. Box, Inc.
21. Brightcove Inc.
22. Brocade Communications Systems, Inc
23. Bungie, Inc.

24. CareZone Inc.
25. Casper Sleep Inc.
26. Castlight Health
27. Cavium, Inc.
28. Checkr Inc.
29. Chegg, Inc.
30. Chobani , LLC
31. Citrix Systems, Inc.
32. Civis Analytics, Inc.
33. ClassPass Inc.
34. Cloudera, Inc.
35. Cloudflare, Inc.
36. Codecademy
37. Color Genomics, Inc.
38. Copia Institute
39. Credit Karma, Inc.
40. DocuSign, Inc.
41. DoorDash
42. Dropbox, Inc.
43. eBay Inc.
44. Edmodo, Inc.
45. Electronic Arts Inc.
46. EquityZen Inc.
47. Etsy Inc.
48. Eventbrite Inc.

49. Evernote
50. Facebook, Inc.
51. Fastly, Inc.
52. Fitbit, Inc.
53. Flipboard, Inc.
54. Fuze, Inc.
55. General Assembly Space, Inc.
56. GitHub, Inc.
57. Glassdoor
58. Google Inc.
59. GoPro Inc.
60. Greenhouse Software, Inc.
61. Greenough Consulting Group
62. Groupon, Inc.
63. Gusto
64. Harmonic Inc.
65. Hewlett Packard Enterprise
66. HP Inc.
67. IDEO
68. Imgur, Inc.
69. Indiegogo, Inc.
70. Intel Corporation
71. Kargo
72. Kickstarter, PBC
73. Knotel

74. Lam Research Corporation
75. Levi Strauss & Co.
76. Linden Research, Inc. d/b/a Linden Lab
77. LinkedIn Corporation
78. Lithium Technologies, LLC
79. Lyft, Inc.
80. Lytro, Inc.
81. Managed By Q Inc.
82. Mapbox, Inc.
83. Maplebear Inc. d/b/a Instacart
84. Marin Software Incorporated
85. Medallia, Inc.
86. Medidata Solutions, Inc.
87. Microsoft Corporation
88. Minted, LLC
89. Molecule Software, Inc.
90. MongoDB, Inc.
91. Motivate International Inc.
92. Mozilla Corporation
93. MPOWERD Inc.
94. NetApp, Inc.
95. Netflix, Inc.
96. NETGEAR, Inc.
97. New Relic, Inc.
98. NewsCred, Inc.

99. Nextdoor.com, Inc.
100. NIO USA, Inc.
101. nTopology
102. Oath, Inc.
103. Optimizely, Inc.
104. Pandora Media, Inc.
105. Patreon, Inc.
106. PayPal Holdings, Inc.
107. Pinterest, Inc.
108. Pixability, Inc.
109. Plaid Technologies, Inc.
110. Planet Labs Inc.
111. Postmates Inc.
112. Pure Storage, Inc.
113. Quantcast Corp.
114. Quora, Inc.
115. RealNetworks, Inc.
116. Red Hat, Inc.
117. Reddit, Inc.
118. Redfin Corporation
119. Rocket Fuel Inc.
120. Rocket Lawyer Incorporated
121. RPX Corporation
122. SaaStr, Inc.
123. Salesforce.com, Inc.

124. Shutterstock, Inc.
125. Singularity University
126. Snap Inc.
127. Space Exploration Technologies Corp.
128. Spokeo, Inc.
129. SpotHero, Inc.
130. Spotify USA Inc.
131. Square, Inc.
132. Squarespace, Inc.
133. Strava, Inc.
134. Stripe, Inc.
135. SugarCRM
136. Sunrun, Inc.
137. SurveyMonkey Inc.
138. TaskRabbit, Inc.
139. Tech:NYC
140. Tesla, Inc.
141. Thumbtack, Inc.
142. TransferWise Inc.
143. TripAdvisor, Inc.
144. Tumblr
145. Turbonomic, Inc.
146. Turo Inc.
147. Twilio Inc.
148. Twitter Inc.

149. Uber Technologies, Inc.
150. Udacity, Inc.
151. Upwork Inc.
152. Verizon Communications Inc.
153. Via
154. Warby Parker
155. The Wikimedia Foundation, Inc.
156. Work & Co.
157. Workday, Inc.
158. Y Combinator Management, LLC
159. Yelp Inc.
160. Zendesk, Inc.
161. Zymergen Inc.

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In the Supreme Court of the United States

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ET AL., PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS
v.
STATE OF HAWAII, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICI CURIAE* PARS EQUALITY CENTER, IRANIAN AMERICAN BAR ASSOCIATION, NATIONAL IRANIAN AMERICAN COUNCIL, AND PUBLIC AFFAIRS ALLIANCE OF IRANIAN AMERICANS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Identity of *Amici Curiae*

Pars Equality Center (Pars) is a nonprofit organization dedicated to helping all members of the Iranian-American community to realize their full potential as informed, self-reliant, and responsible members of American society. Pars believes that learning and teaching the rights and responsibilities of citizenship in a democracy, as well as the rules and rewards of entrepreneurship, are necessary ingredients for success, and the organization achieves its mission primarily by providing extensive social and legal services. Pars's Persian-speaking staff advocates for families and individuals in need, with a strong focus on refugees, asylees, and those newcomers to the United States living in poverty.

The Iranian American Bar Association (IABA) is an independent, apolitical 501(c)(6) nonprofit professional association of attorneys, judges, and law students. It seeks to educate the Iranian-American community in the United States about legal issues of interest, advance the legal rights of the community, and ensure that government officials and the public at large are fully and accurately informed on legal matters of concern to the Iranian-American community. IABA also seeks to foster and promote the achievements of Iranian-American lawyers and other legal professionals. IABA has over 1500 members, and chapters in the District of Columbia, Dallas, Los

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and copies of the letters of consent are on file with the Clerk's Office.

Angeles, New York, Northern California, Orange County, Phoenix, and San Diego.

The National Iranian American Council (NIAC) is a nonpartisan, nonprofit 501(c)(3) organization based in Washington, D.C. NIAC also has a sister organization, NIAC Action, which operates under 26 U.S.C. § 501(c)(4). NIAC seeks to strengthen the voice of Iranian Americans by promoting greater understanding between the Iranian and American people, and seeks to advance the interests of the Iranian-American community on civic, cultural, and political issues. NIAC defends Iranian-American interests against corporate and media bias, discrimination, and government neglect, and monitors and shapes national legislation affecting Iranian Americans. NIAC's constituents number in the tens of thousands, comprised mostly of those of Iranian heritage.

Public Affairs Alliance of Iranian Americans, Inc. (PAAIA) is a nonprofit, nonpartisan organization based in Washington, D.C., that includes 501(c)(3) and (c)(4) components. PAAIA, Inc. is a 501(c)(4) bipartisan, non-sectarian, national membership organization with an affiliated 501(c)(3) organization, IA-100, Inc. PAAIA serves the interests of Iranian Americans and represents the Iranian-American community before U.S. policymakers and the American public at large. PAAIA works to foster greater understanding between the people of Iran and the United States, expand opportunities for the active participation of Iranian Americans in the democratic process at all levels of government and in the public debate, and provide opportunities for advancement for the next generation of Iranian Americans.

Interest of *Amici Curiae*

The discrimination and animus underlying the travel ban and the Trump Administration's policy of discriminatory exclusion has continued to demean and stigmatize minority communities, in particular, the Iranian-American community. Of the seven countries specified in the January 27 Executive Order, Iran had the largest total number of entrants (310,182) between 2006 and 2015. And of the estimated 90,000 visas issued in 2015 to nationals of those seven countries, nearly half were to citizens of Iran. Iranians also represent a substantial proportion of the political and religious refugees who are resettled in the United States each year.

Amici curiae are the four largest Iranian-American organizations in the United States. The United States has a long history of welcoming Iranians who, like so many others from around the world, hope to share in the promise and opportunity that this nation embodies. Many, as political dissidents or members of religious communities, seek shelter in the United States. Many others come here on student, work, and other visas, or as permanent residents through ordinary channels. For decades, this country has made a commitment to Iranian immigrants and their families to allow them to live free from fear and political repression and allow them to contribute to American society.

The travel ban has shaken this community to its very core. Countless families have been traumatically split by forced separation. Life plans have been disrupted. Many individuals have abandoned educational and professional plans. Immediately upon the signing of the January 27 Executive Order, and continuing over the last nine months, *amici* have devoted thousands of hours and a significant proportion of their resources to respond to the effects of the travel ban on the Iranian-American community.

Amici therefore have a real and pressing interest in the outcome of this case. *Amici* agree with respondents that they have shown a likelihood of success on their claims that §§ 2(c), 6(a), and 6(b) of the March 6 Executive Order violate the Establishment Clause and the nondiscrimination provisions of the Immigration and Nationality Act. Indeed, on February 8, 2017, *amici*—together with 19 individual plaintiffs—filed suit in the U.S. District Court for the District of Columbia, asserting constitutional and statutory challenges to the travel ban and seeking a preliminary injunction against the ban's enforcement. *See* Complaint, *Pars Equality Center v. Trump*, No. 17 Civ. 255 (D.D.C. Feb. 8, 2017). *Amici* subsequently amended their complaint and sought preliminary relief against the March 6 order.

Like the cases currently before this Court, *amici*'s complaint raises claims under the Establishment Clause, but also alleges violations of the Equal Protection Clause (discrimination on the basis of national origin and religion), the Due Process Clause, and the Administrative Procedure Act. The case proceeded to an evidentiary hearing, focusing on standing and irreparable harm. On June 20, 2017, the district court stayed the *Pars Equality Center* case pending resolution of the proceedings before this Court. This Court's decision in the *IRAP* and *Hawaii* cases will likely affect the course of *amici*'s case.

Accordingly, *amici* urge this Court to affirm the injunctions against the enforcement of the travel ban.

INTRODUCTION AND SUMMARY OF ARGUMENT

This time last year, Jane Doe #1 was in the thick of wedding planning. She and her fiancé had met three years earlier in San Diego, when he was visiting the United States on a tourist visa. Two years later, they were engaged. They immediately applied for a K-1 fiancé visa, so that Jane Doe #1's fiancé could move to the United States. After an interview, the application was adjudicated and approved, and while the visa was processing, the couple set about planning their wedding celebrations. They selected a venue, placed a large deposit, and began drawing up a guest list. The young couple was looking forward to spending their lives together.

All this changed in an instant on January 27, 2017, when President Trump signed Executive Order No. 13,769, officially titled "Protecting the Nation from Foreign Terrorist Entry into the United States," but which the President calls the "travel ban." After federal courts enjoined the January 27 Executive Order, the President rescinded and replaced it with a materially similar order on March 6. Among other things, the current travel ban bars entry of all nationals from six majority-Muslim countries to the United States, including Iran, and it temporarily suspends the U.S. Refugee Admissions Program (USRAP).

Jane Doe #1's fiancé is an Iranian citizen. Nineteen months since he and Jane Doe #1 first submitted the visa application, and nearly a year since his visa interview, his visa remains pending. The government has not provided the couple any guidance or information about whether and when the visa will be issued so that Jane Doe #1 and her fiancé can get married in the United States. The couple have been forced to postpone their wedding indefinitely.

Jane Doe #1 and her fiancé are just two of tens of thousands of people whose lives the travel ban suddenly upended. Even after the initial chaos in the wake of the January 27 order subsided, countless Iranian Americans and their families—as well as nationals and immigrants from the other countries subject to the travel ban—have been left adrift. Many of these individuals originally sought to come to the United States in the hope of sharing in the promise and opportunity that this country embodies. For them, the travel ban stands as a stunning and painful betrayal.

In the meantime, litigation regarding the constitutionality of the travel ban has proceeded through the courts. Multiple federal courts rightly enjoined the January 27 and March 6 orders on constitutional and statutory grounds.

The government now seeks to vacate the injunctions. Among other things, the government contends that respondents' challenges to the travel ban are not justiciable, on the misguided theory that respondents have not suffered cognizable injuries sufficient to establish Article III standing. As respondents have amply explained in their briefs, IRAP Br. 16-25; Hawaii Br. 21-26, that is simply wrong as legal matter. Moreover, in addition to the individual respondents, the organizational respondents have standing as they have suffered injury-in-fact in their own right: the travel ban has impeded their pursuit of their organizational missions, and has forced them to divert resources away from their regular activities. Nor is there any merit to the government's argument that the President's decision to issue the travel ban is immune from judicial review. As this Court has held, the President does not have unfettered or unreviewable discretion to discriminate on the basis of national origin or religion in carrying out national immigration policy. There should be no question that the respondents' challenges are justiciable.

But more broadly, the government's argument trivializes the real, lasting, and irreparable injuries that the travel ban has visited on an entire community—for nothing more than invidious discrimination that President Trump and his advisors have scarcely bothered and utterly failed to conceal. The travel ban effectively tars every Iranian citizen, Muslim or non-Muslim, religious or secular, infant or adult, as a proponent of "radical Islam" and an incipient terrorist. This baseless stereotyping has placed educational and career plans on hold, separated families, and disrupted (and even imperiled) countless lives.

The individual stories in this brief, as well as the experiences of *amici*, bring to life the real and extraordinary harm that the travel ban and the continuing policy of discriminatory exclusion have inflicted on many thousands of families. There is little doubt that the travel ban will stand as one of the most disgraceful episodes in our nation's history. This Court should affirm the injunctions against its enforcement.

ARGUMENT

I. Respondents' Claims Are Justiciable

A. The government seeks to preclude review of the respondents' constitutional claims for lack of standing, even as it acknowledges the "importance of the legal issues implicated by respondents' challenges to the Order." U.S. Br. 35. In so doing, the government disregards the very real injuries that the travel ban has caused, both on individuals whose lives were interrupted and placed on hold, and on organizations that have diverted resources to combat the travel ban. *See infra* Part II. The respondents in this case are no exception. Respondents have shown ample injury-in-fact to establish Article III standing, and this Court should review their claims on the merits.

The government contends that the respondents' Establishment Clause claims are not justiciable, on the theory that none of the respondents in *IRAP* or *Hawaii* suffered a cognizable violation of their own constitutional rights. U.S. Br. 27-35. But the courts below correctly held that Doe #1 in *IRAP* and Dr. Elshikh in *Hawaii* had standing to challenge Section 2(c) because the March 6 Executive Order had prevented their family members from entering the United States.[2] As the courts below put it, individuals like Doe #1 and Dr. Elshikh have suffered "the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation and the prolonged separation it causes" between them and their family members "in [their] everyday li[ves]." J.A. 202; *see* J.A. 1180-82. And similarly situated litigants in other cases challenging the travel ban remain aggrieved today. Of the individual plaintiffs in the *Pars* litigation, for example, lawful permanent residents and U.S. citizens remain separated from fiancés and family members, and refugees fleeing persecution because of their political or religious beliefs or sexual orientation have been denied resettlement. These injuries are more than sufficient to satisfy constitutional standing requirements.

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[2] Although his Doe #1's wife has now received her visa, his condemnation claim is not moot, and there are other plaintiffs in the case who are similarly situated. IRAP Br. 21-22.

But even beyond the real, cognizable injuries that individual respondents have suffered, the harms the travel ban has inflicted on organizational respondents provide an alternative and independent basis for Article III standing.[3] This Court has held that an organization has standing in its own right if it "has such a personal stake in the outcome of the controversy as to warrant invocation of federal court jurisdiction." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977)).

In *Havens*, this Court held that the plaintiff organization, whose mission was to "assist equal access to housing through counseling and other referral services," *id.* at 379, had standing to bring a challenge under the Fair Housing Act to Havens Realty's practice of steering people toward or away from certain apartment complexes based on their race. The organization asserted that the defendant's practices had "frustrated" its mission, because the organization "had to devote significant resources to identify and counteract the [defendants'] racially discriminatory steering practices." *Id.* This Court held that such statements were sufficient to establish Article III standing. "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.* The Court explained that "[i]f . . . petitioners' steering practices have perceptibly impaired" the plaintiff organization's ability to pursue its mission, "there can be no question that the organization has suffered injury in fact." *Id.*

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[3] Because the courts below found that Doe #1 and Dr. Elshikh had standing, they did not decide whether other individuals or organizations had suffered injury in fact sufficient to establish standing. J.A. 203-04 (*IRAP*); J.A. 1180 & n.6 (*Hawaii*).

Like the plaintiff organization in *Havens*, organizational respondents IRAP, HIAS, and MESA have a significant and personal stake in the outcome of the controversy.

IRAP's mission is to "develop and enforce a set of legal and human rights for refugees and displaced persons." *Mission and Values*, International Refugee Assistance Project, https://refugeerights.org/our-work/mission-values. IRAP "provides legal representation to vulnerable populations, particularly those from the Middle East, who are seeking safety and reunification with their family members in the United States." IRAP Opp. 9.

HIAS is the "oldest refugee assistance organization in the world." HIAS's mission is to "rescue[] people whose lives are in danger for being who they are." *Mission and Values*, HIAS, https://www.hias.org/mission-and-values.

MESA is a U.S.-based membership organization of students and scholars of Middle Eastern studies. MESA is a non-profit association whose mission is to promote scholarship and teaching, and to encourage public understanding of the Middle East through programs, publications, and services that enhance education, further intellectual exchange, recognize professional distinction, and defend academic freedom. *About MESA*, Middle East Studies Association, http://mesana.org/about/index.html.

The travel ban has impeded each organization's pursuit of its mission. IRAP and HIAS have had to divert significant resources in order to find alternative routes to safety for their clients. IRAP Opp. 19. And the travel ban prevents many members of MESA from attending the organization's annual conference—its flagship event and a "leading international forum" for scholarly exchange on the Middle East. J.A. 94. These "concrete and demonstrable injur[ies]" to the organizational respondents are more than sufficient to establish standing. *Havens*, 455 U.S. at 379.

In addition to the litigants currently before this Court, numerous other parties challenging the travel ban have standing to bring constitutional claims. *Amici*, for instance, have suffered direct and concrete harm. The organizations have all had to divert staff and financial resources from their regular activities in order to respond to the travel ban's immediate effects on their members and the community.[4] In the immediate aftermath of the travel ban, *amici* received a deluge of inquiries and requests for legal assistance or referrals, as members of the Iranian-American community and their families who had been traveling outside the United States when the travel ban suddenly took effect found themselves stranded.[5]

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[4] *See Pars Equality Center*, No. 17 Civ. 255, Dkt. 72 Ex. 1 (¶¶ 16-17, 19-21, 32), Ex. 2 (¶¶ 23, 44-48, 56), Ex. 3 (¶¶ 36, 38, 45, 51-52), Ex. 4 (¶¶ 23, 26).

[5] *Id.* Ex. 1 (¶¶ 17, 20-21, 30-31, 40), Ex. 2 (¶¶ 11, 22, 44, 47, 52), Ex. 4 (¶ 32); *see also* Hr'g Tr. 24-26, *Pars Equality Center*, No. 17 Civ. 255 (D.D.C. April 18, 2017) (testimony of Babak Yousufzadeh, President of IABA).

Amici were inundated with requests for assistance in the wake of the President's executive orders. Staff spent hours responding to constituent concerns and providing guidance on the travel ban's effects and application. IABA members provided emergency assistance at airports and gave legal support to those affected.[6] And notwithstanding the current injunctions, Iranian Americans continue to ask NIAC for help coping with the ongoing consequences of the travel ban, including refused visas, cancelled interviews, and the lack of guidance from the government.[7] Combatting the travel ban's persistent effects on their constituents has overwhelmed *amici*'s limited resources and forced them to put other organizational goals on hold.

And the animus that the travel ban reflects—and has normalized—has compelled *amici* to combat the psychological, emotional, and sometimes physical harms inflicted on the Iranian-American community. PAAIA has increased public-education efforts to combat the rise in hate crimes against Iranian Americans, and has increased fundraising efforts to compensate victims of such crimes.[8] Pars fields calls from individuals who are worried, fearful, confused, and have been made to feel like second-class citizens.[9] As the Executive Director of PAIAA testified, many Iranian Americans "escaped arbitrary authoritarian decrees in their homeland, and so when this happens here, the effect is amplified."[10]

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[6] *Id.* Ex. 2 (¶¶ 22, 28, 30, 32, 44-45).

[7] *Id.* Ex. 3 (¶¶ 33, 35, 47-50), Ex. 2 (¶¶ 16-17, 19-21).

[8] Hr'g Tr., *supra* n.4, at 71-74 (testimony of Leila Austin, Executive Director of PAAIA) (detailing specific hate crimes perpetuated against Iranian Americans and the efforts to raise funds "for vandalism repair fees, legal fees, and rewards for apprehending perpetrators").

[9] *Pars Equality Center*, No. 17 Civ. 255, Dkt. 72 Ex 2 (¶¶ 20, 27, 30, 40-43).

It is undeniable that countless individuals and organizations—in these cases and others—have suffered harm as a result of the travel ban. Standing is no impediment to judicial review of respondents' constitutional claims.

B. The government contends more broadly that the President's decisions to restrict entry are "largely immune from judicial review." U.S. Br. 23-25. This argument fails to recognize that (1) Congress, not the President, has plenary power to make policy decisions as to immigration, and (2) Congress has mandated that, in the issuance of immigrant visas and the administration of refugee programs, the Executive must execute its policy in a nondiscriminatory fashion with regard to nationality (for visas and refugee programs) or religion (for refugee programs). *See* 8 U.S.C. §§ 1152(a)(1)(A), 1522(a)(5). The argument also fails to recognize that numerous litigants challenging the statute have standing under *Kleindienst v. Mandel*, because government action predicated on discriminatory animus against persons on the basis of nationality or religion can never be "facially legitimate and bona fide." 408 U.S. 753, 762 (1972). "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer v. Evans,* 517 U.S. 620, 634 (1996).

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[10] Hr'g Tr., *supra* n.4, at 67.

II. The Travel Ban Imperils Individuals and Separates Families

The travel ban has upended the lives of thousands of individuals and families in the United States and around the world. The *amici* filing this brief have collectively received thousands of requests—from couples seeking to marry, grandparents seeking to meet their grandchildren, and families seeking reunification; from young students seeking educational opportunity and young scientists and doctors seeking to accept professional opportunities that will advance scientific and medical innovation; from individuals who have been victims of hate crimes in the United States based on their religion or national origin; and from individuals who are fleeing persecution in Iran based on their political activities, their religion, or their sexual orientation.

The following stories demonstrate how the travel ban has adversely affected—and continues to affect—specific people and families. Although the individuals here are all Iranian, their stories reflect a diversity of experiences, hopes, and desires. Some seek to be reunited with family. Others want to marry and form new families of their own. Many flee violent persecution because of who they are, whom they love, or what they believe. All of them want to be treated equally and afforded basic human dignity.[11]

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[11] Each of these individuals is a plaintiff in *PARS Equality Center v. Trump*, No. 17 Civ. 255 (D.D.C.), or is prepared to be joined as a plaintiff should the district court's stay of that litigation be lifted. Many of them requested permission—which the district court granted—to proceed pseudonymously because they reasonably fear government retaliation against them and their families. Declarations supporting these accounts may be found on the district court docket.

Reza Zoghi. Reza Zoghi, an Iranian citizen, fled with his family to Turkey in December 2013 to escape violent political persecution in Iran. He and his wife and three-year-old daughter have successfully completed virtually all the vetting processes for resettlement through USRAP. They have already completed the vetting process, including medical screening and cultural orientation. All they need are their travel documents. But the travel ban put everything on hold. They remain in indefinite limbo in Turkey, where Mr. Zoghi cannot apply for employment and his daughter is not eligible, when of age, to enroll in school.

Mr. Zoghi's history of persecution in Iran dates back to 2006, when he was tortured for expressing dissatisfaction with new editorial management at the newspaper where he worked. In retribution for Mr. Zoghi's complaints, a former Iranian intelligence officer falsely accused him of theft and had him arrested. When Mr. Zoghi refused to confess to the false accusations, the officer had him tied to a bed and proceeded to beat him, strip him, and rape him. Eight days later, Mr. Zoghi was driven blindfolded to the outskirts of Tehran and released. Traumatized by this event, he quit his job at the newspaper, tried to avoid attracting any attention from the authorities, and twice attempted suicide.

In 2008, Mr. Zoghi started compulsory military service because, without proof of military service, he could not attend university, obtain a driver's license, or own property or a business. Disturbed by the 2009 presidential election in Iran, he began to participate in street protests when on leave. In July 2009, he and approximately 120 other protestors were arrested and sent to the Kahrizak detention center. There, he and the others were incarcerated in a small, dark, unhygienic, unventilated cell with one doorless toilet and one faucet with unsanitary well water. They were denied medical treatment, provided two paltry meals per day, and frequently beaten with PVC pipes and forced to "exercise" outside, barefoot on burning hot asphalt by duck walking, squat-jumping, or crawling. He witnessed the deaths of three injured protestors and was forced to watch three others hung up from their feet and violently beaten.

After almost a week at Kahrizak, Mr. Zoghi and the other detainees were transferred to another detention center, where he was interrogated and pressured to declare that he had been conducting propaganda against the state of Iran and colluding against the state's national security interests. Two weeks later, he was released on bail.

Following his release, Mr. Zoghi and the other Kahrizak detainees filed a lawsuit against their torturers. Shortly thereafter, law-enforcement officers began contacting him and harassing his parents to pressure him to withdraw the suit. Initially, Mr. Zoghi refused, but after he and his family received further threats from law-enforcement officers, he agreed to drop the lawsuit.

In March 2013, Mr. Zoghi was arrested again, this time while visiting the graves of his fellow Kahrizak detainees. He was released only after agreeing to sign a pledge that he would refrain from speaking about Kahrizak or associating with the other victims or their families. In July 2013, Mr. Zoghi posted on his Facebook page criticism of the Kahrizak situation and the authorities' false reporting of its conditions. Shortly thereafter, he began to receive threats of retaliation. He discovered that the security police had gone to his workplace, taken his belongings, including his laptop, and told his secretary that he must surrender to the police. Perceiving no other safe option, Mr. Zoghi fled to Turkey. Later, his wife joined him there, where she gave birth to their daughter. The family cannot return to Iran, where Mr. Zoghi would risk again being arrested, detained, tortured, and possibly even killed.

Mr. Zoghi and his family were granted refugee status by the Office of the United Nations High Commissioner for Refugees (UNHCR) in December 2015, and referred for resettlement in the United States through USRAP. Mr. Zoghi and his wife fear that the reinstated travel ban will bar their entry into the United States and extinguish their chance of a new life here. They do not have any immediate family in the United States, and have no offer to study or work in the United States. Although Mr. Zoghi and his family have been connected with Lutheran Immigration and Refugee Service in Minneapolis, this Court's stay of the judgments below prevents the family from resettling in the United States. They remain in Turkey, where they live in a state of perpetual anxiety and uncertainty. According to Mr. Zoghi: "At times it feels worse than the torture I had to endure in Iran."

Ali Asaei. Ali Asaei, an Iranian citizen, came to the United States on a F-1 student visa in 2015. He was awarded his master's degree in electrical engineering from SUNY New Paltz in 2016. Mr. Asaei now works at the Nathan Kline Research Institute, where he conducts MRI processing in order to understand brain structure and the structure of diseases such as Alzheimer's and Parkinson's. The goal of this work is to be able to predict the occurrence of these diseases. He also writes image-processing software that supports clinical and research applications. His visa allows him to work in the United States until 2018.

Mr. Asaei's family lives in Iran. He has not seen his father or brother since 2013 and last saw his mother and sister in 2014, when they obtained tourist visas to visit him in the United States. Since then, his parents and sister have been working to receive a nonimmigrant visa in order to see their son and brother. The family applied for a visa to again visit Mr. Asaei a few years ago, and finally received notice that their visa interview appointment was scheduled for February 15, 2017, at the U.S. Embassy in Dubai. Four days after President Trump signed the January 27 Executive Order, the U.S. Embassy in Dubai sent an email to Mr. Asaei's family cancelling their visa appointment. The embassy then reversed course, likely in light of the overlapping injunctions of the travel ban, and rescheduled the family's visa interviews for February 16, 2017. Their visas were denied without explanation, and the consular officer told them that he could not give them a reason for the denial.

Mr. Asaei has quit his job and plans to leave the United States permanently soon. He does not want to live in a country where his parents cannot visit him and where, if the travel ban is reinstated, he cannot renew his work authorization.

Omid Moghimi. Omid Moghimi is a dual citizen of Iran and the United States. He earned his medical degree from Tufts University in Boston and is now a resident in internal medicine at Dartmouth-Hitchcock Medical Center. Dr. Moghimi married Dorsa Razi in July 2015 in Iran. Shortly thereafter, he petitioned for family visas so that his wife and mother-in-law could join him in the United States. After over a year of processing, the family's visa-interview appointment was finally scheduled for February 2, 2017, at the U.S. Embassy in Abu Dhabi, U.A.E. But mere days before their appointment, President Trump signed the January 27 Executive Order, and the couple's visa interview was immediately canceled. Several weeks of uncertainty followed as Dr. Moghimi tried to get any information he could from the State Department. After the travel ban was enjoined, however, Ms. Razi was able to reschedule her interview with the help of Senators Jeanne Shaheen and Maggie Hassan and Representative Annie Kuster. The couple was reunited on February 22, 2017, but Ms. Razi's mother is still in Iran.

Dr. Moghimi and Ms. Razi's story is exceptional, however. Many people without their resources and connections have faced extreme hardship as they have waited for the government to reschedule visa interviews that were canceled when the first travel ban took effect. These individuals have been without recourse for months, despite constant and overlapping injunctions from multiple U.S. courts. And the government has refused to provide them with any concrete information about their cases.

Pedram. Pedram, who has chosen to keep his family name confidential, is a dual citizen of the United Kingdom and Iran who wishes to visit his ailing father in the United States. Pedram lives in Canada and has not lived in Iran since 1991. His parents, brother and sister, and his siblings' spouses and children all live in San Diego, California. Pedram's siblings are both naturalized American citizens, and his parents are lawful permanent residents in the process of obtaining their citizenship. Prior to

2016, Pedram was able to visit the United States twice: once in 2003 or 2004 on his Iranian passport, and once in 2015 on his British passport. Pedram applied for a visa in the fall of 2016 and provided the U.S. Consulate with supplemental information in April 2017. In May 2017, Pedram's father suffered a stroke that left him paralyzed. In addition, Pedram's brother had a son born in the United States, whom Pedram has not yet had the chance to meet.

Pedram's visa application has been placed in "administrative processing" and Pedram has received no further guidance from the State Department regarding his visa. Pedram has taken time off of work to contact both the U.S. Consulate and the U.K. Foreign Office to request updates and guidance. Meanwhile, he has not been able to visit his ailing father, who is suffering significant pain. Should the full terms of the travel ban be implemented, it is likely that Pedram's visa application will be denied, potentially preventing him from ever seeing his father again, and will make it very difficult, if not impossible, for him to meet his nephew.

Shiva Hissong. Shiva Hissong is an Iranian citizen and a lawful permanent resident of the United States. She and her husband, who is an architect, have a young son, for whom Ms. Hissong is the primary caregiver.

Ms. Hissong's parents live in Tehran. Her father is ill with Parkinson's disease, and his health is failing. Her parents had wanted to come to the United States for the birth of their grandson and applied for a visa in October 2016. They were told by an interviewing officer at the U.S. Embassy in Yerevan, Armenia, that administrative processing would delay their visa application by three to six months. Because of the delays and her father's illness, after her son was born, Ms. Hissong tentatively made plans to take him to meet her parents in March 2017 in the U.A.E., where her parents would meet their grandson.

After President Trump signed the January 27 Executive Order, however, Ms. Hissong cancelled the trip to the U.A.E. because she was concerned that she would no longer be readmitted to the United States. She and her husband cancelled a planned trip to the Netherlands for the same reason. She remains concerned that her parents will never meet their grandchild. The travel ban has resulted in confusion and uncertainty for Ms. Hissong and her family. Given the severity of her father's illness, she and her family has been greatly emotionally distressed about whether her son will ever meet his grandfather.

Jane Doe #1. In 2001, when Jane Doe #1 was 11 years old, her parents sold everything they owned and fled their native country, Iran. They built a new life for themselves and their two daughters in the United States. Over the past 16 years, Jane Doe #1's parents have founded small businesses here; their daughters have graduated from high school and college here; and the entire family has become U.S. citizens.

Jane Doe #1, now 28 years old, lives in San Diego, where she works for the city and is pursuing a master's degree in city planning from San Diego State University. In 2013, she met her fiancé, who is Iranian, while he was visiting the United States on a tourist visa. He has a master's degree in engineering from Sharif University of Technology in Tehran. Over the following two years, Jane Doe #1 traveled to

Iran to visit him several times, and in October 2015, they were engaged. The couple hired a lawyer to guide them through the visa process so that they could be married in the United States, and in February 2016, Jane Doe #1's fiancé submitted his K-1 visa petition. In October 2016, the couple traveled to Abu Dhabi for the visa interview, whereafter the visa was verbally approved by the consular officer but not yet issued. They were advised that "additional administrative processing" preceding issuance of the visa could take up to six months.

Three months after the couple's visa interview—and before the visa issued—President Trump signed the January 27 Executive Order. It has now been nearly a year since the interview and 19 months since the couple first submitted the visa petition. Still, Jane Doe #1's fiancé has not received his visa. In the meantime, the government has ignored the couple's repeated inquiries about the visa's status. The government has refused to state whether it is continuing to process Jane Doe #1's fiancé's visa or whether it has complied with the injunctions entered in *IRAP* and *Hawaii*—and upheld, in relevant part, by this Court. As a result, the couple has been separated from each other, and they have been forced to postpone their marriage indefinitely.

Jane Does #8 and #9. Iran is one of the few countries where homosexuality is punishable by death. In 2014, Jane Doe #8, who is a lesbian woman, and Jane Doe #9, who is a lesbian transgender woman, fled Iran to Turkey to escape persecution.

Before fleeing Iran, Jane Doe #8 was a leader of an underground LGBT-rights organization and editor of an underground LGBT magazine in Tehran. When she was 20 years old, she was raped by an acquaintance after she told him that she was lesbian. The man then threatened to expose her sexual orientation to her family and to the government if she did not marry him. Even after she refused to marry him, he continued to sexually and physically abuse her, and he also threatened to hurt her sister. Unable to turn to her family or the government for help, Jane Doe #8 was forced to flee Iran to escape her abuser. She went to Turkey, where she contacted UNHCR, seeking resettlement as a refugee. She also wrote to her friend, Jane Doe #9, who was in Iran, urging her to join her in Turkey. Jane Doe #9 had suffered government persecution and physical abuse because of her gender identity. She arrived in Turkey in late 2014, and also sought refugee status. The two women began dating shortly after Jane Doe #9 arrived, and they are now engaged to be married.

After months-long interview and vetting processes, UNHCR determined that both women were eligible for resettlement as refugees. UNHCR initially referred Jane Doe #8 for resettlement in Canada, but Canada would not accept the couple's applications together. In December 2016, UNHCR referred both women to USRAP. They were interviewed by the International Catholic Migration Commission, a nonprofit organization that works to resettle refugees in the United States and around the world. Then, while they were waiting for their second interview to be scheduled, the President signed January 27 Executive Order. Months of uncertainty followed while their own case and others were pressed in courts across the country. But on June 26, 2017, this Court permitted the travel ban to go into effect as to refugee applicants.

Since then, Jane Does #8 and #9 have remained in limbo. Although they are safer in Turkey than in

Iran, the women continue to suffer persecution and abuse because of who they are and whom they love. They are unable to be married in Turkey, nor are they afforded basic human and civil rights.

John Doe #3. John Doe #3 is a respected scientist and researcher in the field of pharmacology. He holds a Ph.D. and a doctorate in pharmacology from a leading research university in Iran, and graduated at the top of his class in both programs. He worked as a resident and physician at another leading university in Iran, and is the lead author or co-author of over 40 scientific articles that have been published in leading journals in his field. Because of his research, John Doe #3 was awarded a competitive three-year fellowship at a renowned research and teaching hospital in Boston to study the effects of diabetes on the heart. He was to conduct this research at a prestigious laboratory run by a well-known professor of medicine and biochemistry at an Ivy League university.

The fellowship was to begin in December 2016. John Doe #3 immediately applied for a J-1 visa for himself and a J-2 visa for his wife. They were both interviewed in October 2016 at the U.S. Embassy in Dubai. Shortly thereafter, John Doe #3 learned that his visa had been approved. John Doe #3 and his wife waited for his wife's visa to be processed, but weeks passed without any news from the government. Finally, because he could no longer delay the start of his fellowship, John Doe #3 made an appointment with the U.S. Embassy to retrieve his own visa. But just days before John Doe #3's appointment, President Trump signed the January 27 Executive Order. Five days later, officials at the U.S. Embassy refused to issue John Doe #3's visa, citing the travel ban, and instructed him to go back to Tehran.

At present, John Doe #3 and his wife still cannot travel to the United States. Although John Doe #3's visa was issued while the travel ban was enjoined, his wife's application remains in administrative processing. And the government has refused to provide any updated information about its status. As a result, John Doe #3 has still not begun his fellowship. If he and his wife are unable to travel to the United States, he will have to forfeit his fellowship.

John Doe #5 and Baby Doe #1. John Doe #5 first came to the United States in 2009 on an F-1 student visa. After obtaining a master's degree and a Ph.D. in mechanical engineering from the University of Buffalo in New York in 2015, he began a postdoctoral fellowship with the State University of New York Research Foundation. In 2013, John Doe #5 returned to Iran to marry his wife, who is also an Iranian citizen. After she obtained her F-2 visa, he and his wife came back to New York to live. Last August, John Doe #5 and his wife welcomed a baby boy into their family, Baby Doe #1. So that his parents and in-laws could meet their first grandchild, John Doe #5 and his wife traveled to Iran in January 2017 with their infant son to spend some time with their parents and extended family.

While in Iran, John Doe #5's wife had to apply for a new F-2 visa, and her visa application was approved by the U.S. Embassy in Dubai on January 17, 2017. But before her visa could be issued, President Trump signed the January 27 Executive Order. The U.S. Embassy refused to issue her visa, and she was unable to go back to New York to be with John Doe #5. Their infant son, who is a U.S. citizen, remained in Iran with John Doe #5's wife, because he was too young to travel by himself. Not until February 19, while the travel ban was enjoined, was John Doe #5 able to be reunited with his wife and infant son. The family's worries are not behind them, however. The visas on which John Doe #5 and his wife entered the United States are expired and, if they wish to travel to Iran to visit family in the future, they will have to apply for new visas to reenter the United States. If the travel ban is again enforced, they risk having their visas denied.

John Does #7 and #8. Like Jane Does #8 and #9, John Does #7 and #8 are a homosexual couple that fled Iran to escape persecution, but have been afforded no relief from their suffering.

While in Iran, John Does #7 and #8 lived together for eight years enduring continued harassment due to religious intolerance for same-sex couples. John Does #7 and #8 were forced to move from their home at least three times due to complaints by the landlord or neighbors, who repeatedly reported them to the police. They lived in constant fear of being arrested and beaten in Iranian prisons, or seized by government officials who would tolerate—or even encourage—violence against same-sex couples. John Does #7 and #8 could not even answer their front door.

John Does #7 and #8 felt unwanted in Iran. More than that, they feared for their safety and together fled to Turkey. There, John Does #7 and #8 continue to suffer. They live in a small town where their relationship is not tolerated, and they are not allowed to work. To make matters worse, John Doe #8 is very ill. He was diagnosed with colitis and experiences physical pain, which is only exacerbated by their substandard living conditions and lack of access to medical care.

After arriving in Turkey, John Does #7 and #8 applied for resettlement to the United States to escape further persecution and to secure medical care for John Doe #8. After a lengthy interview and vetting process, UNHCR determined that both men were eligible for resettlement as refugees and referred them to USRAP. While John Does #7 and #8 were awaiting acceptance to USRAP, President Trump signed the January 27 Executive Order. Months of uncertainty followed, while their own case and others were litigated in courts across the country. But on June 26, 2017, this Court permitted the travel ban to go into effect as to refugee applicants.

Since then, John Does #7 and #8 have lived in a continued state of uncertainty and distress. Because of the intolerance in both Iran and Turkey, for the love shared by a couple of the same of sex, John Does #7 and #8 are deprived of basic human and civil rights.

CONCLUSION

Over the past nine months, thousands of people in the United States and around the world have endured extraordinary pain, distress, and confusion—for no reason other than President Trump's desire to ban Muslims from the United States. This Court should neither prolong nor renew the hardships that the travel ban and the invidious discrimination it embodies have inflicted. The decisions of the Courts of Appeals for the Fourth and Ninth Circuits should be affirmed.

Respectfully Submitted,

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
HAWAII, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* PEN AMERICAN CENTER AND OTHER ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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“The Vulnerability Series” *available at:* http://www.abdallaomari.com/thevulnerabilityseries 9

I. INTEREST OF *AMICI CURIAE*

Amici, described in Appendix A, include a broad array of organizations working to advance cultural and artistic exchange in this country.[1] Lead *amicus* PEN American Center ("PEN America") is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. It champions the freedom to write, recognizing the power of the word to transform the world. Its mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

In one of the two decisions here on review, the Court of Appeals for the Fourth Circuit held that

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[1] All parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Executive Order No. 13780 ("EO-2" or the "Order") was not enacted for a "bona fide" purpose, but rather "to exclude persons from the United States on the basis of their [Muslim] religious beliefs." *Int'l Refugee Assistance Project v. Trump*, JA-236, *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017) ("*IRAP v. Trump*"). This finding by the Fourth Circuit should be affirmed, as well as its finding that EO-2 violates the Establishment Clause of the First Amendment. But *amici* contend that EO-2 also violates the First Amendment right of Americans to receive information. By preventing our citizens from receiving in-person transmission of ideas, expression, and speech, EO-2 impermissibly burdens the free interchange of information necessary to the proper functioning of our democracy.

Amici have a vital mission to foster rich intellectual and artistic discourse in this country, and that mission is directly impaired by EO-2. *Amici* therefore urge this Court to affirm the judgment of the Fourth Circuit Court of Appeals not only because EO-2 violates the Establishment Clause, but also because it violates the free speech rights of *Amici* and other citizens of this country.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons outlined in Respondents' brief, this Court should affirm the Fourth Circuit's determination that because there has been "an affirmative showing of bad faith" underlying EO-2, a full inquiry into the constitutionality of the Order is warranted. *IRAP v. Trump*, JA-212. While the principal Constitutional argument Respondents press is that EO-2 violates the Establishment Clause of the First Amendment (and *Amici* concur that it does), *Amici* contend that the Order also impermissibly burdens the Free Speech rights of *amici* and other U.S. citizens, and should be found unconstitutional for that independent reason.

The United States is singularly unafraid to hear voices that have been silenced elsewhere. From this nation's founding, visitors from abroad have regarded our uncharacteristically open society as a model for the world and for democracy. As Alexis de Tocqueville wrote of our experiment in self-governance: "When the right of every citizen to co-operate in the government of society is acknowledged, every citizen must be presumed to possess the power of discriminating between the different opinions of his contemporaries, and of appreciating the different facts from which inferences may be drawn."[2] Moreover, the United States has always defined itself as nation of immigrants, built by those seeking freedom of thought and action. Throughout our history, we have benefited immeasurably from the contributions immigrants have made to all spheres of knowledge and culture in this country. It is no coincidence – but rather an animating principle – that refugees have created many of the works that define what it means to be an American. From the films of Billy Wilder, the novels of Isaac Bashevis Singer, the political philosophy of Hannah Arendt and the poetry of Joseph Brodsky, the contributions of visitors, immigrants, and refugees to American arts and letters make up the very cultural fabric of our nation.

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[2] Alexis de Tocqueville, DEMOCRACY IN AMERICA 11 (Henry Reeve trans. 2006), *available at* http://www.gutenberg.org/files/815/815-h/815-h.htm.

EO-2 threatens this legacy, and upends our deeply American commitment to the free and fearless exchange of ideas. The First Amendment presumes that a free people can and must choose the ideas they deem worthy of adherence, rather than receiving a state-mandated diet of acceptable views. American citizens must be allowed to engage in in-person dialogue with nationals from the six banned countries, experience their work, test their ideas, and learn first-hand from their perspectives. As this Court has repeatedly recognized, the First Amendment right to free speech is meaningless without a concomitant right to receive information, and the latter right must be as zealously protected as the first. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *James Madison to W.T. Barry,* Aug. 4, 1822, 9 Writings of James Madison 103 (G. Hunt ed. 1910).

This Court has also recognized that there is no substitute for live, in-person interaction. Yet EO-2 severely restricts the right of Americans to receive information by preventing our citizens from hearing and interacting with the ideas and viewpoints of nationals of the targeted countries. By prohibiting the admission of these nationals without a bona fide reason, EO-2 hinders the free marketplace of ideas.

Our civil society depends on the ability of American arts and literary organizations, museums, universities, and cultural foundations to receive and share ideas, and to amplify voices that are being silenced by repression, civil war and censorship abroad. The message that EO-2 sends the world is one of retreat from our history as an open society. The sweeping restriction that EO-2 imposes on our citizens' First Amendment right to receive information is contrary to this Court's precedent and this country's ideals. Accordingly, this Court should not only affirm the judgment of the Fourth Circuit Court of Appeals that EO-2 violates the Establishment Clause, but should also affirm for the independent reason that the Order violates the First Amendment Free Speech rights of U.S. citizens.

III. ARGUMENT

A. EO-2 Impermissibly Burdens The First Amendment Rights of *Amici* and Other U.S. Citizens to Receive Information

Amici are cultural institutions in the United States whose mission depends on the freedom to engage in intellectual and cultural exchange.

Amicus PEN America has provided an unparalleled forum for open expression and exchange of ideas, inviting writers, artists and dissidents from around the world to speak and debate their views in this country.[3] PEN and its fellow *amici* give American citizens the opportunity to hear voices (often voices of dissent) that may never have been heard otherwise.[4] EO-2 jeopardizes this vital mission by banning Americans from experiencing first-hand the work of nationals from the six banned countries, to hear their perspectives in face-to-face communications, and to ask what is happening in their countries of origin, and why.[5]

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[3] Among other conferences, PEN America hosts the PEN World Voices Festival, founded by Salman Rushdie, Esther Allen, and Michael Roberts after the events of September 11, 2001, "with the aim of broadening channels of dialogue between the United States and the world." PEN AMERICA, PEN World Voices Festival, https://pen.org/world-voices-festival/ (last visited Sept. 12, 2017). Since its founding, the annual World Voices Festival has hosted more than 1,500 writers from 118 countries who participate in a weeklong series of events and discussions with a focus on human rights issues.

[4] Reflecting on the 48th International PEN Congress of 1986, a weeklong gathering of writers from around the world, Salman Rushdie wrote:

> In those last years of the cold war, it was important for us all to hear Eastern European writers like Danilo Kiš and Czesław Miłosz, György Konrád and Ryszard Kapuściński, setting their visions against the visionless Soviet regime. Omar Cabezas, Nicaragua's deputy interior minister at the time, who had just published a memoir of his life as a Sandinista guerrilla, and Mahmoud Darwish, the Palestinian poet, were there to articulate views not often heard on American platforms [.]

The PEN and the Sword, The New York Times, April 17, 2005.

EO-2 may be styled by the government as a "temporary" ban on travel, but unless it is held unconstitutional now, each "temporary" ban may be replaced with another, making advance planning impossible.[6] EO-2 sends a clear message to U.S.

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[5] Describing the purpose of the 48th International PEN Congress in 1986, Norman Mailer (then President of PEN America) wrote:

> One purpose of our PEN Congress will be to enhance relations rather than smash them. We are not going to seek for invidious comparisons of governments. PEN was founded on the attractive notion that writers speak across national boundaries more gracefully and instinctively than governments. So when they get together there is, one may hope, a real possibility that new solutions, even surprisingly creative solutions, can be found.

Participants of that conference included Susan Sontag, Amos Oz, Joseph Brodsky, Günter Grass, Saul Bellow, Wole Soyinka, Danilo Kiš, Czeslaw Milosz, György Konrád, Ryszard Kapuściński, Mario Vargas Llosa, Raymond Carver, E. L. Doctorow, Toni Morrison, Edward Said, William Styron, John Updike, Kurt Vonnegut, Nadine Gordimer, J. M. Coetzee, Sipho Sepamla, and Grace Paley.

[6] In *Roe v. Wade*, 410 U.S. 113, 125 (1973), this Court rejected a mootness argument on the basis that the injury to plaintiff was "capable of repetition yet evading review," because a 266-day gestation period is "so short that the pregnancy will come to term before the usual appellate process is complete." *Id.* EO-2, with its at most 120-day duration, fits squarely into this same category: The injury it inflicts cannot be redressed in the courts before each "temporary" iteration of the ban expires. The Order should thus be treated not as a temporary measure, but an infinitely repeatable one, designed specifically to discourage travel to the United States far beyond its ostensibly limited duration.

organizations and citizens: Efforts to bring over artists and thinkers from the six affected countries to engage in cultural exchange – even on a temporary basis – will be frustrated.[7]

EO-2's adverse effects upon Americans' access to vital cross-cultural exchange are already being felt. To take but a few examples: Ag Galierie, based in Tehran, recently announced that it will no longer be participating in the annual Association of International Photography Art Dealers (AIPAD) show in New York, scheduled for April of 2018. As a result, Americans will see an empty booth instead of the photographs of Iranian photographer Bahman Jalali documenting the Iran-Iraq war from 1980 through 1988.[8] Legendary Syrian musician Omar

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[7] Iranian filmmaker Asghar Farhadi would have been blocked under EO-1 from traveling to the United States to attend the 2017 Academy Awards, in which his film *The Salesman* won the Oscar for Best Foreign Language Film. He declined to seek an exemption from the ban. His acceptance speech, which was read by Iranian-American CEO Anousheh Ansari, read in part:

> I'm sorry I'm not with you tonight. My absence is out of respect for the people in my country and those of [the] other six nations ... Filmmakers can turn their cameras to capture shared human qualities and break stereotypes of various nationalities and religions. They create empathy between "us" and "others," an empathy which we need today more than ever.

Steve Dove, "Asghar Farhadi Oscar 2017 Winner Speech Delivered By Anousheh Ansari", THE OSCARS (Feb. 27, 2017, 6:30am) http://oscar.go.com/news/winners/asghar-farhadi-oscar-2017-winner-speech-delivered-by-anousheh-ansari.

[8] *See* Benjamin Sutton, "Iranian Gallery Drops Out of AIPAD Photo Fair Over Trump's Travel Ban," *Hyperallergic*, March 28, 2017, *available at* https://hyperallergic.com/368526/iranian-gallery-drops-out-of-aipad-photo-fair-over-trumps-travel-ban/.

Souleyman, who fled Syria for Turkey in 2011 after the onset of the civil war, and has since performed at the 2013 Nobel Peace Prize Concert, has stated publicly that he is uncertain if he will be allowed to enter the United States to perform several upcoming tour dates.[9] Reacting to what they perceive as the arbitrariness of the ban, other musicians such as Kazakhstan-born violinist Aisha Orazbayeva, have cancelled their American shows.[10]

There are many other artists, writers, and dissidents whose work explores the conditions of life in the banned countries, but whose invaluable perspectives cannot be fully understood, appreciated, or tested by U.S. citizens under the unique conditions of an in-person interaction. These include, as a small sampling, Syrian designer Fares Cachoux, whose minimalist posters tell the story of the Syrian revolution[11]; Abdalla Al Omari, a Syrian refugee living in Belgium whose images of world leaders (including Bashar al-Assad) as refugees are a stark reminder of the gap between policymakers and the people whose lives are in their hands[12]; and Yemeni photographer Boushra Almutawakel, whose portraits explore the experience of Muslim women.[13] The Order bars these individuals and countless others from traveling to the United States without regard for the valuable contributions they could make to political, intellectual, and artistic discourse in this country. Because of EO-2, U.S. citizens are deprived the opportunity to fully inform themselves of current conditions in the banned countries, and the manner in which those conditions are reflected in art and discourse.

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[9] *See* Marc Hogan, "Here's What Musicians Hurt by the Muslim Ban Have to Say to Trump," January 31, 2017, *available at*: http://pitchfork.com/thepitch/1428-heres-what-musicians-hurt-by-the-muslim-ban-have-to-say-to-trump/.

[10] "Cancelling concerts in US because of the #MuslimBan. Why can I enter when Syrians can't? What's the difference? They seek help & I entertain". @AishaOrazbayeva, Twitter, January 28, 2017.

[11] *See* https://www.behance.net/farescachoux.

[12] *See* "The Vulnerability Series" *available at*: http://www.abdallaomari.com/thevulnerabilityseries.

In the short time it has existed, EO-2 has directly and adversely burdened the First Amendment rights of *Amici* and other U.S. citizens to receive information through face-to-face interactions. But beyond this, the Order more generally and perniciously depletes the richness of our country's cultural wellspring. Historically, refugees and immigrants have contributed to every facet of American life, creating celebrated works of arts and letters and helping to define our country's identity.[14] America has traditionally welcomed writers, thinkers, and others whose work bears witness to state repression, so that we can better understand and value our own freedoms. With EO-2, we risk abandoning our identity as a nation of immigrants, and our role as a global defender of the right to free expression.

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[13] *See* "The Hijab/Veil Series," *available at*: http://muslima.globalfundforwomen.org/content/hijab-veil-series.

[14] Refugees and immigrants who have shaped American cultural and political life are too numerous to name, and include such luminaries as Albert Einstein, Hannah Arendt, Leo Strauss, Bertolt Brecht, Thomas Mann, Marlene Dietrich, Jacob Riis, Elie Wiesel, Vladimir Nabokov, Isabel Allende, Czesław Miłosz, Reinaldo Arenas, Nuruddin Farah, Milos Forman, Yaa Gyasi, Masha Gessen, Gary Shteyngart, Viet Thanh Nguyen, Khaled Mattawa, Henry Kissinger, Zbigniew Brzezinski, Madeline Albright, Ilhan Omar (the first Somali-American woman to be elected to a state legislature), Ted Cruz, and Elaine Chao. No less than fourteen individuals on the

B. Americans Have a First Amendment Right To Receive Information and Ideas Via In-Person Interactions

For more than three-quarters of a century, this Court has recognized that the First Amendment protects not only the freedom to speak, but also the freedom to receive ideas and information, ensuring that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The principle animating our constitutional guarantee of free speech – that "the power of reason as applied through public discussion" can "free men from the bondage of irrational fears," *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) – is rendered meaningless without a robust pool of knowledge to inform speakers and drive intellectual, artistic, and political discourse. Thus, while the First Amendment operates by limiting government

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foregoing list came to this country as refugees. Under a blanket, nationality-based travel ban comparable to EO-2, those individuals – who include refugees from extremism in forms such as German national socialism (Albert Einstein, Hannah Arendt, Henry Kissinger) and totalitarian communism (Vladimir Nabokov, Madeline Albright, Reinaldo Arenas) – would not have been allowed entry.

restrictions on speech, its mandate is far broader: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Recognizing that, in order to be "free," speech must be not only uninhibited but also fully informed, this Court has enshrined a constitutional "right to receive [information]," and has reiterated that right wherever it has been challenged. *See Martin*, 319 U.S. at 143. *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("it is now well established that the [First Amendment] protects the right to receive information and ideas"); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both"). Indeed, in the very decision that provides the framework for this Court's analysis, *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), which concerned the visa application of Belgian journalist and intellectual Ernest Mandel, this Court explicitly recognized that in denying Mandel's visa application the government had burdened the First Amendment rights of those who sought to hear him lecture in the United States. The majority opinion only found this burden on the right to receive information permissible because Mandel's visa application had been denied for a "facially legitimate and bona fide" reason. *Id.* at 770. In his dissent, Justice Marshall elaborated on the vital free speech rights to which the majority had alluded:

> The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth."

408 U.S. 753, 775-76 (1972) (Marshall, J. dissenting) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). In short, this Court has long recognized that, even in the sphere of immigration policy, any law which restricts the pool of knowledge available to United States citizens directly implicates their freedom of speech.

The right to receive information is not media-agnostic; each medium – written, spoken, interactive – provides unique and valuable contributions to the quality of a communication. *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it"). In-person interactions – which permit free, improvised exchange of thoughts and reactions, observation of facial expressions, body language, and gestures, and the tailoring of one's message to the mood or energy of the recipients – carry a value that cannot be replicated by any other form of speech or expression.[15] This Court recognized the distinctive First Amendment value of face-to-face interactions in *Martin v. City of Struthers* (concerning the door-to-door distribution of literature by a Jehovah's Witness), holding that the "widespread use of this method of communication by many groups espousing various causes attests its major importance." 319 U.S. at 145. Indeed, the truism that there is no substitute for live, face-to-face exchange of information and ideas finds voice in the explicit Constitutional right of assembly, which is set out separately and distinctly from the rights to speak and publish. U.S. CONST. amend. I.

Technological advancements in remote communications do not provide a constitutionally sufficient alternative to live, in-person exchanges. In *Mandel*, the majority rejected the government's argument that "technological developments" could provide a substitute for physical presence, citing the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning." 408 U.S. at 765. Justice Marshall elaborated on this principle:

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[15] *See* Laura Vanderkam, *The Science of When You Need In-Person Communication*, FAST COMPANY (Sept. 30, 2015), https://www.fastcompany.com/3051518/the-science-of-when-you-need-in-person-communication (citing extensive research supporting the unique and positive social value of face-to-face interaction).

> The availability to appellees of Mandel's books and taped lectures is no substitute for live, face-to-face discussion and debate, just as the availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work.

Id. at 776 n. 2 (Marshall, J., dissenting). While *Mandel* was decided some time ago, recent advances in technology do not undercut this Court's prescient recognition that remote communication (be it via email, video chat, or tweet) is no substitute for live academic conferences or lectures – much less for live concerts, plays, and other performances. This recognition is exemplified by our courts' continuing emphasis on in-person hearings, trials, and appellate arguments. If anything, advances in technology have only thrown into sharp relief the inimitable qualities of live, face-to-face interaction.[16] Indeed, since *Mandel*, this Court has consistently continued to acknowledge that government bans on in-person interactions violate the First Amendment. *See e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014)

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[16] A Forbes article from 2011 cited the "growing pile of data from psychologists, biologists and computer scientists" showing that even the most advanced form of teleconferencing cannot replicate the unique benefits of an in-person interaction. Susan Adams, *Being There*, FORBES (Feb. 9, 2011), *available at* https://www.forbes.com/forbes/2011/0228/travel-teleconferencing-polycom-john-medina-being-there.html. *See also* Cisco, *Power of In-Person: The Business Value of In-Person Collaboration* (White Paper conducted by the Economist Intelligence Unit) (2012), *available at* https://www.cisco.com/c/dam/global/en_in/assets/pdfs/45808_Economist_wp1c_HR.pdf.

("When the government makes it more difficult to engage in ['one-on-one communication'], it imposes an especially significant First Amendment burden."); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (law prohibiting "direct, in-person, uninvited solicitation" by certified public accountants was unconstitutionally overbroad).

There is simply no substitute for in-person conversation, debate, gathering, or live performance. American citizens have a constitutional right – and duty – to engage in robust intellectual and artistic discourse. EO-2, by preventing citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen from presenting their knowledge and viewpoints in the United States, places an unjustifiable burden on the First Amendment right of U.S. Citizens to receive information and exchange ideas.[17]

C. By Any Standard of Review, EO-2's Burdens on Free Speech Must be Found Unconstitutional

The Fourth Circuit Court of Appeals found that EO-2 was enacted with an "anti-Muslim religious purpose," and was not therefore "facially legitimate and bone fide." *IRAP v. Trump* JA-215-216. Because of this, the Court of Appeals was not limited to the deferential standard of review set forth by *Mandel*, *see* 408 U.S. at 770, and correctly engaged in a searching constitutional inquiry into whether the Order violated the Establishment Clause of the First Amendment. For the reasons stated above, *Amici* contend that the Order also burdens free speech rights guaranteed under that Amendment. Regardless of the standard of review applied, this burden is constitutionally impermissible. The Fourth Circuit determined that EO-2 was enacted with the unmistakable and bad faith purpose of targeting and excluding foreign Muslims from this country, its ostensible national security rationale was only formulated after enactment, and even then, "internal reports from DHS contradict[ed]" that rationale. *IRAP v. Trump* at JA-225. Under these circumstances, the government can make no claim to even a rational basis underlying the Order.

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[17] This burden on the First Amendment right of all Americans to engage in in-person interchanges with nationals from the six banned countries is impermissibly onerous regardless of whether a foreign national meets the "bona fide relationship" test set forth by this Court in its order granting the petitions for certiorari. *See* Order Granting Petitions for Writ of Certiorari, 582 U.S. ___, at 9 (2017).

But even if there was a legitimate justification for EO-2, and assuming that it could even be defined as a content-neutral law (a categorization of which *Amici* are deeply skeptical), the Order would *still* not pass constitutional muster because it suppresses too much speech. The Order operates to foreclose Americans' access to an entire channel of communication – in-person interaction – with nationals of six countries, and thus impermissibly burdens First Amendment free speech rights.

> Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. . . . Although prohibitions

> foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech. *City of Ladue v. Gilleo,* 512 U.S. 43, 55 (1994).

In its overbreadth, EO-2 cuts off access to whole swaths of information that we, as citizens, are entitled to hear and consider in exercising self-government. Only an informed citizenry can properly judge its government's policies and actions, and our citizenry cannot be fully informed without an opportunity to engage in face-to-face interactions with nationals from the six countries targeted by EO-2. In the words of Albert Einstein, "(i)n these unfinished things, people understand one another with difficulty unless talking face to face."[18]

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit Court of Appeals should be affirmed for the separate and independent reason that EO-2 violates the First Amendment's freedom of speech guarantee.

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[18] As quoted by Justice Marshall in his *Mandel* dissent, 408 U.S. at 776 n. 2 (citing Developments in the Law-The National Security Interest and Civil Liberties, 85 Harv.L.Rev. 1130, 1154 (1972)).

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September 18, 2017

APPENDIX A

PEN American Center ("PEN America") is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. It champions the freedom to write, recognizing the power of the word to transform the world. Its mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

Future of Music Coalition ("FMC") is a Washington D.C.-based nonprofit organization supporting a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC works with musicians, composers and industry stakeholders to identify solutions to shared challenges. Founded in June 2000 by musicians, artist advocates, technologists and legal experts, FMC promotes strategies, policies, technologies and educational initiatives that always put artists first while affirming the role music fans play in shaping the future. FMC works to ensure that diversity, equality and creativity drives artist engagement with the global music community, and that values of free expression and fair compensation for artists as well as the public's ability to hear the creative work of diverse voices are reflected in laws, licenses, and policies.

International Association of Art Critics ("AICA" signing as the AICA International Committee on Censorship) was founded in 1950 and was admitted in 1951 as a non-governmental organization. AICA comprises various experts anxious to develop international co-operation in the fields of artistic creation, dissemination and cultural development.

Americans for the Arts is the nation's leading nonprofit organization for advancing the arts and arts education. Americans for the Arts serves, advances, and leads the diverse networks of organizations and individuals who cultivate, promote, sustain, and support the arts in America. Its work helps build environments in which the arts and arts education thrive and contribute to more vibrant and creative communities. With more than fifty years of service, it is dedicated to representing and serving local communities and creating opportunities for every American to participate in and appreciate all forms of the arts, including the cultural exchange of ideas. Its work demonstrates that collaboration in the arts and culture builds bridges among people of different countries, cultures, and faiths.

CASH Music is a nonprofit organization registered in the state of Oregon, and focused on educating & empowering artists & their fans to foster a viable & sustainable future for music. CASH Music believes the best way to ensure a sustainable future for music is to invest in its creators. Artists are leaders and keepers of our culture, and CASH is committed to defending creative expression.

Chamber Music America, the national network for ensemble music professionals, was founded in 1977 to develop, support, and strengthen the chamber music field. CMA's membership of nearly 6,000 includes musicians, ensembles, composers, presenters, artist managers, educators, music businesses, and advocates of ensemble music, who perform and present myriad styles ranging from historic to contemporary, Western to non-Western, American jazz, and evolving traditions. CMA provides the field with grant programs, consulting services, a national conference, professional development seminars and workshops, access to instrument and other insurances, and several publications, including Chamber Music magazine, the weekly Accent e-newsletter, and a member-driven website, www.chamber-music.org.

The International Committee for Museums and Collections of Modern Art ("CIMAM") is an affiliated committee of ICOM, the International Council of Museums created in 1946 to represent the needs of the museum community. Founded in 1962, CIMAM's vision is a world where the contribution of museums, collections and archives of modern and contemporary art to the cultural, social and economic well-being of society is recognized and respected. CIMAM's aim is to foster a global network of museums and museum professionals in the field of modern and contemporary art in order to raise awareness and respond to the evolving needs of modern and contemporary museums, and to take a leadership role on issues of concern. By generating debate and encouraging co-operation between art institutions and individuals at different stages of development around the world, CIMAM plays a key role in growth of the sector. Current membership includes over five hundred contemporary art curators and directors of contemporary art museums and collections, independent curators and researchers from 85 different countries.

The Content Creators Coalition is a non-profit, artist-run, advocacy organization for musicians. With chapters in five cities, we are dedicated to working with songwriters, performers, and musicians for equity in the digital world. If music generates money for anyone, therein lies the proof of its value and c3 is devoted to artists and creators receiving what theirs is. There is a groundswell of musicians banding together to demand action and see laws put into place and c3 will continue to protect and support those creators as changes are made.

Dance/USA believes that dance is essential to a healthy society, demonstrating the infinite possibilities for human expression and potential, and facilitating communication within and across cultures. Dance/USA sustains and advances professional dance by addressing the needs, concerns, and interests of artists, administrators, and organizations. By providing national leadership and services, Dance/USA enhances the infrastructure for dance creation and distribution, education, and dissemination of information.

Fractured Atlas is a non-profit arts service organization based in New York. We serve a diverse national membership of more than 60,000 primarily low-budget and independent artists and arts organizations located in all 50 states. We also have approximately 3,500 international members. Our core mission is to empower artists, arts organizations, and other cultural sector stakeholders by eliminating practical barriers to artistic expression, so as to foster a more agile and resilient cultural ecosystem. We are committed to ensuring that individuals are able to express themselves freely, and believe strongly that the government should not put up barriers to lawful expression or the free movement and sharing of ideas.

globalFEST believes that music can be a driving force toward a society that values cultural diversity as a source of unity rather than division. Over the last decade, globalFEST has become one of the most dynamic global music platforms in North America, growing from an acclaimed festival/showcase into a catalytic non-profit service organization for curators, artists, and the performing arts field. Through its work, gF encourages networking and cultural diplomacy; deepens cultural understanding among its constituents; builds audiences for international music and creates new opportunities for artists leading to a more robust and sustainable ecosystem for world music in the United States. Artists that participate in gF programs represent diverse musical styles from all corners of the globe, ranging from traditional to contemporary, and everything in between. Programs include: the gF Touring Fund, which provides direct support to artists to develop new markets and audiences; Wavelengths World Music Conference, a free annual gathering of the global music community in New York that includes networking and professional development opportunities; gF On the Road, tours that brings creatively programmed lineups to venues nationwide; and guest curating for both commercial and performing arts settings, including such influential events as SXSW, Bonnaroo, Lincoln Center and beyond, that serve to raise the profile and visibility of the artists gF works with, and world music overall.

Guitar Mash, a non-profit organization in New York, was founded with the belief that playing & singing music with other people connects us in a unique & profound way, and with the mission of bringing communal music-making experiences to as diverse a community as possible. Founded in 2012, Guitar Mash coordinates large and small-scale jams and workshops, which have brought together thousands of players and music lovers – of all ages, backgrounds, socio-economic levels and musical abilities – to share and create. We work closely with community-based organizations to provide underserved teens opportunities for communal playing and songwriting.

The Institute of Contemporary Art ("ICA") at the University of Pennsylvania believes in the power of art and artists to inform and inspire. The ICA is free for all to engage and connect with the art of our time. Founded in 1963 by the visionary dean of the school of architecture, Holmes Perkins, who wanted to expose students to what was "new and happening" in art and culture, ICA is now a preeminent venue for contemporary art and culture. A non-collecting museum, ICA is also one of the only kunsthalles (a facility dedicated to mounting exhibitions) in America. The ICA has historically been an important entrée for international artists to share their work with America, and has a compelling interest in protecting and promoting the free flow of information across international borders.

Founded in 2011, Live Sounds produces, creates and curates international music and dance programs in New York and across the country. Devoted to preserving and cultivating innovative, thought-provoking traditional and contemporary performing arts from around the world to build bridges and engage audiences and communities. Live Sounds projects promote cultural understanding and appreciation for global traditions while supporting and preserving artists and their art forms.

The National Alliance for Musical Theatre, founded in 1985, is a not-for-profit organization serving the musical theatre community. Our mission is to advance musical theatre by: nurturing the creation, development, production and presentation of new and classic musicals; providing a forum for the sharing of resources and information relating to professional musical theatre through communication, networking and programming; and advocating for the imagination, diversity and joy unique to musical theatre.

The National Coalition Against Censorship ("NCAC") is an alliance of 56 national non-profit organizations that promotes freedom of thought, inquiry and expression and opposes all forms of censorship. Founded in 1974, NCAC engages in direct advocacy and education to support First Amendment principles. Its participating organizations include literary, artistic, religious, educational, professional, labor, and civil liberties groups.

A national community of artists and arts organizations dedicated to collaborative creation, the Network of Ensemble Theaters ("NET") exists to propel ensemble theater practice to the forefront of culture and society. NET links a diverse array of ensembles and practitioners to one another and the performing arts field, encouraging collaborations and knowledge building/dissemination. NET is committed to the advancement of the ensemble form and strives to bring about change in the world beyond ourselves through the transformative power of collaborative theater and ensemble practice. We support bold artistic and civic experiments and aim to heighten the impact and excellence of ensemble theater.

The New England Foundation for the Arts ("NEFA") is a non-profit organization that invests in the arts to enrich communities. NEFA plays a unique role in New England by connecting our creative people and cultural communities, and promoting greater access to the arts. We accomplish our work by granting funds to artists and cultural organizations; connecting them to each other and their audiences; and analyzing their economic contributions. NEFA's mission is to build connections among artists, arts organizations, and funders, powering the arts to energize communities in New England, the nation and the world.

OPERA America draws on resources and expertise from within and beyond the opera field to advance a mutually beneficial agenda that serves and strengthens the field through programs in the following categories: Creation: Artistic services that help artists and companies increase the creativity and excellence of opera productions, especially North American works; Presentation: Opera company services that address the specific needs of staff, trustees and volunteers; Enjoyment: Education, audience development and community services that increase all forms of opera appreciation.

The Performing Arts Alliance envisions a United States in which the diverse ecology of the performing arts is deeply-valued and supported, adequately and equitably resourced, and where participation is accessible to all. The Performing Arts Alliance is uniquely able to achieve this mission and vision on behalf of the nonprofit performing arts sector: (1) through the directors who lead our coalition, and through our highly- skilled staff and government affairs directors who implement the advocacy work of the Alliance; (2) by coordinating federal advocacy efforts and aligning interests among organizations, artists, and allies in the nonprofit performing arts sector to create a more powerful, unified voice before Congress, the White House, and federal agencies; (3) by operating as a learning organization where our Board members, staffs, and member networks are engaged in sharing and building knowledge for an informed performing arts field; (4) by exploring how the values of diversity, equity, and inclusion affect the work of PAA members and the field; the policies for which we advocate; the leadership learning agenda through which our directors share and build knowledge; and PAA's operations and activities.

Sundance Institute is a nonprofit organization that provides and preserves the space for artists in film, theatre, and new media to create and thrive. The Institute's signature Labs, granting, and mentorship programs, dedicated to developing new work, take place throughout the year in the U.S. and internationally; the Sundance Film Festival and other public programs connect audiences to artists in igniting new ideas, discovering original voices, and building a community dedicated to independent storytelling and freedom of expression.

Tamizdat is a nonprofit organization with the mission of facilitating international cultural exchange. Founded in 1998 by a group of international musicians, Tamizdat is motivated by the conviction that artist mobility and the international exchange of culture are fundamental to a flourishing civil society and that the American people's access to international culture should not be encumbered. We have recently published a draft "White Paper on Artist Mobility to the United States," and we lead a coalition of domestic and international organizations and private stakeholders, committed to improving the U.S. artist visa process. Tamizdat also runs an "Artist Visa Assistance and Information Line" for the international performing arts community.

Teachers & Writers Collaborative (T&W) is a nonprofit organization that provides creative writing programs at New York City schools and community-based organizations and that publishes resources to support learning through the literary arts. We have also hosted readings by authors and poets, including writers from outside the United States. In the last 50 years, our programs have reached more than 750,000 young people and more than 25,000 educators. Our writing programs utilize work by diverse authors from around the world as models and inspiration for student writing. This modeling is important to the population we serve, which includes many young people whose families are from the countries affected by the travel ban. The ban hinders our ability to identify and share the work of both established and emerging literary artists from the affected countries, and to support a thriving international literary community by introducing children, teens, and their teachers to work by a broad range of poets and writers.

Theatre Communications Group, the national organization for the American theatre, is dedicated to nurturing, strengthening and promoting the professional non-profit theatre in the United States.

TCG's membership includes over 700 theatres and Affiliate organizations and more than 12,000 individual members nationwide. TCG offers its members networking and knowledge-building opportunities through our conferences, events, research, and communications; grants approximately $2 million per year to theatre companies and individual artists; advocates on the federal level; and through the Global Theater Initiative, TCG's partnership with the Laboratory for Global Performance and Politics, serves as the U.S. Center of the International Theatre Institute. TCG is the nation's largest independent publisher of dramatic literature, with 15 Pulitzer Prizes for Best Play on our booklist; it also publishes the award-winning American Theatre magazine and ARTSEARCH®, the essential source for a career in the arts. In all of its endeavors, TCG seeks to increase the organizational efficiency of its member theatres, cultivate and celebrate the artistic talent and achievements of the field, and promote a larger public understanding of, and appreciation for, the theatre.

Trudel | MacPherson LLC is a consulting partnership that helps nonprofits, arts organizations, public agencies, and membership organizations with branding, stakeholder engagement, and other marketing and communications needs. Trudel | MacPherson LLC believes strongly in the importance of artistic and cultural exchanges, and the importance of the free flow of art, culture and ideas across national borders.

Western Arts Alliance ("WAA"), serves the field of performing arts touring and presenting in the Western United States and Canada, with 460 members and 1,500 affiliated professionals including presenting organizations, individual artists, companies, agents, and managers. Western Arts Alliance was established in 1967 by sixteen universities, and universities remain the backbone of our network. Members are given a multitude of resources to help them in their careers, and are part of a supportive community of fellow professionals. As an organization, WAA speaks to a diverse field and promotes inclusive participation. Many of WAA's members are actively engaged in international exchange with Muslim artists, companies, and producers. The members of Western Arts Alliance and the communities they serve, seek out these opportunities with the goals of strengthening understanding, trust, cooperation, and peace.

The Yerba Buena Gardens Festival ("YBGF") is a presenting organization dedicated to enhancing the vitality and quality of life in the parks and open spaces of Yerba Buena Gardens and San Francisco through the curated presentation of admission-free artistic, community and cultural programs. Artistic excellence, inclusion, diversity and innovation are at the heart of our mission. YBGF strives to ensure that our audiences have the opportunity to gain greater understanding of diverse art forms and cultural heritages. By presenting art that meets the highest standards of excellence, our intention is to foster cross-cultural understanding, respect, and appreciation among our communities, towards a more civil, more enlightened and more pleasing urban environment where art and people thrive.

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DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Courts of Appeals
for the Fourth and Ninth Circuits**

BRIEF OF THE PORT OF SEATTLE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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September 18, 2017

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BRIEF OF *AMICUS CURIAE* THE PORT OF SEATTLE SUPPORTING RESPONDENTS AND URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Port of Seattle has a significant interest in the uniform application of a constitutional and statutorily authorized system of immigration as the operator of the port of entry into the United States for thousands of passengers arriving from the Middle East and other regions on a weekly basis. Among other responsibilities, the Port of Seattle operates Seattle-Tacoma International Airport ("Sea-Tac Airport"). More than 20 passenger airlines, serving approximately two dozen international cities and nearly 80 domestic destinations, operate out of Sea-Tac Airport. Specifically, the international carrier Emirates Airline, the Middle East's largest airline, operates daily flights into and out of the airport. Because Sea-Tac Airport is an international port of entry, U.S. Customs and Border Protection employs officers at the airport, charged with enforcement of the immigration laws.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), the Port of Seattle notes that all parties have consented to the filing of this brief; their consents have been filed with the Clerk of this Court.

As the primary international airport in the region, Sea-Tac Airport generates more than 100,000 direct jobs, more than $2.8 billion in direct earnings, and $565 million in state and local taxes, according to recent estimates. The airport is undergoing a $1.9 billion dollar renovation in anticipation of growing international travel to and through Seattle.

In 2015, Emirates Airline added a second non-stop flight from Dubai to Seattle, which the Port estimated at the time would add $75 million in economic impact and 1,400 jobs to the region. In April 2017, Emirates canceled this second flight, citing in part a drop in demand following the issuance of President Donald J. Trump's executive orders temporarily halting entry to the United States for citizens of six (initially seven) countries in the Middle East.

In addition to the direct economic harm the Port has experienced stemming from the executive orders, the Port, like many points of entry in the United States, experienced the well-documented chaos resulting from the enforcement of the executive orders. Under the first executive order, the Port encountered differing and confusing interpretations of the scope of the travel ban, based on visa status, legal status, or the purpose of entry. Major international airports like Sea-Tac Airport had to manage the sensitive issues arising from the detainment of numerous travelers, including connecting such individuals with appropriate legal assistance, ensuring compliance with legal mandates, and maintaining the daily functioning of a major international airport amid an influx of affected families, attorneys, and protestors. *Statement by the Port of Seattle in Response to Trump Administration Immigration Ban*, PORT OF SEATTLE (Jan. 31, 2017), https://www.portseattle.org/Newsroom/News-Releases/Pages/default.aspx?year=2017#640. At one point, a Port commissioner at the gate of a departing airline worked to facilitate conversations between legal representatives, federal agencies, and a district court judge about whether two travelers would be detained, allowed to enter the country, or sent back to the countries they had just left. *Id.* A flurry of court orders enjoined the application of the first executive order as to individuals and, finally, on a nationwide basis. Absent a uniform, nationwide injunction, such litigation would persist based on the specific situations of individual plaintiffs. Accordingly, the Port of Seattle has a keen interest in the uniform application of immigration laws that comply with constitutional and statutory mandates.

SUMMARY OF ARGUMENT

On January 27, 2017, President Trump signed Executive Order No. 13,769 ("EO-1"), which, among other provisions, banned the entry into the United States for 90 days of citizens from seven majority-Muslim countries and froze the admission of refugees from those countries for 120 days. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017). EO-1 took effect immediately, leaving an untold number of people in transit to the United States stranded and wreaking havoc on the country's uniform system of immigration. The widespread confusion spurred numerous lawsuits, including one by the State of Washington. The U.S. District Court for the Western District of Washington enjoined EO-1's enforcement on a nationwide basis, which the Ninth Circuit declined to stay. *Washington v. Trump*, 2017 WL 462040, at *2–3 (W.D. Wash. Feb. 3, 2017), *aff'd*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

In light of these legal challenges, President Trump issued a new executive order ("EO-2") on March 6, 2017. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). EO-2 largely retained the previously challenged provisions and prompted a second round of lawsuits. As relevant here, EO-2 prevents the entry into the United States of citizens of six countries for a 90-day period, suspends travel by refugees and decisions on refugee applications for 120 days, and lowers the cap on the number of refugees that may be admitted to the United States in 2017.

Before EO-2 took effect, the U.S. District Court for the District of Hawaii enjoined enforcement of the travel and refugee bans. The U.S. District Court for the District of Maryland also enjoined the travel ban portion of EO-2. The Fourth and Ninth Circuits each affirmed. The Fourth Circuit determined that the travel ban has a primarily religious purpose and likely violates the Establishment Clause. The Ninth Circuit held that the travel and refugee bans run afoul of several provisions of the Immigration and Nationality Act ("INA").

As respondents have ably explained, the challenged provisions of EO-2 cannot withstand constitutional scrutiny and violate the INA.[2] Petitioners, however, would have this Court forgo review of EO-2 or, at the very least, limit the relief to individual plaintiffs. Pet. Br. 79-82. But the challenged provisions of EO-2 inflict harms that more than satisfy the standing inquiry for all respondents. And nothing short of a nationwide injunction will remedy that harm.

I. As to the justiciability inquiry, EO-2 has imposed real and tangible harms on not only the particular respondents but many other individuals and entities. As respondents correctly have argued, the executive order imposes intangible harms by condemning a particular religion. IRAP Br. 15–25; Hawaii Br. 18–21. Beyond such harms, however, the organizational and state plaintiffs have experienced significant and quantifiable economic injury from restrictions imposed by the executive order. These harms alone are sufficient to confer Article III standing, particularly at this early stage of the case, for both the Establishment Clause and INA challenges. As the significant harms experienced by *amicus curiae* the Port of Seattle confirm, the economic harms alleged by Hawaii, the International Refugee Assistance Project ("IRAP"), HIAS, and the Middle East Studies Association ("MESA"), are not unique to the plaintiffs here. Indeed, the Ninth Circuit previously determined that the State of Washington had standing to challenge the first executive order. *Washington v. Trump*, 847

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[2] Br. for Respondents State of Hawaii, *et al.* 28–60 ("Hawaii Br."); Br. of Respondents International Refugee Assistance Project, *et al.* 31–59 ("IRAP Br.").

F.3d 1151, 1158–59 (9th Cir. 2017). Federal courts thus have the ability to review the validity of EO-2 and to grant the relief requested by respondents.

II. As to the proper scope of the injunction, the courts of appeals each correctly affirmed imposition of a nationwide injunction to prevent application of the challenged provisions. Under both the Ninth Circuit's statutory approach and the Fourth Circuit's constitutional approach, the enjoined provisions of the executive order are facially invalid. Thus, it is appropriate to prevent the invalid provisions from being implemented anywhere in the nation. In addition, the strong interest in ensuring the uniform application of the immigration laws justifies imposition of a nationwide injunction. Absent a nationwide injunction, points of entry would have to apply different standards to the admission of individuals who may be subject to EO-2's travel and refugee bans. For instance, under the government's approach, an individual's ultimate destination in the United States could determine whether the person is subject to EO-2's restrictions upon entry to the United States through any international airports in the country. Such an approach would undermine the uniform enforcement of the immigration laws and risk a repeat of the chaos that resulted from EO-1.

ARGUMENT

I. THE ECONOMIC INJURIES SUFFERED BY THE STATE OF HAWAII AND THE ORGANIZATIONAL RESPONDENTS ARE INDEPENDENTLY SUFFICIENT TO CONFER STANDING TO SUE

Petitioners challenge the justiciability of the present controversy, arguing that respondents do not have standing. Pet. Br. 27–35. But respondents, which include individual plaintiffs as well as the State of Hawaii and several non-profit organizations, have suffered harm stemming from the travel and refugee admission restrictions. Indeed, many states and organizations are experiencing the same harms as respondents here, as demonstrated by the numerous lawsuits challenging EO-2. Such harm can be traced directly to the executive order.

A. Economic Injury Is Sufficient To Confer Article III Standing

The "gist of the question of standing" asks whether a plaintiff has a "personal stake in the outcome of the controversy." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). To establish Article III standing, a plaintiff must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Only a single plaintiff need demonstrate standing. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

For the Establishment Clause, a plaintiff may demonstrate standing by alleging that a statute or policy that violates the Establishment Clause injures the plaintiff's economic well-being. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 118 (1982) (plaintiff denied liquor license because of store's proximity to a church, thus resulting in economic loss); *Torcaso v. Watkins*, 367 U.S. 488, 489–90 (1961) (plaintiff prohibited from holding office in Maryland because he refused to swear that he believed in God); *Two Guys from Harrison–Allentown, Inc. v. McGinley*, 366 U.S. 582, 592 (1961) (plaintiff prosecuted for violating blue laws and prohibited from selling goods on Sunday); *McGowan v. Maryland*, 366 U.S. 420, 430–31 (1961) ("Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion. We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion." (footnote omitted)). Likewise, economic injuries confer Article III standing to challenge the President's invocation of powers under the INA. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014) (economic injury in the form of exposure to competition provides constitutional standing to challenge immigration regulation); *Int'l*

Longshoremen's & Warehousemen's Union v. Meese, 891 F.2d 1374, 1379 (9th Cir. 1989) (same as to agency action). Here, at least one respondent from each action has sufficiently demonstrated an economic injury sufficient to satisfy the standing requirements for challenging the specific provisions of EO-2 as violating the Establishment Clause and the INA.

1. The State of Hawaii has demonstrated economic harm resulting from the Section 2(c) travel ban, the Section 6(a) refugee ban, and the lowered cap on refugees in Section 6(b). Specifically, at the preliminary injunction stage, Hawaii has made an adequate showing that it will suffer economic harm from the loss of students and faculty at its universities, from the drop in tourism to the state from the banned countries, and from the loss of funds to assist with the settlement of refugees. Hawaii Br. 22–23.

Hawaii has standing by virtue of the direct injury the executive order inflicts in the forms of a loss of specific tax revenues and impairment of Hawaii's tourism industry. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (municipality's "claims of financial injury . . . specifically, lost tax revenue and extra municipal expenses" satisfies Article III); *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992) (state has standing based on "direct injury in the form of a loss of specific tax revenues"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110–11 (1979) (village may challenge action that "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services"); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198–99 (9th Cir. 2004);

Colo. River Indian Tribes v. Town of Parker, 776 F.2d 846, 848–49 (9th Cir. 1985). EO-2 chills tourism, decreasing State revenues, including taxes. As the Hawaii district court found, "preliminary data from the Hawaii Tourism Authority" that "includ[es] visitors from Iran, Iraq, Syria, and Yemen" suggests that "during the interval of time that the first Executive Order was in place, the number of visitors to Hawai'i from the Middle East dropped." *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1130 (D. Haw. 2017). Relating specifically to Sections 6(a) and 6(b), the State of Hawaii will lose both tax payments and economic contributions from refugees that settle in Hawaii. *See* Hawaii Br. 22–23.

Hawaii also has standing because the travel ban prevents nationals of six countries from entering the United States, thereby precluding students and faculty from joining the state universities. As the Ninth Circuit correctly concluded: "EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body." *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017). For this same reason, the Ninth Circuit correctly determined that the State of Washington had standing in a challenge to the first executive order. *Washington*, 847 F.3d at 1161.

Contrary to petitioners' argument, Pet. Br. 33–34, the State of Hawaii may assert these economic injuries.[3] *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 155–62 (5th Cir. 2015) (holding the State of Texas had standing to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program based on its alleged injury of subsidizing driver's licenses to DAPA beneficiaries), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). And such injuries are not, as petitioners contend, "merely the incidental effects of the United States' application of federal law to aliens outside the United States." Pet. Br. 34. Rather, they are a direct effect of prohibiting the travel of 180 million people to the United States.

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[3] Separately, under the "third party standing" doctrine, injuries to state universities give states standing to assert the rights of the students, scholars, and faculty affected by the EO-2. *See Singleton v. Wulff*, 428 U.S. 106, 114–16 (1976) (explaining that third-party standing is allowed when the third party's interests are "inextricably bound up with the activity the litigant wishes to pursue"; when the litigant is "fully, or very nearly, as effective a proponent of the right" as the third party; or when the third party is less able to assert her own rights); *see also Craig v. Boren*, 429 U.S. 190, 195 (1976) (explaining that vendors "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function"). The third-party standing doctrine provides an independent basis for standing, but its invocation is not necessary to hold that respondents have standing here.

2. Likewise, wholly apart from the injuries experienced by their clients, respondent non-profit organizations HIAS, IRAP, and MESA have demonstrated sufficient economic injury to establish standing. EO-2 imposes direct economic harm on these organizations in a variety of ways, such as the otherwise unnecessary expenditure of funds to contend with the consequences of EO-2's travel and refugee bans, the diversion of funds from the organization's primary mission, and the loss of funds through restrictions on entry. To hold otherwise would veer from settled precedent establishing that non-profit advocacy organizations have standing under such circumstances in cases that implicate their interests, the effects of which would reach far beyond this case.

For instance, as respondents explain, MESA's members cannot attend its annual conference. IRAP Br. 23–24. The lower number of submissions for MESA's conference translated to a loss of $18,000. *Id.* at 24. The travel ban thus directly impedes MESA's ability to carry out its central purposes and results in quantifiable economic harm, which is sufficient to confer standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes" injury in fact); *see also Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 724 & n.10 (D. Md. 2011) (holding plaintiff suffered injury in fact stemming from diversion of resources that impeded organization's growth and impaired ability to carry out core mission).

In this same vein, IRAP and HIAS have had to devote resources to confronting the ramifications of EO-2's travel and refugees bans. IRAP Br. 24; *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 578 (4th Cir. 2017) (noting IRAP and HIAS "claim that they have already diverted significant resources to dealing with EO-2's fallout"); *see also Hawaii v. Trump*, —— F. 3d ——, 2017 WL 3911055, at *11–12 (9th Cir. Sept. 7, 2017) (detailing the economic injuries and consequent interference with organizational purpose experienced by refugee assistance organizations resulting from EO-2). And IRAP and HIAS, which both assist in the settlement of refugees, have alleged "lost revenue arising from a reduction in refugee cases that may necessitate reductions in staff." *Int'l Refugee Assistance Project v. Trump v. Trump*, 241 F. Supp. 3d 539, 549 (D. Md. 2017), *aff'd in part, vacated in part,* 857 F.3d 554 (4th Cir. 2017). Such loss, directly related to the temporary ban and lower refugee admission cap, satisfies the Article III standing inquiry. *See Exodus Refugee Immigration, Inc. v. Pence,* 165 F. Supp. 3d 718, 739 (S.D. Ind. 2016) (recognizing that, although funding to a refugee resettlement organization could be repaid, "in the interim, its organizational objectives would be irreparably damaged by its inability to provide adequate social services to its clients"), *aff'd*, 838 F.3d 902 (7th Cir. 2016).

The organizational respondents thus have demonstrated Article III standing by virtue of these economic injuries.

B. Respondents' Injuries Fall Within The Zone Of Interest Of The INA

Respondents also meet the requirement that their claims vindicate interests that "fall within the zone of interests protected" by the INA. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal quotation marks omitted). The INA specifically addresses the admission of students, faculty, tourists, and refugees from abroad, and therefore the challenged provisions fall squarely within the zone of interests protected by the INA.

As an initial matter, the INA specifically provides for the admission of nonimmigrant students for study in the United States. *See* 8 U.S.C. § 1101(a)(15)(F) (defining eligible nonimmigrant students); 8 C.F.R. § 214.2(f) (identifying eligibility requirements for nonimmigrant college students). The same is true for nonimmigrant scholars and teachers. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (defining eligible nonimmigrant "student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill"); *id.* § 1101(a)(15)(H) (identifying aliens coming to the United State temporarily to perform services in a specialty occupation). International students and visiting faculty may qualify for a visa on a number of different grounds. *See Directory of Visa Categories,* U.S. DEP'T STATE, https://travel.state.gov/content/visas/en/general/all-visa-categories.html (last visited Sept. 18, 2017). These statutory provisions make clear that the injuries asserted by the State of Hawaii and, for instance, MESA conference attendees, fall within the zone of interest of the INA.

Similarly, the INA defines "refugee" and provides the policy and procedure for determining the number of refugees admitted. *See* 8 U.S.C. § 1101(a)(42) (defining "refugees"); *id.* § 1157 (providing the procedure for determining the number of refugee admissions). Congress amended these provisions to provide a "systematic procedure" for the admission of refugees into the United States, as well as "uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102, 102 (1980). Further, the INA establishes a grant program for the resettlement of refugees. *See* 8 U.S.C. § 1522(a)(4)(B); *id.* § 1522(b)(2)–(5) (provisions related to medical screening, initial medical treatment, and educational needs of refugees). States also receive grants that they may provide to organizations that assist with resettlement efforts, such as helping refugees become self sufficient in their new country through job training and English courses. *See* 8 U.S.C. § 1522(a)(4)(B)(ii), (iii). Thus, Hawaii's interest in effectuating its refugee resettlement policies and programs, and the interests of the organizational respondents in assisting in the settling of refugees, fall within the core purpose of the INA.

II. THE NATIONWIDE INJUNCTION IS APPROPRIATE AND WARRANTED

Both the Fourth and Ninth Circuits issued nationwide injunctions as to the portions of EO-2 each court of appeals held invalid. *Int'l Refugee Assistance Project*, 857 F.3d at 604–05; *Hawaii*, 859 F.3d at 787–88. This Court should uphold the full scope of the injunctions, as respondents urge. Hawaii Br. 60–61;

IRAP Br. 59–61. The enjoined provisions of EO-2 are facially invalid and not simply invalid as applied to one individual or class of people. A nationwide injunction thus is necessary to redress the legal violation. Separately, as respondents also correctly argue, a nationwide injunction is appropriate to ensure the uniform application of the immigration laws. *See* Hawaii Br. 61. The limitations the government proposes for the injunctive relief, Pet. Br. 78–79, 82–83, are neither tailored to the legal violation nor feasible. To the contrary, such an approach would result in a haphazard application of immigration law, requiring the use of different standards for entry to the United States for individuals subject to EO-2's travel and refugee bans.

A. The Facial Invalidity Of The Challenged Provisions Of EO-2 Justifies Issuance Of A Nationwide Injunction

Where a law is invalid on its face, a nationwide injunction is appropriate. This Court has made clear that when a plaintiff claims that a law is facially vague and violates his or her Constitutional rights, that "party seeks to vindicate not only his [or her] own rights, but those of others who may also be adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the [constitutional] rights of other parties not before the court."). "In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing." *Morales*, 527 U.S. at 55 n.22.

As petitioners correctly note, the courts of appeals held that "categorical relief was necessary because a more limited injunction would not cure the alleged legal defects in the Order." Pet. Br. 82. Such "legal defects" are that provisions of EO-2, *on their face*, violate the Establishment Clause, per the Fourth Circuit, and the INA, per the Ninth Circuit. Under these circumstances, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The facial invalidity of Sections 2(c), 6(a), and 6(b) thus warrants a nationwide injunction.

To the extent the government argues that the scope of relief must be limited to that necessary to"redress cognizable injuries to respondents themselves," Pet. Br. 78, the government's argument suffers from a second flaw: the government neglects to consider the full slate of plaintiffs. For instance, the government contends that the Fourth Circuit based its nationwide injunction "on two purported injuries to a single respondent," whose wife has now received a visa. Pet. Br. 79 (emphasis omitted). As demonstrated, *supra*, the injuries established by IRAP, HIAS, and MESA independently confer standing and support issuance of a nationwide injunction based on the facial invalidity of the challenged provisions. The Fourth Circuit never addressed the standing of any other plaintiff—nor did it need to do so. Instead, the Fourth Circuit accurately reasoned that, "because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim." *Int'l Refugee Assistance Project*, 857 F.3d at 586.[4]

With regard to the Ninth Circuit injunction, the government argues that "[a]ny injuries to Hawaii's university system . . . could be fully redressed by an injunction tailored to particular, identified students or faculty whom Hawaii has enrolled or hired." Pet. Br. 81. This argument, of course, ignores entirely the fact that Hawaii has suffered direct and quantifiable harm as a result of the loss of tourism revenue resulting from the travel ban. Further, this argument fails to account for the inability of the University of Hawaii to attract students and faculty, which results in harm to the State university system no less than the loss of "identified students or faculty whom Hawaii has enrolled or hired."

Accordingly, only an injunction on a nationwide scale would redress the legal defects in EO-2.

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[4] For this same reason, petitioners' argument that the Fourth Circuit wrongly relied upon plaintiffs throughout the United States in fashioning the injunction even though the Fourth Circuit "did not hold that any respondent besides Doe #1 had standing—and even his claimed injury has been eliminated," Pet. Br. 82, is misplaced. The organizational plaintiffs have standing to challenge EO-2 and the provisions of EO-2 are invalid no matter where they are sought to be enforced.

B. The Need For Uniform Application Of The Immigration Laws Independently Supports Affirmance Of The Nationwide Injunctions

Separately, as the government acknowledges, "[b]oth courts of appeals also concluded that categorical relief is appropriate because 'Congress has made clear that the immigration laws of the United States should be enforced vigorously and uniformly.'" Pet. Br. 82 (quoting J.A. 244; citing J.A. 1233).[5] This rationale independently supports affirmance of the nationwide injunctions.

As a general matter, "[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Arizona v. United States*, 567 U.S. 387, 401–02 (2012); *see also id.* at 395 ("Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."). Individualized application of EO-2 based on the relationship of an individual with a respondent would serve to undermine such uniform application, thus justifying issuance of a nationwide injunction.

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[5] The Washington district court, which first enjoined EO-1, also determined that the injunction should issue on a national scale. *Washington*, 2017 WL 462040, at *2 ("Although Federal Defendants argued that any TRO should be limited to the States at issue, the resulting partial implementation of the Executive Order 'would undermine the constitutional imperative of a *uniform* Rule of Naturalization and Congress's instruction that the immigration laws of the United States should be enforced vigorously and *uniformly*.'" (quoting *Texas*, 809 F.3d at 187-88)).

While the government points to the severability clause in EO-2 to support a more narrowly tailored injunction, Pet. Br. 83, that provision does not support narrowing the injunction. Section 15(a) of EO-2 provides that, if "application of any provision to any person or circumstance[] is held to be invalid," then "the application of [the Order's] other provisions to any other persons or circumstances shall not be affected." 82 Fed. Reg. at 13,218. As explained, *supra*, however, the challenged provisions were held invalid in *all* circumstances because they are facially invalid. Thus, the severability provision actually supports, rather than undermines, the nationwide scope of the injunction.

As a practical matter, EO-2 is framed in terms of entry into the United States and not linked (as a visa may be) to the purpose of the entry. Thus, an injunction must be nationwide because an individual's travel plans may result in entry through any port of entry. The government's approach would not enjoin application of the travel or refugee ban but rather would require the application of an entirely different standard to refugees, tourists, students, and faculty, based on whether a specific refugee has "concrete plans to resettle in Hawaii," Pet. Br. 81, whether a tourist was headed to the beach in Hawaii, whether a student plans to study at the University of Hawaii, or whether an individual plans to attend MESA's conference.

Similarly, to the extent Section 6(b) lowers the cap on the number of refugees, the government's approach could have the effect of directing refugees to Hawaii, making such a limitation illogical. For a similar reason, the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), held that "a geographically-limited injunction would be ineffective" because the plaintiffs affected by the order would be subject to different immigration laws simply by moving between states. *Id.* at 188. Here, too, such non-uniform application of the law across the country would impose a two-tiered system of immigration—one applicable to an unknown number of individuals with ties to the respondents here and one applicable to anyone else. Such a confusing and segmented approach would result in chaos.

Finally, such a non-uniform approach to entry into the United States would conflict with the stated purpose for imposing the travel and refugee bans. Far from "temporarily reduc[ing] investigative burdens on relevant agencies," 82 Fed. Reg. at 13,213, as stated in Section 2(c) of EO-2, the burden would increase. This Court need only look to the effect of EO-1, which resulted in increased burdens on the entities responsible for determining the ability of an individual to enter the country, to confirm this fact. This sort of improvised application of federal law is precisely the harm that a uniform system of immigration is intended to avoid. Accordingly, the need for the uniform application of immigration alone justifies the nationwide injunctions.

CONCLUSION

The judgments of the Fourth and Ninth Circuits should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL COURTS JURISPRUDENCE, CONSTITUTIONAL LAW, AND IMMIGRATION LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are academics whose expertise includes the jurisprudence of federal courts, constitutional law, and/or immigration law. *Amici* submit this brief to explain why, given constitutional commitments to separation of powers, the President lacked authority to issue the directive set forth in section 2(c) of Executive Order No. 13780 (the "Executive Order") denying entry to the United States to individuals from a list of predominantly Muslim countries based solely on nationality.

SUMMARY OF ARGUMENT

The Executive Order categorically suspends the entry of all nationals from a list of predominantly Muslim countries on the premise that all such nationals present heightened risks of terrorism, rendering their entry into the United States a threat to national security. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) is central to evaluating the validity of this executive action and whether it complies with established separation-of-power principles. The framework described in *Youngstown*, and its subsequent application in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), requires this Court to analyze what Congress has authorized, what it has prohibited, and the "general tenor" of congressional immigration legislation. As we argue below, the President does not have independent and exclusive authority over immigration, and the Executive Order is not authorized by statute and contravenes express and implied congressional mandates.

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[1] The parties have consented to the filing of this brief. Counsel affirms, in compliance with Supreme Court Rule 37.6, that no party, or counsel for a party, has played a role in the drafting or preparation of this brief; nor did any person other than amici provide financial support in connection with the preparation and filing of this brief. A list of *amici* may be found at Appendix A.

Contrary to the President's assertion, the Immigration and Nationality Act ("INA") does not delegate to the executive plenary authority to act invidiously by invoking nationality as the sole basis for excluding millions of people from the United States. Reading section 212(f), codified at 8 U.S.C. § 1182(f) (hereinafter section 1182(f)), as authorizing such unfettered discretion is at odds with its historical interpretation and usage and cannot be reconciled with its meaning in the broader statutory context within which it operates. Moreover, the President's broad reading of section 1182(f) would raise concerns that Congress has abdicated its own constitutional role in setting immigration policy.

Section 1182(f) must be read in the context of the INA as a whole. In 1965, Congress, deeply troubled by the historic abuse of nationality as a stalking horse for racial, ethnic, and religious intolerance, banned its use in the issuance of immigrant visas. *See* 8 U.S.C. § 1152(a). And in the half century since, Congress has repeatedly insisted on the use of specific nondiscriminatory criteria when excluding entrants to the United States on the basis that individuals are purported threats to safety and security.

The Executive Order employs nationality as a stand-in for an individual's religion and propensity to engage in terrorism or to undermine Americans' safety. In so doing, the President unilaterally resurrects the use of nationality as the sole basis to ban entry into the United States and acts in contravention of sustained congressional opposition to the use of such historically-discredited tests for entry. Under these circumstances, the President's power is at or near its "lowest ebb" and is valid only if the President possesses independent and exclusive constitutional powers that preclude Congress "from acting upon the subject." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring). Because no such constitutional power of the president over immigration exists, the Executive Order cannot be sustained.

ARGUMENT

Throughout its history, this Court has played a foundational role in protecting the rule of law by delineating and enforcing constitutional limits on the authority of the other branches of our national government. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding unconstitutional an executive order that "legislated" the seizure of the nation's steel mills). *See also Marbury v. Madison*, 1 Cranch 137 (1803) (holding that courts possess power to review the legality of actions by even the highest officers of the government and concluding that Congress exceeded constitutional limits in attempting to expand Article III jurisdiction).

When executive action is challenged, the Court does not stay its hand because the President argues his prerogatives in the areas of national security, foreign affairs, citizenship, or immigration. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that, notwithstanding the president's Commander-in-Chief powers and an existing exigency, executive lacked authority to convene the military commission at issue). *See also Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (evaluating whether executive action was consistent with the "general tenor" of congressional legislation). As this Court has explained, "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

In this case, the Court is called on once again to scrutinize the President's claimed basis for authorization, viewed as it must be in the context of Congress's other more specific actions dealing with the same general subject. As explained below, the President's attempt to use nationality as a proxy for the individualized characteristic of "heightened risk[] to ... security", Exec. Order 13780,—and to bar entry to millions of individuals on that basis alone—not only lacks specific statutory authorization, but contravenes both express and implicit congressional directives.

I. THE GOVERNING LEGAL FRAMEWORK

"The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585.

Youngstown provides the framework for assessing the validity of the Executive Order in this case. *See Hamdan*, 548 U.S. at 638 (Kennedy, J. concurring ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*."). As Justice Black's opinion for the Court explained, the question of the President's power to seize control of the private companies turned on the Constitution or laws, and it had to be analyzed initially in light of relevant legislation. *Youngstown*, 343 U.S. at 585–86.

In *Youngstown*, this Court invalidated an executive order directing a temporary government seizure of the nation's steel mills to avoid a steel workers' strike that could have halted steel production during the Korean War.[2] Despite the threat to the lives of American service members if steel production ceased, the Court held that the President had acted without appropriate congressional authority and struck down the seizure order as an unconstitutional exercise of unilateral presidential power. The Court concluded that the order was "not only unauthorized by any congressional enactment," but also effectively legislated policy that Congress had specifically rejected. *Id.* at 586.[3] The Court further held that the President's constitutionally derived power, including his power as Commander-in-Chief, could not authorize the seizure order. *Id.* at 587. At bottom, the Court deemed the power "to take possession of private property to keep labor disputes from stopping production ... [to be] a job for the Nation's lawmakers, not for its military authorities." *Id.*

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[2] As the dissent explained, the United States furnished "vigorous support" in response to the United Nations's call for assistance "to repel aggression in Korea." *Youngstown*, 343 U.S. at 668 (Vinson, C.J., dissenting). At the time *Youngstown* was decided, American armed forces had been fighting in Korea for "almost two full years . . . suffering casualties of over 108,000 men," and hostilities had not abated. *Id.*

In his concurrence, Justice Jackson set forth what has become an important tripartite framework applied to evaluate the legality of presidential action. Under this admittedly "somewhat over-simplified grouping," an exercise of presidential power typically falls within one of three categories:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. [hereinafter "Category 1"]
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is

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[3] Five years prior, Congress had considered—and rejected—enacting a law that would have authorized such governmental seizures in cases of emergency. *Youngstown*, 343 U.S. at 586.

> uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. [hereinafter "Category 2"]
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers . . . . Courts can sustain exclusive Presidential control in such as case only by disabling the Congress from acting upon the subject. [hereinafter "Category 3"]

Id. at 635-38 (Jackson, J., concurring).

Justice Jackson concluded that the President's seizure order fell in Category 3 because no statute explicitly authorized the executive seizure of the steel industry, and Congress had enacted detailed procedures for the seizure of property that were inconsistent with the President's order. *Id.* at 639. Accordingly, the order could be sustained only if the seizure was "within [the President's] domain and beyond control by Congress." *Id.* at 640. Justice Jackson rejected each of the President's asserted bases for such "conclusive and preclusive" constitutional authority, *id.* at 638, including the executive power, the President's powers as commander in chief, and any "nebulous, inherent powers" to act regardless of congressional decisions. *Id.* at 640-46.

Thirty years later, in *Dames & Moore*, this Court returned to the *Youngstown* categories and explained both their application and how they might overlap. In evaluating the legality of three executive orders implementing an agreement to secure the release of U.S. citizens held hostage in Iran, the Court recognized that "executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore*, 453 U.S. at 669.

This Court held that the first two executive orders—which (1) nullified certain Article III prejudgment attachments on Iranian assets and (2) directed that those assets be transferred to federal authorities for ultimate return to Iran—were specifically authorized by the International Emergency Economic Powers Act ("IEEPA") and thus fell within *Youngstown*'s Category 1. *Id.* at 670–74. With respect to the third order, suspending pending claims, however, the Court ruled that neither the IEEPA nor the so-called Hostage Act of 1868 provided statutory authority for this executive action. "Although the broad language of the Hostage Act suggests it may [have] cover[ed] this case," the Court recognized that legislative history suggested the Act was passed in response to a non-analogous situation, and it was therefore "somewhat ambiguous" as to whether Congress contemplated the precise presidential action at issue. *Id.* at 675–77.

Given this ambiguity, the Court looked to two factors, (a) the "general tenor of Congress's legislation in this area" and (b) the long and unbroken history of claims settlement through Executive Agreement. *Id.* at 678–80. The Court concluded that Congress had acquiesced in the President's exercise of authority to settle claims against foreign powers. *Id.* The Court emphasized, however, the "narrowness" of its decision, *id.* at 688, and indicated that, as this Court has recently explained, its approach was not intended to "be construed as license of the broad exercise of unilateral executive power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 & n. 28 (2017).

Applying *Youngstown* and *Dames & Moore* here, *amici* have evaluated whether § 1182(f)'s facially broad language specifically authorizes the Executive Order. *Amici* conclude that language, particularly when read in light of subsequent legislation and executive action, does not sustain the Executive Order. In light of the interpretive history of this provision, it is, at a minimum, ambiguous whether Congress intended to afford the President such broad discretion. Moreover, neither of the factors licensing presidential authority in *Dames & Moore* is present in this case. Indeed, other "legislation in this area," *Dames & Moore*, 453 U.S. at 678, demonstrates Congress's affirmative *opposition* to the use of nationality in determining eligibility for entry (beyond specific visa allocation authorization) and, more generally, its opposition to substituting categorical proxies for "dangerousness" in place of an individualized assessment. Because the President lacks any "conclusive and preclusive" constitutional power to override this contrary congressional intent, *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring), the Executive Order was not authorized.

II. SECTION 1182(F) DOES NOT GRANT THE PRESIDENT UNFETTERED DISCRETION TO EXCLUDE NONCITIZENS

As *Youngstown* and *Dames & Moore* illustrate, a careful analysis of specific statutes is essential to evaluating the lawfulness of executive action. The President asserts that 8 U.S.C. § 1182(f) provides authorization for the Executive Order. Section 1182(f) provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).[4]

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[4] The Executive Order cites a second provision to support its claim of statutory authorization, section 215(a)(1) of the Immigration and Nationality Act, which provides: "Unless otherwise ordered by the President, it shall be unlawful ... for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, (footnote continued)

Although the President claims that this language delegates unfettered discretion to the Executive to suspend entry for whole classes of aliens based on any criteria whatsoever, canons of statutory construction as well as the statute's interpretive history counsel against such an expansive reading. The House Report recommending the bill that would enact § 1182(f) began with a lengthy affirmance of the power of *Congress* to control immigration, *see* H.R. Rep. 82-1365 at 5–6, a principle derived directly from the Constitution, which vests Congress with authority to "establish an uniform Rule of Naturalization" and to regulate or prohibit the "Migration" of persons. U.S. Const., art. I, s. 8,9.[5] The sorry history of the Migration clause, aimed to protect the slave trade, does not preclude its use to show the relevant constitutional framework—that after the twenty year hiatus stipulated, it is for Congress to decide on the "Migration ... of ... Persons."[6]

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regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. 1185(a)(1) (hereinafter section 1185(a)(1)). This provision does not add to the President's substantive authority.

[5] Article I, Section 9, prohibits Congress, for a period of twenty years, from prohibiting "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit."

[6] This Court has identified other sources for Congress's power to regulate immigration, including the Commerce Clause, war powers and powers inherent in sovereignty. *See generally, e.g., Chae Chan Ping v. United States,* 130 U.S. 581 (1889); *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952).

Given congressional power, the question becomes understanding what Congress has delegated and this case is one of many in which a potentially broad authorization from Congress has to be read by this Court to reflect basic principles of separation of powers and to avoid constitutional questions about the limits of delegation.[7] In *Hamdan,* 548 U.S. 557, this Court concluded that the Joint Resolution for the Authorization for Use of Military Force (AUMF), enacted by Congress immediately after the September 11 terrorist attacks, while capacious, did not authorize the use of military commissions to try suspected terrorists. The AUMF delegates to the President power to "'use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks … in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'" *Id.* at 568 (quoting AUMF, 115 Stat. 224). The President invoked this authority to issue an Executive Order providing for trial by military commission for any individual suspected of membership in al Qaeda or participation in terrorist acts against the United States. *Id.* at 568. The Court concluded that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter Article 21 of the" Uniform Code of Military Justice. *Id.* at 594. Even in the context of a direct response to domestic terrorist attacks, the Court did not approve the excessive claim by the Executive of unfettered authority to convene military commissions to try noncitizens.

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[7] In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (1936), the Court rejected a non-delegation challenge to a far more narrowly circumscribed statute. Congress had passed a Joint Resolution authorizing the President to prohibit "the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco," to wit, fighting between Paraguay and Bolivia, upon making certain findings. In concluding that presidential power was at its zenith in this case, the Court was addressing a factual circumstance in which the President was acting pursuant to a very specific, and limited, authorization by Congress.

Similarly, *Jean v. Nelson*, 472 U.S. 846 (1985), shows that a broad statutory delegation of immigration discretion to the executive should not be read as conferring limitless power to engage in discrimination. There, the Eleventh Circuit had concluded that in enacting a statute granting the Executive discretion to "parole into the United States any ... alien applying for admission 'under such conditions as he may prescribe,'" Congress delegated to the Executive the authority to make parole decisions on the basis of race or national origin, and that such a delegation was consistent with the Constitution. *Id.* at 848, 852 (quoting 8 U.S.C. § 1182(d)(5)(A)). This Court declined to endorse this view. The Court found it unnecessary to reach the constitutional issues in light of its conclusion that the statutes and regulations prohibited such discrimination. *Id.* at 854–56, *cf. id.* at 862–63 (Marshall, J., dissenting) (noting absence of language in statute expressly prohibiting nationality-based distinctions).

Even in *Dames & Moore*, which concluded that the President did have the constitutional authority to suspend pending judicial claims against Iran, the Court was unwilling to read a broadly worded statute, outside of the context of other relevant statutes and past practices, to authorize presidential action. After deciding that the International Emergency Economic Powers Act (IEEPA) did not authorize the President's actions, the Court further analyzed the much older Hostage Act of 1868, which provided that whenever a U.S. citizen was unjustly held by a foreign government, the President was to demand the citizen's release "and if the release so demanded is unreasonably delayed or refused, *the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release.*" 22 U.S.C. § 1732 (emphasis added). *See also Dames & Moore*, 453 U.S. at 676. While recognizing this "broad language," the Court nonetheless declined to construe it as authorizing the President's suspension of pending claims. *Id.* at 676-77. The Court noted that the issue prompting the 1868 legislation did not involve foreign powers interested in trading hostages back, but rather foreign powers seeking to repatriate American citizens. *Id.* The Court then turned to the legislative history, which it found "somewhat ambiguous" on whether the statute contemplated actions such as those taken by the President. *Id.* at 677. But the Court found that Congress *had* enacted specific procedures to implement Executive Agreements of this kind and, from that, concluded that Congress had "placed its stamp of approval" on such actions. *Id.* at 680.

The Executive Order here benefits from no such "stamp of approval." Unlike in *Dames & Moore,* there is no evidence that Congress assumed, much less endorsed, unlimited executive power to exclude noncitizens on the basis of nationality alone. No President has ever issued an order akin to what is before this Court now—eliminating any possible inference that Congress has "acquiesced" to such a practice. Rather, past presidential exercises of the authority to bar noncitizens' entry suggest an understanding of meaningful limits to this power. A recent Congressional Research Service Report identified 43 instances between 1981 and 2017 where the president invoked § 1182(f) to suspend the entry of noncitizens. *See* Kate Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017). In one additional instance of which amici are aware, the President relied on section 1185(a)(1) rather than section 1182(f) to justify the suspension of a class of aliens.[8]

On no occasion has a President used nationality alone to impute individualized characteristics for the purpose of barring noncitizens' entry into the United States. In the vast majority of instances, the executive barred noncitizens who on an individual basis demonstrated engagement in a particular course of conduct. *See, e.g.,* Exec. Order No. 13694, 80 Fed. Reg. 18077 (Apr. 2, 2015) (suspending the entry of aliens who have engaged in significant

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[8] As discussed immediately below, President Carter relied on section 1185(a) to "prescribe limitations and exceptions" on the entry of Iranians.

"malicious cyber-enabled activities"); Proclamation No. 8697, 76 Fed. Reg. 49277 (Aug. 9, 2011) (suspending entry of individuals who participate in serious human rights violations); Proclamation No. 4865, 46 Fed. Reg. 48017 (Oct. 1, 1981) (suspending entry of noncitizens who approach the United States by sea without documentation).

A number of instances target individuals from particular nations based on specific conduct or affiliations. *See* Exec. Order No. 13687, 80 Fed. Reg. 819 (Jan. 6, 2015) (suspending officials of the North Korean government or the Workers' Party of Korea); Proclamation No. 7524, 67 Fed. Reg. 8857 (Feb. 26, 2002) (suspending entry of individuals who threaten Zimbabwe's democratic institutions); Proclamation No. 7249, 64 Fed. Reg. 62561 (Nov. 19, 1999) (suspending entry for individuals responsible for repression of civilian population in Kosovo); Proclamation No. 5377, 50 Fed. Reg. 41329 (Oct. 10, 1985) (suspending the entry of nonimmigrant officers or employees of the Government of Cuba or the Communist Party of Cuba).

In only two instances has the President suspended entry without regard to individualized conduct, and both were part of specific conflicts with a particular country. In response to the Government of Cuba's decision to suspend execution of then-governing immigration agreements between the U.S. and Cuba, President Reagan, in August 1986, suspended the entry of Cuban nationals under certain types of immigrant visas. Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 26, 1986). President Carter invoked section 1185(a)(1) to "prescribe limitations and exceptions on the rules and regulations governing entry of aliens into the United States" for Iranians. Exec. Order No. 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979); Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980) (modifying Exec. Order No. 12172). These orders were a specific response to actions taken by a foreign government.[9] In neither of these instances did the Executive's actions impute individualized characteristics on the basis of nationality. Nationality was not used as a surrogate for dangerousness, but as a means of sanctioning a country for its behavior towards the United States. The exclusion of Cubans in the 1980s and of Iranians during the Iranian hostage crisis was not based on presumptions of, for example, criminality. Instead, these exclusions were deployed as diplomatic tools to target the *governments* of those nations,[10] in resolving intergovernmental foreign policy crises within the realm of presidential power that had not been cabined by Congress.

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[9] The ban on entry of Iranian nationals was a direct response to the Iran hostage crisis. *See* Jimmy Carter, "Sanctions Against Iran Remarks Announcing U.S. Actions.", April 7, 1980. The ban on entry of Cubans was a direct response to Cuba's decision to "suspend all types of procedures regarding the execution" of the immigration agreement between Cuba and the United States. It applied only to immigrant entrants, and only to those who did not enter as "immediate relatives under Section 201(b)" or "as preference immigrant under Section 203(a)." Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 26, 1986).

[10] The President has, through executive orders, identified specific nationalities in another context—to determine the level of scrutiny to be applied to visa applicants, including to relax the review prior to entry. Those actions are explicitly authorized by Congress, which has created the visa waiver program to authorize the Secretary of Homeland Security, in consultation with the Secretary of State, to designate the nationals of particular countries as eligible for entry for (footnote continued)

The present case is the inverse of Dames & Moore. There, the President sought to exert his authority in an area in which the Executive had long exercised such powers and Congress had repeatedly acquiesced to that application of those Executive powers. Here, by contrast, the President seeks to exert far broader authority than any president before him; he demands, in essence, the type of "license for the broad exercise of unilateral executive power," which Dames forbade. *Bank Markazi*, 136 S. Ct. at 1328 & n.28.

Nor does the "general tenor" of congressional legislation in the immigration arena suggest congressional approval of the President's actions. *See Dames & Moore*, 453 U.S. at 678-79. Congress has enacted a complex statutory scheme that suggests just the opposite: Contrary to the Executive Order, denials of entry must be based on evaluations of dangerousness rather than the blanket assumption that individuals from certain countries are *per se* dangerous. *See, e.g.,* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, § 302 (1996); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, § 411 (2001); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, § 103 (2005). As this Court said in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, "[i]t is a

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business or tourism without first securing visas at U.S. consular offices. *See* 8 U.S.C. § 1187.

'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" 529 U.S. 120, 132 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).[11] It is to these other provisions of the INA to which *amici* now turn in more detail.

III. THE GENERAL TENOR OF IMMIGRATION LEGISLATION IS CONTRARY TO THE EXECUTIVE ORDER

A review of the history of immigration law is required to understand how the "general tenor" of congressional legislation changed during the last century. By the time of the 1952 enactment of section 1182(f), Congress had already begun to eschew the use of nationality as a proxy for racial, ethnic, and religious intolerance in entry determinations. And legislation enacted after 1952 evinces Congress's repudiation of the use of nationality as the sole basis to exclude persons based on generalized fears of terrorism.[12] Thereafter, Congress in 1965 enacted an explicit ban on the use of nationality to discriminate against persons seeking immigrant visas. And in other legislation, Congress has repeatedly demonstrated a commitment to relying on individualized assessments—rather than discredited stereotypes—to determine admissibility.

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[11] Given that section 1182(f), as properly construed, does not allow unfettered executive discretion to engage in invidious nationality-based discrimination, *see* § II, *supra*, the Court need not reach the issue of whether the President's sweeping view of section 1182(f) would raise the question of whether Congress's delegation to the Executive is invalid. *See, e.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.").

[12] Given "the institutional and other barriers to the passage of legislation," affirmative acts by Congress rejecting a particular course of presidential conduct "should be given very heavy interpretive weight." Curtis A. Bradley & Trevor W. Morrison, (footnote continued)

A. Congress Historically Used Nationality Categorically To Exclude Noncitizens

No student of United States history can ignore that our Nation's immigration policies once routinely relied on notions of racial and cultural inferiority and religious prejudice to exclude certain nationalities as threats to our safety and stability. It was not until the mid-twentieth century that Congress, recognizing the frequency with which nationality and national origin had historically been employed as the basis for invidious discrimination based on race, religion, and ethnicity, prohibited the use of such classifications.

A brief recap of this history is helpful to deciding the constitutionality of the Executive Order. Beginning after the Civil War, Congress relied expressly on nationality to restrict the entry of noncitizens perceived as threats to national security and national identity.[13] Congress enacted a series of

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Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 449 (2012).

[13] Prior to the Civil War, states regulated the entry of noncitizens, as part of their regulation of people from other states. See generally Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 Colum. L. Rev. 1833, 1885 (1993).

laws targeting and ultimately prohibiting virtually all Chinese immigration. *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882); Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888); Geary Act of 1892, ch. 60, 27 Stat. 25 (1892); Act of April 27, 1904, ch. 1630, 33 Stat. 428 (1904).[14] In 1917, Congress created the "Asiatic Barred Zone," excluding noncitizens from a vast swathe of the globe stretching from Saudi Arabia to the Polynesian islands. *See* Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874 (1917). In 1924, Congress imposed an even broader prohibition on immigration of noncitizens who were not "free white persons," "aliens of African nativity, . . . [or] persons of African descent." *See* Immigration Act of 1924, Ch. 190, § 13, 43 Stat. 153, 161–62 (1924); H. R. Rep. 68-350 at 6 (1924) (internal quotation marks omitted).

Noncitizens who were not categorically excluded on these racial grounds remained subject to strict national-origin quotas, a system designed to favor immigrants from northern and western Europe. *Id.* These restrictions were commonly understood to be aimed "principally at two peoples, the Italians and the Jews." 70 Cong. Rec. 3526 (1929). During this time, national origin served as a proxy for undesirable groups perceived to "reproduce more rapidly on a lower standard of living" and "unduly charge our institutions for the care of the socially inadequate." H. R. Rep. 68-350, 13-14. The goal was to "preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity in the United States." *Id.* at 16. These measures were described as necessary to national survival: "If therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained." *Id.* at 13.[15]

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[14] Proponents of these measures frequently invoked national security rationales, characterizing the Chinese as "a standing menace to the social and political institutions of the country." H. R. Rep. 45-62, 3 (1879).

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[15] To be sure, passage of the 1924 Act was not without objection. The minority report in the House noted, "The obvious purpose of [favoring northern and western Europeans over southern and eastern Europeans], however much it may now be disavowed, is the adoption of an unfounded anthropological theory that the nations which are favored are the progeny of fictitious and hitherto unsuspected Nordic ancestors, while those discriminated against are not classified as belonging to that mythical ancestral stock." H. R. Rep. No. 68-350, pt. 2, at 4. These members of Congress characterized the bill as "casting the apple of discord into our national life, and without the slightest reason is attempting to create a new classification of our population and to declare, in the form of legislation, that American citizens are to be divided into superior and inferior types, depending upon the land which gave birth to them or to their ancestors." *Id.* at 14.

B. In 1965, Congress Expressly Prohibited the Use of Nationality in the Issuance of Immigrant Visas

In 1965, Congress enacted the Hart-Celler Act, amending the Immigration and Nationality Act. The 1965 Act eliminated the national-origins quota system that had been used to exclude nationalities deemed to be undesirable. The Act did use nationality to further equal access to immigration visas through numerical allocations but it otherwise expressly ruled out the use of nationality—as well as race, sex, place of birth, and place of residence—in the issuance of long-term immigrant visas. Pub. L. 89-236, 79 Stat. 911, sec. 2 (1965).

An overarching goal of the 1965 Act was to ensure that exclusions would be based on individualized determinations, rather than on the basis of blanket stereotypes about race and country of origin. Aside from a few exceptions, Section 1152(a) provides, in relevant part: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a).[16]

This text was explained by Senator Philip Hart, one of the chief sponsors of the bill: "No matter how you slice it, it is impossible to defend and it is offensive to anyone with a sense of the right of an individual to be judged as a good or a bad person, not from which side of the tracks he comes. This just does not make sense and should offend those of us here at home as much as we know it offends peoples all around the world." Hearings on S. 500 Before the Subcomm. on Immigration & Naturalization, 89 Cong. 4 (1965). President Johnson described the national origin quotas as "incompatible with our basic American tradition.... The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities." *See* 111 Cong. Rec. 686 (Jan. 15, 1965). Thereafter, when he signed the bill, the President made plain its commitments: "This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship with those already here." Lyndon B. Johnson, Remarks At The Signing Of The Immigration Bill (Oct. 3, 1965).

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[16] The Hart-Celler Act abandoned the national-origin quota systems and instead imposed a uniform per-country limit of 20,000 for all countries outside of the western hemisphere. *See* Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911–912 (1965).

The text prohibits using nationality as a basis for denying entry to long-term immigrants. The scope is likewise of central importance. Unlike other provisions of the INA, section 1152(a) acts to restrain the entire executive branch, including the President. *Cf. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 172 (1993) (concluding that constraints on executive discretion imposed by § 243(h) of the INA apply to the Attorney General but not the President). Further, Congress authorized, in section 1152(a), an enumerated set of exceptions relating to uniform per-country cap on immigrant visas; the President's exercise of section 1182(f) power is not listed as one of those exceptions.

C. Congress Has Repeatedly Required That Entry Decisions Be Based On Assessment Of Noninvidious Criteria

In addition to the express language of section 1152(a) prohibiting discrimination against noncitizens seeking entry as permanent residents, the historical arc of our nation's immigration laws and the overall structure of the INA demonstrate congressional intent to preclude the use of invidious stereotypes for nonimmigrant temporary entrants as well.

Beginning in the 1940s with the repeal of the Chinese Exclusion Acts, Congress has eliminated various nationality-based bars to entry in favor of individualized assessments for undesirable traits. As explained above, the 1965 Act was enacted in furtherance of the fundamental American belief that persons ought to be judged based on their individual qualities.

Since the passage of the 1965 Act, Congress has required that the immigration processes of our government focused on individualized criteria to determine whether a given noncitizen—whether an immigrant or a non-immigrant—should be excluded as a national security risk. *See, e.g.,* Anti-Terrorism and Effective Death Penalty Act § 411 (expanding grounds for excluding noncitizens affiliated with terrorist organizations); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 § 342; USA PATRIOT Act § 411 (2001) (expanding definition of terrorist activity for purposes of exclusion; REAL ID Act § 103 (same). Thus, individuals may be excluded because, for example, they are "a member of a terrorist organization ... unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization" or because they are "the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years" unless the child or spouse did not know of the terrorist activity, or has renounced such activity. 8 U.S.C. § 1182(3)(B).

Similarly, in legislation dealing with non-terrorism related immigration issues, Congress has eschewed the use of nationality as a basis for exclusion. *See generally* IIRIRA § 346. On the few occasions where Congress employed nationality classifications, it did so to *grant relief* based on particular country conditions—either to permit special opportunities to enter the United States or to avoid deportation—and did so *without* imputing invidious or stigmatizing traits. *See, e.g.*, Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. 105-100, 111 Stat. 2160; Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681.

The historical evolution of our nation's immigration laws, the 1965 statutory ban on the use of nationality in issuing immigrant visas except to further equal access to immigrant visas, and Congress's post-1965 enactments focusing on individualized assessments to determine inadmissibility all demonstrate that the "general tenor of Congress's legislation in this area" is a repudiation of the blanket use of "nationality" to impute traits of dangerousness or criminality for the purpose of imposing a categorical bar to entry. *Dames & Moore*, 453 U.S. at 678. The President is, therefore, "acting alone," without "the acceptance of Congress." *Id.*

This conclusion is consistent with this Court's approach to statutory interpretation. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . ." *Id.* at 550–51; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

Here, Section 1152(a) was enacted after section § 1182(f) and addresses the specific issue of non-discrimination in the issuance of immigrant visas. Given that the President is precluded from discriminating against persons in the issuance of immigrant visas based on nationality, section 1182(f) should not be read to permit him to enact a wholesale denial of entry to persons based on this same classification—a subset of which would include persons seeking immigrant visas. *See, e.g. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

Moreover, the two sections are reconcilable: the President's exercise of § 1182(f) power—suspending entry of a class of aliens deemed to be "detrimental to the interests of the United States,"—is limited by § 1152(a). Namely, the President may not, in the absence of intergovernmental conflict with foreign countries, broadly suspend the entry of aliens as threats based solely on their nationality and in a manner that carries invidious implications of criminal, terrorist or dangerous tendencies on the part of all persons of that nationality. In short, the Executive's use of nationality as a proxy for dangerousness and as the sole criterion to suspend entry into the United States is not only contrary to the "general tenor" of congressional legislation, it cannot be reconciled with section 1152(a) and subsequent immigration laws that demonstrate congressional intent to move the United States away from reliance on nationality as a categorical basis for exclusion on national security grounds.[17]

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[17] Amici do not suggest that nationality classifications are never permitted in the immigration context. Congress has not precluded the President from using nationality as a factor to determine the level of scrutiny for individuals of identified countries, or to respond to special disaster needs, diplomatic interactions, or the hostile acts of foreign governments to the United States. In such instances, there is no imputation of invidious, discriminatory purpose based on nationality, of the kind that can redound to the detriment of U.S. citizens and others within the U.S of the same heritage. In 1965, when the Hart-Celler Act became law, President Johnson said: "We can now believe that [the prior system] will never again shadow the gate to the American Nation with the twin barriers of prejudice and privilege. .. [T]hose who do come here will come because of what they are , and not because of the land from which they

(footnote continued)

IV. THE EXECUTIVE ORDER IS NOT AUTHORIZED UNDER THE YOUNGSTOWN FRAMEWORK

By enacting a categorical entry ban based solely on nationality—and justifying its use as a credible proxy for "heightened risks to the security of the United States"—the President took "measures incompatible with the expressed [and] implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). The Executive Order violates both Congress's explicit directive and implied will by enacting a categorical entry ban on the basis of nationality as a substitute for individualized assessment of dangerousness.

Even if this Court decided that, rather than prohibiting the Executive Order, Congress's position is "somewhat ambiguous," *Dames & Moore*, 453 U.S. at 677, the Executive Order could not be sustained. As explained, no long-standing history suggests congressional acquiescence to the executive action at issue here; indeed Congress has plainly *disapproved* of the use of nationality as a basis for exclusion. *Cf. Dames & Moore*, 453 U.S. at 680. *See also Bank Markazi*, 136 S. Ct. at 1328 & n.28 ("Much of the [*Dames*] Court's cause for concern, however, was the risk that the ruling could be construed as license for the broad exercise of unilateral executive power."). Put differently, even if not squarely prohibited by Congress, the Executive Order is quite close, on the "spectrum running from explicit congressional

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sprung." Lyndon B. Johnson, Remarks At The Signing Of The Immigration Bill (Oct. 3, 1965).

authorization to explicit congressional prohibition," to the type of discriminatory actions Congress has rejected. *Dames & Moore*, 453 U.S. at 669.

Nor can the President rely on his exclusive constitutional powers to authorize the Executive Order. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.*

Here, the President can make no such claim. Although some of the earlier case law characterized executive authority over immigration as capacious, *see Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (stating, in a case involving executive exercise of power expressly authorized by Congress, that power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation"), this Court has repeatedly recognized legislative control as pivotal. *See, e.g.*, *Harisiades*, 342 U.S. at 599 (when exercising judicial review stating that "[t]he power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power 'To establish an uniform Rule of Naturalization'." (quoting U.S. Const., art. I, s. 8, cl. 4)); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (exercising judicial review while acknowledging that "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens" (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 329 (1909)); *Galvan v. Press,* 347 U.S. 522, 531 (1954) (exercising judicial review while noting "that the formulation of … policies [relating to the entry of aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues or our body politic as any aspect of our government"). Even assuming the President possesses some constitutionally derived authority to regulate immigration, that authority is, at best, shared with Congress. In the absence of "conclusive and preclusive" constitutional power, the President has no power to act unilaterally, in contravention of congressional intent to prohibit the use of nationality as a basis for discrimination. *Youngstown*, 343 U.S. at 638 (Jackson, J. concurring).

CONCLUSION

The President lacked statutory and constitutional authority to issue the Executive Order. The decisions of the courts below should be affirmed.

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APPENDIX A

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Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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INTERESTS OF AMICI[1]

Oxfam America, Inc. and its affiliates (Oxfam) have worked around the globe in more than 90 countries to combat poverty and injustice. Although Oxfam plays a critical role in responding to immediate crises, its ultimate goal is to address the root causes of violence and poverty by supporting civil society so that communities can address their own problems. Oxfam accordingly addresses the institutional issues that keep people poor and marginalized: inequality, discrimination, and unequal access to resources including food, water, and land.

Oxfam employs 8,500 people worldwide, works with 60,000 volunteers, and operates in four of the six countries targeted by Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("Order" or "EO2") (Yemen, Syria, Somalia, and Sudan), with more than 300 employees stationed in those four countries. Oxfam provides infrastructure and direct aid to refugees, including to refugees from Somalia and Syria living in neighboring countries. In Syria, Jordan, and Lebanon, Oxfam is helping more than 2 million people with life-saving clean water, sanitation, and vital support for families who have lost everything. Oxfam is one of the few non-governmental organizations currently working in Sudan, providing desperately needed aid, including clean water and sanitation programs, to people in the Darfur region and beyond. The Executive Order harms Oxfam and the organizations with which it works, and undermines its mission to help people escape violence and build better lives. Oxfam, therefore, has a direct interest in the outcome of this case.

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been provided to the Clerk of the Court. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission.

The International Rescue Committee (IRC) is a non-profit, non-sectarian global organization that was founded in 1933 and operates in over 40 countries around the world. IRC is one of nine refugee resettlement organizations in the United States that contracts with the U.S. Department of State to resettle pre-screened refugees. The IRC's core mission is to serve people forced to flee from war, conflict, and disaster, and help them survive, recover, and gain control of their lives. A substantial part of the IRC's work is providing aid to refugees, which it does recognizing that refugees are the victims of terror, not the perpetrators of it. Over the past 40 years, the IRC has resettled roughly 370,000 global refugees in cities throughout the United States.

The IRC currently operates in 28 cities to oversee domestic refugee resettlement. Starting from the moment a new refugee arrives at the airport, the IRC provides essential services to maximize successful resettlement through its 28 U.S. offices. These offices serve as a free, one-stop center for refugees' needs during their pivotal first months in the United States, providing immediate aid, including food, housing, and medical attention. The Executive Order suspending the United States Refugee Program has interfered with the IRC's ability to carry out its mission and directly harms those the IRC serves: refugees awaiting resettlement to the U.S. and those already residing here waiting to be reunited with them.

The U.S. Committee for Refugees and Immigrants is a not-for-profit organization founded in 1911. USCRI is one of nine refugee resettlement organizations in the United States that contracts with the U.S. Department of State to resettle pre-screened refugees in the United States. To carry out its protective mission, USCRI has created an extensive nationwide network of organizations and individuals. Since fiscal year 2011, USCRI has resettled 50,553 people through its network, including 11,127 in the fiscal year ending September 30, 2016. Many of the refugees who were resettled in 2016 were victims of the ongoing violence in Syria and Iraq.

The Executive Order suspending the United States Refugee Program significantly interferes with USCRI's mission and operations. The Executive Order directly harms not only USCRI, but also the individuals and entities in the USCRI network who stand ready to assist these heavily-screened displaced individuals—many of whom are women and children, and all of whom are the victims of horrific situations in their home countries—integrate into, and become self-sufficient members of, American society. USCRI appeared as an *amicus curiae* before the Ninth Circuit, and also filed a response in this Court in opposition to the government's motion to stay the Ninth Circuit order affirming the modified injunction.

Exodus Refugee Immigration Inc. (Exodus) is a non-profit, refugee resettlement affiliate agency founded in 1981 in Indianapolis, Indiana. Exodus is dedicated to the protection of human rights by serving the resettlement needs of refugees and other displaced people fleeing persecution, injustice, and war by welcoming them to Indiana. Exodus partners with various community organizations and employers to empower refugees in their initial months, days, and years in the United States by providing assistance with housing, medical and mental health case management, English language acquisition, employment, and immigration needs.

Exodus has a record of welcoming refugees from many nationalities, cultures, languages, faiths, and political persuasions. These individuals have come to Indiana from 33 different countries, 4 of which are included in the Executive Order's list of travel-blocked countries (Iran, Somalia, Sudan, and Syria). In fiscal year 2016, Exodus received 947 refugees through the admissions programs and expected similar arrivals in 2017 until the Executive Order curbed resettlement and significantly reduced the expected arrival number by more than 400. The Executive Order pausing refugee admissions has obstructed Exodus' mission to welcome refugees to Indiana and has hindered the process of resettlement for many refugees overseas who have already been assured to the agency by the federal government's resettlement process. Further, the Executive Order has hampered the process of reunification for many refugees served by Exodus whose family members abroad await resettlement.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 27, 2017, President Trump issued Executive Order No. 13,768, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO1") designed to fulfill his campaign promise to ban Muslims from entering the United States. Although couched as a national security measure, EO1 was explicitly grounded in anti-Muslim stereotypes, banned all immigration from seven majority-Muslim countries for 90 days, banned all refugees for 120 days, and lowered the refugee limit (the "cap") for 2017 from 110,000 to 50,000. *Id.* at 8978-79. EO1 exempted religious minority refugees, and in statements the day he enacted it, President Trump explained the exemption was meant to protect Christian refugees.

Amidst public outcry against this "Muslim Ban" and widespread confusion in its implementation, the Ninth Circuit upheld an injunction prohibiting EO1 from taking effect. That led President Trump to issue a second, slightly revised Executive Order on March 9, 2017. EO2 maintained the same basic structure as EO1. Section 2 of EO2 bans immigration from six of the seven originally named Muslim nations, and section 6 suspends the United States Refugee Program (USRAP) for 120 days and reduces the cap on refugees for fiscal year 2017 from 110,000 to 50,000. 82 Fed. Reg. at 13,210-13, 13,216.

The hastily issued second Executive Order is no more lawful than the first one. This *amicus* brief focuses on EO2 section 6. When promulgating this moratorium on refugee admissions and cutting total admissions by almost 60%, the President exceeded his statutory authority under the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101 *et seq.*, in two respects. First, the President impermissibly reduced the refugee cap unilaterally without prior consultation with Congress. Congress took the unusual step of explicitly requiring such consultation when the President sets the cap for each fiscal year or increases it to accommodate refugee crises in order to ensure itself a robust role and ensure an orderly, well-planned, and predictable refugee admission process. *See id.* § 1157. To the extent the President has authority to reduce the cap mid-year, he must engage in the same consultation process. Instead, the President bypassed Congress entirely, and his knee-jerk unilateral action threatens exactly the kind of upheaval that Congress passed the statute to avoid.

Second, to the extent that the President purported to rely on his statutory authority under section 212(f) of the INA, *id.* § 1182(f), the President failed to make the requisite "find[ing]" that the class of refugees as a whole (who were banned by the moratorium) or refugees numbered 50,001-110,000 (who were excluded by the new cap) are detrimental to the interests of the United States. Nor could the President plausibly have done so. This "class" of refugees includes tens of thousands of children and refugees from parts of the world that implicate none of the concerns that the President recited, and both long-term and recent experience establishes that refugees are far less likely than this country's own citizens to commit a terrorist attack in the United States.

In addition to violating the INA, the President's issuance of EO2, including its refugee provisions, violated the core Establishment Clause command that government may not take actions that, in the eyes of a reasonable observer, discriminate among religions by denigrating a particular religion. In general, of course, government actions are assessed on their own terms, not based on ephemeral statements by government actors leading up to or later explaining them. But every principle has its limits, and this Court has rightly refused to turn a blind eye in those rare circumstances when governmental actors have declared outright that they have acted with unconstitutional intent or animus. That is, sadly, the situation here. Candidate, President-elect, and President Trump's own statements confirm that he issued EO1 and EO2 to fulfill his repeated campaign promise to enact a Muslim ban, and the text of the Order and its disproportionate effect on Muslim refugees reflect that abiding animus.

The President has broad authority over the country's borders, but that authority remains subject to the limits established by Congress and the Constitution. EO2 is not a valid exercise of executive authority.

ARGUMENT

I. THE PRESIDENT'S REDUCTION OF THE REFUGEE CAP VIOLATED THE TIMING AND CONSULTATION REQUIREMENTS OF 8 U.S.C. § 1157

The INA created an oversight scheme for refugee admissions that is codified at 8 U.S.C. § 1157. Section 1157 requires the President to set, and allows him to raise, annual refugee admissions limits provided he follows specific timing, consultation, and public disclosure requirements. The statute grants the President no authority to *lower* the refugee cap. But to the extent that it may be read to allow him to do so, it must be read to require the same consultation as when the President sets or raises the refugee cap. When the President acts unilaterally without engaging in this required consultation process, he violates the statute, undermines the role of Congress, and disrupts the efforts of the voluntary agencies on whom the government relies to implement its resettlement programs.

When he lowered the refugee "cap" in EO2 section 6, President Trump failed even to acknowledge the consultation requirements of section 1157, much less comply with them. The Order violates the text and the purpose of section 1157.

A. The President's Unilateral Reduction Of The Refugee Cap Violated The Requirements Of Section 1157

In issuing EO2 section 6, the President failed to comply with the consultation procedures of section 1157, which Congress established to ensure that it and critical stakeholders would have input in the establishment of the annual targets for refugee resettlement in the United States. Subsection (a)(2) provides that "the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, *before the beginning of the fiscal year and after appropriate consultation*, is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. § 1157(a)(2) (emphasis added). Subsection (e), in turn, defines "appropriate consultation" as "*discussions in person* by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives" to review the refugee situation and the participation of the United States in resettlement of refugees in light of specific information defined by statute. *Id.* § 1157(e) (emphasis added). Subsection (e) applies to both *setting* the refugee cap under (a) and *raising* it under (b). *See id.* §§ 1157(a), (b), (e); *see also* 123 Cong. Rec. 3431 (1977); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the*

Refugee Act of 1980, 19 San Diego L. Rev. 9, 52 (1981). Subsection (d) requires public disclosure of the consultation in the Congressional Record and via public hearings, along with periodic review with designated stakeholders.[2] 8 U.S.C. § 1157(d). Thus, Congress envisioned an orderly, deliberate, and collaborative process for refugee allocation taking place before the start of the fiscal year, and only after detailed consultation with designated members of Congress and an opportunity for public engagement.

Subsection (b) of section 1157 authorizes the President to alter the cap in certain situations. It provides that, when there is "an unforeseen emergency refugee situation," the President may "fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months)" after consultation with Congress. *Id.* § 1157(b). But the text and legislative history make clear that this provision only allows the President to *increase* the cap. It is reserved for the emergency admission of *additional* refugees, when "the admission to the United States of these refugees cannot be accomplished under subsection (a)." *Id.*; *see also, e.g.*, *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of H. Comm. on the Judiciary*, 96th Cong. 29 (1979) (statement of Rep. Hamilton Fish, testimony of Hon. Griffin B. Bell, Atty. Gen.) ("*Hearings on H.R. 2816*, 96th Cong.") ("[T]he President is authorized to admit emergency situation refugees, and these are, by definition, the unforeseen situations."); *id.* at 31 ("I would recommend you keep the figure low, because the world may become calm . . . . I'd rather keep [the cap] low, but let the President ask for extra numbers if he needs them, in consultation with the Congress.").

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[2] Notably, Subsection (d) calls for "periodic discussions" among stakeholders "for adjustments in the allocation of admissions *among* refugees," but does not envision changes to the allocated number itself. *See* 8 U.S.C. § 1157(d)(1) (emphasis added). The statute is set up so that the refugee cap is established *in advance*, so much so that even when Congress and stakeholders discuss refugees, they are not changing the refugee cap.

The statute provides no mechanism for the President to *lower* the refugee cap mid-year. In the government's view, this means the President is free to lower the cap whenever he wishes and to do so unrestricted by the consultation requirements that apply when the cap is initially set or increased. *See* Gov't Br. 60-62. The government contends that allowing the President to lower the cap unilaterally makes sense, because the statutory process is concerned with setting limits on refugee admissions, not ensuring that any number actually be admitted. *See id.* at 61-62 (emphasizing that in practice the number of refugees admitted almost always falls short of the cap). According to the government, therefore, EO2's "refugee cap does not violate 8 U.S.C. 1157, which establishes a procedure for setting the maximum number of refugees who may be admitted each year, but does not set a minimum number who must be admitted." Gov't Br. 21.

The government is wrong. To begin with, where Congress has explicitly directed the President to set annual refugee admission caps, and explicitly authorized the President to increase the caps mid-year in emergency circumstances, the most likely inference from the statute's utter silence on mid-year lowering of the caps is that the President lacks that authority—not that Congress delegated such authority sub silentio. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power."). But even if section 1157 were interpreted to allow the President to make mid-year downward adjustments, it cannot reasonably be interpreted to allow him to do so free of the detailed consultation requirements that apply when the cap is initially set or increased. It is unreasonable to presume that Congress enumerated specific requirements the President must follow to establish the number and allocation of the refugees, as justified by humanitarian concerns and the national interest, after an obligatory consultation process, only to permit the President to order a midyear reduction ad hoc without engaging in any consultation whatsoever.

The government is of course correct that the caps are a limitation, not a target, and that nothing in section 1157 requires the President to ensure the admission of any particular number of refugees. But the discretion to admit fewer refugees is not the same thing as the power to lower the cap. By purporting formally to lower the maximum number of refugees who "may" be admitted, the President acted beyond his statutory authority.

The error in the government's contrary reasoning is clear from the following analogy. If a fire department determines that a lecture hall "may" safely contain only 100 people, the fact that classes regularly are held with only 30 people does not change this maximum lawful capacity. If, after further inspection, the fire department lowers the maximum capacity to 50, it has altered how many people "may" be in the room at a time. In exactly the same way, when the President effects a reduction in the cap, he has *changed* the number of refugees who "may be admitted." And it is highly unlikely that Congress intended to authorize the President to unilaterally alter the number of refugees admitted, without consultation, when consultation is both explicitly required in the statute and was central to Congress's mission in enacting the INA. The consultation requirement was, after all, at the heart of the reforms of the 1980 Refugee Act. Before its enactment, the Attorney General had wide discretion unilaterally to set the number of refugees admitted to the U.S. through "parole" provisions. The 1980 Act was passed because of an increase in the number of refugee crises occurring worldwide and a corresponding need for more than an ad hoc system, *see* H.R. Rep. No. 96-608, at 6 (1979) (citing Statement of J. Kenneth Fesick, Director, U.S. Gen. Accounting Office before the Subcomm. on Asian and Pacific Affairs on *Indochine Refugee Assistance Programs* (Apr. 24, 1979), http://www.gao.gov/assets/100/99033.pdf), and a more robust coordinate role for Congress. The 1980 Act formalized the role of Congress in the refugee allocation process, ensuring a more rigorous system that allowed Congress and executive agencies jointly to plan and budget in advance.

During consideration of the 1980 Act, "the [d]ebate centered on congressional control over refugee admissions numbers and strengthening of the consultation process." Anker & Posner, 19 San Diego L. Rev. at 56. The House Report stated "the Committee cannot over-emphasize the importance it attaches to consultation." H.R. Rep. No. 96-608 at 14. Extensive discussions on the floor and in hearings further underscored the significance that Congress attached to consultation. For instance, Representative Lundgren stated that in the past, "many of us in the Congress have felt that consultation has not been the cornerstone" and asked the Attorney General "what real signal do we have in the Congress that if we pass this legislation there would, in fact, be good faith, real efforts to consult with us before some major decision would be made by the President in the area of refugees[?] . . . Would you have an objection to . . . mak[ing] [the Act] very specific what we are talking about in terms of consultation with the Congress?" *Hearings on H.R. 2816*, 96th Cong. at 30 (statement of Rep. Dan Lundgren, testimony of Hon. Bell). And in the House Subcommittee hearings leading up to the 1980 Act, Chairwoman Holtzman stated that "[a]ny new legislation should clearly define what part Congress will play in refugee decisionmaking, and that role should not be a pro forma one." *Id.* at 2.

Having made such detailed provision for consultation in the initial establishment of and any interim increases in the level of the cap, the statute cannot reasonably be interpreted to allow the President to lower the cap unilaterally with no consultation at all. *See First Nat'l Bank of Atlanta v. Bartow Cty. Bd. of Tax Assessors*, 470 U.S. 583, 595-96 (1985) (refusing to infer that Congress *sub silentio* adopted a provision inconsistent with the rest of the statutory scheme). And until now, no President has ever attempted to lower the cap mid-year, especially without consulting Congress.[3]

B. The President's Ad Hoc And Post Hoc Action Undermined The Underlying Goals Of Section 1157

Congress's emphasis on consultation was more than simply a desire to ensure a robust role for itself. Congress recognized the need for an orderly and informed refugee process. Before passage of the 1980 Act, contemporaneous commentators observed that "[t]he absence of a coherent refugee policy, as demonstrated by the use of sporadic, *ad hoc* parole actions, created needless uncertainties for voluntary agencies and for United States officials participating in resettlement. In addition, it confused other nations, causing them to become less motivated to share in refugee relief." Anker & Posner, 19 San Diego L. Rev. at 33. During the debate over the Act, members of the executive branch expressed similar concerns, explaining that the "sudden termination of previously agreed upon programs would be 'disruptive of a harmonious' relationship between the two branches and place the United States in 'an awkward international position of being unable to honor a commitment to participate in a refugee resettlement of a multilateral character.'" *Id.* at 39 (quoting

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[3] *See* Legal Information Institute, *8 U.S. Code § 1157 - Annual admission of refugees and admission of emergency situation refugees*, https://www.law.cornell.edu/uscode/text/8/1157 (follow "Notes" tab) (a listing of each "Presidential Determination Concerning Admission and Adjustment of Status of Refugees").

Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int'l Law of the H. Comm. on the Judiciary, 95th Cong. 79 (1977)).

Congress understood that refugee agencies like *amici* are key to the efficient functioning of a refugee resettlement system. Under federal law, the government relies on these agencies to implement the refugee resettlement process. The statute directing the Office of Refugee Resettlement (within the federal Department of Health and Human Services) to manage the resettlement process specifies that "[i]t is the intent of Congress that in providing refugee assistance . . . local voluntary agency activities should be conducted in close cooperation and advance consultation with State and local governments." 8 U.S.C. § 1522(a)(1)(B). To that end, the statute requires federal agencies to "consult regularly (not less often than quarterly) with State and local governments *and private nonprofit voluntary agencies* concerning the sponsorship process and the intended distribution of refugees." *Id.* § 1522(a)(2)(A) (emphasis added).

When Congress passed the 1980 Act, the federal Coordinator for Refugee Affairs recognized that the government's "relationship with the private volunteer agencies"—which work overseas "with the international organizations that manage the refugee camps" and "in this country . . . [to] provide an important link between the federal government and the private sector in providing placement and other resettlement services"—is "[a] crucial element in both our international and domestic assistance programs." *Hearings on H.R. 2816*, 96th Cong. at 39 (statement of Dick Clark, Ambassador at Large and U.S.

Coordinator for Refugee Affairs). It was anticipated that the consultation required by the 1980 Act would "facilitate long-term planning of budget and admission levels and permit smoother functioning of assistance programs." *Id.* Consultation and stable long-term planning is vital, because an abrupt change in refugee numbers disrupts the ability of these private refugee resettlement agencies to maintain infrastructure, hire staff, and contract with local authorities and partners. And these effects in turn impact the operations and capacity of the entire refugee resettlement system.

Congress's provision for coherent and inclusive long-term planning was entirely disregarded here. Issued ad hoc and post hoc, the EOs created precisely the kind of "sudden termination" that Congress and the Executive sought to prevent through the 1980 Act. The President's abrupt unilateral actions have strained the Nation's established multi-national commitments, and devastated agencies' long-term planning efforts—precisely the consequences that Congress sought to avoid.

II. THE PRESIDENT'S REDUCTION OF THE REFUGEE CAP AND TEMPORARY BAN ON ALL REFUGEE ADMISSIONS EXCEED THE AUTHORITY CONGRESS DELEGATED TO THE PRESIDENT UNDER 8 U.S.C. § 1182(f)

When President Lyndon Johnson signed the INA at the Statue of Liberty in 1965, he stated that the law established a simple and fair test that "those who can contribute most to this country—to its growth, to its strength, to its spirit—will be the first that are admitted to this land," undoing the "harsh injustice of the national origins quota system."[4] In that spirit, the INA contains detailed provisions and structures for the admittance of aliens into the United States. But at the same time, because pre-set policies do not always provide needed flexibility, Congress retained the President's unilateral authority to suspend entry "of all aliens or any class of aliens as immigrants or nonimmigrants" in special circumstances not otherwise provided for in the INA. 8 U.S.C. § 1182(f). This authorization, however, does not grant the President carte blanche to override the rest of the INA. Before the President may invoke his statutory authority to suspend entry of a class of aliens under section 1182(f), he must first "find[]" that entry of that class would be "detrimental to the interests of the United States." *Id.*

President Trump invoked section 1182(f) as his authority to reduce the cap on refugees from 110,000 to 50,000. He did not cite any law as his authority for suspending the entire USRAP, but the government has since claimed that section 1182(f) authorized that action as well. Gov't Br. 39. But neither action is authorized by this statute. The Order does not make anything that could qualify as a "finding" that refugees as a class are detrimental to the United States. Nor could the President plausibly have made such a finding, since the historical record establishes that, given the existing rigorous screening process, refugees as a class do not remotely threaten the public interest.

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[4] LBJ Presidential Library, LBJ on Immigration, *President Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill Liberty Island, New York* (Oct. 3, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration.

To be sure, EO2 "proclaim[s]" that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." EO2 § 6(b). It also recites that (i) "[t]errorist groups have sought to infiltrate several nations through refugee programs," *id.* § 1(b)(iii); (ii) three "individuals who first entered the country as refugees" have been "convicted of terrorism-related crimes," *id.* § 1(h); and (iii) "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation," *id.*

But the "finding" that section 1182(f) requires must be more than a rote declaration and recitation. The term "finding" has a well-understood and established meaning in the law, invoking a reasoned determination. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) ("A common definition of 'finding of fact' is, for example, '[a] conclusion by way of reasonable inference from the evidence.'" (alteration in original) (citation omitted)); *see also Delegation of Power by Congress*, 48 Harv. L. Rev. 798, 805 (1935) ("The mere recital of [the statute's] phrases would seem inadequate as 'findings.'"); FINDING OF FACT, *Black's Law Dictionary* (10th ed. 2014) ("A determination . . . of a fact supported by the evidence . . . . Often shortened to finding."). Reducing it, as the government would, to a formalistic recitation, regardless of even facial plausibility, would make the requirement of a finding meaningless, and Congress is not presumed to create empty requirements. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . ."

(citation omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (same).

For the "finding" requirement that Congress imposed on the President to accord with its established meaning, the President must do more than simply declare he has made one. While the government wishes to claim that the President's burden to justify a section 1182(f) exclusion is minimal, there is a point at which an exclusion is so illogical or fundamentally unsupported by reason that a mere proclamation cannot sustain it. And on the face of EO2, there is nothing justifying a ban on *all* refugees.

The text of EO2 is insufficient to satisfy even that most minimal requirement. None of the supporting facts recited in EO2 suggests that refugees present heightened risks. The Order states that "[t]errorist groups have sought to infiltrate several nations through refugee programs," but does not claim that any such infiltration attempts were successful, much less that they would have posed any danger to the United States in light of our country's rigorous vetting procedures. The Order also identifies three refugees who have been convicted of terrorism-related crimes in this country (out of more than three million admitted here). Banning all refugees for that reason would be akin to banning all men because all three convictions in question were of men. Finally, EO2 observes that 300 refugees in the U.S. have been subjects of FBI counterterrorism investigations.[5] But those 300 refugees represent less than a tenth of a percent of all refugees admitted since 1975,[6] and 99.95% of FBI investigations end without a terrorism conviction for attempts to perpetuate a terrorist attack against the United States.[7]

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[5] EO2 § 1(h).

The President's failure to muster any actual support for EO2's anti-refugee provisions is unsurprising, because there is nothing innately dangerous about refugees as a class. Unlike nationals of a particular country or individuals with particular characteristics or associations, "refugees" covers a broad and unrelated range of people who lack any unifying quality that might cause them, as a class, to threaten the U.S. public interest. "[R]efugee[s]" are defined by statute as people who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion that makes them unable or unwilling to avail themselves of the protection of their home country. 8 U.S.C. § 1101(a)(42). As such, refugees are linked solely by their status as vulnerable and displaced individuals. Their common profile is hardship and displacement, not dangerousness. In fact, UNICEF estimated that nearly half of *all* refugees worldwide are children.[8] And they include a massive number of people (including children) that have no articulable link to terrorism, even as per the reasoning of EO2. Treating refugees as a class for section 1182 purposes is not defensible.

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[6] David Bier, CATO Institute, *Deconstructing Trump's Security Defense of His Immigration Ban* (Mar. 9, 2017), http://bit.ly/2xgHdZu.

[7] *Id.*

[8] *Nearly Half of All Refugees are Children, Says Unicef*, The Guardian, (Sept. 14, 2016), http://bit.ly/2cmFfek.

The Order's presumption of dangerousness is especially indefensible with respect to the Order's refugee cap reduction. The Order would allow the entry of refugees numbers 1 through 50,000, but bar entry of refugees numbers 50,001 through 110,000. But a refugee's place in the resettlement queue is an arbitrary and nonsensical basis for exclusion. Section 1182(f) provides the President no authority to remake immigration policy by whim.

The absence of evidence supporting the purported need to ban refugees is unsurprising for another reason: this country already applies an extremely thorough vetting process for refugees. To embark on the often years-long refugee resettlement process, an applicant first must register and interview with the United Nations (UN), which determines whether to grant refugee status.[9] To make that determination, the UN assesses whether the person is among the most vulnerable refugees and therefore eligible for resettlement in a country like the United States.[10] Once an applicant is deemed a "refugee," she is referred to a specific country for resettlement. After a refugee is referred to the United States for resettlement, she must interview with a State

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[9] United States Citizenship and Immigration Services (USCIS), Dep't of Homeland Security, *Refugee Processing and Security Screening* (last updated Dec. 3, 2015), http://bit.ly/1YodRyW; Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Already Face a Rigorous Vetting Process*, N.Y. Times, Jan. 29, 2017, http://nyti.ms/2o7WN2o.

[10] Park & Buchanan, *supra* note 9; Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, Obama White House Archives (Nov. 20, 2015), http://bit.ly/2kqqbmh.

Department partner organization.[11] The refugee then undergoes two background checks, along with three fingerprint screenings.[12] These background checks include consultation with the State Department, the Federal Bureau of Investigation, the Drug Enforcement Agency, the National Counterterrorism Center, the Department of Defense, and Interpol.[13] Syrian refugees in particular must undergo two additional steps at this point: review by a refugee specialist from the United States Citizenship and Immigration Services and review by the Department of Homeland Security.[14] Only after all of these extensive checks and screenings are complete does the refugee attend an in-person interview with a Homeland Security officer.[15] After evaluating the applicant's credibility and reviewing the case file, the officer determines whether to admit the applicant as a refugee.[16] The refugee must then undergo a screening for contagious disease and a cultural orientation class.[17] Finally, because the amount of time between the initial screening and actual departure is often significant, there is another security check before the refugee can actually travel to the United States and begin the next chapter of her life.[18] This process is far more extensive than for any other type of admission to the United States.

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[11] Park & Buchanan, *supra* note 9; U.S. Comm. for Refugees and Immigrants (USCRI), *Security screening of refugees admitted to the United States*, http://refugees.org/wp-content/uploads/2015/12/USCRI-Security-Screening-Process-5.16.16.pdf (last visited Sept. 14, 2017).

[12] Park & Buchanan, *supra* note 9.

[13] USCIS, *supra* note 9.

[14] Park & Buchanan, *supra* note 9; USCRI, *supra* note 11.

[15] Park & Buchanan, *supra* note 9.

[16] *Id.*; USCIS, *supra* note 9; USCRI, *supra* note 11.

[17] USCRI, *supra* note 11; USCIS, *supra* note 9.

In fact, because of this rigidly choreographed process, the Order's refugee ban is not simply a matter of a 120-day delay. Many of the checks conducted during the refugee admission process expire after a set amount of time. For instance, some medical tests expire within three months, while other checks and screenings are valid for a little over a year.[19] The combination of these different windows of validity often leaves a refugee less than a two-month period during which all of her checks are simultaneously valid.[20] Once a check expires, during the time it takes to repeat that check, another check may expire, creating a domino effect. This becomes even more complicated when a family attempts to travel together, because all of their windows need to line up at the same time.[21] If the window for travel expires before the refugee has made it to the United States, the refugee must generally start the process all over again from the beginning.[22] This could take up to another two years. And this delay would likely be compounded by the backlog created by the Order's dramatic decrease in total refugee admissions. The added years of waiting are more than just an inconvenience. Refugees, by definition, are the most vulnerable people on earth, fleeing persecution, lacking the most basic necessities, and at constant risk of violence. In many cases, an additional delay has life-or-death consequences.

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[18] Park & Buchanan, *supra* note 9.

[19] *Medical Examination: Frequently Asked Questions (FAQs)*, Ctr. for Disease Control and Prevention (last updated Feb. 22, 2017), http://bit.ly/2ocISHp; *US Refugee Admissions Program: An overview of built-in security safeguards for refugee resettlement*, Int'l Rescue Comm., http://bit.ly/2oeddFt (last visited Sept. 14, 2017); Elise Foley & Willa Frej, *Court Ruling May Force Trump To Admit The Number Of Refugees Obama Wanted*, Huffington Post, Mar. 20, 2017, http://huff.to/2mUyCGi; *see also* Natasha Hall, *Refugees are already vigorously vetted. I know because I vetted them.*, Wash. Post, Feb. 1, 2017, http://wapo.st/2oEGRHZ; Ann M. Simmons, *We don't know exactly what 'extreme vetting' will look like, but screening for refugees is already pretty tough*, L.A. Times, Jan. 29, 2017, http://lat.ms/2jKJvsP.

[20] Erol Kekic, *Homeland Security Chief John Kelly Says Waiting 120 Days Won't Hurt Refugees. He's Wrong*, Time (Feb. 10, 2017), http://ti.me/2lTAYT8.

Due in part to the extremely thorough vetting, experience demonstrates that, in fact, refugees are far *less likely* than other foreign nationals, or even United States citizens, to commit deadly terrorist attacks in the United States.[23] Between 1975 and 2015, the United States admitted 3.3 million refugees and only three (all from Cuba, all prior to 1980) engaged in deadly acts of terrorism in the United States.[24] In that time period, the annual risk of death to a United States resident by a refugee terrorist in the country was 1 in 3.64 billion.[25] (To put this in perspective, the chance of being killed in a regular homicide was 1 in 14,000.[26]) Tourist visa holders are 1,000 times more likely than refugees to kill someone in the United States in a domestic terrorist attack.[27] Indeed, an analysis of refugee resettlement data has revealed that after refugees move into an American city, crime usually goes down, sometimes by drastic amounts.[28]

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[21] *Id.*

[22] Sarah Wildman, *9 Questions about the global refugee crisis you were too embarrassed to ask*, Vox (updated June 20, 2017), http://bit.ly/2p8N5k0; Michael Brindley, *After Trump's Executive Order, Refugees Who Were N.H. Bound Now On Hold*, N.H. Pub. Radio (Jan. 31, 2017), http://bit.ly/2pwf6hT.

[23] Bier, *supra* note 6.

[24] Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Policy Analysis 13 (Sept. 13, 2016), http://bit.ly/2kem9fJ.

[25] Bier, *supra* note 6.

As the Cato Institute's recent report found, only 20 refugees planned, attempted, or carried out any terrorist attack in the United States from 1975 to 2015.[29] Of these attacks, only three were fatal and all three occurred before 1980 and the institution of modern vetting procedures.[30] More recently, of the 784,000 refugees resettled in the United States since September 11, 2001, just three were even arrested for planning terrorist activities, only one of those was planned to take place in the United States, and the plan was described as "barely credible."[31] The data fit the reality of refugee admission: refugees resettled in the United States are vulnerable people who, as a class, pose no threat to the public interest. The Order contains no legitimate "finding" otherwise.

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[26] *Id.*; *see also* Alex Nowrasteh, *Americans' Fear of Foreign Terrorists Is Overinflated*, Time.com (Sept. 13, 2016), http://ti.me/2jKIQVK.

[27] Nowrasteh, *supra* note 24, at 5.

[28] Tanvi Misra, *Are Refugees Dangerous?*, Citylab (Feb. 14, 2017), http://bit.ly/2sSlg1f.

[29] Nowrasteh, *supra* note 24, at 2, 8, 13.

[30] *Id.* at 13.

[31] Lauren Gambino, *Trump and Syrian refugees in the US: separating the facts from fiction*, The Guardian (Sept. 2, 2016), http://bit.ly/2fQF0wP.

III. EO2, INCLUDING THE ANTI-REFUGEE PROVISIONS OF SECTION 6, IS A THINLY VEILED ATTEMPT TO EXCLUDE MUSLIMS ON RELIGIOUS GROUNDS IN VIOLATION OF THE ESTABLISHMENT CLAUSE

As a candidate, President Trump famously promised to enact "a total and complete shutdown of Muslims entering the United States."[32] That would have been blatantly unconstitutional. So this explicit Muslim ban morphed, campaign adviser Rudolph Giuliani explained, into the idea of using nationality as a proxy for religion.[33] Shortly after he was sworn into office, President Trump put that idea into action via EO1 and EO2. In light of Donald Trump's numerous statements as a candidate, President-elect, and later as President evidencing anti-Muslim animus, the Muslim-specific rationales for excluding refugees, and the disproportionate impact that the refugee ban and lowered cap have on Muslims, a reasonable observer would conclude that EO2, including the refugee-specific provisions of section 6, was driven by impermissible animus.

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[32] Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post, May 9, 2017, http://wapo.st/2w1WTR9; *Trump's Deleted "Preventing Muslim Immigration" Statement*, The Memory Hole (Dec. 7, 2015), http://bit.ly/2wVdcML.

[33] Amy B. Wang, *Trump asked for a 'Muslim ban," Giuliani says – and ordered a commission to do it 'legally'*, Wash. Post, Jan. 29, 2017, http://wapo.st/2gYT0lq.

A. President Trump's Statements Evince Clear Anti-Muslim Animus

President Trump's statements as a recent candidate, the President-elect, and now President bear on the assessment of whether his Executive Order was motivated by anti-Muslim animus. It is well established that the government cannot "denigrate . . . religious minorities," "signal disfavor" toward a faith, or "suggest that [one's] stature in the community [is] in any way diminished" because of one's religion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823, 1826 (2014). In evaluating whether a government action crossed that line, a court acts as a reasonable, "objective observer." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). As Respondents explain, this analysis is relevant both to assessing whether the Order's rationale is "bona fide" under *Kerry v. Din*, 135 S. Ct. 2128 (2015), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and to assessing whether it violates the First Amendment under *Town of Greece*. No. 16-1436 Resps. (IRAP) Br. 32-50; No. 16-1540 Resps. (Hawaii) Br. 48-52.

While a court considering unconstitutional animus must avoid "judicial psychoanalysis of a drafter's heart of hearts," that does not mean it must turn a blind eye to statements explicitly evidencing bias. *McCreary*, 545 U.S. at 862. To the contrary, a court must consider "readily discoverable fact[s]," *id.*, including the action's "historical context" and "the specific sequence of events leading to [its] passage," *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987). This includes examination of statements of purpose by the lawmaker. *See, e.g.*, *id.* at 587-88, 591-94 (discussing the statements of the legislative sponsor to conclude that the law had an illicit purpose and therefore violated the Establishment Clause).

No psychoanalysis is needed to recognize that the Executive Order was targeted *specifically* at Muslims—that is what President Trump said on many occasions.

- On December 7, 2015, then-candidate Trump issued an official statement "calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[34]
- Candidate Trump's then-campaign manager Corey Lewandowski told CNN that the ban would apply not just to Muslim foreigners looking to immigrate to the U.S., but also to Muslims looking to visit the U.S. as tourists.[35]
- The next day, then-candidate Trump explained how this would work. "[T]hey would say, are you Muslim?" Contributor Willie Geist then volunteered "And if they said yes, they would not be allowed in the country," to which Trump responded "That's correct."[36]

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[34] Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post, May 9, 2017, http://wapo.st/2w1WTR9; *Trump's Deleted "Preventing Muslim Immigration" Statement*, The Memory Hole (Dec. 7, 2015), http://bit.ly/2wVdcML.

[35] Jeremy Diamond, *Donald Trump: Ban all Muslim travel to U.S.*, CNN (Dec. 8, 2015), http://cnn.it/1QbhhSR.

[36] Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015 7:51 AM), http://politi.co/1XYTrc8.

- Shortly thereafter, on January 18, 2016, then-candidate Trump vowed: "We're going to protect Christianity"; "I don't have to be politically correct, we're going to protect it."[37]
- On March 9, 2016, then-candidate Trump said "I think Islam hates us,"[38] and two weeks later on March 22, 2016, he declared "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[39]
- On March 22, 2016, he tweeted "Incompetent Hillary, despite the horrible attack in Brussels today, wants borders to be weak and open-and let the Muslims flow in. No way!"[40]
- On May 4, 2016, when a reporter asked then-candidate Trump "Do you stand for example by the idea of a ban against foreign Muslims coming here?" he responded "I do. We have to be vigilant."[41]

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[37] Alex Swoyer, *Donald Trump Quotes the Bible at Liberty University, Tells Youth 'Never Give Up'*, Breitbart (Jan. 18, 2016), http://bit.ly/2xVv2yw.

[38] Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4.

[39] Matthew Wisner, *Donald Trump Calls for End of Visa Waiver Program,* Fox Business (Mar. 22, 2016), http://fxn.ws/1pHa1n8.

[40] Donald J. Trump (@realDonaldTrump), Twitter (Mar. 22, 2016, 7:59 PM), http://bit.ly/2wl9EBt.

[41] *Presumptive GOP Nominee Trump Goes One-on-One With Lester Holt* at 2:07, NBC News (May 4, 2016), http://nbcnews.to/1SZtIAq.

- As a candidate, sometimes Donald Trump would make only veiled references to Islam, clear only from the context and his prior statements. For instance, he stated that "Hillary Clinton also wants to push to bring in 620,000 refugees in her first term—a number of whom come from countries where women and gays are horribly brutalized—which will weaken our tolerant way of life."[42]
- When asked soon after the election, on December 21, 2016, whether he had rethought or reevaluated his "plans to create a Muslim register and ban Muslim immigration to the United States?" then-President-elect Trump responded "You know my plans."[43]
- Now-President Trump continues to showcase the same anti-Muslim animus. In response to the recent Barcelona terror attack, President Trump tweeted: "Study what General Pershing of the United States did to terrorists when caught. There was no more

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[42] Donald J. Trump for President, Inc., *Donald J. Trump Calls for American Independence, Lays Out Need for Immigration Security* (Aug. 24, 2016), http://bit.ly/2wqaLzG.

[43] *Donald Trump: "...You Know my Plans..."* at 0:12, Daily Mail.com (Dec. 22, 2016), https://www.youtube.com/watch?v=ip4vsPInyRY; Madeline Conway, *Trump stokes fears he'll pursue Muslim ban*, Politico (Dec. 22, 2016 8:09 AM), http://politi.co/2hgmkXM; Katie Reilly, *Donald Trump on Proposed Muslim Ban: 'You Know My Plans'*, Time.com (Dec. 21, 2016), http://ti.me/2hWs4FG.

Radical Islamic Terror for 35 years!"[44] This is a reference to an apocryphal story that General Pershing killed Muslim terrorists with bullets dipped into the blood of pigs and buried their bodies with the bodies of pigs.[45]

As Rudolph Giuliani explained, in an attempt to avoid the obvious constitutional problems with an explicit anti-Muslim ban, nationality was introduced as a proxy for religion. But before and after assuming office President Trump made clear this was just window-dressing.

- On July 26, 2016, he explained that while he was *not* "changing [his] position" on what Vice-Presidential candidate Pence had termed his "[c]all[] to ban Muslims from entering the U.S.," he would "call it territories" instead.[46]
- Upon signing EO1, after reading the title aloud (which is "Protecting the Nation from Foreign Terrorist Entry into the United States"), President Trump said "We all know what that means."[47]

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[44] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 17, 2017, 11:45 AM), http://bit.ly/2fO75Fi.

[45] Dan Bowens, *Trump tweets fake Gen. Pershing story after Spain attack*, FOX 5 (Aug. 17, 2017), http://bit.ly/2jjr8wH; *General Pershing on How to Stop Islamic Terrorists*, Snopes (last updated Aug. 17, 2017), http://www.snopes.com/rumors/pershing.asp.

[46] Lesley Stahl, *The Republican Ticket: Trump and Pence*, 60 Minutes (July 17, 2016), http://cbsn.ws/29NrLqj.

[47] *Trump Signs Executive Orders at Pentagon* at 0:36, ABC News (Jan. 27, 2017), https://goo.gl/7Jzird.

- In an interview with the Christian Broadcasting Network shortly thereafter, President Trump stated that EO1's religious minority protection provision was designed to give Christians priority when applying for refugee status. "If you were a Muslim you could come in [to the United States], but if you were a Christian, it was almost impossible," he said. "[T]hey were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."[48]
- EO1 employed multiple thinly veiled references to stereotypes regarding Islam, mentioning "honor killings," "violent ideologies," "persecution of those who practice religions different from their own," and "foreign nationals" being "radicalized." EO1 §§ 1, 10(a)(ii), 10(a)(iii).
- The son of the National Security Advisor, himself a past member of President Trump's staff, repeatedly called the first Executive Order a "#MuslimBan."[49]

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[48] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), http://bit.ly/2kCqG8M. President Trump made similar claims regarding Christian and Muslim refugees at least as far back as July 11, 2015. *See also* Louis Jacobson, *Donald Trump says if you're from Syria and a Christian, you can't come to the U.S. as a refugee*, PolitiFact (July 20, 2015), http://bit.ly/1CLkBPj (quoting, and determining as false, Trump making the same claims in a speech on July 11, 2015).

[49] Mathew Nussbaum, *Flynn's son says 'Muslim ban' is 'necessary'*, Politico (Jan. 29, 2017), http://politi.co/2k6e2jr.

The second Executive Order eliminated some of the more glaring indications of its anti-Muslim purpose, but it is infected by the same discriminatory intent. Again, President Trump's own statements confirm this. He described EO2 as simply "a watered-down version of the first one"[50] and a senior White House policy adviser told Fox News that "fundamentally, you're still going to have the same basic policy outcome" as the original.[51] And in April, President Trump vowed that, when it came to refugees, "I'm going to be helping Christians big league."[52]

In assessing the intent of EO2, it is not impermissible judicial psychoanalysis to take the President at his word and consider his repeated and consistent statements linking the successive executive orders to express anti-Muslim bias. In *McCreary*, this Court considered a third attempt by local government to create a courthouse display including the Ten Commandments after two prior displays had been struck down as unconstitutional. This Court held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absented-minded objective observer, not one presumed familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866. As in *McCreary*, "[n]o reasonable observer could swallow the claim that" President Trump has "cast off the objective so unmistakable" in his public statements and in the original Executive Order. *Id.* Indeed, the President has not even tried to cast off EO1's objective, repeatedly equating the two Orders.

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[50] Jacob Pramuk, *Trump may have just dealt a blow to his own executive order*, CNBC (updated Mar. 16, 2017), http://cnb.cx/2p4LPOi.

[51] Kevin Lui, *Comments by Stephen Miller and Rudy Giuliani Cited in Judge's Decision to Block Trump's Travel Plan*, Time (Mar. 15, 2017), http://ti.me/2wSX0hh.

[52] Scott Johnson, *At the White House with Trump*, Power Line (Apr. 25, 2017), goo.gl/ZeXqhY.

B. The Bias Animating EO2 Extends To Section 6

The refugee provisions of EO2 are specifically motivated by the same anti-Muslim bias as the country ban. That is clear from the face of the Order: its only articulated basis for halting USRAP or lowering the refugee cap is the purported danger of terrorism from refugees from Muslim countries. EO2 § 1(h). Given President Trump's repeated statements linking or equating Islam and terrorism, and the facial implausibility of the stated national security concerns with respect to refugees, a reasonable observer would conclude that the refugee provisions of EO2 were animated by the same religious discrimination animating the travel ban.

A reasonable observer would also appreciate that, in practice, section 6 has a disproportionate impact on Muslims. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) ("[I]mpact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."). Even though Muslims comprise just 23% of the global population, they represented 46% of refugees admitted to the United States in 2016.[53] Indeed, 65% of the world's refugee population came from 49 Muslim-majority countries in 2015,[54] and just three of those countries—Syria, Afghanistan, and Somalia—account for 54% of all refugees worldwide.[55] The fact that Muslims are disproportionately represented in the global refugee population and in USRAP makes shutting off refugee admissions an especially efficient way to keep Muslims from entering the United States.

* * *

The First Amendment bars the government from giving, or appearing to give, a stamp of approval or disapproval to any religion. A reasonable observer would conclude that EO2 section 6 violates this fundamental principle.

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[53] Philip Connor, Pew Research Center, *U.S. Admits Record Number of Muslim Refugees in 2016* (Oct. 5, 2016), http://pewrsr.ch/2cSmd2t; *see also* Pew Research Center, *Religious Composition by Country, 2010-2050* (Apr. 2, 2015), http://pewrsr.ch/2nMIS0G.

[54] *See* Pew Research Center, *Religious Composition by Country, 2010-2050* (Apr. 2, 2015), http://pewrsr.ch/2nMIS0G (providing religious demographics by country); UNHCR, *Global Trends: Forced Displacement in 2015* at 62-65 (2016), http://bit.ly/2wVw5AU (providing number of refugees by country under UNHCR mandate).

[55] UNHCR, *supra* note 54, at 3.

CONCLUSION

The Court should affirm the decisions of the Ninth and Fourth Circuits.

Respectfully submitted,

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v.
INTERNATIONAL REFUGEE ASSISTANCE
PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES
ET AL., PETITIONERS
v.
HAWAII, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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8 U.S.C. § 1182(f) 2, 24

OTHER AUTHORITIES

Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004) 35
Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379 (2011) 35

INTEREST OF AMICUS CURAIE

The MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has represented clients facing myriad human rights and civil rights injustices, including issues of discrimination, the unlawful detention of foreign nationals, and the rights of marginalized groups in the American justice system. MJC has an interest in the rule of law and the independence of the judiciary in determining whether government officials have acted with discriminatory animus against an unpopular minority group.

MJC submits this brief to document the President's extensive record of hatred against people of the Muslim faith, his open desire to curtail their rights, and his specific, sustained promise to inhibit their entry to the U.S. MJC's prior briefing was relied upon by the U.S. District Court for the District of Hawaii in enjoining Executive Order 13780, *see Hawai'i v. Trump*, Civ. No. 17-00050, __ F. Supp. 3d __, 2017 WL 1011673, at *14 n.14 (D. Haw. Mar. 15, 2017), and by parties in the proceedings below.[1]

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[1] No person other than MJC and its counsel authored any part of this brief or made a financial contribution to the brief. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

SUMMARY OF ARGUMENT

This President of the United States selected an unpopular minority faith that makes up 1% of the nation's population, ran a campaign that vilified and spread propaganda about that minority faith, and then—immediately upon taking office—sought to deliver on one of his most repeated promises: To prevent people of that faith from entering the country. The MacArthur Justice Center submits this brief to document the President's extensive record of hatred against Muslims, his open desire to curtail their rights in various ways, and his specific, sustained pledge to inhibit their entry.

In its opening brief, the government claims a "stark disconnect" between Executive Order 13780 and the President's pledge to restrict the entry of Muslims from the country. Pet. 77. It writes off the latter as mere "campaign-trail comments" or "informal remarks." Pet. Br. 71, 73. The government's characterization is divorced from fact. The record shows that the President's promise to restrict the entry of Muslims was made with remarkable specificity. Not only did he openly and repeatedly express his discriminatory intent, but he telegraphed that he would achieve it under the guise of a neutral order—by speaking in terms of "territories" and "extreme vetting" instead of "Muslims" (just as he would later do). He also explained how he would get away with it—by asserting the President's broad immigration authority under 8 U.S.C. § 1182(f), the provision invoked in his Order and by the government before this Court. Pet. Br. 39-40. Indeed, Mr. Trump even invoked the internment of Japanese Americans during World War II as proof that he would succeed in singling out Muslims. Executive Order 13780 is the assault on Muslims that the President promised he would deliver.

Fact also belies the government's suggestion that the President's animus toward Muslims requires a "selectively negative interpretation" or a "wide-ranging search for pretext." Pet. Br. at 14, 67. As documented herein, the President engaged in a sustained and targeted attack on Muslim people, labeling them a "problem" and affirmatively disseminating anti-Muslim propaganda. He openly and repeatedly expressed his desire to curtail the rights of persons who practice Islam, including by shutting down mosques, surveilling and profiling Muslims, and creating a Muslim registry.

Finally, while the government asks the Court to imagine that the President has retracted or abandoned his discriminatory objective since being elected, Pet. Br. 73, the facts show that he has reaffirmed it. Indeed, the President has repeatedly and specifically chided the Department of Justice for making his Executive Order "politically correct"—directly implying that he views the territories named to be a proxy for Muslims. Moreover, despite the Acting Solicitor General's repeated representations that Executive Order 13780 has no relation to the President's long-promised "Travel Ban," the President has repeatedly characterized it as just that. The government's suggestion that the oath of office "mark[ed] a profound transition" is incredible in light of the actual facts: Within days of taking office, the President signed an executive order without consulting any of his national security experts. Upon reading the order's abstruse title, he added: "We all know what that means"—an obvious reference to his longstanding pledge to restrict the travel of Muslims. His revised, "politically correct" order—by his Administration's own admission— was designed to achieve "the same basic policy outcome."

If this Court failed to intervene on this record, the judicial abdication would be matched only by cases like *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Korematsu v. United States*, 323 U.S. 214 (1944). Indeed—setting aside the President's express invocation of Japanese American internment—the government's call for this Court to step aside because "the President made a national-security judgment," Pet. Br. 66-78, is chillingly reminiscent of the closing remarks defending the government's detention of Japanese Americans in *Korematsu* itself:

> To cast this case into outlines of [religious] prejudice, without reference to the real military dangers which were presented, merely confuses the issue. [Muslims were] not excluded from the [United States] because of hostility to [them] or [their religion]. [They were] excluded because we are at war with [radical Islamic terrorism], because the [President] feared an invasion of our [country] and felt constrained to take proper security measures, because [he] decided that the military urgency of the situation demanded that

> [certain persons of Muslim religion] be segregated from the [United States] temporarily, and, finally, because [the President] . . . determined that [he] should have the power to do just this. There was evidence of disloyalty on the part of some [Muslims], the [President] considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Id. at 233 (with modification in brackets).

The MacArthur Justice Center urges the Court not to repeat that depraved moment in U.S. history.

ARGUMENT

I. The President's Expressions Of Hatred, Dissemination Of Propaganda, And Pledges To Use His Official Power Against Muslims.

The President's Executive Order followed repeated and unabashed admissions of an intent to discriminate against people who choose to practice Islam. This Section documents the President's hateful statements against Muslim people, his affirmative dissemination of propaganda vilifying them, his expressed desire to oppress them, and his specific and sustained pledge to restrict their entry into the country.

A. The President's Description Of Muslim People As A "Problem" And His Spreading Of Vilifying Propaganda.

1. Labeling Muslims A "Problem."

President Trump has long advocated that a "Muslim problem" exists in the U.S., that Islam is a religion of "tremendous hatred," and that there is no meaningful distinction between being Muslim and being a terrorist. As early as April 2011, he recounted:

> Bill O'Reilly asked me is there a Muslim problem? And I said absolutely, yes. In fact I went a step further. I said I didn't see Swedish people knocking down the World Trade Center. . . . I mean I could have said, "Oh absolutely not Bill, there's no Muslim problem, everything is wonderful, just forget about the World Trade Center." But you have to speak the truth. . . . The Koran is very interesting. . . . there's something there that teaches some very negative vibe. . . . there's tremendous hatred out there that I've never seen anything like it.[2]

The President has repeatedly echoed these views. On September 18, 2015, for instance, Mr. Trump had the following exchange with an audience member at an event:

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[2] David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe,'* CBN News (Apr. 12, 2011), http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches.

Questioner: “We have a problem in this country. It’s called Muslims.”

Mr. Trump: “Right.”

Questioner: “You know our current president is one. You know he’s not even an American.”

Mr. Trump: “We need this question.”[3]

The President has adhered to his view that people of the Muslim faith are a “problem” and vilified them on numerous other occasions:

- On December 10, 2015, Mr. Trump tweeted three separate statements referring to a “massive Muslim problem,” praising an author for acknowledging “Muslim problems,” and associating Muslims with terrorism.[4]
- On February 4, 2016, Mr. Trump was asked to clarify: “Is it really a Muslim problem, or is it a radical Islamist problem?” He declined to

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[3] Jonathan Merritt, *Trump’s Proposals Could Backfire on Christians*, The Atlantic (Nov. 24, 2015), https://www.theatlantic.com/politics/archive/2015/11/donald-trump-muslims-christians/417255/; Theodore Schleifer, *Trump doesn’t challenge anti-Muslim questioner at event*, CNN (Sept. 18, 2015), http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/.

[4] Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/674934005725331456; Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/674936832010887168; Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/675123192864899072.

accept that distinction, saying, "Maybe it's a Muslim problem, maybe it's not."[5]

- On March 9, 2016, Mr. Trump stated, "I think Islam hates us" and that Muslims have "tremendous hatred" and "unbelievable hatred." He expressly rejected that a distinction could be drawn between radical Islam and Islam itself, claiming "[i]t's very hard to define."[6]
- The following day, on March 10, 2016, Mr. Trump was asked whether his statement that "Islam hates us" referred to all 1.6 billion Muslims in the world. He responded: "I mean a lot of them. I mean a lot of them." When given another opportunity to clarify, he stated: "There's something going on that maybe you don't know about, maybe a lot of other people don't know about, but there's tremendous hatred. And I will stick with exactly what I said [the previous day]."[7]
- On June 13, 2016, Mr. Trump equated Islam with the Islamic State terrorist group and

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[5] CNN Interview of Donald Trump, YouTube (Feb. 4, 2016), https://www.youtube.com/watch?v=uW9UlMqJtro (minutes 18:42 to 18:46).

[6] Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/.

[7] *Transcript of Republican Debate in Miami*, CNN (Mar. 15, 2016), http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/.

stated that "[r]efugees are trying to take over our children" by telling them "how wonderful Islam is."[8]

2. Spreading Anti-Muslim Propaganda.

The President has gone further, disseminating propaganda that vilifies people of the Muslim faith. On November 21, 2015, for instance, he falsely proclaimed: "I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering."[9]

In the face of the authorities and articles debunking his claim,[10] Mr. Trump continued to spread this lie:

- On November 22, 2015, he stated: "There were people that were cheering on the other side of

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[8] *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (Jun. 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats (minutes 20:05 to 20:30).

[9] Glenn Kessler, *Trump's outrageous claim that 'thousands' of New Jersey Muslims celebrated the 9/11 attacks*, Wash. Post (Nov. 22, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/.

[10] *See, e.g.*, Lauren Carroll, *Fact Checking Trump's claim that thousands in New Jersey cheered when World Trade Center tumbled*, Politifact (Nov. 22, 2015), http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/.

New Jersey, where you have large Arab populations. They were cheering as the World Trade Center came down. . . there were people cheering as that building came down—as those buildings came down. And that tells you something."[11]

- On November 23, 2015, he again stated: "I saw people getting together and, in fairly large numbers, celebrating as the World Trade Center was coming down, killing thousands of people–thousands and thousands of people... People are still dying over what happened with the World Trade Center. And they're dying a terrible death. And I saw people."[12]
- On November 25, 2015, Mr. Trump tweeted: "Credible Source on 9-11 Muslim Celebrations: FBI" and linked to an article stating that a retired FBI agent referred to Mr. Trump's claims as "plausible."[13]

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[11] *See* Kessler, *supra* note 9.

[12] AP Archive, Trump Defends 9/11 Celebrations with Article (Nov. 24, 2015), http://www.aparchive.com/metadata/US-OH-Trump-CR-/cadcfee1334d2a1fea065ba383ef6f8e; Jenna Johnson, *Donald Trump on waterboarding: "If it doesn't work, they deserve it anyway,'* Wash. Post (Nov. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/.

[13] Donald J. Trump, Twitter (Nov. 25, 2015), https://twitter.com/realDonaldTrump/status/669682774673137665; *see also* Bill Riales, *Credible Source on 9-11 Muslim Celebrations: FBI*, WKRG (Nov 25, 2015), http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/.

- On December 2, 2015, Mr. Trump shared another individual's tweet claiming to have seen "militant Muslims burning our flag and burning George Bush photos and figures, right after 9/11!"[14]
- On December 7, 2015, Mr. Trump repeated his November 25, 2015 tweet, linking to the article calling his claim "plausible."[15]

The President also repeatedly praised a false story involving the mass murder of Muslims using pig blood. On February 19, 2016—treating "terrorist" as a synonym for being Muslim—he approvingly recounted the following story:

> Early in the century, last century . . . they had a terror problem. And you know there's a whole thing with swine and animals and pigs and you know the story, they don't like that. And they were having a tremendous problem with terrorism. . . General Pershing was a rough guy. . . he took the 50 terrorists, and he took 50 men and he dipped 50 bullets in pigs' blood . . . And he had his men load his rifles, and he lined up the 50 people, and they shot 49 of those

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[14] Donald J. Trump, Twitter (Dec 2, 2015), https://twitter.com/realDonaldTrump/status/672182509111767041.

[15] Donald J. Trump, Twitter (Dec 7, 2015), https://twitter.com/realDonaldTrump/status/673905762087936000; *see also* Riales, *supra* note 13.

> people. . . And for 25 years, there wasn't a problem.[16]

President Trump repeated this anti-Muslim propaganda, adding new flourish. On March 11, 2016, for instance, again equating being a terrorist to being a Muslim, he recounted:

> So General Pershing, . . . they catch 50 terrorists in the Philippines . . . And as you know, swine, pig, . . . a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets. . . . They put the bullets into the rifles. And they shot 49 men. . . . I'm just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country

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[16] C-Span, Donald Trump Campaign Rally in Charleston, South Carolina (Feb. 19, 2016), https://www.c-span.org/video/?404947-1/donald-trump-campaign-rally-charleston-south-carolina (minutes 34:09 to 35:31); Louis Jacobson, *Donald Trump cites dubious legend about Gen. Pershing, pig's blood and Muslims,* Politifact (Feb. 23, 2016), http://www.politifact.com/truth-o-meter/statements/2016/feb/23/donald-trump/donald-trump-cites-dubious-legend-about-gen-pershi/; Jenna Johnson and Jose A. DelReal, *Trump tells story about killing terrorists with bullets dipped in pigs' blood, though there's no proof of it,* Wash. Post (Feb. 20, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/trumps-story-about-killing-terrorists-with-bullets-dipped-in-pigs-blood-is-likely-not-true/; *see also* David Mikkelson, *Pershing the Thought,* Snopes (Apr. 28, 2016), http://www.snopes.com/rumors/pershing.asp, debunking Mr. Trump's story about General Pershing.

> any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in each one. . . For 28 years, there was no terrorism. . . . We have to do what we have to do. We have to clean it out."[17]

As discussed in Section I.D, the President has continued to repeat this propaganda after taking office and as recent as August 17, 2017.[18]

B. The President's Express Desire To Close Down And Surveille Mosques, Profile Muslims, And Create A Muslim Registry.

1. Closing And Surveilling Mosques.

The President has, on numerous occasions, called for closing and surveilling mosques in America. On

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[17] Mr. Trump also equated being Syrian and being a terrorist, breaking in the middle of his story to say, "And by the way, we have to get to the bottom of it, we cannot allow people to come into the country who want to destroy us, we cannot do it. We can't allow the Syrians. We can't allow the migration of the Syrians into the country." *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YouTube (Mar. 12, 2016), https://www.youtube.com/watch?v=-9KOAHf4GCw (minutes 42:45 to 46:45); Mark Z. Barabak, *All in a day's Trump rally: sneering, sarcasm, protests,* Los Angeles Times (Mar. 12, 2016), http://www.latimes.com/nation/politics/la-na-trump-rallies-20160312-story.html; *see also* Lydia Wheeler, *Trump resurrects story of Muslims shot with pig's blood-dipped bullets,* The Hill (Mar. 12, 2016), http://thehill.com/blogs/blog-briefing-room/news-campaigns/272780-trump-resurrects-story-of-muslims-shot-with-pigs.

[18] *See* Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088 (encouraging people to "[s]tudy what General Pershing of the United States did to terrorists when caught.").

November 16, 2015, for example, he expressed his preference for shutting down mosques, saying: "[I]t's something that you're going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is coming from these areas."[19]

Two days later, when asked whether he would actually shut down mosques, Mr. Trump responded that there was "absolutely no choice" but to do so: "A lot of people understand it. We're going to have no choice. There's absolutely no choice."[20]

The President has called for shutting down mosques or the suspicionless surveillance of mosques on numerous other occasions:

- On October 21, 2015, Mr. Trump stated that he was "going to have to certainly look at" closing mosques in the United States.[21]

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[19] Jenna Johnson, *Donald Trump would 'strongly consider' closing some mosques in the United States*, Wash. Post (Nov. 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/.

[20] Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), http://www.politico.com/story/2015/11/trump-close-mosques-216008; *Trump says US will 'have no choice' but to shut some mosques down*, Fox News (Nov. 18, 2015), http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html.

[21] Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, Wash. Post (Oct. 21, 2015), https://www.washingtonpost.com/news/acts-of-

- On November 16, 2015, Mr. Trump said: "You're going to have to watch and study the mosques, because a lot of talk is going on at the mosques."[22]
- On November 19, 2015, Mr. Trump was asked whether his push for increased surveillance of American Muslims could include warrantless searches. He explained that he would consider a series of drastic measures against Muslims: "We're going to have to do things that we never did before. . . . And certain things will be done that we never thought would happen in this country in terms of information and learning about the enemy. And so we're going to have to do certain things that were frankly unthinkable a year ago."[23]
- At a November 21, 2015 rally, Mr. Trump stated: "[J]ust to say it clear—I want surveillance of these people. I want

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faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/.

[22] Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/.

[23] Hunter Walker, *Donald Trump has big plans for 'radical Islamic' terrorists, 2016 and 'that communist' Bernie Sanders*, Yahoo News (Nov. 19, 2015), https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html.

surveillance if we have to, and I don't care. . . . I want surveillance of certain mosques."[24]

- On December 7, 2015, Mr. Trump called for the surveillance of mosques, again equating the Muslim religion with hatred and terror: "Yes, we have to look at mosques . . . . We have no choice. We have to see what's out there, because something is happening in there. Man, there's anger. There's anger. And we have to know about it."[25]
- On June 13, 2016, Mr. Trump stated: "We have to be very strong in terms of looking at the mosques, you know, which a lot of people say, 'Oh, we don't want to do that. We don't want to do that.' We're beyond that."[26]
- On June 15, 2016, Mr. Trump stated: "We have to go and we have to maybe check, respectfully, the mosques."[27]

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[24] Lauren Carroll, *In Context: Donald Trump's comments on a database of American Muslims,* Politifact (Nov. 24, 2015), http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/;.

[25] Jessica Taylor, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S.,* NPR (Dec. 7, 2015), http://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s; Transcript, *Trump Calls for Ban on Muslims Entering the U.S.,* CNN (Dec 8, 2015), http://www.cnn.com/TRANSCRIPTS/1512/08/es.02.html.

[26] *See* Jacobson, *supra* note 22.

[27] Jeremy Diamond, *Trump doubles down on calls for mosque surveillance,* CNN (Jun. 15, 2016),

- On June 19, 2016, when asked what it means to "respectfully check a mosque," Mr. Trump clarified that he meant the suspicionless surveillance and shutdown of mosques: "Well, you do as they used to do in New York, prior to this mayor dismantling. By the way, if you go to France right now, . . . they are closing down mosques. People don't want to talk about it. People aren't talking about it. But look at what they're doing in France. They are actually closing down mosques."[28]

2. Registering American Muslims.

Mr. Trump has repeatedly advocated for registering all Americans who choose to practice the Muslim faith.

On November 19, 2015, Mr. Trump was asked whether he would require Muslims to register or carry a special form of identification that noted their religion, and he responded: "We're going to have to look at a lot of things very closely. We're going to have to look at the mosques. We're going to have to look very, very carefully."[29] The following day, when asked pointedly whether he was in favor of

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http://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/.

[28] *Face the Nation transcripts June 19, 2016: Trump, Lunch, LaPierre, Feinstein,* CBS News (Jun. 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/; *see also* Jacobson, *supra* note 22.

[29] *See* Walker, *supra* note 23.

implementing a database tracking Muslims, he responded, "Oh I would certainly implement that. Absolutely."[30] When asked whether Muslims would be legally obligated to sign into the database, Mr. Trump responded, "They have to be—they have to be."[31]

Mr. Trump was asked how registering Muslims would be different from the Nazis' registration of Jewish people. He responded four times: "You tell me."[32]

The President has echoed his call for a registry of American Muslims on several occasions:

- On November 21, 2015, Mr. Trump reaffirmed his desire to have a database of all Muslims: "So the database—I said yeah, that's alright fine . . . but database is okay, and watch list is okay, and surveillance is okay. If you don't mind, I want to be—I want to surveil."[33]
- The following day, Mr. Trump was asked: "You did stir up a controversy with those comments over the database. Let's try to clear

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[30] Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015), http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716.

[31] *Id.*

[32] *Id.*

[33] ABC 33/40, Donald Trump in Birmingham: Full speech at the BJCC (Nov. 21, 2015), https://www.youtube.com/watch?v=IgvPoFo1zPY (minutes 43:11 to 43:32).

that up. Are you unequivocally now ruling out a database on all Muslims?" He responded, "No not at all."[34]

- The day following that, Mr. Trump stated: "We have to really be vigilant with respect to the Muslim population . . . we have to surveil; we have to create lists; we have the refugees coming in and we have to create lists."[35]

3. *Profiling Muslims.*

On June 19, 2016, Mr. Trump stated that it was "common sense" to profile Muslims.[36] He later went further, stating on September 19, 2016, that there is "no choice" but to profile Muslim people.[37]

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[34] *See* Carroll, *supra* note 22.

[35] *Donald Trump in Ohio: U.S. has become 'soft, weak,'* Dayton Daily News (Nov. 23, 2015), http://www.daytondailynews.com/news/national-govt--politics/donald-trump-ohio-has-become-soft-weak/5ZOBQutE4XSjTxV2NjvFnJ/.

[36] *Face the Nation transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein*, CBS News (June 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/.

[37] Aaron Blake, *Donald Trump doesn't call his position racial profiling. It is.*, Wash. Post (Sept. 20, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/20/donald-trump-doesnt-call-his-position-racial-profiling-it-is/.

C. The President's Specific Pledge To Restrict The Entry Of Muslims Under The Guise Of A Neutral Order.

Mr. Trump repeatedly promised that he would prevent Muslims from entering the U.S. and that he would achieve this result by speaking in terms of "territories" and "extreme vetting" instead of using the word "Muslim." He also previewed that, upon doing so, he would invoke the President's broad immigration powers—just as the Government does now—and justified that position by reference to the internment of Japanese Americans during World War II.

On December 7, 2015, Mr. Trump announced on his website: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[38] The same day that Mr. Trump issued this announcement, he tweeted it with the title "Statement on Preventing Muslim Immigration."[39] Further equating Muslims with hatred and terror, he tweeted, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country.

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[38] Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on May 8, 2017).

[39] Donald J. Trump, Twitter (Dec. 7, 2015), https://twitter.com/realDonaldTrump/status/673993417429524480.

We must be vigilant!"[40] At a rally the same day, Mr. Trump called for "a total and complete shutdown of Muslims," and added: "We have no choice. We have no choice. We have no choice."[41] He also appeared on national television to advocate his ban on Muslims.[42]

On December 8, 2015, the day following the announcement of his intent to ban Muslims, Mr. Trump was asked whether such a "broad approach against all Muslims" would be counterproductive, in contrast to targeting people the Government had reason to investigate. Mr. Trump confirmed that he would not distinguish between Muslims and people suspected of wrongdoing, citing President Franklin D. Roosevelt's World War II Executive Proclamations authorizing the detention and internment of Japanese, German, and Italian aliens: "[L]ook at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it."[43]

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[40] Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States,'* Wash. Post (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.

[41] *Id.*

[42] *Id.*

[43] *Donald Trump On Muslim Travel Ban, Obama And 2016,* YouTube (Dec. 8, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc (minutes 00:46 to 01:03); Michael Barbaro and Alan Rappeport, In Testy Exchange, Donald Trump Interrupts

When asked how border officials might implement his plan, Mr. Trump explained: "They would say, 'are you Muslim?'" The commentator further questioned: "And if they said yes, they would not be allowed in the country?" Mr. Trump responded, "That's correct."[44]

That same day, when asked whether he was given "any pause at all" by being compared to Hitler, Mr. Trump again justified banning Muslims based on President Roosevelt's internment of Japanese Americans, stating: "No because what I'm doing is no different than what F.D.R. did. F.D.R.'s solution for Germans, Italians, Japanese, many years ago."[45] Asked if he was in favor of internment camps, Mr. Trump repeated his reliance upon President Roosevelt's actions during World War II: "He did the same thing."[46]

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and 'Morning Joe' Cuts to Commercial, New York Times (Dec. 8, 2015), https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donald-trump-interrupts-and-morning-joe-cuts-to-commercial/.

[44] *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc (minutes 14:58 to 15:14); *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), http://www.msnbc.com/transcripts/hardball/2015-12-08.

[45] Miriam Hernandez, *Trump Cites History to Defend Muslim Immigration Ban*, ABC 7 (Dec. 9, 2015), http://abc7.com/politics/trump-cites-history-to-defend-muslim-immigration-ban/1116396/.

[46] *Id.*

Two days later, on December 10, 2015, Mr. Trump defended his position by publishing a link to an article stating that Islam is a "very evil and wicked religion," a "false religion," advocating that Muslims should be banned, and making further analogy to the treatment of Japanese during World War II.[47]

On March 9, 2016, Mr. Trump stated denied that a distinction could be made between "radical Islam" and "Islam itself," and stated "we can't allow people coming into this country who have this hatred of the United States."[48] Echoing the justification used by the Government to detain Japanese Americans in *Korematsu*—he stated that it was necessary to include all Muslims because "you don't know who is who."[49] *See Korematsu*, 323 U.S. at 218-19 ("temporary exclusion [of all Japanese Americans] was rested by the military" on the rationale that "it was impossible to bring about an immediate segregation of the disloyal from the loyal").

Moreover, on June 13, 2016, Mr. Trump previewed that he would attempt to defend his religious ban based on the President's immigration authority. Indeed, just as he did in his Order and the government does before this Court, Mr. Trump invoked the language of 8 U.S.C. § 1182(f), stating that "laws of the United States give the president powers to suspend entry into the country of any class of persons . . . as he or she deems appropriate."[50]

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[47] Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/675034063447662592; *see also* Sarah Larimer, *Why Franklin Graham says Donald Trump is right about stopping Muslim immigration*, Wash. Post (Dec. 10, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/.

[48] Transcript, Anderson Cooper 360 Degrees (Mar. 9, 2016), http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html.

[49] *Id.*; *see also* Schleifer, *supra* note 6.

Two days later, on June 15, 2016, Mr. Trump explained that he would not back down from pursuing his "temporary ban on Muslim integration" even if he faced opposition by the Senate, again equating being Muslims with being a radical terrorist. He stated, "You are going to have to watch and are going to have to see. I have done a lot of things that nobody thought I could do."[51]

The government suggests that the President's statement that he would achieve his campaign promise by acting based on "territory" indicates that he abandoned his intent to discriminate against Muslims. Pet. Br. 73-74. That argument is refuted by the President's actual statements, in which he expressly stated that he viewed "territory" as a proxy for the word "Muslim." In particular, on July 21, 2016, Mr. Trump stated, "[W]e must immediately suspend immigration from any nation that has been compromised by terrorism until such time it's proven that vetting mechanisms have been put in place."[52] Three days later, asked whether this language indicated an intent to "pull back from" the "Muslim ban," Mr. Trump made clear that it was not:

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[50] *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats (minutes 5:30 to 6:40).

[51] *Face the Nation transcripts June 5, 2016: Trump*, CBS News (June 5, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/.

> I don't think so. . . In fact, you could say it's an expansion, I'm looking now at territory. People were so upset when I used the word "Muslim": "Oh, you can't use the word 'Muslim.'" Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. . . .
>
> Now, we have a religious, you know, everybody wants to be protected. And that's great. . . . I view it differently. . . .
>
> We're making it territorial. We have nations and we'll come out, I'm going to be coming out over the next few weeks with a number of the places.[53]

The President advocated restricting the entry of Muslims to the United States on numerous other occasions:

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[52] Politico, *Full text: Donald Trump 2016 RNC draft speech transcript* (July 21, 2016), http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974.

[53] Transcript, Meet the Press, NBC News (July 24, 2016), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706; Jenna Johnson, *Donald Trump is expanding his Muslim ban, not rolling it back*, Wash. Post (July 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/.

- On September 18, 2015, when asked about getting "rid of" Muslims, Mr. Trump responded that he was "going to be looking at that and many other things."[54]
- On October 12, 2015, Mr. Trump tweeted: "Muslims escorted into U.S. through Mexico. Now arriving to Oklahoma and Kansas! Congress?"[55]
- On January 2, 2016, Mr. Trump tweeted: "Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!"[56]
- On March 22, 2016, Mr. Trump tweeted that Hillary Clinton was "incompetent" because she would "let the Muslims flow in. No way!"[57]
- On March 24, 2016, Mr. Trump tweeted that "[i]t is amazing how often I am right" about "Muslims."[58]

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[54] *See* Schleifer, *supra* note 3.

[55] Donald J. Trump, Twitter (Oct. 12, 2015), https://twitter.com/realDonaldTrump/status/653774823483703297.

[56] Donald J. Trump, Twitter (Jan. 2, 2016), https://twitter.com/realDonaldTrump/status/683277309969694720.

[57] Donald J. Trump, Twitter (Mar. 22, 2016), https://twitter.com/realDonaldTrump/status/712473816614772736.

[58] Donald J. Trump, Twitter (Mar. 24, 2016), https://twitter.com/realDonaldTrump/status/713012045214531584.

D. The President Has Reaffirmed His Discriminatory Purpose On Several Occasions Since Being Elected.

The government does not meaningfully contest that the reprehensible statements above demonstrate hatred for, and a desire to discriminate against, people of the Muslim faith. It, instead, argues that "nearly all" of the statements demonstrating the President's intent to assail Muslims took place before he was elected, Pet. Br. 12, 22, 71, 73, and that the Court should ignore them because Mr. Trump has since taken the oath of office, Pet. 73.

That argument is easily refuted by the factual record alone. First, the government's suggestion that the oath of office "mark[ed] a profound transition" in the President, Pet. Br. 73, is belied by the fact that he issued an Executive Order, within days of taking the oath, without consulting any national security experts, doing what he said he would do before he took the oath—down to the details of naming "territories" and the legal authority invoked.

Second—far from ever retracting his pledge—the President has made numerous statements connecting his Executive Order to his discriminatory campaign promise since being elected. Indeed, even if there were some rule against considering pre-election statements (a rule that seems to confuse the *weight* that should be given statements with the *admissibility* of statements), the President's post-election references to those sentences would require their consideration here.

Over a month after being elected, Mr. Trump was asked whether he would reevaluate his intention to ban entry of Muslim people. Referring to his earlier pledge, he responded: "You know my plans all along, and I've been proven to be right."[59]

Within a week of taking the oath of office, the President signed his initial Executive Order. Upon reading its abstruse title, "Protecting the Nation from Foreign Terrorist Entry into the United States," he added, "We all know what that means"—an obvious reference to his well-known pledge to prevent Muslims from entering the country.[60] The same day, President Trump explained on national television that the exceptions he had set forth in his Order were intended to prioritize Christians over Muslims. He stated that he sees Christians as a "priority" and—expressly drawing a comparison between Christian refugees and Muslim refugees—

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[59] Video, *Trump: 'You've known my plans' on proposed Muslim ban*, Wash. Post (Dec. 21, 2016), https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html; Abby Phillip and Abigail Hauslohner, *Trump on the future of proposed Muslim ban, registry: 'You know my plans,'* Wash. Post (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/.

[60] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173.

he explained that he was "going to help" Christians.[61]

On February 4, 2017, President Trump referred to his initial Executive Order the same way he had throughout his campaign—as a "ban"—stating that "certain Middle-Eastern countries agree with the ban."[62] After the government received stays in judicial proceedings across the country while they revised the Executive Order, the President's senior advisor stated that the new Order would be designed to achieve "the same basic policy outcome" as the first Order and to address only "very technical issues."[63]

On March 15, 2017, the day that President Trump's second Order was first enjoined, President Trump himself stated that the Order was simply "a watered down version of the first order" and expressed that he would prefer to "go all the way" and do "what [he] wanted to do in the first place."[64] The next day, President Trump reiterated his oft-expressed view during the campaign that "[t]he assimilation [of Muslims in the U.S.] has been very, very hard. It's been a very, very difficult process."[65]

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[61] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees.

[62] Politico, *Trump warns of 'death & destruction' if U.S. not allowed to limit immigration* (Feb. 4, 2017), http://www.politico.com/story/2017/02/trump-travel-ban-judge-james-robart-234643; Donald J. Trump, Twitter (Feb. 4, 2017), https://twitter.com/realDonaldTrump/status/827865957750161408.

[63] Fox News, Transcript, *Miller: New order will be responsive to the judicial ruling* (Feb. 21, 2017), http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis/.

In these proceedings, the Acting Solicitor General has repeatedly represented that the President's revised Executive Order bears no connection to the "Travel Ban" or "Muslim Ban" for which the President long advocated, attempting to sanitize the Order as a national security judgment based on a need for greater information from the selected nations. *See, e.g.*, Pet. Br. 65, 70.[66] The President's own statements since issuing the revised order, however, make clear that he views it as effectuating his long-promised "Travel Ban." Indeed, he has derided the Department of Justice for making the language in the Executive Order "politically correct," directly implying that his actual intention is to single out Muslims (indeed, his complaint cannot reasonably be attributed any other meaning). In particular, the President has made the following statements:

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[64] Andrew Prokop, *With Trump's new travel order blocked and his health bill flailing, his agenda's in tatters*, Vox (Mar. 16, 2017), http://www.vox.com/policy-and-politics/2017/3/16/14935784/trump-achievements-accomplishments.

[65] Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Wash. Post (Mar. 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/16/donald-trump-explained-twitter-the-universe-and-everything-to-tucker-carlson/.

[66] *See also* Garrett Epps, *Trump's Tweets May Have Sunk His Travel Ban*, Atlantic (June 5, 2017), https://www.theatlantic.com/politics/archive/2017/06/trumps-tweets-may-have-sunk-his-travel-ban/529167/. The President's Press Secretary made similar representations that "it's not a travel ban." Peter W. Stevenson, *Trump says it's a travel 'ban.' His staff insisted it wasn't*, Wash. Post (June 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/05/trump-says-its-a-travel-ban-his-staff-insisted-it-wasnt/.

- On April 26, 2017, the President stated, "the Ninth Circuit rules against the ban . . . ridiculous."[67]
- On June 3, 2017, the President stated, "We need the Travel Ban as an extra level of safety!"[68]
- Two days later, the President stated, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[69]
- The same day, he stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct

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[67] Donald J. Trump, Twitter (April 26, 2017), https://twitter.com/realDonaldTrump/status/857177434210304001.

[68] Donald J. Trump, Twitter (June 3, 2017), https://twitter.com/realDonaldTrump/status/871143765473406976.

[69] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871674214356484096.

version they submitted to S.C."[70] He further stated, "we need a TRAVEL BAN . . . not some politically correct term that won't help us protect our people."[71]

- One week later, on June 13, 2017, he wrote: "the 9th Circuit did it again - Ruled against the TRAVEL BAN."[72]

Despite being updated daily, the President's website continued to call for a "total and complete shutdown of Muslims entering the United States" when he issued his initial Executive Order, his revised Executive Order, and for long after. Notwithstanding repeated notification,[73] the President continued to call for a total and complete ban on Muslims from the U.S. until May 8, 2017, when the Acting Solicitor General was questioned about it by the Fourth Circuit.[74]

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[70] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

[71] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871899511525961728

[72] Donald J. Trump, Twitter (June 13, 2017), https://twitter.com/realDonaldTrump/status/874578159676665857.

[73] *See, e.g.*, Complaint at 7, *Hawaiʻi v. Trump*, 1:17-cv-00050 (D. Haw. Feb. 3, 2017); Amended Complaint at 8, *Hawaiʻi v. Trump*, 1:17-cv-00050 (D. Haw. Mar. 7, 2017).

[74] Cristian Farias, *Trump's 'Muslim Ban' Pledge Scrubbed From Website Just As Judges Ask About It*, Huffington Post (May 9, 2017), http://www.huffingtonpost.com/entry/trump-muslim-ban-pledge-website_us_591204dfe4b050bdca5ff6c1; Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing*

Most recently, on August 17, 2017, the President again promoted the same anti-Muslim propaganda he repeated while campaigning, that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood. *See supra* Part I.A.2. In the immediate wake of a terror attack in Barcelona, he stated, "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"[75]

II. This Court's Failure To Intervene Would Be A Serious Abdication Of The Judicial Role.

The above factual record makes clear that the President's decision to target people from six Muslim-majority countries is intended to effectuate his longstanding and reaffirmed (let alone never disavowed) pledge to restrict the entry of Muslim people. Discrimination against a protected class, such as religion, on the basis of such overt animus is the most obvious and fundamental abuse of government authority that the Establishment and Equal Protection Clauses exist to protect. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating

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Muslim Immigration (Dec. 7, 2015), https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on May 8, 2017).

[75] Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088.

factor in the decision, . . . judicial deference is no longer justified.").

The government argues that regardless of whether the President is, in fact, using his power to oppress Muslims, the Court must defer to the Order's facial purpose and the Executive's broad authority over matters relating to immigration. *See* Pet. Br. at 62-66. Not so. It is the Court's duty to protect discrete and insular minority communities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and to prevent the exercise of Executive power to "harm a politically unpopular group," *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted). Moreover, this Court has recognized that courts have a duty to enforce the Constitution even when the Executive claims national security concerns. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (the President does not "have the power to switch the Constitution on or off at will" by invoking national security); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("Our precedents . . . make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role."). Indeed, the importance of judicial intervention is at its highest in these circumstances. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, concurring in the judgment, and dissenting in part) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive

Branch of Government, whose particular responsibility is to maintain security.").

The Government's argument is not novel. It is the same line of argument it used advanced 70 years ago to convince this Court to uphold the internment of Japanese Americans in *Korematsu*, now viewed as one of the most shameful decisions in American history. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (Complete "judicial acquiescence or abdication" in the face of executive discretion "has a name. That name is Korematsu."); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011) (*Korematsu* "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute").[76]

The MacArthur Justice Center urges the Court not to overlook the extensive record showing that Executive Order 13780 was motivated by animus against people of the Muslim faith, and to avoid repeating the terrible mistake made in generations past.

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[76] Indeed, at oral argument the Ninth Circuit asked the Acting Solicitor General how the government would distinguish *Korematsu*. Despite having already defended Executive Order 13780 for months, he was unable to provide a single meaningful distinction, stating that he had not reviewed the details of *Korematsu* and offering only that if this case were *Korematsu*, "the United States would not be defending it." Oral Argument at 20:22 to 21:30, No. 17-15589 (9th Cir. Mar. 15, 2017), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011579. The United States did, of course, defend the reprehensible order in *Korematsu*. Its months-long defense of this Order without meaningfully considering whether it is advocating the same disgraceful end should give this Court great pause.

CONCLUSION

For the foregoing reasons, the MacArthur Justice Center respectfully urges the Court to affirm the courts below.

Respectfully submitted,

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AND
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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR SCHOLARS OF FEDERAL JURISDICTION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are legal scholars who study the scope and limits of federal judicial power.[2] Their interest in these appeals arises from the important questions that the appeals present in relation to mootness. Amici urge the Court to dismiss the appeals as moot but forbear from vacating the judgments below under the narrow doctrine announced in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

STATEMENT

These appeals arise from the government's challenges to preliminary injunctions barring enforcement of certain provisions of an executive order dated March 6, 2017 that sought to (i) temporarily ban entry into the United States of noncitizens from several predominantly Muslim countries for 90 days, (ii) suspend refugee admissions under the U.S. Refugee Admissions Program ("USRAP") for 120 days, and (iii) reduce the number of refugees to be admitted in fiscal year 2017.

A. January Executive Order

On January 27, 2017, President Donald J. Trump signed Executive Order No. 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1").

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[1] No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a blanket letter of consent. Respondents the International Refugee Assistance Project and the State of Hawaii have consented to the filing of this brief.

[2] A complete list of amici is set forth in the appendix to this brief.

The immediate effects of EO-1 included, among other things, suspending the entry of noncitizens from seven predominantly Muslim countries for a period of 90 days. *See* EO-1, § 3(c) (suspending entry of noncitizens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen). EO-1 instructed the Secretary of State, Secretary of Homeland Security, and Director of National Intelligence to review those countries' procedures for vetting applicants for admission to the United States and to assess the information used to determine whether noncitizens seeking entry posed a national security risk. *See, e.g., id.* § 3(a)-(b), (h). Other provisions of EO-1 reduced the number of refugees to be admitted to the United States in fiscal year 2017 from 110,000 to 50,000 and suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days. *See* EO-1, § 5(a), (c)-(d). The President's actions substantially effectuated his well-publicized proposal as a presidential candidate to implement a "total and complete shutdown of Muslims entering the United States." JA 478.

EO-1 was promptly challenged and, in February 2017, the U.S. District Court for the Western District of Washington enjoined enforcement of certain provisions of the order. *See Washington* v. *Trump*, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The district court enjoined enforcement of, *inter alia*, Sections 3(c) (suspending entry from listed countries for 90 days) and 5(a) (suspending USRAP for 120 days). The Ninth Circuit declined to stay the district court's decision pending appeal. *See Washington* v. *Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

No injunction issued concerning EO-1's requirements relating to any internal executive review of current procedures and informational needs associated with the adjudication of visas, admissions, or other immigration benefits. *See, e.g.*, EO-1, §§ 3(a)-(b), 3(h).

B. March Executive Order

On March 6, 2017, the President signed a second, superseding Executive Order ("EO-2"), also captioned "Protecting the Nation from Foreign Terrorist Entry Into the United States." Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). After the President signed EO-2, the government sought (and obtained) dismissal of the Ninth Circuit proceedings relating to EO-1 rather than seek *en banc* or certiorari review.

Like EO-1, EO-2 restricted entry of most noncitizens from enumerated predominantly Muslim countries for a period of 90 days "from the effective date of th[e] order." EO-2 differed in that it did not apply to Iraqi nationals. EO-2, § 2(c).[3] Like EO-1, EO-2 instructed national security agencies to conduct a review to determine what information was needed to assess whether individuals seeking admission from other countries posed a threat to national security. *Id.* § 2(b). EO-2 also suspended USRAP for a 120-day period "from the effective date of th[e] order," and reinstated the reduction to 50,000 of the number of refugees to be admitted to the United States in fiscal year 2017. *Id.* §§ 6(a)-(b). Section 14 of EO-2, entitled "Effective Date," provided that EO-2 would take effect on March 16, 2017. *Id.* § 14.

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[3] EO-2 exempted several categories of persons—such as lawful permanent residents of the United States—whose due process rights the Ninth Circuit had concluded were violated by EO-1. *See **Washington***, 847 F.3d at 1165-1166. Alluding to these exemptions, the President publicly described EO-2 as "a watered-down version of [EO-1]." JA 183.

EO-2 was likewise immediately challenged. On March 15, 2017, the U.S. District Court for the District of Hawaii enjoined Sections 2 and 6 of EO-2 in their entirety, including the internal review and reporting provisions in, for example, Sections 2(a), (b), (d), and (e). On the same day, the U.S. District Court for the District of Maryland separately enjoined Section 2(c)'s 90-day entry ban, but unlike the district court in *Hawaii*, did not extend the injunction to include any of the review and reporting provisions in Section 2. On May 25, 2017, the *en banc* Fourth Circuit affirmed the latter ruling in relevant part. *See International Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 604-606 (4th Cir. 2017) (en banc) ("*IRAP*"). On June 12, 2017, the Ninth Circuit lifted the injunction on enforcement of Section 2's internal review and reporting provisions, but affirmed the injunction as to Sections 2(c), 6(a), and (b). *See Hawaii* v. *Trump*, 859 F.3d 741, 757 (9th Cir. 2017).

On June 13, 2017, the government filed a consent motion in the *Hawaii* case, requesting that the mandate issue immediately so that the "Government may then implement" the review provisions of Sections 2 and 6 of EO-2. Consent Mot. To Issue Mandate 3-4, Doc. 316, *Hawaii* v. *Trump*, No. 17-15589 (9th Cir. filed June 13, 2017). The Ninth Circuit granted that motion on June 19, 2017.

Since June 19, 2017, no injunction or other judicial restraint has limited the government's ability to implement the internal executive review and reporting procedures of Sections 2 and 6 of EO-2.

C. June 14 Memorandum

The government petitioned for writs of certiorari in the *Hawaii* and *IRAP* cases and moved to stay the lower courts' injunctions. In opposing certiorari, respondents argued that any challenge to Section 2(c) of EO-2 would be moot before the Court could hear it because, by its own terms, Section 2(c) expired at 12:01 a.m., Eastern Daylight Time on June 14, 2017, 90 days after the "effective date of th[e] order," which was 12:01 a.m., Eastern Daylight Time on March 16, 2017. EO-2, §§ 2(c), 14.

Apparently in response to that argument, on June 14, 2017, after Section 2(c) had already expired at 12:01 a.m. that same day, the President issued a memorandum declaring that the "effective date" of EO-2's enjoined provisions would be "the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." JA 1442 ("Memorandum"). The Memorandum further stated that it "should be construed to amend" EO-2 "[t]o the extent it is necessary." *Id.*

D. This Court's June 26 Order

On June 26, 2017, this Court granted certiorari, consolidated the *Hawaii* and *IRAP* appeals, and stayed the appealed injunctions of EO-2's operative provisions insofar as they applied to foreign nationals with "no connection to the United States at all." *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam). The Court stated:

> In light of the June 12 decision of the Ninth Circuit vacating the injunction as to § 2(a), the executive review directed by that subsection may proceed promptly, if it is not already underway. EO-2 instructs the Secretary of

> Homeland Security to complete this review within 20 days, after which time foreign governments will be given 50 days further to bring their practices into line with the Secretary's directives. §§ 2(a)-(b), (d).

Id. at 2088-2089. The Court noted that it "fully expect[ed] that the relief we grant today will permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of § 2(c)." *Id.* at 2089.

The Court's June 26 order also directed the parties, in briefing the appeal, to address whether the challenges to Section 2(c) became moot on June 14, 2017. 137 S. Ct. at 2086-2087. No party has argued to this Court that the challenges are moot.

E. Implementation Of The March Executive Order

After the mandate issued in the *Hawaii* case on June 19, 2017, the government began to implement the review and reporting processes required by EO-2. On June 29, senior administration officials confirmed that "review of additional procedures for vetting of refugees ... began ... on June 23rd."[4] On or about July

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[4] U.S. Dep't of State, *Background Briefing on the Implementation of Executive Order 13780 Protecting the Nation From Foreign Terrorist Entry Into the United States* (June 29, 2017), *available at* https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm; *see also* U.S. Dep't of Homeland Security, *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* (June 29, 2017), https://web.archive.org/web/20170629221445/https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states (indicating that review of the USRAP application and adjudication processes was "underway").

10,[5] the Department of Homeland Security ("DHS") issued its Section 2(b) report to the President concerning the results of the worldwide review described in Section 2(a). On September 11, a spokesperson stated that DHS would provide a further report "in the coming weeks."[6] At that time the State Department was "engaging with foreign governments to meet ... new standards for information sharing."[7] At least some of the consequences of the required review have already emerged. For example, USCIS will begin expanding in-person interviews for certain applicants for permanent residency effective October 1 to "compl[y] with Executive Order 13780."[8]

The government began implementing Section 2(c)'s 90-day travel restriction within 72 hours of this Court's June 26 ruling—*i.e.*, no later than June 29, 2017. JA 1442; *see also* Opp. To Emergency Mot. 6, *Hawaii* v. *Trump*, No. 17-50 (D. Haw. filed July 3, 2017) (Doc.

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[5] *See* Culliford, *U.S. Demands Nations Provide More Traveler Data or Face Sanctions*, Reuters (July 13, 2017), *available at* http://live.reuters.com/Event/Live_US_Politics/1012197528 (quoting cable that "outlines the results of the report submitted to the President on July 10").

[6] Zapotosky, *Supreme Court allows broad enforcement of travel ban—at least for a day*, Wash. Post (Sept. 11, 2017), https://www.washingtonpost.com/world/national-security/justice-dept-again-asks-supreme-court-to-allow-broad-enforcement-of-travel-ban/2017/09/11/6c3853ae-970b-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.b7b019502bf6.

[7] *Id.*

[8] USCIS, *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants* (Aug. 28, 2017), https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.

301). A June 26 DHS press release explained that the "granting of a partial stay of the circuit injunctions ... has allowed the Department of Homeland Security to largely implement the President's Executive Order."[9] Two days later, the State Department promulgated guidance concerning implementation of EO-2 in a cable to visa-adjudicating posts.[10] The cable stated that "implementation of [EO-2] sections for which injunctions have been lifted will begin June 29, 2017."[11]

More specifically, the cable stated that Section 2(c)'s "90-day suspension of entry will be implemented worldwide at 8:00 p.m. Eastern Daylight Time (EDT) June 29, 2017."[12] The June 28 cable also stated that the USRAP refugee program "is suspended for 120 days."[13]

SUMMARY OF ARGUMENT

These appeals concern the government's challenge to preliminary injunctions against enforcement of three specific provisions of EO-2. That challenge is or shortly will be moot.

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[9] *See* DHS, Press Release, *DHS Statement On U.S. Supreme Court Decision On The President's Executive Order On Protecting The Nation From Foreign Terrorist Entry Into The United States* (June 26, 2017), https://www.dhs.gov/news/2017/06/26/dhs-statement-us-supreme-court-decision-president-s-executive-order-protecting.

[10] *See* Sec'y, U.S. State Dep't, *(SBU) Implementing Executive Order 13780 Following Supreme Court Ruling—Guidance to Visa-Adjudicating Posts* (June 28, 2017), *available at* http://live.reuters.com/Event/Live_US_Politics/989297085.

[11] *Id.*

[12] *Id.*

[13] *Id.*

By their terms, two of the provisions at issue expired months ago. EO-2 states, in a provision never enjoined by any court, that its "effective date" was March 16, 2017. Sections 2(c) and 6(a) were due to expire within 90 and 120 days, respectively, of that effective date and those time periods now have run.

Independently, all three contested provisions of EO-2 began to be implemented when this Court stayed the injunctions in its June 26, 2017 decision. Even assuming Sections 2(c), 6(a), and 6(b) were not "effective" until June 26, all three provisions will have run their course before or shortly after this Court hears oral argument. The government's challenge to the injunctions accordingly no longer presents a live case or controversy (or shortly will cease to do so), thus mooting the appeals.

Given that the appeals are or shortly will be moot, the only remaining question is whether the Court should vacate the judgments of the courts of appeals. The Court should not do so. The mootness of these cases has nothing to do with the "vagaries of circumstance," and everything to do with the government's choice to impose the restrictions in question for only a short period, and by its conscious, strategic, and voluntary decisions not to expedite litigation during that period. "The case is therefore one where the United States, having slept on its rights, now asks [the Court] to do what by orderly procedure it could have done for itself." *Munsingwear*, 340 U.S. at 41. Accordingly, the correct course is to dismiss the petitions for certiorari while leaving the judgments below in place.

ARGUMENT

I. MOOTNESS IS A THRESHOLD JURISDICTIONAL ISSUE THAT MUST BE ADDRESSED BEFORE THE MERITS

The "exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). This requirement reserves federal courts' power for controversies that are "definite and concrete" and "touch[] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). The "case or controversy" requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984).

Mootness doctrine bars the federal courts from considering cases in which "'the parties lack a legally cognizable interest in the outcome.'" *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979)). This Court has accordingly recognized that mootness is "a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam) (internal quotation marks omitted). Because "moot questions require no answer," *Missouri, Kan. & Tex. Ry. Co.* v. *Ferris*, 179 U.S. 602, 606 (1900), resolution of a controversy that has become moot "amount[s] to no more than an advisory opinion," which federal courts are without power to provide, *Boston Firefighters Union Local 718* v. *Boston Chapter NAACP, Inc.*, 468 U.S. 1206, 1210 (1984).

Mootness at any stage of litigation forecloses judicial review—even if a justiciable question existed at an earlier time. *See, e.g.*, *Arizonans for Official English* v.

Arizona, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam) (dispute was moot because "[t]he case [] lost ... its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law").

Mootness may arise, as in these appeals, in the context of an appellate challenge to a preliminary injunction. *See, e.g., Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985); *University of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981). In such an appeal, the only issue before the Court is "whether the preliminary injunction should have issued." *Honig*, 471 U.S. at 149. Once the enjoined conduct has ceased, "the correctness of the decision to grant [the] injunction ... is moot." *Camenisch*, 451 U.S. at 394. Where the injunction tied to the conduct "expired by its own terms, ... there remain for this Court no actual matters in controversy." *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 367 (1960) (internal quotation marks omitted); *see also Burke* v. *Barnes*, 479 U.S. 361, 363 (1987) (legislators' challenge to pocket veto was mooted when "[t]he bill in question expired by its own terms"); *Alejandrino* v. *Quezon*, 271 U.S. 528, 532 (1926) (action to enjoin legislator's disciplinary suspension was mooted when suspension expired).

II. THESE APPEALS WILL BE MOOT BEFORE (OR VERY SHORTLY AFTER) THE COURT HEARS ORAL ARGUMENT

A. According to EO-2's stated "Effective Date," Sections 2(c) and 6(a) expired months ago. Section 14 of EO-2 states that the order "is effective at 12:01 a.m., eastern daylight time on March 16, 2017." EO-2, § 14. Section 2(c), in turn, suspended entry into the United States of designated individuals "for 90 days from the effective date of this order." *Id.* § 2(c). Thus, as the government initially conceded, "Section 2(c)'s 90-day suspension" presumptively "expire[d] in early June," specifically at 12:01 a.m. Eastern Daylight Time on June 14, 2017. Gov't Stay Mot. 11, *International Refugee Assistance Project* v. *Trump*, No. 17-1351 (4th Cir. filed Mar. 24, 2017) (Doc. 35). Similarly, Section 6(a) of EO-2 suspended refugee travel and decisions on applications for refugee status "for 120 days after the effective date of this order." On its own terms, therefore, Section 6(a) expired on July 14, 2017. Expiration of these two provisions of EO-2 mooted the government's challenge to the injunctions against their implementation.

The government identifies no basis for disagreement with this straightforward view of the order's plain terms and their effect. It merely points to EO-2 itself, along with unspecified "background legal principles" and "common sense," to support its contention that the preliminary injunctions issued in March somehow "delayed or tolled" the 90-day period specified in Section 2(c). Pet. Br. 36. But nothing in EO-2 contemplates any delay or "tolling" of the time periods provided in Sections 2(c) and 6(a), much less suggests that those two provisions could be tolled while other provisions of EO-2 remained subject to "the effective date of th[e] order" that the order itself specifies, *i.e.*, March 16, 2017. Instead, EO-2 directs that entry be suspended "temporarily" during a fixed, discrete interval commencing at 12:01 a.m. Eastern Daylight Time on March 16, 2017, and ending 90 days later, to facilitate the "review" described in Section 2(a)—which, as explained above (pp. 6-8), has proceeded notwithstanding the injunctions. It is entirely consistent with "common sense" to conclude that EO-2 means what it says: when the specified interval ends, so does any suspension of entry. The same conclusion applies equally to Section 6(a)'s suspension of refugee travel and status decisions. That the lower courts enjoined enforcement of these provisions should not prompt this Court to extend their effective dates or imply a tolling provision that EO-2's plain terms do not contemplate. This is especially true where the government has treated the order as "effective" all along, by implementing other, complementary requirements of EO-2.[14]

Nor does the President's June 14 Memorandum "put[] the issue to rest," as the government contends. Pet. Br. 37. *First*, the Memorandum issued on June 14, 2017, *after* Section 2(c)'s suspension of entry had already expired at 12:01 a.m. that same day. The Memorandum purported to "provide[] guidance" concerning Section 2(c) or, if necessary, "amend" that provision "[i]n light of questions in litigation." JA 1441-1442. But by the time the Memorandum issued, there was no effective provision suspending entry as to which the Memorandum could provide guidance or effect an amendment. The government has articulated no reason the Court should construe Section 2(c) as surviving the very expiration that the June 14 Memorandum (belatedly and ineffectively) sought to address.

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[14] *See, e.g.*, DeChiaro, *Travelers From Six Muslim Countries Drop Without Travel Ban*, Roll Call (June 12, 2017), https://www.rollcall.com/news/policy/travelers-six-muslim-countries-drop-without-travel-ban (noting DHS "implemented some new vetting procedures in accordance with a section of the March 6 order that was not affected by the courts"; quoting DHS press secretary as stating "'Section 5 allows us to continue to work on uniform vetting and screening procedures for all countries'").

Second, to the extent the government contends that the Memorandum somehow resuscitated the defunct Section 2(c), or amended Section 6(a) so as to forestall its expiration, it did neither. 8 U.S.C. § 1182(f), which the President invoked as authority for issuing EO-2, requires him to act "by proclamation." Thus, the suspension power historically has been exercised by proclamation, and in some instances by executive order. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* 6-10 (2017) (listing executive orders and proclamations). Both are formal documents that require a specific recitation and must be reviewed by the Director of the Office of Management and Budget and the Attorney General before they are final. *See* 1 C.F.R. Part 19 (setting forth requirements for executive orders and proclamations); Exec. Order No. 11,030 (governing preparation of executive orders and proclamations); Exec. Order No. 11,354 (amending EO 11,030).

Plainly, the Memorandum is not a proclamation or executive order. It omits the recitation required by 1 C.F.R. § 19.1(g), and there is no indication the Memorandum was subject to review by the Director of the Office of Management and Budget and the Attorney General. These requirements are not trivial. The D.C. Circuit recognized as much when it rejected a challenge to certain presidential action as insufficiently formal because there was no "relevant statute or judicial decision requiring the President [when taking such action] to act by Executive Order or any other formal proclamation." *American Fed'n of Gov't Employees, AFL-CIO* v. *Carmen*, 669 F.2d 815, 820 n.27 (D.C. Cir. 1981). Here, by contrast, a "relevant statute," Section 1182(f), expressly constrains the President to proceed formally. An exercise of the suspension power by memorandum therefore would constitute an impermissible end run around statutory requirements. The Ninth Circuit recognized this in rejecting a purported modification of EO-1 via "[a]uthoritative [g]uidance." *Washington*, 847 F.3d at 1166. The same fate should meet any attempt to rescue or amend Sections 2(c) and 6(a) of EO-2 by means other than an actual proclamation or executive order.

B. Even if the June 14 Memorandum somehow salvaged Sections 2(c) and 6(a) from becoming moot, all three contested provisions will cease to be effective by the time this Court hears argument or shortly thereafter. That is because, on the government's own reading of EO-2 and the Memorandum, Sections 2(c), 6(a), and 6(b) of EO-2 became operative as of "the date and time at which the ... injunctions [we]re lifted or stayed with respect to [each] provision"—specifically, on the morning of June 26, when this Court issued its ruling staying the appealed-from injunctions. *See Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087-2089 (2017).

Put differently, even taking June 26 (rather than March 16) as the effective date of Section 2(c), that provision's entry-suspension policy will lapse 90 days later, *i.e.*, on September 24, 2017. Similarly, Section 6(a), which suspends the admission of refugees under USRAP for "120 days from the effective date of [the] order," will expire on October 24, 2017.[15] And Section

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[15] Even if the Court concludes that mootness doctrine does not prevent it from adjudicating the government's soon-to-be-moot challenge to Section 6(a), an important prudential question exists whether the Court should "decide such momentous constitutional issues based on a request for such narrow and temporary relief." *ACLU* v. *Clapper*, 804 F.3d 617, 626 (2d Cir. 2015); *see also Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J.,

6(b), which limits the entry of refugees to no "more than 50,000 [] in fiscal year 2017" will have no effect after September 30, the last day of the 2017 fiscal year. *See, e.g.*, S. Rep. No. 114-264, at 1 (2017) ("[M]aking appropriations ... for the fiscal year ending September 30, 2017[.]"). Accordingly, even to the extent the provisions at issue have not already expired, all three will shortly do so, mooting the appeals.[16]

As set forth in detail above (pp. 6-8), the government's own statements confirm that it implemented Sections 2(c), 6(a), and 6(b) after this Court's June 26

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dissenting) ("Petitions [] have been denied because, even though serious constitutional questions were raised, it seemed ... that time would soon bury the question[.]").

[16] *See* Litman, *Symposium: The mootness games*, SCOTUSblog (July 11, 2017), http://www.scotusblog.com/2017/07/symposium-mootness-games/ ("[T]he case will likely be moot by the time the court hears argument in the fall, or reaches a decision."); Rappaport, *Travel ban issue will be moot before SCOTUS date—here's why*, TheHill (June 28, 2017), http://thehill.com/blogs/pundits-blog/immigration/339825-travel-ban-will-be-moot-before-it-reaches-supreme-court-heres ("This will moot the travel ban issues before the [C]ourt reconvenes to hear arguments on the merits of the case."); Lederman, *It's All About that Stay (and Its Surprising Limits)*, Just Security (June 26, 2017), https://www.justsecurity.org/42550/stay-or-lack-thereof/ ("No, the case will be moot for two other reasons: For one thing, the 90-day entry ban goes into effect 72 hours from now, at least as to some aliens (see below), and thus it will expire by its terms on September 27. Moreover, as the Court explains, by October the Section 2 "internal review" should be completed ... and therefore the predicate for the entry ban will be kaput by then, too."); Epps, *Trump's Limited Travel Ban Victory*, Atlantic (June 26, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-trump-administrations-limited-victory/531708/ ("[T]he court merely granted review, and delayed actual consideration of the case until the opening of next October's term—by which time the specific issue will most likely be moot.").

order issued, conclusively demonstrating that those provisions "took effect" no later than that date. In an "Important Announcement" published on July 14, for example, the U.S. Department of State's Bureau of Consular Affairs clarified that it "began implementing [EO-2] at our embassies and consulates abroad in compliance with the Supreme Court's decision and in accordance with the Presidential Memorandum issued on June 14, 2017." U.S. Dep't of State, *Important Announcement: Executive Order on Visas*, https://travel.state.gov/content/travel/en/news/important-announcement.html (last visited Sept. 18, 2017).

In addition, the government has explained that Sections 2(c), 6(a), and 6(b) were designed "to operate in tandem with the parallel reviews," Reply Br. in Support of Application for Stay Pending Appeal 5, prescribed in EO-2 to "assess whether current ... procedures are adequate to detect terrorists seeking to infiltrate the Nation," EO-2, § 1(f). The government has been free to implement—and indeed has implemented—those review procedures since at least June 19. *See supra* pp. 6-8. The parallel review of admission procedures that was the predicate for the contested provisions of EO-2 will be complete either by the time this Court hears argument or shortly thereafter.

C. No exception to the doctrine of mootness applies. The appeals do not fall within "the established exception to mootness for disputes capable of repetition, yet evading review." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). That exception applies "only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles*

v. *Lyons*, 461 U.S. 95, 109 (1983). Here, the challenged conduct is not "capable of repetition" within the meaning of the exception because there is no "reasonable showing" that similarly situated individuals "will again be subjected to the alleged illegality." *Id.*

Although the President could theoretically issue a new order (or extend the existing order) in the future, "'[s]uch speculative contingencies afford no basis for [the Court's] passing on the substantive issues ... with respect to the' now-expired provisions." *Burke*, 479 U.S. at 364-365 (quoting *Hall*, 396 U.S. at 49-50); *see also Rendell* v. *Rumsfeld*, 484 F.3d 236, 242 (3d Cir. 2007) ("[i]t would be speculation upon speculation were one to attempt a prediction" about possible repetition); *cf. Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 123-124 (1974) (finding policy was capable of repetition because it was not "contingent upon executive discretion"). And even if any such new order (or extension of the existing order) might overlap with the one at issue in these appeals, it would nonetheless require a fresh assessment by the lower courts of any material differences in the factual record and evidentiary basis for the new (or renewed) order. *See, e.g., Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000) (with respect to actions that "took place after the Court of Appeals issued its decision" and "the prospect of future violations," finding that "[t]hese issues have not been aired in the lower courts; they remain open for consideration on remand"); *Fortson* v. *Toombs*, 379 U.S. 621, 622 (1965) (declining to resolve mootness issues arising on appeal where "the situation

... changed somewhat" since the trial court's decision).[17]

III. THE WRITS OF CERTIORARI SHOULD BE DISMISSED WITHOUT VACATING THE DECISIONS BELOW

A. The proper disposition of appeals that have become moot turns on the "equitable tradition of vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). The doctrine is "based solely upon determining what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case," including "the nature and character of the conditions which have caused the case to become moot." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916) (quoting *South Spring Hill Gold Min. Co.* v. *Amador Medean Gold Min. Co.*, 145 U.S. 300, 302 (1892)); *see also* 28 U.S.C. § 2106.

One of the amici before this Court, relying on *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), asserts that "vacatur is the rule, and letting the lower court decision stand is the exception." CJLF Amicus Br. 16. In fact, the law is to the contrary. As the Court concluded unanimously in *U.S. Bancorp*, "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." 513 U.S. at 26. This principle follows not only from considerations of fairness, but also because "'"[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* at 26-27 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). Otherwise, "[t]o allow a party ... to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the ordinary operation of the federal judicial system." *Id.* at 27; *see also Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009). Thus, although there are circumstances where a "*Munsingwear* vacatur" is appropriate, it is by no means the default rule or reflexively applied.

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[17] These appeals are also not within the exception for "voluntary cessation," for the straightforward reason that the relevant provisions of EO-2 either have expired or will soon expire by their own terms and as intended. The government "has not voluntarily ceased anything," *Rendell*, 484 F.3d at 243, *e.g.*, by repealing or declining to implement the contested provisions.

B. When considering whether to vacate a lower court judgment where the case has become moot on appeal, "[t]he principal condition to which [this Court has] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24. In this case, petitioners' voluntary actions are indeed responsible for the mootness of these cases, in three respects.

First, the language of the Executive Order itself is directly responsible for the fact that the challenge at issue in *IRAP* has now become moot, and the one in *Hawaii* will shortly become moot as well. Section 2(c) specifically provides that suspension of entry of nationals from the six designated countries will last "for 90 days from the effective date of this order," and Section 6(a) similarly provides for the suspension of refugee admissions "for 120 days after the effective date of this order." The President adopted these time limits expressly with an eye toward litigation. *See* EO-2, § 1(i) ("[I]n order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order[.]"). Thus, whereas a harder case might arise when voluntary actions unrelated to the underlying litigation cause mootness, *see, e.g., U.S. Bancorp*, 513 U.S. at 25 n.3, here, there is a direct and inseparable connection between the two.

Second, the mootness of the government's appeal of the injunctions can also be attributed to the separate voluntary action reflected in the President's June 14 Memorandum, which purported to alter "the effective date of each enjoined provision." JA 1442. That Memorandum was a specific and direct response to mootness concerns that had arisen in the litigation. *See id.* (stating that the memorandum was drafted "[i]n light of questions in litigation about the effective date of the enjoined provisions and in the interest of clarity"). The Memorandum therefore reflected a decision by the Executive Branch to start the relevant clocks at the moment the enjoined provisions went into effect—while maintaining expiration periods that have now expired or shortly will do so.

Third, although the facts just described created a manifest prospect that the time periods specified in EO-2 would run before resolution of the appeal, the government did not proceed with urgency. Instead, its litigation choices increased the likelihood of mootness. For example, when the government noticed its appeal in *IRAP* on March 17, 2017, that filing triggered this Court's jurisdiction under 28 U.S.C. § 1254(1), *see Hohn v. United States*, 524 U.S. 236 (1998), and would have allowed the government to petition for certiorari before judgment under this Court's Rule 11 and seek a stay of the injunction pending the disposition of that petition (and, indeed, the government filed just such a petition in the *Hawaii* case). Instead, the government waited not only until after the *en banc* Fourth Circuit affirmed the injunction on May 25, but an additional week thereafter before filing its petition with this Court.

Even then, while the government requested expedited briefing and consideration of the petition, it did not do so with respect to the merits. This Court took note. *IRAP*, 137 S. Ct. at 2086 ("The Government has not requested that we expedite consideration of the merits to a greater extent."). *Compare Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981) (in litigation arising from Iranian hostage crisis, granting certiorari before judgment and setting expedited briefing upon Solicitor General's request); *United States* v. *Nixon*, 418 U.S. 683, 686-690 (1974) (government requested expedited briefing, petitioned for certiorari before judgment). The government's decision not to seek expedited argument, whether before this Court's summer recess or during a special September sitting, guaranteed that at least 90 days would elapse between any relief on its stay applications and oral argument on the merits—with the mootness consequences outlined above.

When a party decides to invade the legal rights of another party for only a short period of time—a period that ordinarily does not allow for the full scope of appellate litigation, up to and including this Court's disposition after full briefing and argument—the offending party should not be able to have any adverse judgments vacated by virtue of the facts that it chose neither to extend its conduct nor to seek fully expedited review in this Court. "The case is therefore one where the United States, having slept on its rights, now asks [the Court] to do what by orderly procedure it could have done for itself." *Munsingwear*, 340 U.S. at 41.

At its core, *Munsingwear* stands for the proposition that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 513 U.S. at 25. The mootness of these cases, however, arises not from the "vagaries of circumstance," but from the government's strategic choices. In such circumstances, the "equitable tradition of vacatur" does not support that disposition.

CONCLUSION

The writs of certiorari should be dismissed as moot, and the judgments of the courts of appeals should not be vacated.

Respectfully submitted.

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APPENDICES

APPENDIX

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
HAWAII, *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Courts of Appeals
for the Fourth and Ninth Circuits**

BRIEF OF SCHOLARS OF MORMON HISTORY & LAW AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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BRIEF OF SCHOLARS OF MORMON HISTORY AND LAW AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

The undersigned scholars respectfully submit this amici curiae brief in support of neither party.[1]

INTERESTS OF AMICI CURIAE

Amici curiae are twenty-one scholars of American religious history and law, with special expertise and familiarity with the history of The Church of Jesus Christ of Latter-day Saints (also known as the "Latter-day Saints," "Mormons," or "Mormon Church"). The amici are:

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. A letter from counsel for the petitioners consenting to amici briefs is on file with the Clerk's office; letters of consent from counsel for respondents are being filed along with this brief.

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Although some amici are themselves Mormon, amici do not speak for the Mormon Church itself or for other members of the faith.[2] Rather, amici write because they have specialized knowledge of the federal government's efforts to restrict Mormon immigration as part of the government's sustained 19th-century legal campaign against the Mormon faith. As this brief explains, this history illustrates the particular dangers of discriminating against religious groups in the immigration context, and labeling their members as "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

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[2] Similarly, institutional affiliations of amici are provided for identification purposes only. Amici speak only for themselves in their personal capacity.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, the Mormon faith of the Republican candidate for president, Mitt Romney, was hardly a campaign issue.[3] But the idea of a Mormon president would have been inconceivable a century earlier. In the late 19th century, the government undertook a sustained legal campaign against members of the Mormon faith—a campaign that included attempts to limit Mormon immigration—which led to decades of Mormon exclusion from the American civic community.

The parallels between the Mormon experience and this case are surprising. Using language one might hear today about unpopular immigrant groups, 19th-century officials described Mormons as a "community of traitors, murderers, fanatics, and whores."[4] Politicians and the press explicitly compared Mormons to Muslims and "Orientals," viewing them as "distinct, peculiar, suspicious, and potentially dangerous outsiders."[5] Much of this fear focused on immigration: as Harper's Magazine wrote in 1881, the Mormon Church "is an institution so absolutely un-American in all its requirements that it would die of its own infamies within twenty years, except for the yearly infusion of fresh serf blood from abroad."[6]

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[3] *Little Voter Discomfort with Romney's Mormon Religion*, PEW RESEARCH CENTER (July 26, 2012), http://www.pewforum.org/2012/07/26/2012-romney-mormonism-obamas-religion/ ("The vast majority of those who are aware of Romney's faith say it doesn't concern them.").

[4] DEAN L. MAY, UTAH, A PEOPLE'S HISTORY 115 (1987) (quoting Colonel Patrick E. Connor); *see also* W. Paul Reeve, *My View: Trump's Muslim Ban Looks Like Mormon Ban*, DESERET NEWS (Jan. 28, 2017), http://www.deseretnews.com/article/865672083/My-view-Trumps-Muslim-ban-looks-like-Mormon-ban.html.

The government responded to this popular animus by initiating a variety of legal measures targeting Mormons, including executive actions designed to cut down Mormon immigration to the United States. While immigration law was still in its infancy, executive branch officials urged Congress to ban Mormon immigration, issued official directives to all consular officials directing them to pressure foreign governments to limit Mormon immigration, and turned away Mormon immigrants at ports of entry.[7]

Amici are scholars of Mormon history and law, and do not take a position on whether the President's March 6, 2017 Executive Order[8] violates the Establishment Clause or is otherwise unlawful. But amici do seek to provide this Court with an example of religious discrimination in immigration from America's past, and to show the harms caused by treating particular religious minorities as dangerous and foreign. If the Executive Order does target Muslims for disfavored treatment, then the history of the government's mistreatment of Mormons suggests it could take decades—if not longer—to undo the damage that official action would cause to both America's body politic and the place of Muslims in our society.

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[5] W. PAUL REEVE, RELIGION OF A DIFFERENT COLOR: RACE AND THE MORMON STRUGGLE FOR WHITENESS 14 (2015); *see infra* Section I.B.

[6] William Mulder, *Immigration and the "Mormon Question": An International Episode*, 9 W. POL. SCI. Q. 416, 417 (1956) (quoting C. C. Goodwin, *The Mormon Situation*, HARPER'S MAGAZINE, LXIII, 763 (Oct. 1881)).

[7] *Id.* at 422-428; *see infra* Section I.C.

[8] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

In recent years, this Court has taken steps to undo some of the harms inflicted by the government against Mormons, overruling the 1890 Supreme Court decision allowing Mormons to be deprived of the right to vote. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (recognizing that *Davis v. Beason*, 133 U.S. 333 (1890), is no longer good law insofar as it "held that persons advocating a certain practice may be denied the right to vote," and its legality is "most doubtful" to the extent it held groups may be denied the right to vote because of their status).

This case presents an opportunity to give the Executive Order the sort of genuine scrutiny that did not exist in the 19th century. This Court should ensure that history does not repeat itself by taking a hard look at the government's purported justifications for the Executive Order to determine whether the evidence supports "an affirmative showing of bad faith," *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring), because "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

ARGUMENT

I. The History of Religious Discrimination Against Mormon Immigrants Demonstrates the Need for Vigilant Judicial Review of Government Actions Based on Fear of Religious Minorities

Throughout the 19th century, many Americans viewed Mormons as dangerous outsiders because of their religious faith. Mormons suffered mob violence countenanced by state officials, legal attacks by the federal government, and a crusade of discrimination waged against Mormon immigrants because of their religion. This history demonstrates the ease with which exaggerated fears of religious minorities regarded as different can be translated into unconstitutional government policies.

A. Mormons Were the Objects of Widespread Religious Hostility in the 19th Century

The Mormon Church—officially the Church of Jesus Christ of Latter-day Saints—was founded in 1830. One of its earliest settlements was in Missouri, but in 1833 and 1838 mobs drove the Mormon settlers from their homes. The governor of Missouri then issued an executive order declaring "'[t]he Mormons must be treated as enemies, and must be exterminated or driven from the State,'"[9] and an open letter urged all citizens to provide "assistance in expelling the fanatics [Mormons], who are mostly aliens by birth, and aliens in principle from the country."[10]

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[9] Gov. Lilburn W. Boggs, Executive Order (Oct. 27, 1838), *available at* https://www.sos.mo.gov/cmsimages/archives/resources/findingaids/miscMormRecs/eo/18381027_ExtermOrder.pdf. This order remained on the books in Missouri until it was rescinded in 1976. *See* Gov. Christopher S. Bond,

Many Mormons relocated to Illinois, but in 1844 an Illinois mob murdered Church founder Joseph Smith, and the Mormons were eventually driven out of Illinois as well. In 1847, the Mormons fled to the area of the Great Basin that would eventually become the state of Utah.

Public hostility grew even stronger in 1852, when the Mormon Church publicly announced the practice of polygamy as part of its religion. While only a minority of 19th-century Mormons practiced polygamy, the teaching deeply offended many outside the Church, and set off years of additional political conflict. After several decades of legal wrangling, the Mormon Church publicly abandoned polygamy in 1890. But not only had opposition to Mormonism predated the Church's embrace of polygamy, animus against the Mormons continued long after the Church abandoned the practice of polygamy.

One flash-point for public hostility was the Mormons Church's extensive and successful overseas proselytizing program. Throughout the 19th centu-

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Executive Order (June 25, 1976), *available at* https://www.sos.mo.gov/cmsimages/archives/resources/findingaids/miscMormRecs/eo/19760625_RescisOrder.pdf.

[10] DOCUMENTS CONTAINING THE CORRESPONDENCE, ORDERS, & C. IN RELATION TO THE DISTURBANCES WITH THE MORMONS; AND THE EVIDENCE GIVEN BEFORE THE HON. AUSTIN A. KING 40 (1841).

ry, Mormons pursued a successful missionary effort in Europe, especially Scandinavia and the British Isles, resulting in thousands of Latter-day Saint converts. Because of this program Mormon immigrants from around the world flocked to the United States, where the Mormon faith described a promised land.

The infusion of immigrants into the Mormon population heightened the brewing distrust and animosity of many other Americans. One widely-read celebrity pastor insisted that "'[u]nless we destroy Mormonism, Mormonism will destroy us'" and called, if necessary, for the use of "'howitzer and bombshell and bullets and cannon-ball'" against the Latter-day Saints.[11] Another pastor and public lecturer compared Latter-day Saint immigrants to European excrement and vermin, describing how Mormon immigrants came "from the dark lanes, and crowded factories, and filthy collieries of the old world,—sewerage and drainings of European population" to gather in a "great western hive" in Utah.[12]

This popular animus against Mormons was increasingly translated into law as the 19th century progressed. Congress criminalized bigamy in the territories in 1862, of course, but legal action against the Mormons included far more than simply the suppression of plural marriage:

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[11] REEVE, *supra* note 5, at 216 (discussing the pastor's background and his widely-published speeches on Chinese immigrants and Mormons).

[12] BENJAMIN MORGAN PALMER, MORMONISM: A LECTURE DELIVERED BEFORE THE MERCANTILE LIBRARY ASSOCIATION OF CHARLESTON, S.C. 32 (1853).

- Congress dissolved the Mormon Church as a legal entity and confiscated its assets with the Edmunds-Tucker Act, Pub. L. No. 49-397, ch. 397, § 17, 24 Stat. 635, 638 (1887) (disincorporating the Church and creating procedures for the confiscation of its property);
- Mormons were systematically excluded from service on juries in the Edmunds Act of 1882, Pub. L. No. 47-47, ch. 47, § 5, 22 Stat. 30, 31 (1882) (excluding jurors who merely believed in polygamy);
- Congress revoked Mormon women's territorial right to vote, commanding that "it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect," with the Edmunds-Tucker Act, Pub. L. No. 49-397, ch. 397, § 20, 24 Stat. 635, 639 (1887);
- Mormon children of newly contracted polygamous marriages were disinherited, *id.* at § 11 (repealing territorial laws allowing "illegitimate" children to inherit);
- and Idaho deprived all Mormons of the right to vote, a deprivation upheld by this Court in *Davis*, 133 U.S. at 347, abrogated as explained by *Romer*, 517 U.S. at 634.

Notably, many of these actions did not explicitly or facially target Mormons, although the purposes behind the laws were clear. When Congress revoked women's right to vote in Utah, for instance, it made the law apply to all Utah women regardless of religion—but the fact Congress did not similarly disenfranchise women in neighboring Wyoming made its purpose plain, as did the context of the Edmunds-Tucker Act. 24 Stat. at 639.

B. Animus Against Mormons Was Often Linked to Animus Against Muslims or Other "Foreigners"

Public discussions of Mormonism became increasingly race-based as the 19th century progressed. While today it might seem odd that a group of mostly white Caucasians who practice a religion founded in America would be viewed as alien and foreign, 19th-century racial theorists suggested that the practice of Mormonism had given rise to a "physiologically distinct race."[13]

Indeed, politicians and the press often lumped Mormonism together with foreign and exotic non-

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[13] Nathan B. Oman, *Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 681 (2011); *see also* REEVE, *supra* note 5, at 14-15 (chronicling the idea of a "New Race" supposedly created by Mormonism); J. SPENCER FLUHMAN, "A PECULIAR PEOPLE": ANTI-MORMONISM AND THE MAKING OF RELIGION IN NINETEENTH-CENTURY AMERICA 111-117 (2012) (noting that "in the church's first decades anti-Mormon antagonists routinely invoked racial epithets as knee-jerk insults" and discussing 19th-century racial ideologies that were used to present Mormons as dangerous aliens).

Christian belief systems to emphasize its otherness. Thus, on the Pacific coast, concerns about Mormon immigration from Europe were coupled with concerns about immigration from Asia, both decried as examples of dangerous "oriental" outsiders.[14] Mormons were also frequently compared to the Hindus of India, and labeled a barbaric people in need of oversight just like the British Raj oversaw India—a type of oversight that would be unacceptable for "real" Americans.[15]

Most relevant here, Mormons were attacked through comparisons to Muslims, especially the perceived violent and lustful Turks and Arabs. The Church's founder, Joseph Smith, was derided as an "'American Mohamet.'"[16] In popular books, Mormonism was identified with "'the deepest debauchery, superstition and despotism known to Paganism, Mohammedanism or Medieval Papacy.'"[17]

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[14] *See also* REEVE, *supra* note 5, at 215-220. In 1882, the same Congress that passed the anti-Mormon Edmunds Act also passed the Chinese Exclusion Act. *See* Chinese Exclusion Act of 1882, Pub. L. No. 47-126, ch. 126, § 1, 22 Stat. 58, 58-59 (1882); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 657-661 (2005).

[15] Oman, *supra* note 13, at 684-685. As Oman explains, this "creation of a Mormon race had legal implications. Their status as a degenerate people justified imperial control, hence the common equation of federal rule in Utah with the British Empire in India." *Id.* (footnote omitted).

[16] *See* REEVE, *supra* note 5, at 221.

[17] PATRICK Q. MASON, THE MORMON MENACE: VIOLENCE AND ANTI-MORMONISM IN THE POSTBELLUM SOUTH 103 (2011).

This 1889 political cartoon illustrates how attacks on Mormonism employed comparisons between

Mormonism and Islam to paint Mormons in a negative light. The cartoon shows the anti-Mormon Senator George F. Edmunds of Vermont as a crusading Christian knight striking a prostrate man dressed as a Turk and identified on his headdress (enlarged in the inset) as a "Mormon bluebeard." And not only were Mormons likened to Muslims, but critics of Mormonism complained about the Latter-day Saints' "dangerously" sympathetic attitude toward Muslims.[18]

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[18] *See* FLUHMAN, *supra* note 13, at 109. Mormons do, indeed, have a long tradition of sympathy toward Muslims. In 1841, the Mormon city of Nauvoo enacted an ordinance promising "free toleration, and equal privileges in this city" to all oth-

C. Nineteenth-Century Immigration Restrictions Targeted Mormons Because of Religious Animus

The Executive Branch had a long history of attempting to limit Mormon immigration. As President Buchanan told Great Britain's Secretary of Foreign Affairs, "I would thank you to keep your Mormons at home."[19] Other presidents followed suit—even President Cleveland, one of the least antagonistic towards Mormons in that era, called on Congress to pass a law "to prevent the importation of Mormons into the country."[20]

These efforts to cut off Mormon immigration came at a transitional moment in the history of U.S. immigration law. For most of the 19th century, federal law placed no restrictions on migration. It was only in 1875, with the passage of the Page Act, that the federal government sought to substantially limit immigration. *See* Page Act of 1875, Sess. II, ch. 141, 18 Stat. 477 (1875); *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).[21] Congress did not, however, at-

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er religions. As one scholar has observed, "[t]he only non-Christian religion specifically mentioned in the code was 'Mohammedans [Muslims],' which was a striking inclusion." REEVE, *supra* note 5, at 221.

[19] Mulder, *supra* note 6, at 422 (quoting John Bassett Moore, ed., THE WORKS OF JAMES BUCHANAN (Philadelphia, 1910), X, 318.)

[20] *Id.* (quoting James D. Richardson, ed., MESSAGES AND PAPERS OF THE PRESIDENTS (New York: Bureau of National Literature, 1897), XI, 4947).

[21] *But see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV.

tempt to impose religion-based immigration restrictions in the Page Act.

Lacking congressional action that could be the basis for excluding Mormons, in 1879 Secretary of State William Everts sent a letter to all American diplomatic officers, directing them to pressure European governments to stop Mormon emigration from their countries.[22]

The Secretary of State's official directive called on European governments to make sure the United States did not become "a resort or refuge for . . . crowds of misguided men and women," warning that "the bands and organizations [of Mormons] which are got together in foreign lands as recruits cannot be regarded as otherwise than a deliberate and systematic attempt to bring persons to the United States with the intent of violating their laws and committing crimes expressly punishable under the statute as penitentiary offenses."[23] The letter denounced Mormon converts as coming from among the "ignorant classes," and implored foreign governments "to check the organization of these criminal enterprises."[24]

1833 (1993) (recounting the various ways that state law restricted immigration prior to 1875).

[22] William Evarts, *Circular No. 10, Sent to the Diplomatic Officers of the United States* (August 9, 1879) *in* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 11 (1880).

[23] *Id.* at 12.

[24] *Id.*

This attempt by the Executive Branch to halt Mormon immigration was not well planned. The press quickly ridiculed America for asking other countries to do its dirty work, given that Congress had not passed any ban on Mormon immigration nor had the government taken any action to stop American Mormons from going abroad to recruit new converts in the first place.[25] Several governments declined to take action, but anti-Mormon sentiment still grew in several countries, and some U.S. consular officials attempted to hinder Mormon immigration based on the State Department's directive.[26]

As the American press and public clamored to reduce Mormon immigration, federal officials responded with attempts to detain and return Mormon immigrants at U.S. ports of entry.[27] At New York City, for example, Mormons from England were detained and sent back to the United Kingdom, but the courts stepped in to protect the detained Mormons, granting them habeas relief.[28]

In 1888, responding to public claims that a recently arrived immigrant ship was packed with young woman for the imagined harems of Utah, federal officials moved in.[29] As it turned out, the company of Mormons was evenly divided between men and women, consisting mainly of families. One of the women detained was reported in the press as "'guilty of being 53 years of age and having with her two innocent grandchildren.'"[30] On other occasions, federal officials detained Latter-day Saint immigrants and then assisted Protestant missionaries in trying to persuade them to abandon Mormonism.[31]

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[25] Mulder, *supra* note 6, at 423-424.

[26] *See id.*, at 423-424 & nn. 35-40; Ardis E. Parshall, *The Very Real Consequences of the American Government's 1879 Effort to Bar Mormon Immigration*, THE KEEPAPITCHININ, (Aug. 10, 2016), http://www.keepapitchinin.org/2016/08/10/the-very-real-consequences-of-the-american-governments-1879-effort-to-bar-mormon-immigration/.

[27] Mulder, *supra* note 6, at 424, 427-428.

[28] *See id.*

In the late 1880s, Congress also moved to attack Mormon immigration directly. To facilitate immigration, the Church had created a financing mechanism called the "Perpetual Emigrating Fund" so Mormons living abroad could borrow money to pay for their passage, and then repay these funds once they were settled in the United States. In 1887, Congress disincorporated this fund and confiscated its assets. *See* Edmunds-Tucker Act, Pub. L. No. 49-397, ch. 397, § 15, 24 Stat. 635, 637 (1887). The law prohibited the Utah territorial legislature from taking any steps to "create, organize, or in any manner recognize any such corporation or association, or to pass any law for the purpose of or operating to accomplish the bringing of persons into the said Territory for any purpose whatsoever." *Id.*

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[29] *Id.* at 428.

[30] *See id.*

[31] *See* Fred E. Woods, *Norfolk and the Mormon Folk: Latter-day Saint Immigration Through Old Dominion (1887-90)*, 1 MORMON HIST. STUD. 72, 85-86 (2000).

D. The Effects of the Federal Government's Targeting of Mormons Lingered for Decades

Even after the Mormons publicly abandoned polygamy in 1890—the ostensible goal behind the federal government's hostility—the effects of the message of exclusion sent by the federal government's targeting of Mormonism and Mormon immigrants remained.

In 1898, the U.S. House of Representatives excluded one of Utah's duly elected Congressmen because he had engaged in (but had been pardoned for) polygamy.[32] Five years later, the U.S. Senate embarked on a massive investigation of the Latter-day Saints when Utah sent another Mormon, Reed Smoot, to represent the state as its U.S. Senator.[33] During the resulting investigation, the media "references were overwhelming (three to one) to Mormonism as a danger to the American political system and way of life."[34] The Senate investigative committee ultimately produced thousands of pages devoted to the question of whether Mormons could be permitted to fully participate in the nation's political life. The committee voted to exclude Smoot, although the full Senate rejected its suggestion and seated Smoot in 1907. Even so, the message that non-Mormons were "insiders, favored members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring), while Mormons were "outsiders, not full members of the political community," *id.*, persisted.

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[32] The Congressman was Brigham H. Roberts, who had been pardoned for violation of federal anti-bigamy laws by President Grover Cleveland, along with other Mormon polygamists married prior to 1890.

[33] *See generally* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE (2004) (recounting the prolonged controversy over the election of Reed Smoot and the efforts to keep Mormons from full membership in the American political community).

[34] JAN SHIPPS, *From Satyr to Saint: American Perceptions of the Mormons, 1860-1960*, *in* SOJOURNER IN THE PROMISED LAND: FORTY YEARS AMONG THE MORMONS 51, 71 (2000).

A comprehensive scholarly study of Mormons in the media shows the nadir of treatment of Latter-day Saints came in the 1880s, corresponding to the peak of the federal government's anti-Mormon crusade.[35] But it took until well into the 20th century for the message sent by the government to dissipate. Decades after Mormons abandoned polygamy, media coverage of Latter-day Saints continued to be dominated by the suggestion that they were "'un-American'" and bad citizens, mere "'human units [who] move[d] instantly and unquestionably at [the] command'" of a religious "'hierarch.'"[36] Indeed, echoes of the government's policy of exclusion in the 1880s continued to reverberate in the opening years of the 21st century. In 2007, one in four Americans continued to tell pollsters that they would be less likely to vote for a candidate solely because she was

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[35] *See* SHIPPS, *supra* note 35, at 63 (charting the negative treatment of Latter-day Saints based on a comprehensive database of media coverage of Mormonism).

[36] *Id.* at 67.

Mormon.[37] Of religions in America at the time, only Islam garnered greater suspicion.[38]

The Mormon experience illustrates the harms that result from the government targeting a particular religion. The federal government's actions against Mormons occurred at a time when First Amendment jurisprudence was in its infancy, and the law blessed government actions that today would be blatantly unconstitutional. Fortunately, this attitude toward religious minorities has been replaced in our law. *See Romer*, 517 U.S. at 634 ("To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." (citations omitted)). But this history shows the negative and long-lasting effects of government action aimed at religious minorities.

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[37] *See* Scott Keeter & Gregory Smith, *Public Opinion About Mormons*, PEW RESEARCH CENTER (Dec. 4, 2007), http://www.pewresearch.org/2007/12/04/public-opinion-about-mormons.

[38] *See Public Expresses Mixed Views of Islam, Mormonism*, PEW RESEARCH CENTER (Sept. 25, 2006), http://www.pewforum.org/2007/09/26/public-expresses-mixed-views-of-islam-mormonism/.

II. The First Amendment Requires Courts to Take a Hard Look at the Government's Justifications and Motivations for Actions That Disparately Affect a Religious Group

The Mormon historical experience underscores the need for rigorous judicial scrutiny of allegedly discriminatory government action, and for careful consideration of the purposes behind even facially neutral orders.

This Court has made clear that "'the First Amendment mandates government neutrality'" with respect to religion. *McCreary Cnty., Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 861 (2005). Favoring one religion over another impermissibly "sends the ancillary message to . . . nonadherents that 'they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (citation omitted).

To determine whether the Executive Order's territory-based approach was pretextual rather than truly neutral, the Fourth Circuit assessed what it described as "ample evidence that national security is not the true reason" for the Executive Order. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591 (4th Cir. 2017); *see id.* at 575-577, 594-597. In the Ninth Circuit action, the district court similarly focused on what it described as "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor." *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *13 (D. Haw. Mar. 15, 2017). This evidence is thoroughly cataloged in the opinions and the parties' briefs, but includes such facts as then-candidate Trump's press release calling "'for a total and complete shutdown of Muslims entering the United States.'" *Int'l Refugee Assistance Project*, 857 F.3d at 594.[39]

As this Court has explained, "facial neutrality" cannot shield "[o]fficial action that targets religious conduct for distinctive treatment." *Church of the Lukumi Babalu Aye*, 508 U.S. at 534. To prevent "religious gerrymanders," *id.* at 534, courts must not "turn a blind eye to the context in which [a] policy" arises. *McCreary Cnty.*, 545 U.S. 844, 866 (citation and quotation marks omitted); *see also Washington v. Trump*, 847 F.3d 1151, 1167-68 (9th Cir. 2017) (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534). This Court should thus closely examine the "readily discoverable fact[s]" leading to the government action, including the "historical context" and the "sequence of events." *McCreary Cnty.*, 545 U.S. at 862.

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[39] The day after then-candidate Trump issued this press release, the Mormon Church took the rare step of issuing a statement in response, pointing to the words of Church founder Joseph Smith, who said, "I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any denomination; for the same principle which would trample upon the rights of the Latter-day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves." The Church of Jesus Christ of Latter-day Saints, *Church Points to Joseph Smith's Statements on Religious Freedom, Pluralism*, MORMON NEWSROOM (Dec. 8, 2015), http://www.mormonnewsroom.org/article/church-statement-religious-freedom-pluralism.

The Mormon experience illustrates why it is important for courts to carefully examine the government's proffered reasons for singling out religious minorities. In the 19th century, American government officials relied on religious identity as a proxy for determining the risk of lawlessness and danger posed by Mormon immigrants and refugees. Federal officials insisted that Mormon immigrants must be detained and returned because they would likely violate anti-bigamy laws.[40]

Yet, contrary to the claims made by government officials, American Mormon missionary efforts abroad were not aimed at beguiling young women to immigrate to Mormon harems in Utah. These fantasies bore little if any relationship to the realities of the overwhelming majority of Mormon families who wished to enter the United States to escape persecution in their home countries and to unite with their co-religionists in the Utah territory. Excluding members of a religious group on the basis of stereotypes was (and is) a poor method of identifying those planning to break the law.

It is easy to understand how such a religious test would be a tempting proxy for assessing the risks of would-be immigrants, especially when such a religious test coincides with or is in reaction to popular passions. This is precisely why the courts have an obligation to look beyond the government's purported justifications to determine whether they are religious gerrymanders.

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[40] *See* Evarts, *supra* note 22, at 11; Mulder, *supra* note 6, at 422-424.

Accordingly, amici urge this Court to take a hard look at the entire context of government action that may have a disparate impact on religious minorities. Amici do not, however, take a position on what specific contextual evidence the courts should have considered in these cases, whether the government's national security justifications were pretextual, or whether the issue is even justiciable at this stage.

CONCLUSION

This Court has long held that the judiciary has a special role in scrutinizing government action motivated by "prejudice against discrete and insular minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). And as this Court has explained, "facial neutrality" cannot shield "[o]fficial action that targets religious conduct for distinctive treatment." *Church of the Lukumi Babalu Aye*, 508 U.S. at 534. Amici thus respectfully urge the Court to subject the Executive Order to close scrutiny for a religious animus to prevent repeating the harms of the past.

Respectfully submitted,

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On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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INTEREST OF *AMICI CURIAE*

Amici curiae are social scientists at leading universities in the United States who specialize in the study of Islam and Muslims in the United States and Europe. Collectively, amici have spent decades studying the way in which Islam manifests, and the ways in which it is received in the United States and Europe.[1]

Amici have published their findings concerning the reception of Islam and Muslims in the United States and Europe in leading peer-reviewed scholarly journals and leading academic presses, including Harvard and Princeton. Their research entails a study of the manner in which negative attitudes toward Muslims are expressed and reproduced. Amici respectfully submit this brief to draw the Court's attention to terminology used in the executive orders relevant to this litigation.

Amici are listed below. Their institutional affiliations are included for informational purposes only.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

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SUMMARY OF THE ARGUMENT

The two Executive Orders giving rise to this litigation both contain on their face an inexplicable reference that reveals an invidious anti-Muslim intent. Executive Orders 13679 (EO-1) and 13780 (EO-2) both discuss "honor killings"—the homicide of a family member, typically female, due to the perpetrator's belief that the victim has shamed the family, usually by violating a religious tenet. The first Executive Order states an intent to prohibit "those who engage in acts of bigotry or hatred . . . including 'honor' killings." *Protecting the Nation From Foreign Terrorist Entry Into the United States* § 1, 82 Fed. Reg. 8977 (Jan. 27, 2017). Both the first and the second Executive Orders compel the Director of Homeland Security to collect information regarding "honor killings" perpetrated by foreign nationals. *Id.* § 10(iii); *Protecting the Nation From Foreign Terrorist Entry Into the United States* § 11, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

These references seem, at first blush, incongruous with the purported objective to protect U.S. national security. The practice of "honor killings" has never been tied to international terrorism. There is no known association between "honor killings" and the six countries at issue in this case—Iran, Libya, Somalia, Sudan, Syria or Yemen. Nor is there any connection between the incidence of "honor killings" and the likelihood that a government of one of those nations will supply information requested by U.S. immigration authorities.

This begs the question: why do the texts of two emergency measures intended to "Protect[] the Nation From Foreign Terrorist Entry" invoke the unrelated phenomenon of honor killings?

These references make sense only when viewed in context. The term "honor killings" is used in current political discourse as a coded message that invokes and reinforces animus against one religious group—Muslims—by painting them as violent and uncivilized. The term is routinely invoked in discriminatory invective as a way to stigmatize Muslims. Expressions of concern about "honor killings," in the present political context, are therefore not neutral references to all gender-based violence. They are a means of affirming and propagating anti-Muslim stereotypes.

A contextual understanding of the term "honor killings" bears on a central premise of the government's submission to this Court. The government contends that EO-2 is supported by a "facially legitimate and bona fide reason." Pet. Br. 21; *id.* at 62, 65 (same). The government therefore urges this Court to hold that no further review is permitted or warranted. *Id.* at 21, 68.

The government's premise is false. As explained below, an expression of prejudicial motive is explicitly, if subtly, included in the text of the Orders. Neither EO-1 nor EO-2 is "neutral" on its face. References to honor killings are intended to conjure up negative associations with Muslims as a class. The context, implementation, and consequences of EO-1 and EO-2 reinforce the conclusion that references to "honor killings" can be understood only as a reflection of animus. Governmental action that rests on such biases is antithetical to our Constitutional tradition.

To be sure, our Nation has not always lived up to its promise of nondiscrimination on the basis of religion, race, and ethnicity. Those wishing to invoke malicious stereotypes have long used so-called 'dog whistles' in political discourse. African-Americans, for example, understand the discriminatory subtext when officials fret publicly about 'ghetto thugs' and 'violence in our inner cities.' Jews are attuned to warnings of 'rootless cosmopolitans' and 'international financiers.' So, too, Muslims know that references to 'honor killings' are designed to propagate misleading stereotypes of a primitive and violent culture. The use of such coded epithets is deplorable in any context. Enshrining a negative stereotype of a religious minority in the text of an official federal directive, however, raises grave constitutional concerns.

Amici agree with respondents that it is necessary and appropriate to look beyond the face of EO-2 to evaluate its legality. But even assuming *arguendo* (a) that the Order's validity is measured by its text alone, or (b) that consideration of additional indicia requires a prima facie showing of illegitimate intent, EO-2 contains on its face evidence of a discriminatory motive inconsistent with the Establishment Clause of the First Amendment.

ARGUMENT

I. This Court regularly parses the text of government orders for evidence of unconstitutional animus.

The Constitution prohibits the government from acting on the basis of hostility toward, or negative stereotypes about, a disadvantaged or unpopular class of persons. In particular, the Establishment Clause "forbids" state action based on "an official purpose to disapprove of a particular religion." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968). This Court has not hesitated to strike down a law because of its "capacity—indeed, its express design—to burden or favor selected religious denominations." *Larson v. Valente*, 456 U.S. 228, 255 (1982). A taint of hostility toward a faith or its members can mark the difference between lawful and unconstitutional government action. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1831 (2014) (Alito, J., concurring); *accord Locke v. Davey*, 540 U.S. 712, 725 n.10 (2004).

Animus need not be articulated *in haec verba* to be recognized in the text of a government order or enactment. Constitutional violations can manifest in either "obvious" or "subtle" forms. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In *Lukumi Babalu*, for example, the Court considered a Florida city's ordinance that seemed facially neutral but in fact was motivated by hostility toward the Santeria faith. 508 U.S. at 528, 534. The Court looked first to the text of the ordinance and, notwithstanding the fact that it did not reference Santeria, honed in on the presence of "words with strong religious connotations" in the ordinance's text—specifically "sacrifice" and "ritual"—as "consistent with the claim of facial discrimination." *Id.* at 534.

The fact that a law references particular groups can also be powerful evidence that it rests upon an unconstitutional motive. In *Loving v. Virginia*, for example, the Court saw past the state's justifications for its anti-miscegenation law by observing that Virginia's law on its face prohibited "only interracial marriages involving white persons," which "demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." 388 U.S. 1, 11 (1967). Likewise, when a legal text contains a classification that bears no plausible relation to the putative objective of a measure, it "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (internal quotation marks omitted); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding the impact of the law was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

The Court has not hesitated to find impermissible intent even where it is veiled or coded. *Lukumi Babalu*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). For example, in *Mitchell v. Helms*, the Court observed that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." 530 U.S. 793, 828 (2000). Tellingly, the traditional prohibitions on such aid were not framed in terms of explicit anti-Catholic bias. Rather, at the time prohibitions on such aid were first installed, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 829. Similarly, in *City of Chicago v. Morales*, the Court declined to credit the existence of prior anti-loitering laws as evidence that there was no fundamental right to loiter because such laws had been "used after the Civil War to keep former slaves in a state of quasi slavery." 527 U.S. 41, 53 n.20 (1999).

In *United States v. Windsor*, the Court looked to the title of a law to "confirm" its impermissible purpose. 133 S. Ct. 2675, 2693 (2013). The title—on the "Defense of Marriage"—did not itself directly bespeak an improper motive. But just as the *Mitchell* Court situated the term "sectarian" in historical context, so the Court in *Windsor* interpreted the "Defense of Marriage" in the prevailing political climate to infer an unlawful purpose. "In law as in life, . . . the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015).

Of course, other forms of evidence, including historical context, the process of enactment, and the consequences of a law, are also useful to assessing the constitutionality of the motives that undergird governmental action. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding that law was based on impermissible animus against "hippies" in part based on consideration of legislative history); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (finding that the denial of a special use permit to group home for persons with mental disabilities was motivated by "irrational prejudice" in part based on statements made at hearings about the permit); *Windsor*, 133 S. Ct. at 2693 (evaluating the "history of DOMA's enactment"). Extrinsic evidence of bias in the promulgation of EO-1 and EO-2 abounds here. *See* JA 219–20.

Amici agree with the Respondents that the Court can and should look beyond the four corners of EO-2 to evaluate its constitutionality. The Court has done so to ascertain the constitutionality of immigration measures many times before. *See, e.g.*, *INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (looking to the "historical record" to determine whether U.S. government officials' decisions to temporarily suspend naturalizations in the Philippines after World War II were "motivated by any racial animus"); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690–92 (2017) (applying heightened scrutiny to gender-based provision in immigration law, noting that "history reveals what lurks behind § 1409" and reviewing at length its legislative history, including statements made at hearings on the law).

But the Court need not venture beyond the text of EO-2 to find evidence of an improper motive. Here, such evidence is found in the Order's incongruous "honor killings" provision, as we explain below. Thus, even if the Court decides that it is required as an initial matter to cabin its review to the text of EO-2, there is still sufficient evidence therein of an impermissible animus against a particular religion to compel strict judicial scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (holding that the First Amendment "subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status'"). At a minimum, this evidence requires more searching review than the "minimal scrutiny (rational basis review)" proposed by the government. Pet. Br. 63; *Lawrence*, 539 U.S. at 580.

II. **Evidence of anti-Muslim animus is present on the face of the Executive Order.**

The text of EO-2 contains evidence of an impermissible animus. EO-2, like its precursor EO-1, makes an otherwise inexplicable reference to "honor killings." EO-2 § 11(a)(iii); EO-1 §§ 1, 10(iii). This term is akin to the word "sectarian" in *Mitchell v. Helms*: it is a veiled reference intended to invoke association with a particular religious minority. It is what is colloquially known as a "dog whistle."

EO-2's words thus reveal that the government's action is not "facially legitimate and bona fide." *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Even under the government's view of *Mandel*, this Court may therefore consider both the available evidence of improper motivation and the absence of a legitimate national security justification in assessing the constitutionality of EO-2.

A. The term "honor killings" conveys a negative stereotype of Muslims as violent and uncivilized.

EO-1 and EO-2 each invoke the concept of "honor killings." EO-1 identifies a supposed risk of "honor killings" among the motivations for the President's action. EO-1 § 1. It requires that the Secretary of Homeland Security collect data, *inter alia*, on "'honor killings' in the United States by foreign nationals." *Id.* § 10(iii). EO-2 reiterates this command. EO-2 § 11(a)(iii) (requiring that the Secretary of Homeland Security "collect and make publicly available . . . information regarding the number and types of acts of *gender-based violence against women, including so-called 'honor killings,'* in the United States by foreign nationals") (emphasis added).

The term "honor killing" is not neutral. It refers to the killing of a woman by her relatives for violation of a sexual code in the name of restoring family honor, and it is used almost exclusively to refer to such acts within Muslim families. LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 113–14 (2013). It is deployed in this way despite the absence of any evidence of a causal relationship between religion and such violence. Accordingly, it serves as a code to imply Muslims' purported proclivity to violence.

The term "honor killing" has long been used to denigrate Islam as a violent and dangerous faith. KATHERINE PRATT EWING, STOLEN HONOR: STIGMATIZING MUSLIM MEN IN BERLIN 151–53 (2008) (describing how violence by men assumed to be

Muslim has been "retrospectively classified as honor killing" without regard to the evidence of actual motives).

For example, in 2008, an Egyptian-born taxi driver in Dallas, Texas, murdered his two daughters. Even though the father had a long history of sexually abusing his children, and even though there was no evidence that he was motivated by religion, commentators quickly labeled the murders "honor killings" and blamed them on "Islam." Leti Volpp, *Framing Cultural Difference: Immigrant Women and Discourses of Tradition*, 22 DIFFERENCES: J. OF FEMINIST CULTURAL STUD. 90, 90–91 (2011). Likewise, when a Muslim American woman was killed by her husband in Buffalo, New York, just after obtaining a restraining order against him based on past abuse, the media was quick to cite "experts" who categorized the crime as an honor killing because of "the fierce and gruesome nature of th[e] murder." Joshua Rhett Miller, *Beheading in New York Appears to be Honor Killing, Experts Say,* FOX NEWS (Feb. 17, 2009), https://goo.gl/8Tsmu3. Again, there was no evidence that the perpetrator was motivated by religion.

Similarly, high-profile murders of Muslim women by family members elsewhere are assigned the status of "honor killings" after the fact merely by dint of the assumed religious identity of the perpetrator. Ewing, *supra*, at 151–53. In this way, media treatment of "honor killing" in North America and Europe also "link honour killing to Islam . . . in ways that lead to the stigmatization of entire immigrant communities." Anna C. Korteweg & Gökçe Yurdakul, United Nations Research Institute for Social Development, *Religion, Culture and Politicization of Honour-Related Violence: A Critical Analysis of Media and Policy Debates in Western Europe and North America*, at iii (Oct. 2010), https://goo.gl/YUC8p1.

More generally, news stories, reports, and political statements that link gender- and sexual-based violence to Islam assert a false and derogatory stereotype about Islam specifically. Discussing a sexual assault on a CBS reporter in Egypt, for example, the syndicated columnist Debbie Schlussel described Muslims as "animals" and described the assault as "what Islam is all about." ANNE NORTON, ON THE MUSLIM QUESTION 69 (2013).

Intrafamilial violence is shamefully pervasive across cultures and nations. K.M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 SCIENCE 1527, 1527 (2013) (estimating that 30 percent of women "aged 15 and over have experienced, during their lifetime, physical and/or sexual intimate partner violence"). While regional rates vary, the incidence of intrafamialial violence exceeds 19 percent everywhere in the world except east Asia. *Id.* at 1528. No culture, religion, or country has a monopoly on intrafamilial violence against women.

Moreover, to the extent the term is understood to isolate a specific subcategory of domestic violence, "[h]onor crimes are committed worldwide and . . . cu[t] across cultures and religions." Brittany E. Hayes et al., *An Exploratory Study of Honor Crimes in the United States*, 31 J. FAM. VIOLENCE 303, 304 (2016); Aisha Gill, *Honor Killings and the Quest for Justice in Black and Minority Ethnic Communities in the United Kingdom*, 20 CRIM. JUST. POL'Y REV. 475, 480 (2009) ("Honor killings cut across ethnic, class, and religious lines [and are committed] not only by Muslims but also by Druze, Christians, and occasionally Jews.").

Yet the term "honor killing" is used in current political discourse almost exclusively to refer to Muslims, and to thereby suggest that Muslims are distinctively violent and uncivilized. *See, e.g.*, Benjamin Weinthal, *Suspected 'Honor Killing' Stokes German Fears About Customs, Crimes of Middle Eastern Refugees*, FOX NEWS WORLD (Oct. 9, 2015), https://goo.gl/TH7EQq (linking honor killings to Islam); Chad Groening, *Ignoring Root of 'Honor Killings' Dangerous*, ONE NEWS NOW (Nov. 4, 2009), https://goo.gl/Bm6Uzy; *see also* ABU-LUGHOD, *supra*, at 114 (noting the "constant association" of honor killings stories with "the Middle East and South Asia, or immigrant communities originating in these regions, [which] has given them a special association with Islam"); *accord* SHERENE RAZACK, CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS 128 (2008) (explaining how the same crime is labeled a crime of "passion" or of "honor" depending on the religious identity of the perpetrator in a way that "reifies Muslims as stuck in premodernity"); Inderpal Grewal, *Outsourcing Patriarchy: Feminist Encounters, Transnational Mediations and the Crime of 'Honour Killings,'* 15 INT'L FEMINIST J. POL. 1, 5 (2013).

Put differently, the term "honor killing" is a way of misleadingly categorizing violence against women as a Muslim problem. It is a way of "consolidating the stigmatization" of Muslim communities as deficient, backward, and prone to violence. ABU-LUGHOD, *supra*, at 113.

Individuals and groups with anti-Muslim biases commonly invoke so-called "honor crimes" as a phenomenon that supposedly "divides civilized societies from uncivilized societies," *id.* at 115, notwithstanding the pervasive occurrence of intrafamilial violence against women across cultures, Devries, *supra*, at 1528. Anti-Muslim organizations and websites commonly depict Muslims as "inherently violent" and prone to "rape, sexual abuse against children, violent acts caused by a *culture of honour*, violence within arranged marriages, threats against public individuals and physical violence against non-Muslims." Mattias Ekman, *Online Islamophobia and the Politics of Fear: Manufacturing the Green Scare*, 38 ETHNIC & RACIAL STUD. 1986, 1995 (2015) (emphasis added).

But Muslim religious leaders have repeatedly and forcefully condemned violence against women. *See, e.g.*, Paola Loriggio, *Shafia Murders: Imams Issue Fatwa Against Honour Killings, Domestic Violence*, HUFFINGTON POST (Feb. 4, 2012), https://goo.gl/vyjdeE. Rather than condoning gender-based violence, "Islam and Islamic law . . . [over time] are coming to be invoked more and more *against* honor crimes." ABU-LUGHOD, *supra*, at 139 (emphasis added); Gill, *supra*, at 480 ("[B]oth Sharia law (Islamic law) and customary law alike have strict guidelines forbidding [honor killings]."). Where survey data of public attitudes to honor killing exist, they show no difference between Muslims' and non-Muslims' attitudes to such acts. *The Gallup Coexist*

Index 2009: A Global Study of Interfaith Relations 34 (2009), https://goo.gl/VXBqE9.

Coded stereotypes, however, have a long history in U.S. politics. Jim Crow was defended by "coded" appeals to white supremacy framed in terms of "African-Americans' illegitimate sexual relations and proclivity to crime." TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGING, AND THE NORM OF EQUALITY 94-95 (2001). Coded invocations of the same fears are still employed in current political discourse. Jon Hurwitz & Mark Peffley, *Playing the Race Card in the Post–Willie Horton Era: The Impact of Racialized Code Words on Support for Punitive Crime Policy*, 69 PUB. OPINION Q. 99 (2005) (demonstrating the racially loaded effect of crime-related language); *see also* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 520 (2003). Sadly, the use of "subtle" allusions to negative stereotypes has been shown to reap political rewards because dog whistles "activate racial attitudes" while maintaining a measure of deniability. Nicholas A. Valentino et al. *Cues That Matter: How Political Ads Prime Racial Attitudes During Campaigns*, 96 AM. POL. SCI. REV. 75, 75–76 (2002).

B. **The reference to "honor killings" reveals a discriminatory intent behind EO-2.**

EO-1 and EO-2's references to "honor killings," in short, are neither neutral nor superfluous. They are masked invocations of common negative stereotypes, *Lukumi Babalu*, 508 U.S. at 534, used to malign Muslims as violent and uncivilized. The continued inclusion of such a reference in EO-2, particularly in combination with the absence of any relation between "honor killings" and terrorism or the countries that are the subject of the Order, severely undermines the government's claim that EO-2 is neutral on its face.

The context and structure of EO-2 confirm that its reference to "honor killing" is not neutral but rather reflects impermissible animus against Muslims.

First, references to honor killings are "so discontinuous with the reasons offered for" the measure, as to raise concern about animus. *Romer*, 517 U.S. at 632; *see also Windsor*, 133 S. Ct. at 2693 (noting that "[d]iscriminations of an unusual character" demand "careful consideration") (internal quotation marks omitted). The government defends EO-2 on the basis of national security. So-called "honor killings," while reprehensible, are not terrorism. They are also rare: the most careful study available identifies sixteen "honor crimes" in the United States between 1990 and 2014. Hayes et al., *supra*, at 303. Nor are they harbingers or proxies for terrorism, and the government does not contend otherwise. In fact, the government's brief offers no rationale whatsoever for the EOs' references to honor killings.

But the term was not included in the text by accident—and certainly not preserved from EO-1 and carried into EO-2 by chance. The only plausible rationale for invoking "honor killings" in the text of both Executive Orders was to trigger a negative association with Muslims. In particular, the use of the term in the text of both EO-1 and EO-2 invokes the very same negative stereotypes about Muslims that permeated the rhetoric surrounding the Orders' promulgation. JA 181–84 (collecting statements).

Hence, there is a direct link between EO-2's text and the surrounding evidence of animus that the government wishes to obscure.

Second, there is no relationship between "honor killings" and the specific countries covered by EO-2. EO-2 extensively quotes the 2015 State Department Country Reports on Terrorism to establish "some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States." EO-2 § 1(e). But the full State Department Reports for these six countries make no mention of "honor killings." *See* U.S. State Department Country Reports on Terrorism 2015 (June 2016), https://www.state.gov/documents/organization/258249.pdf (last visited Sept. 18, 2017). That makes sense: honor killings are unrelated to national security, terrorism, or the six countries targeted by the Order. The "discontinu[ity]" between the text and its effect is a cautionary flag this Court cannot ignore. *Romer*, 517 U.S. at 632.

Third, the reference to "honor killings" in EO-2 is a holdover from EO-1 that demonstrates a continuity of motivation between EO-1 and EO-2. EO-1 was riddled with additional evidence of anti-Muslim bias. For example, in provisions relating to refugee admissions, EO-1 created an express preference for adherents of "minority" religions in the selection of refugees. EO-1 § 5(b). As the President explained in contemporaneous statements, this provision was intended to favor Christian minorities from Muslim-majority countries. JA 1112. When the reference to "honor killings" is juxtaposed alongside an intentionally discriminatory provision in the same Order, such as the Christian-minority exception, the term is explicable solely as an invocation of anti-Muslim animus.

* * *

Invidious and hateful stereotypes such as those reflected in the term "honor killings" have no place in a nation committed to the ideals and commands of the Establishment Clause. The government's use of this coded message in EO-2 is evidence of anti-Muslim bias that requires strict judicial scrutiny.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY & INTEREST OF *AMICUS CURIAE*[*]

Southeastern Legal Foundation ("SLF") is a nonprofit, public-interest law firm and policy center. Founded in 1976, SLF is dedicated to advocating for individual liberties in the courts of law and public opinion. SLF's interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers, a critical safeguard of individual liberty.

SLF submits this brief principally to address one particularly disturbing aspect of the decision below: the Fourth Circuit's reliance on media statements to discern the "real purpose" behind Executive Order 13,780. Consulting these statements intrudes on the prerogative of the Executive Branch by allowing individuals outside the Article II hierarchy to speak for the President. Worse still, the Fourth Circuit consulted these statements to override the President's assessment of national security. And it read them in the worst possible light for the President, refusing to give him the presumption of regularity commensurate with his office. None of this bodes well for separation of powers.

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[*] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Fourth Circuit has invoked the Establishment Clause to enjoin an executive order that bars certain aliens from entering the United States. *See* Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("Order"). According to the court of appeals, the Order targets Muslims. But that is untenable. The Order's text is not discriminatory: it treats all religions the same. The Order's effect is not discriminatory: it targets countries known to have weak vetting procedures. And the Order's purpose is not discriminatory: the official statements about the Order show that it was enacted to promote national security. Yet, for the first time in our history, courts have enjoined a President's order based on things he said on the campaign trail. That is precisely what the Fourth Circuit did here.

This unprecedented ruling should be reversed. The evidence is not relevant, appropriate, or persuasive. When it comes to the admission of aliens, courts must defer to the political branches. Courts do not look behind the text of an order to discover its "real" purpose. Moreover, presidential candidates are not the President and, constitutionally, they cannot speak for him. Nor are their statements especially probative; proclamations on the campaign trail are ambiguous, contradictory, and quickly forgotten. Put simply, the decision is built on an illegitimate legal foundation. Courts should not evaluate federal laws this way.

But if courts are going to consult these statements, they should at least give the speaker the benefit of the doubt and require much more proof of animus than the Fourth Circuit had here. There is ample evidence that, from the start, the so-called "Muslim ban" was not born of religious animus. But even if the Court disagrees, the better reading of the evidence is that Donald Trump abandoned that type of idea during the campaign in favor of an entirely legitimate territory-based policy. In other words, the Fourth Circuit relied not only on statements from the 2016 campaign, but a heavily revisionist version of them. This Court should reverse the decision below.

ARGUMENT

The Fourth Circuit's decision is indefensible. First, the Order's legality must be determined based on its text. Second, even if courts can go beyond the Order's text, unofficial campaign statements cannot be used to determine the Order's purpose. Third, and last, the ruling below is wrong even if this evidence is relevant to proving an Establishment Clause claim. It does not show anti-Muslim bias.

I. The Fourth Circuit impermissibly ventured beyond the text to determine the Order's purpose.

As Chief Justice Warren cautioned nearly fifty years ago, "[i]nquiries into [the government's] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). For one thing, "discerning … subjective motivation," even for "a single [actor]," is "almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting). For another, judicial evaluation of a law's purpose can easily morph into evaluation of a law's wisdom. "[T]hat the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted" is tempting in theory, but dangerous in practice. *McCray v. United States*, 195 U.S. 27, 56 (1904). Indulging it "would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions." *Id.* at 54-55. Courts therefore must evaluate the purpose of a law "with the most extreme caution." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 6 (1947). "[T]he stakes are sufficiently high for [courts] to eschew guesswork." *O'Brien*, 391 U.S. at 384.

To that end, courts generally look to the text of a law to determine its purpose. *See, e.g., Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971). Because courts "presume that [the government] act[s] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987), they are "reluctan[t] to attribute unconstitutional motives" to it "when a plausible secular purpose ... may be discerned from the face of the [law]." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). And because the "text" of a law is the only thing that the government actually "adopted," it is the "best evidence of [the law's] purpose." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991). That is why courts "must begin with the language employed by [the law] and the assumption that the ordinary meaning of that language accurately expresses [its] purpose." *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).

The judicial inquiry must end there, too, when the law regulates the admission of aliens into the United

States. In *Kleindienst v. Mandel*, this Court held that "the Executive" need only offer "a *facially* legitimate and bona fide reason" for denying entry to aliens. 408 U.S. 753, 770 (1972) (emphasis added). Once the Executive does so, "'courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests" of the affected individuals. *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in judgment). There are no exceptions. This Court has applied *Mandel* to claims of discrimination under the First Amendment, *id.* at 765-70, and the Fifth Amendment, *Fiallo v. Bell*, 430 U.S. 787, 791-99 (1977); *see also* Brief for the Petitioners ("Pet. Br.") 63-65.

The reasons that underlie *Mandel*'s "narrow standard of review" are the same "reasons that preclude judicial review of political questions." *Fiallo*, 430 U.S. at 796. The Constitution generally commits questions concerning the admission of aliens to the political branches—not the courts. Congress has "plenary ... power to make policies and rules for exclusion of aliens," which it "has delegated ... to the Executive." *Mandel*, 408 U.S. at 769-70; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); *see* 8 U.S.C. § 1182(f). "'[O]ver no conceivable subject is the legislative power of Congress more complete'" because "the admission of aliens" is "a fundamental sovereign attribute." *Fiallo*, 430 U.S. at 792. In this area, courts are ill-equipped to weigh the competing concerns. The admission of aliens involves "a wide variety of classifications [that] must be defined in the light of changing political and economic circumstances," and the "decisions in these matters may implicate our relations with foreign powers." *Id.* at 796. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The *Mandel* rule "has particular force in the area of national security." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in judgment). "[W]hen it comes to collecting evidence and drawing factual inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). When the political branches act in the national-security realm, courts should be hard-pressed to discard their stated purpose. After all, "most federal judges" do not "begin the day with briefings that may describe new and serious threats to our Nation and its people." *Id.* It is simply "not the judicial role in cases of this sort to probe and test the justifications for the [government's] decision." *Fiallo*, 430 U.S. at 799.

The Ninth Circuit has concluded that *Mandel* applies only to "an individual visa application," not the "*promulgation* of sweeping immigration policy ... at the highest levels of the political branches." *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017). But this distinction "cannot withstand the gentlest inquiry." *Washington v. Trump*, 858 F.3d 1168, 1179 (9th Cir. 2017) (Bybee, J., dissental). *Mandel* applies to "a wide variety" of "decisions made by the Congress or the President," including whether "particular classes of aliens ... shall be denied entry altogether." *Fiallo*, 430 U.S. at 796.

The Fourth Circuit wisely acknowledged that *Mandel* applies to the Order, but it nevertheless found that the Order's national-security justifications were not "facially legitimate and bona fide." Pet. App. 42a-47a.

The Fourth Circuit interpreted "bona fide" to require that the proffered reason for the Order be the actual, primary reason—to be determined by consulting all of the extratextual evidence. That ruling finds no support in this Court's decisions.

The word "facially" in *Mandel* modifies both "legitimate" and "bona fide"; just like its legitimacy, the Order's bona fides must be determined based on the text alone. *See* Pet. App. 162a-65a (Niemeyer, J., dissenting). Otherwise, *Mandel* is meaningless. As the Fourth Circuit acknowledged, the *Lemon* test already requires courts to assess a law's primary purpose. *Id.* at 46a (majority op.). *Mandel* was not meant to simply duplicate this analysis; it requires the political branches to prove *less* out of respect for their authority over the admission of aliens. Hence, *Mandel* asks whether the Executive offered "*a* facially legitimate and bona fide reason," not whether that reason was the primary one. 408 U.S. at 770 (emphasis added).

Searching for the primary purpose would require courts to enter the forbidden territory of "look[ing] behind" the Executive's justifications, *id.*, and "prob[ing] and test[ing]" them, *Fiallo*, 430 U.S. at 799. Here, for example, a federal court could conclude that national security was not the primary purpose of the Order only by first rejecting the accuracy of the President's national-security determinations. Indeed, the Fourth Circuit stated that the Order is based on "weak evidence" and does not "diminish the threat of potential terrorist activity." Pet. App. 44a. The specter of courts telling the President what national security requires is precisely what *Mandel* seeks to avoid.

The Fourth Circuit's principal rejoinder—that the immigration power "is still 'subject to important constitutional limitations,'" Pet. App. 40a-41a, 45a-46a—is unhelpful. It begs the question of what the constitutional limitations *are* in this context. The two deportation cases that the Fourth Circuit cited—*Zadvydas v. Davis*, 533 U.S. 678 (2001), and *INS v. Chadha*, 462 U.S. 919 (1983)—are not relevant. "Whatever the rule may be concerning deportation," it does not apply to "the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543. When the Executive does the latter, *Mandel* provides that courts can review only whether it offered a facially legitimate and bona fide reason. This is not a "*no* judicial review" standard; it is a "limited judicial review" standard. *Fiallo*, 430 U.S. at 795 n.6. The President's Order easily satisfies it. *See* Pet. App. 165a-68a (Niemeyer, J., dissenting); *see also* Pet. Br. 65-69.

II. The Fourth Circuit impermissibly consulted unofficial campaign statements to determine the Order's purpose.

When a law does not regulate the admission of aliens into this country, courts sometimes search more broadly for evidence of its purpose. But the judicial inquiry must remain "deferential and limited." *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in judgment). Courts cannot engage in "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). Accordingly, courts usually limit their search to "the face of the legislation," "its legislative history," and "its operative effect." *McGowan v. Maryland*, 366 U.S. 420, 453 (1961); *accord Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment). In all events, the evidence of purpose must be some "official act." *McCreary*, 545 U.S. at 862; *see* Pet. Br. 73-76.

This principle has two important corollaries. First, courts should not rely on the views of private citizens to determine a law's purpose. *See Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004); *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002). Obviously, only the government can violate the Establishment Clause. "Private purpose" is thus not relevant unless "there is evidence that the government has adopted [it]." *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 850-51 (6th Cir. 2010).

Second, courts should not consult informal media statements to determine a law's purpose. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006); *Adland v. Russ*, 307 F.3d 471, 483 n.3 (6th Cir. 2002). Statements to the media are not "official acts." And they are unreliable indicia of purpose. Such "informal communications often exhibit a lack of 'precision of draftsmanship,'" and "internal inconsistencies are not unexpected." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995).

The Fourth Circuit ignored these principles. It concluded that the Order is a "Muslim ban" in disguise based largely on press releases, media interviews, and news articles from the 2016 campaign. This "evidentiary snark hunt" is not normal: "[n]o Supreme Court case ... sweeps so widely in probing politicians for unconstitutional motives." *Washington*, 858 F.3d at 1174 (Kozinski, J., dissental). These media statements from nongovernmental actors all suffer from the defects mentioned above. And because most were made by a political candidate in the heat of a campaign, the statements present still more concerns.

If statements to the media are unreliable, then statements to the media by a politician in the thick of a campaign are doubly unreliable. A candidate's goal is "to get elected," not to make policy. *Id.* To get elected, the candidate must first win the primary, which requires drawing attention to himself. *See* Stephen J. Wayne, *Road to the White House 2016*, at 120 (10th ed. 2015) ("Candidates cannot win if they are not known. Recognition as a political leader is most important at the beginning of the nomination cycle ...."). "[I]nflammatory" statements often help in this regard. *Washington*, 858 F.3d at 1173 (Kozinski, J., dissental). Over the course of the campaign, moreover, a candidate must win over primary voters and the general electorate—two very different groups—all while reacting to shifting poll numbers and swirling media narratives. Unsurprisingly, "subtle (or not-so-subtle) changes in a candidate's position during the course of the campaign are common." 1 Robert North Roberts et al., *Presidential Campaigns, Slogans, Issues, and Platforms: The Complete Encyclopedia* 160 (2012). But to avoid the dreaded label of a "flip flop," candidates also tend to insist that their position has been the same all along. All of these dynamics result in a smattering of contradictory, chaotic, and ambiguous statements—not the kind of evidence that should decide the fate of a federal law or executive order.

The Fourth Circuit insisted that judges should not "shut our eyes to such evidence when it stares us in the face." Pet. App. 60a. But that is *exactly* what judges should do:

> [T]he Court ought to shut its mind to much of what all others think they see. That is precisely what courts are for. They try things out on evidence, by process of proof and refutation, and shut their minds to the kind of surmise by which the general public may reach politically sufficient conclusions. No doubt, ... courts as triers of fact draw inferences concerning matters of common knowledge in the shared experience of the community. But such common knowledge is not common gossip, or common political judgment.... [A court should not] infer, along with common gossip, that a legislature is corrupt, or that a politician is a self-seeking powermonger rather than a disinterested statesman[.]

Alexander M. Bickel, *The Least Dangerous Branch* 220 (1962). In fact, in any other case, many of the sources cited here would be disregarded as "hearsay" remarks that "do not constitute legal evidence." *ACLU of Ky. v. Grayson Cty.*, 605 F.3d 426, 430 (6th Cir. 2010). "[T]o rely in any way on what *these [sources] say* various [government officials] *said* is both incorrect and inappropriate." *ACLU of Ky.*, 605 F.3d at 430.

Nor can a court assume that the positions an official takes during the campaign will match the policies he enacts once in office. Officials "change their own thinking as a function of whether they are running for office or having to make the hard choices that come with power.... A politician who is not in office can make strong promises and claims .... Once in office, however, ... their speech and thinking become more complex than they were during the campaign…." Roy F. Baumeister, *The Cultural Animal* 236 (2005).

Beyond these practical differences, our constitutional structure rejects any attempts to conflate a presidential candidate with the President. The President is not just a person; the President is an "Office." U.S. Const. art. II, § 1. While the Constitution vests "[t]he executive Power" in the President alone, *id.*, the President can appoint "Officers of the United States" and "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," *id.* § 2. This last part—the Opinion Clause—"place[s] the President at the apex of [an] awesome pyramid[] of power … as Chief Administrator of the Executive Bureaucracy." Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 652 (1996). A presidential candidate thus does not have access to, and is not part of, this constitutional hierarchy. Here, for example, the Cabinet officials tasked with enforcing the Order agree that it is a vital national-security measure and targets countries with weak vetting procedures—not Muslims. *See* Sec'y John Kelly, *Statement on President's Executive Order Signed Today* (Mar. 6, 2017); Sec'y Rex Tillerson, *Remarks on the President's Executive Order Signed Today* (Mar. 6, 2017); Att'y Gen. Jeff Sessions, *Remarks on Revised Executive Order Protecting the Nation from Foreign Terrorist Entry* (Mar. 6, 2017).

Also unlike the President, a presidential candidate has not "take[n] the … Oath" in Article II. U.S. Const. art. II, § 1. The oath requires the President to "swear" that he will "preserve, protect and defend the Constitution," *id.*, and it activates his duty to "take Care that the Laws be faithfully executed," *id.* § 3. The oath is not a formality: it triggers the presumption that the President's actions are constitutional. *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc). Indeed, while the Constitution requires all officials to take an oath, U.S. Const. art. VI, Article II actually spells out the presidential oath with "emphatic language," Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 338 (2016). This distinction "indicates that the President's promise may be especially demanding and unyielding." *Id.* But conflating the pre-oath intentions of a candidate with the post-oath policies of a President treats that oath as a nullity.

The use of campaign statements to find violations of the Establishment Clause raises other concerns too. For starters, it is impossible to apply. *See* Pet. App. 170a-71a (Niemeyer, J., dissenting); *Washington*, 858 F.3d at 1173 (Kozinski, J., dissental). And it invites courts to make decisions based on their subjective beliefs about the character of government officials. Moreover, the Fourth Circuit's reasoning turns the First Amendment against itself. "'To view [campaign] statements as indicative of bad faith … would … chill political debate during campaigns … in contravention of First Amendment values." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995). Yet "our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Washington*, 858 F.3d at 1173 (Kozinski, J., dissental) (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)).

The Fourth Circuit tried to limit its ruling by emphasizing the "highly unique" and "direct" evidence in this case. Pet. App. 61a. But that is no limit at all. Consider an example. During the 2008 presidential campaign, then-Senator Obama made a statement about "bitter" people in "small towns" who "cling to guns or religion … to explain their frustrations"—a statement that many perceived to be anti-Christian. *Obama Angers Midwest Voters with Guns and Religion Remark*, The Guardian (Apr. 14, 2008), goo.gl/ICSSVi. After he was elected, President Obama's administration issued a regulation requiring Catholic nonprofits to, in their view, facilitate contraceptive coverage and violate their deeply held religious beliefs. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016). Is Senator Obama's statement from the 2008 campaign evidence that he is an anti-Catholic bigot and, thus, evidence that the regulation has an unconstitutional purpose under the Establishment Clause? Under the Fourth Circuit's logic, a court would at least have to consider the possibility. And what may be "highly unique" and "direct" evidence of President Obama's motive to one judge may not be for another. This is where we are headed under the Fourth Circuit's approach.

Indeed, given the sheer amount of times that politicians reference the Bible in political campaigns, other possible scenarios abound. That is why considering this sort of evidence would be a "huge, total disaster." *Washington*, 858 F.3d at 1174 (Kozinski, J., dissental). This Court should not countenance it.

III. The Fourth Circuit's finding that the Order has an impermissible purpose is untenable even considering all of the evidence.

As just explained, courts should not consider unofficial statements from political candidates or nongovernmental actors when evaluating the purpose of a federal law. But even under the no-holds-barred approach of the Fourth Circuit, there is not enough evidence here to conclude that the Order was enacted for an impermissible purpose.

Under the *Lemon* test, the government must show that the purpose on the face of the Order is "not a sham." *Edwards*, 482 U.S. at 587. This is a low bar. Courts do not invalidate laws when "a plausible secular purpose ... may be discerned from the [text]." *Mueller*, 463 U.S. at 394-95. The statements that the Fourth Circuit consulted here do not even come close to establishing that the Order's national-security justifications are a "sham."

In fact, a court could arrive at that conclusion only by plucking statements about the Order out of context and reading them in the worst possible light for the President. "[T]he purpose inquiry is not," however, "an invitation to courts to cherry pick." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 567 F.3d 595, 601 n.7 (9th Cir. 2009). And if courts are going to treat politicians like government officials, then they should at least give political statements the deference and presumptive regularity that government officials receive.

With these principles in mind, the statements about the Order paint a very different picture: the best reading of the evidence is that the President was never motivated by anti-Muslim bias. Rather, he was always concerned with national security. His decision to abandon his initial call for a "Muslim ban" in favor of a policy focused on geography instead of religion made that abundantly clear.

The first statement that the Fourth Circuit considered was the "Statement on Preventing Muslim Immigration" that Mr. Trump posted on his campaign website in December 2015. Pet. App. 49a. True, this statement—made two months before the Iowa Caucus and over a year before President Trump signed the first executive order—focused on "Muslims." Notably, however, it was concerned with national security. It was made in response to the terrorist attack in San Bernardino, and it discussed the need to prevent the country from being "the victims of horrendous attacks." *Id.* at 10a n.5.

Moreover, statements he made during that same timeframe show that Mr. Trump never harbored anti-Muslim bias. Mr. Trump repeatedly explained that he believes that Muslims are "good people." *The War on Terror, the Political Equation*, Fox: O'Reilly Factor, 2015 WLNR 35053429, (Nov. 26, 2015); *see World News Tonight with David Muir*, ABC World News, 2015 WLNR 34794508 (Nov. 23, 2015) (same). His position was clear: "most Muslims are good, wonderful people" and it is only when "they become radicalized" that "they become different people." *MSNBC Morning Joe Interview with Donald Trump (R), Presidential Candidate, Regarding Muslims in America and Homeland Security*, MSNBC, 2015 WLNR 36290582 (Dec. 8, 2015); *see Special Report*, ABC News, 2015 WLNR 37932408 (Dec. 22, 2015) ("One thing I have to say, I have tremendous friendships in the Muslim community.... They're great people."); *Donald Trump Says His Muslim Friends Support His Muslim Ban*, Seattle Post-Intelligencer, 2015 WLNR 37529330 (Dec. 16, 2015) ("'I have many, many friends who are Muslim and they're great people,' Trump said. 'And some of them, not all of them ... but many of them called me and they said, 'You know what, Donald? You're right. We have a problem.'").

Thus, the Fourth Circuit did not even have enough evidence, especially given the context of this lawsuit, to establish that Mr. Trump *ever* harbored the kind of animus needed to make out an Establishment Clause claim. But even if that is incorrect, the Fourth Circuit failed to appreciate that Mr. Trump clearly abandoned the initial proposal.

In May 2016, just before clinching the Republican nomination, Mr. Trump explained in a radio interview that his initial statement from December was "just a suggestion." *Kilmeade's Wide-Ranging Interview with Donald Trump*, Fox News Radio (May 11, 2016), goo.gl/C55oeX. Then, on June 13—one day after the Orlando nightclub shooting—Mr. Trump announced his new plan to "suspend immigration from areas of the world when there is a proven history of terrorism." *Transcript: Donald Trump's National Security Speech*, Politico (June 13, 2016), https://goo.gl/rn28gr. In the ensuing weeks, members of the Trump campaign explained that his new focus on "terror states" was a "changed" position and a "pivot[]" away from the initial statement he made in December. *Trump on Latest Iteration of Muslim Ban*, CNN (July 24, 2016), goo.gl/lIu40E.

Notably, that is precisely how the media covered it at the time. *See, e.g.*, *Donald Trump Back-Pedals on Banning Muslims from U.S.*, Wall Street Journal (June 28, 2016), goo.gl/UATLkc; *What Is Donald Trump Even Running on Anymore? His "Muslim Ban" Shift Sells Out His Core Constituents*, Vox (June 28, 2016), goo.gl/nopqpn; *Trump Changing Muslim Ban to Countries with Terror Links*, Newsmax (June 27, 2016), goo.gl/VzW79d; Katherine Krueger, *Trump Pivots: Only Muslims from 'Terrorist Countries' Would Be Banned*, Talking Points Memo (June 25, 2016), goo.gl/qGxNGy; *see also The Final Push: Clinton*, FactCheck.org (Nov. 4, 2016), goo.gl/Zg0x10 ("Trump has clearly changed his initial call for a 'total and complete shutdown of Muslims entering the United States.'").

The Fourth Circuit nevertheless asserted that Mr. Trump did not really change positions, but rather "attempt[ed] to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality." Pet. App. 49a. This speculative theory is not supported by the evidence.

The Fourth Circuit pointed to an interview on Meet the Press in July, where Mr. Trump was asked whether his new policy was a "rollback" from his original statement. *Id.* at 49a-50a. Mr. Trump challenged the word "rollback" but confirmed that he was "looking now at territories":

> I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. *I'm looking now at territories*. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. But just remember this: Our Constitution is great. But it doesn't necessarily give us the right to commit suicide, okay? Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful

> part of our Constitution. I view it differently. Why are we committing suicide? Why are we doing that? But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. *We're making it territorial.* We have nations and we'll come out, *I'm going to be coming out over the next few weeks with a number of the places.*

Transcript, *Meet the Press* (July 24, 2016), goo.gl/jHc6aU (emphases added).

The Fourth Circuit read this statement as an admission that "territory" is code for "Muslim," but that reading is implausible. Mr. Trump clearly stated that he was *not* using religion and was now "looking at territories" and "making it territorial." His characterization of the territory-based proposal as an "expansion" of his initial proposal was true—looking at territories is an "expansion" in the sense that it involves considering people of *all* religions in a given territory. This is not evidence of anti-Muslim purpose.

The Fourth Circuit concluded that Mayor Giuliani confessed, during an interview on Fox News, that the territory-based proposal was just a way to create a Muslim ban that would stand up in court. Pet. App. 50a. Putting aside the absurdity of crediting a hearsay statement from a nongovernmental consultant about what the President said, *see Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment), Mayor Giuliani actually said the opposite:

> OK. I'll tell you the whole history of it. So when he first announced it he said "Muslim ban."

> He called me up and said, "Put a commission together, show me the right way to do it legally." I put a commission together with Judge Mukasey, with Congressman McCaul, Pete King, a whole group of other very expert lawyers on this. And what we did was *we focused on, instead of religion, danger*. The areas of the world that create danger for us. *Which is a factual basis. Not a religious basis*. Perfectly legal, perfectly sensible, and *that's what the ban is based on. It's not based on religion*. It's based on places where there are substantial evidence that people are sending terrorists into our country.

Dkt. 171-3 at 61, *Hawai'i v. Trump*, No. 17-cv-00050 (D. Haw.) (emphases added).

The Fourth Circuit read "show me the right way to do it legally" to mean "show me how to discriminate and get away with it." But it could have just as plausibly meant "show me how to prevent terrorism from certain regions without giving the misimpression that I'm engaging in religious discrimination." Indeed, that is precisely what Mayor Giuliani said it meant in the rest of his statement. Although the Fourth Circuit credited the first two sentences of Mayor Giuliani's statement, it inexplicably did not credit his assurances that "we focused on, instead of religion, danger" and that the Order is "not based on religion." The omission is glaring.

The Fourth Circuit also found it important that, "[o]n December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, 'You know my plans.

All along, I've proven to be right. 100% correct.'" Pet. App. 49a. But this statement is horribly ambiguous. The Fourth Circuit assumed "plans" meant "Muslim ban," but the only "plan" that Mr. Trump had discussed for the previous six months was his territory-based policy. As his spokesperson Kellyanne Conway explained the next day: "You're going back to over a year ago in what he said about the ban" but later "he made it much more specific and talked about countries." *Conway: Trump Will Not Pursue Immigration Ban Based Solely on Religion*, CNN (Dec. 22, 2016), goo.gl/0fDOq6. Before signing the first order, moreover, President Trump told ABC News, "[N]o it's not the Muslim ban. But it's countries that have tremendous terror." Transcript, *David Muir Interviews President Trump*, ABC News (Jan. 25, 2017), goo.gl/q5MNDV.

The few post-inauguration statements that the Fourth Circuit cited fare no better. When President Trump signed the first order, he stated: "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." Pet. App. 50a. Any judge who claims to know what "that" means is engaged in psychoanalysis, not law. It likely does not mean "Muslim ban"—a concept the President abandoned six months earlier. Indeed, two days after signing the Order, the President reaffirmed that "[i]t's not a Muslim ban." *Here's What President Donald Trump's Immigration Executive Order Means*, ABC (Jan. 29, 2017), goo.gl/apck1X.

The Fourth Circuit also relied on two staffers who said that the Order had the same "principles" and "basic policies" as the first order with "mostly minor technical differences." Pet. App. 50a-51a. The President likewise described the Order as a "watered down" version of the first order. Pet. App. 51a. But these statements are only relevant if the first order was a Muslim ban. And it was not, as explained above. Indeed, both staffers emphasized that the first order was a lawful national-security measure. *See Miller: New Order Will Be Responsive to the Judicial Ruling*, Fox News (Feb. 21, 2017), goo.gl/wcHvHH; *Press Gaggle by Press Secretary Sean Spicer*, White House (Mar 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer. Moreover, none of these statements was made with respect to Muslims or the Establishment Clause. The Order was a reaction to the Ninth Circuit's decision in *Washington*, which invalidated the first order under the Due Process Clause only. The statements comparing the Order with its predecessor were all made in that context.

At bottom, the statements that purportedly show the Order is a "Muslim ban" in disguise do not hold up. Undeterred, the Fourth Circuit concluded that the Order was an attempt to discriminate against Muslims for another reason: because Mr. Trump allegedly expressed "anti-Muslim sentiment" on two occasions during the campaign. Pet. App. 49a. But in the first statement—an interview with CNN where Mr. Trump said "Islam hates us"—he clarified that the reference was to "radical Islam," not all Muslims. *Donald Trump: "I Think Islam Hates Us"*, CNN (Mar. 10, 2016), goo.gl/wcLcF7. And in the second statement—a response to the terrorist attack in Brussels—Mr. Trump clarified that he was talking about "people from the Middle East" and that he "didn't say shut it down … I said you have to be very careful. We have to be very, very strong and vigilant at the borders." *Trump: 'Frankly, We're Having Problems with the Muslims'*, The Hill (Mar. 22, 2016), goo.gl/MmBvKO. Further, the

Fourth Circuit did not credit more recent statements from President Trump, like his speech in Saudi Arabia where he called Islam "one of the world's great faiths" and called for "tolerance and respect for each other." *President Trump's Speech to the Arab Islamic American Summit*, White House (May 21, 2017), https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit.

More troublingly, by resorting to these generic statements, the Fourth Circuit was implying that the President is *generally* anti-Muslim. By this logic, *any* action that he takes with respect to a majority-Muslim country is ripe for invalidation under the Establishment Clause. Even if his early comments were somehow insensitive, they cannot "forever taint" his ability to take actions in the Middle East. *McCreary*, 545 U.S. at 873-74. The theory of the decision below is that Mr. Trump did not *mean* it when he said, repeatedly, that he had changed his initial proposal. This is not law; this is "psychoanalysis." *Id.* at 862.

In short, the decision below is not supported by the record. Read fairly and accurately, the evidence indicates that President Trump has maintained a bona fide interest in national security and that any initial calls for a "Muslim ban" were not evidence of religious animus and, in any event, were ultimately abandoned for a geography-based approach to an urgent national-security problem. The Fourth Circuit reached the opposite conclusion by cherry picking snippets of statements and reading them in the light least favorable to the President—just the opposite of what the law requires.

CONCLUSION

For all these reasons, the Court should reverse the Fourth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF FOR *AMICUS CURIAE* SYRIAN ASYLEE AHMAD M. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Ahmad M. is an asylee from Aleppo, Syria, who fled the Syrian Civil War in 2014.[1] He received asylum in the United States in 2016 and promptly sought derivative-asylum status for his wife and daughter, whom Ahmad had been forced to leave behind. The derivative-asylum process was well underway when President Trump signed his first Executive Order banning entry from Syria and six other majority-Muslim countries. That Executive Order halted Ahmad's derivative petitions, as did its replacement, Executive Order 13,780 (the "Order").

Ahmad challenged the Order and, in March 2017, a federal district court enjoined its enforcement against Ahmad and his family, recognizing the irreparable harm the Order caused and the equities his case presented. *Doe* v. *Trump*, 2017 WL 975996 (W.D. Wis. Mar. 10, 2017). Because of that injunction and the nationwide injunctions under review here, Ahmad's petitions were processed, and he reunited with his wife and daughter in Wisconsin in April 2017.

Ahmad shares his story in the hope of sparing others from an order that tears families apart. He urges the Court to vindicate the fundamental American values underlying the carefully calibrated immigration laws that Congress created.

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[1] Petitioner has filed blanket consents to the filing of *amicus* briefs in these cases. Emails from respondents consenting to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund its preparation or submission. *Amicus*'s counsel funded in entirety the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

What is at issue in these cases is, at bottom, a matter of congressional intent. The Government argues that Congress granted the President unlimited and unreviewable authority to close the Nation's borders to certain nationalities.

But Congress's "specific statutory directions" in the Immigration and Nationality Act ("INA") instruct that aliens seeking admission are to be evaluated as individuals, not as members of a national, ethnic, or religious group. *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring); 8 U.S.C. § 1152(a)(1)(A) (the Executive may not discriminate in issuing visas on the basis of "race, sex, nationality, place of birth, or place of residence"). Here, the President has adopted sweeping, group-based classifications that are incompatible with these congressional directives and with "the simple command that the Government must treat" individuals "as individuals, not as simply components of a racial, religious, sexual, or national class." *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks omitted). The Order therefore exceeds the President's authority.

Ahmad's story shows why the Government's view of the President's statutory power cannot and should not carry the day. Ahmad and his family are precisely those whom the asylum laws are meant to protect. Receiving asylum in the United States "was one of the most memorable moments of [his] life," Ahmad explained in his suit to enjoin the Order. Aff. of John Doe ¶ 21, *Doe* v. *Trump*, No. 17-cv-00112 (Feb. 13, 2017), ECF No. 11 ("Aff."). "Yet, at the same time, [he] was terribly afraid" for his family, and was "desperate to get them to safety." *Id.* Ahmad had good reason to worry. Ahmad's three-year-old son was killed in Aleppo while fleeing an artillery strike in 2015. Given the security conditions in Aleppo, Ahmad's son was "hastily buried in an unmarked grave." *Id.* ¶¶ 18-19. His wife and daughter, facing a constant threat of rape and murder by militia members, went into hiding. Ahmad did not know if he would ever see them again—and by the Executive's lights, he never would have. The Order would have stranded them in Syria, where they faced almost-certain death. But because the federal courts intervened, Ahmad reunited with his family in Wisconsin, where they now live and play a productive role in their community.

Ahmad's narrative exposes how the Order, by regulating entry based on arbitrary, nationality-based distinctions, "slic[es] deeply into the family itself," *Moore v. City of E. Cleveland*, 431 U.S. 494, 498 (1977) (plurality opinion), unlawfully separating American immigrants from their relatives. The Order targets immigrant families, refugees, and asylees purely because they share a nationality with a few others who are extremists. Congress could not have intended such a result. The Order cannot be squared with the Nation's laws or most fundamental values, and it should be set aside.

ARGUMENT

I. Ahmad's Story Shows That The Order Violates Our Immigration Laws.

Ahmad M. is a 31-year-old Sunni Muslim man who currently lives in Madison, Wisconsin, with his wife and three-year-old daughter. He immigrated to the United States from Syria in 2014. He has become an engaged member of his community. He is active in his mosque and normally works 12 hours a day, seven days a week. He and his wife are expecting another child, who is due to be born next year. This is the happy ending to Ahmad's story. But it is one that could not and would not have occurred without the intervention of the federal courts.

A. Ahmad Flees Civil War For Safety In A Nation Of Immigrants.

We begin in 2011, as the "Arab Spring" protests first reached Syria. Syrian Accountability Project, Covered in Dust, Veiled by Shadow: The Siege and Destruction of Aleppo 8 (2017), https://goo.gl/4mHgYn. While activists protested Bashar al-Assad's totalitarian regime in Aleppo, Ahmad was celebrating his recent marriage. To support his new family, he began working as the manager of his father's outdoor-recreation business. Aff. ¶ 3.

Ahmad's wife gave birth to their first child, a son, in early 2012. She became pregnant with their second child, a daughter, shortly thereafter. By then, Syria had fallen into full civil war. *Id.* ¶ 4. Armed militias took control of Aleppo. The Syrian Arab Army ("SAA"), a militia aligned with the Assad regime, controlled the area in which Ahmad lived. The Free Syrian Army

("FSA"), a rebel militia affiliated with Sunni Muslims, controlled the area in which his father's business was located. *Id.* ¶ 5. The militias stationed snipers at the borders between their strongholds and targeted civilians who tried to cross. Janine di Giovanni, The Morning They Came for Us: Dispatches from Syria 127 (2016); Robert F. Worth, *Aleppo After the Fall*, N.Y. Times Magazine, May 24, 2017.

The SAA and rebel militias both subjected civilians in Aleppo to "unthinkable atrocities." Amnesty Int'l, "Death Everywhere:" War Crimes and Human Rights Abuses in Aleppo, Syria 6 (2015), https://goo.gl/U3rs1E. Both sides routinely imprisoned, tortured, and executed civilians. *Id.* at 16-17. Members of the FSA began extorting and kidnapping civilians, holding them in appalling conditions until they or their families paid a ransom. *Id.* at 45; Robin Yassin-Kassab & Leila Al-Shami, Burning Country: Syrians in Revolution and War 96 (2016). Sexual violence against women was rampant. Amnesty Int'l, *supra*, at 40.

Eventually, the militias got to Ahmad and his family. Because Ahmad is a Sunni Muslim, the SAA wrongly believed he sympathized with the FSA. Aff. ¶ 5. The FSA, for its part, wrongly believed he sympathized with the SAA because it controlled the area of Aleppo in which he lived. *Id.* This put Ahmad in an impossible—and impossibly dangerous—situation. He could not safely commute within Aleppo from his home in SAA territory to his father's business in FSA territory. Instead, he had to leave Aleppo entirely, circumvent the city, and reenter the FSA-controlled area from a different road, a trip that took approximately fifteen hours each way. *Id.* ¶¶ 6-7.

At the end of one trip in June 2013, he found that the FSA had commandeered his family's business. FSA members demanded that Ahmad pay them "protection money." When he said he could not pay, they slashed his abdomen with a knife and beat him severely. Ahmad was hospitalized and underwent surgery. His abdomen remains disfigured to this day. *Id.* ¶ 7.

Ahmad's wife gave birth to their daughter five months later. *Id.* ¶ 10. Ahmad was away at the time, visiting the United States with his parents on a tourist visa. *Id.* ¶ 8. The purpose of the trip was to try to find a way to get his family out of Syria, but he was unsuccessful in doing so. *Id.* ¶ 9. While in the United States, Ahmad learned that he had been conscripted by the SAA. Because he refused to fight for the Assad regime, he had to travel back to Syria in secret. *Id.* ¶ 10.

In February 2014, one month after he returned to Aleppo, SAA members broke into Ahmad's home. They beat him, kidnapped him, and locked him in an underground prison. He was imprisoned for two days before he was able to pay his captors' ransom. *Id.* ¶ 11.

Ahmad's circumstances grew even more dire in the following weeks. The Victory Front, an al-Qaeda branch affiliated with the FSA, declared that anyone who saw Ahmad should kill him on sight. *Id.* ¶ 12; *see* Yassin-Kassab & Al-Shami, *supra,* at 126-27 (discussing the Victory Front). The Victory Front added Ahmad to a "wanted dead or alive" list and posted it near his family's business. The list identified Ahmad and his parents by their full names. Aff. ¶ 12.

Having been conscripted into the SAA and marked for death by the FSA, Ahmad knew he could not remain in Syria. He fled to the United States in March 2014. Immigration officials at Chicago O'Hare International Airport detained Ahmad for nearly a week. After determining that he had a credible fear of returning to Syria, however, they welcomed him into the country, consistent with the laws of the United States. *Id.* ¶ 13.

Ahmad's experience places him in a long history of immigrants, starting with the Founders, who fled persecution in their home countries for a safer life here. *In re Griffiths*, 413 U.S. 717, 719 (1973) ("From its inception, our Nation welcomed and drew strength from the immigration of aliens.").

B. Ahmad Is Separated From His Family, Who Remain In Mortal Danger In Syria.

Ahmad's arrival in the United States was bittersweet. He had narrowly escaped further harm in Syria, but his wife and two infant children remained in mortal danger.

Ahmad's wife, son, and daughter had to contend with "one of history's lengthiest campaigns of heavy aerial bombardment." Syrian Accountability Project, *supra*, at 29. From 2012 through December 2016, the Syrian military carried out a relentless bombing campaign against civilian areas in Aleppo. *Id.* at 10-17, 47-53. Using missiles, chemical weapons, and barrel bombs,[2] the military targeted residences, markets, bakeries, and hospitals. *Id.* at 10-17, 34-40; Amnesty Int'l, *supra*, at 20-34; *see also* U.S. State Dep't, Syria 2016 Human Rights Report 2 ("The Asad government and its supporters reportedly continued [in 2016] to use indiscriminate and deadly force against civilians, conducting air and ground-based military assaults on cities, residential areas, and civilian infrastructure.").[3] Rebel militias also attacked civilians areas using mortars and improvised rockets that locals called "hell cannons." Amnesty Int'l, *supra*, at 34-39.

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[2] Barrel bombs are improvised explosive devices made by packing "oil barrels, fuel tanks or gas cylinders" with "explosives, fuel and metal fragments—such as ball bearings, nails and machine parts." Amnesty Int'l, *supra*, at 19. They cannot be aimed at specific targets, so the Syrian Air Force used them to indiscriminately target civilians. *Id.* at 19-22. They "are

In July 2015, an artillery strike killed Ahmad's son. The blast hit Ahmad's family's home. In the ensuing panic, his son—then just three years old—fell three stories to his death. Ahmad could not travel to Syria to mourn with his wife and daughter. Nor, given the security situation in Aleppo, could his wife give their son a proper funeral. He was buried hastily in a park and now rests in an unmarked grave. Aff. ¶ 19.

C. Ahmad Overcomes The Trump Administration's Attempts To Keep Him Away From His Family.

1. After an Immigration Judge granted Ahmad asylum under the INA and Convention Against Torture, Ahmad invoked the INA's protections for families by filing derivative-asylum petitions for his wife and daughter. *Id.* ¶¶ 20, 22.

While the Government was processing Ahmad's petitions, his family continued to suffer. The Syrian government began a siege of Aleppo in July 2016,

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unspeakably effective at causing pain." di Giovanni, *supra* at 123.

[3] https://www.state.gov/documents/organization/265732.pdf.

surrounding the city and cutting off supply lines. Syrian Accountability Project, *supra*, at 17-20. Over the next five months, the Syrian government blocked humanitarian aid and continued its bombing campaign against markets and bakeries. *Id.* at 28. The city's residents, including Ahmad's wife and daughter, lacked access to food and safe drinking water. *Id.* To make matters worse, Ahmad's daughter came down with tonsillitis. But because of the SAA's attacks on hospitals, she could not seek medical care.

Back in the United States and with limited means of communicating with his family, Ahmad spent every day obsessively checking Syrian news outlets, in constant dread that he would find out that an attack had taken his wife and daughter from him. *Id.* ¶¶ 24-25.

In the meantime, Ahmad followed the American presidential election in the media. A year and a half after Ahmad sought refuge in the United States from war-torn Syria, then-candidate Trump called for "a total and complete shutdown of Muslims entering the United States." J.A. 179. That campaign promise troubled Ahmad, who feared he would never again see his family.

2. On January 27, 2017, President Trump signed Executive Order 13,769. Ahmad filed suit, seeking a temporary restraining order prohibiting the enforcement of Executive Order 13,769 against him or his family. Complaint, *Doe*, No. 17-cv-00112 (Feb. 13, 2017), ECF No. 1. He withdrew his request for a TRO after the Government resumed processing Ahmad's petitions in response to the nationwide injunction entered in *Washington* v. *Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

Then, on March 6, Present Trump signed the revised Order. The Government admitted that the Order, once it went into effect, would block further consideration of Ahmad's petitions. Def. Opp. at 10-11, *Doe*, 3:17-cv-00112 (Mar. 16, 2017), ECF No. 40. Given the imminent threat to his reunification with his family, Ahmad renewed his request for a TRO. On March 10, the district court granted the request and enjoined the Government from enforcing the Order against Ahmad, his wife, or his daughter. *Doe*, 2017 WL 975996, at *1.

3. With an injunction in place in Ahmad's case, and then two additional, nationwide injunctions entered against enforcement of the Order, the Government continued to process Ahmad's derivative petitions and, in April 2017, Ahmad was reunited with his family. His story, however, is a cautionary tale. His reunion occurred only after great loss and suffering, and only because federal courts enjoined the Orders that would have stranded his wife and daughter in Syria. If this Court reverses the decisions of the Fourth and Ninth Circuits, the Order will keep other families apart. These families' stories, unlike Ahmad's, may not have happy endings.

II. The Order Violates The INA.

Ahmad's story places into sharp focus the reason why the Court should reject the Government's view of the President's authority to exclude entire nationalities under the INA. Congress granted a statutory right to asylees, including Ahmad, to seek derivative-asylum status for spouses and children. 8 U.S.C. § 1158(b)(3). Congress mandated that, in this process, the Government could not discriminate against Ahmad or his family on the basis of nationality, but was instead required to make an individualized determination of admissibility. Had the President not adopted the Order, the Government would have simply processed Ahmad's derivative-asylum petitions according to law, ensuring that Ahmad's wife and three-year-old daughter did not pose a threat to the security of the United States.

The Government provides no satisfying reason why Congress, at the same time, intended to permit the President to upend this statutory scheme, separate the families of asylees and others, and suspend the United States' refugee program, all on the basis of a sweeping, national-origin-based say-so. There is none.

In enacting Section 1152(a), Congress "could hardly have chosen more explicit language." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam). "Congress has unambiguously directed that no nationality-based discrimination shall occur." *Id.*

Congress instead mandated that individual aliens seeking entry into the United States are to be evaluated as individuals, on the basis of quasi-adjudicative facts found by the Executive. And Congress enacted a detailed list enumerating the individual criteria that the Executive should consider in evaluating alien admissibility. *See* 8 U.S.C. § 1182(a) (criteria for ineligibility include communicable disease, drug addiction, criminal history, violations of religious liberty, human trafficking, involvement in espionage, and terrorist activity); *see also id.* § 1158(b) (specifying "conditions for granting asylum").

The INA's focus on individualized determinations of eligibility for entry reflects the consensus in our jurisprudence that government action may not rely on "inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms." *Schuette* v. *BAMN*, 134 S. Ct. 1623, 1635 (2014) (plurality opinion of Kennedy, J.). Just as citizens must be "treat[ed] . . . as individuals, not as simply components of a racial, religious, sexual or national class," Congress has determined that the Nation's immigration framework will not "engage[] in the offensive and demeaning assumption" that "individuals a[re] the product of their race" or nationality, and will not "evaluat[e] their thoughts and efforts—their very worth as [potential] citizens—according to a criterion barred to the Government by history and the Constitution." *Miller*, 515 U.S. at 911-12 (citations and quotation marks omitted).

Sections 1182(f) and 1185(a)(1), on which the Government relies, therefore anticipate that the President can bar entry based upon classifications tied to individual circumstances involving a threat to the interests of the United States, but not arbitrary, group- or nationality-based characteristics. The existence of Congress's specific and detailed regime for individualized assessment of aliens—its "distinct regulatory regime"—"foreclose[s]" the Order's broad-based national-origin classification. *FDA* v. *Brown & Williamson Tobacco*, 529 U.S. 120, 137, 155 (2000).

Ahmad's story proves the point. The Government thoroughly evaluated Ahmad's wife and three-year-old daughter before granting them entry into the United States, verifying that none of the INA's grounds for exclusion applied. Government officials therefore checked, among other things, that his wife and three-year-old daughter had no communicable diseases; that they had no criminal convictions; that they had not persecuted any person on the basis of race, religion, nationality, or membership in a particular social group; that they had not supported or engaged in any terrorist activity and did not intend to do so; and that they did not otherwise pose a threat to the security of the United States. The Government would have the Court hold that—although government officials checked all the boxes for these and other criteria—the President could still exclude Ahmad's wife and infant child because they are Syrians. There is no basis in law for that perverse result.

* * * *

Congress's decision to evaluate individuals on their own terms should lead the Court to reject the Government's sweeping interpretation of Sections 1182(f) and 1185(a)(1). *Cf. United States* v. *Witkovich*, 353 U.S. 194, 199-200 (1957) (in the immigration context, the Executive's legislatively conferred discretion must accord with the "purpose of the legislative scheme").

CONCLUSION

The Court should affirm the judgments of the Courts of Appeals.

Respectfully submitted,

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DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR T.A., A UNITED STATES CITIZEN OF YEMENI DESCENT, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus files this brief in support of Respondents. This brief offers a narrow but dispositive basis for affirming: the Government does not even assert a vetting justification for the June 14, 2017 extension of the travel and refugees bans. The purported reason for the bans had been to enable the Administration to establish "adequate" vetting. However, this Administration stated that it had implemented its *own* "extreme vetting" procedures by June 5, 2017—before the extension and while the bans were enjoined. The Government does not assert that this Administration's "extreme vetting" procedures may be inadequate for nationals of the six countries designated in the Amended Executive Order ("Amended Order") or refugees. Thus, the ongoing bans contradict their own rationale.

T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. The Amended Order would bar them from entering the United States. Although the Government states that banned persons "could" apply for "[c]ase by case" waivers under Section 3 of the Amended Order,

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[1] This amicus brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. This Court has permitted litigants to use pseudonyms and initials in similar circumstances. *See, e.g., Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000). No counsel for any party authored the brief in whole or in part, and no person or entity other than amicus made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

Section 16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." J.A. 1440. The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny a waiver, any timing for or notification of a denial, much less any reason, or any ability to appeal a denial.

SUMMARY OF ARGUMENT

This brief focuses on one narrow but dispositive basis for affirming: the Government's failure even to assert that the travel and refugee bans are still justified by vetting concerns *after* this Administration implemented its *own* "extreme vetting." By June 5, 2017, this Administration had achieved "extreme vetting," and a resulting 55% reduction in visas to nationals of the six nations designated by the Amended Order, while the travel ban was completely enjoined. *After* achieving "extreme vetting" and the 55% reduction, the President *extended* the bans on June 14, 2017. Because the Administration had surpassed the Amended Order's goal of adequate vetting before that extension, there is not even a purported finding of detriment for the extended bans. Lacking such a justification, the bans contravene both the statutory limits on the President and the Establishment Clause.

Part I of this brief demonstrates that this Court's function includes comparing the asserted rationale for the Amended Order with the public record of subsequent Administration statements and official statistics.

Part II demonstrates that the Administration's own official explanations and official statistics negate vetting concerns as a basis for sustaining the ongoing travel and refugee bans. The Government had represented that the bans would be "temporary" so that the Administration could establish vetting procedures that "are adequate to detect terrorists." *Infra*, at 14. Yet, on June 14, 2017, the Administration extended the bans *after* it had established "extreme vetting" by June 5, 2017. Before the extension, this "extreme vetting" already had resulted in a 55% reduction in visas to nationals of the six countries designated by the Amended Order *while* the travel ban was completely enjoined.

Part III demonstrates that, in accord with the texts of the pertinent statutes and the Establishment Clause, the Court should enjoin all prospective applications of the Amended Order's illegal travel and refugee bans.

BACKGROUND

A. President Trump's Campaign Promise To Ban Muslims.

President Trump made repeated campaign promises to order a "shutdown of Muslims entering the United States . . . ." J.A. 1050. The President stated during the campaign that the ban would be dressed up in different clothes: "I'm talking territory instead of Muslim." *See* J.A. 1015, 1133 (citing *Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* https://goo.gl/jHc6aU); *see also* https://youtu.be/YRezlhHA9Vg?t (Trump to Sean Hannity on July 25, 2016: "People don't want me to say Muslim. I guess I prefer not saying it, frankly, myself. So we're talking about territories.").

B. The Amended Order "Deliver[s] On" The President's "Campaign Promises."

On March 6, 2017, President Trump issued the Amended Order. J.A. 1416-1440. The next day, the White House Press Secretary, in *prepared* remarks made before taking questions from reporters, heralded the Amended Order as the fulfillment of President Trump's campaign promises: "President Trump yesterday *continue[d]* to *deliver on* . . . his *most significant campaign promises*: protecting the country against radical *Islamic* terrorism." Brief of *Amicus Curiae* T.A., Ex. 2, CV. No. 17-00050-DKW-KJM, *Hawaii v. Trump* (D. Haw. Mar. 14, 2017), ECF No. 201-2 (Press Briefing by Press Secretary Sean Spicer (Mar. 7, 2017), *available at* http://bit.ly/2mW39oB) (emphasis added).

Moreover, on March 15, 2017, President Trump stated at a rally not only that the Amended Order was a "watered-down version of the first order," but also that both Orders were justified by "radical *Islamic*" terrorism. J.A. 183 (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, Time (Mar. 16, 2017), *available at* http://ti.me/2o09ixe) (emphasis added).

The President's statements in early June 2017 about terror attacks in London demonstrate that banning Muslims is the reason for the Amended Order. Within an hour of a June 3, 2017 terror attack in London, the President tweeted that it showed why "[w]e need the Travel Ban . . . ." Donald J. Trump (@realDonaldTrump), Twitter (June 3, 2017 4:17 p.m.), http://bit.ly/2rzYrwd. He added the next morning: "We must stop being politically correct." Donald J. Trump (@realDonaldTrump), Twitter (June 4, 2017 4:19 a.m.), http://bit.ly/2qQRn1e.

But President Trump never had any basis to believe that any of the three London attackers would be covered by the Amended Order's bans. Indeed, *the Amended Order's bans would not have applied to the London attackers*. One was a British national; another was an Italian national; and the third was a national of Morocco and perhaps also had Libyan roots. CBS/AP, *Who were the London attackers? Chef, clerk and 'suspicious' Italian*, CBS News (June 6, 2017 6:46 p.m.), http://cbsn.ws/2g1LWYq (identifying three London attackers as (1) Khurum Butt, "a Pakistan-born failed customer service clerk"; (2) Rachid Redouane, "a Moroccan pastry chef . . . who claimed to have both Moroccan and Libyan roots"; and (3) Youssef Zaghba, "an Italian man").

The Amended Order does not apply to British, Italian, or Moroccan nationals, or dual nationals who travel under their status as a national of a non-designated country. *See* Pet. Br. at 49 n.160; J.A. 1428 §§ 3(b)(iii), (iv). Moreover, none of the London attackers had been screened by, and passed, the equivalent of what President Trump described on June 5, 2017 as his Administration's current "EXTREME VETTING." *Infra*, at 23.

The President's statements *as President* about the London attackers thus confirm that the basis for the Amended Order's bans has never been concerns about the adequacy of vetting procedures, abroad or at home, for nationals of the six countries or refugees. Rather, the President's blunt statements on June 3-4, 2017 show that the basis for his bans always has been fulfilling his pledge to ban Muslims.

C. T.A.

T.A. is a Muslim and a United States citizen who grew up in Yemen. When T.A. was eighteen, he returned to the United States to attend college. He lives here and has been a videographer.

T.A.'s father, aunts, uncles, and cousins—all of whom hold Yemeni passports—now live in Jordan, where they fled as refugees from the ongoing Yemeni Civil War. Many of them want to travel to the United States to visit T.A. and their extended family. In particular, T.A.'s cousin, with whom he is close, wishes to travel to this country to look at schools and visit his brother, a U.S. citizen, as well as T.A. The Amended Order would bar T.A.'s father, cousin and his extended family from traveling to this country.

D. The Decisions Below.

On March 16, 2017, the Maryland District Court issued a preliminary injunction barring enforcement of Section 2(c) of the Amended Order. *See* J.A. 117, 166. The Maryland District Court found that "the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." J.A. 157. The Maryland District Court further found that the Government had "not shown, or even asserted that national security cannot be maintained without an unprecedented six-country travel ban." J.A. 163-64. The Fourth Circuit substantially affirmed the decision of the Maryland District Court and demonstrated at length that "any national security justification for EO-2 . . . was offered as more of a 'litigating position' than as the actual purpose of EO-2." J.A. 225.

On March 29, 2017, the Hawaii District Court issued a preliminary injunction barring enforcement of Sections 2 and 6 of the Amended Order. J.A. 1163. The Hawaii District Court found that "the record here" is "full of religious animus, invective and *obvious pretext*." J.A. 1157 (emphasis added).

On June 12, 2017, the Ninth Circuit affirmed the preliminary injunction against Sections 2(c), 6(a), and 6(b) of the Amended Order. J.A. 1236. The court held that these Sections contravened a number of provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* Among other things, the decision explained that the Amended Order and the Government have "specifically avoid[ed] making any finding that the current screening procedures are inadequate." J.A. 1203.

ARGUMENT

I. This Court Has Authority To Compare The Amended Order's Asserted Rationale With The Administration's Statements And Official Statistics.

This Court's judicial review could stop with comparing the Amended Order's asserted rationale with the Administration's own public statements and official statistics. This comparison provides a dispositive basis for affirming and does *not* involve either balancing or substituting this Court's national security judgment for the President's. First, as Part II demonstrates, the *Administration's own* public explanations and statistics have severed any connection between (a) the Amended Order and (b) its purported statutory authority, 8 U.S.C. § 1182(f), and national security rationale. The Amended

Order states that its statutory authority rests on the need to prevent the "detriment[]" of "*unrestricted entry* into the United States of nationals" of the six designated countries. J.A. 1426, 1434 (emphasis added). But before the President extended the bans on June 14, 2017, the Administration's own statements and statistics established that *without* any ban, the entry of these nationals and refugees had been and would remain heavily restricted. Specifically, while the ban was completely enjoined, the President stated on June 5, 2017, that his Administration was subjecting *all* entrants to "extreme vetting." *See infra*, at 17. Indeed, visa issuances to nationals of the six designated countries were cut by 55% by April 2017. *See infra*, at 18.

Second, as Part II also demonstrates, under the Establishment Clause, a review of the same public record shows that the Amended Order's national security assertion is, at best, "secondary to a religious objective" of banning the entry of Muslims. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). The Government's national security assertion has been that *temporary* bans were ordered to enable the Administration to establish *adequate* vetting. *Infra*, at 14. But the Administration had established "extreme vetting" by June 5, 2017. Yet the President subsequently extended the bans on June 14, 2017. The plain, undebatable *public* record of Administration statements and official statistics therefore debunks that improving vetting is the primary objective of the Amended Order. There is thus no need for "judicial psychoanalysis." *Id.* at 862. This is especially so as it is equally unconstitutional under the Establishment Clause, whether the primary objective of a government action is religious discrimination, or an opportunistic, public appeal to religious prejudice. *Cf.*

Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (finding "violation" where "primary purpose" was "to *endorse* a particular religious doctrine") (emphasis added).

Comparing the Administration's rationale with its own subsequent statements and statistics is well within this Court's authority. National security is not a "talismanic incantation" that obviates judicial review. *United States v. Robel*, 389 U.S. 258, 263 (1967). This Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). "Security subsists, too, in fidelity to freedom's first principles." *Boumedine v. Bush*, 553 U.S. 723, 797 (2006).

The Government's argument against considering the Administration's own statements and statistics contradicts the controlling concurrence of Justice Kennedy, joined by Justice Alito, in *Kerry v. Din*, 135 S. Ct. 2128 (2015). That concurrence looked beyond the consular officer's official decision to evidence that the particular visa applicant "worked for the Taliban government, which . . . provides at least a factual connection to terrorist activity." *Id.* at 2141. That concurrence also stated that courts properly look beyond the stated reason for the denial of a visa when there is "an affirmative showing of bad faith . . . ." *Id.* Even by itself, extending the bans after the purported reason for them had ended shows bad faith. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (When the "sheer breadth [of government action] is so *discontinuous with the reasons offered for it* that the [action] seems *inexplicable by anything but animus toward the class it affects*; it lacks a rational relationship to legitimate state interests.") (emphasis added).

In contrast, there were neither explanations by the President nor official statistics that contradicted a purported reason in any case relied on by Petitioners. The visa applicant in *Kleindienst v. Mandel*, 408 U.S. 753, 758 (1972), did not rely on publicly-stated reasons different from those offered by the sole decision maker, the consular official. *See also Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("This is not to say . . . that the Government's power in this area [of immigration] is never subject to judicial review.").

Judicial reliance on the public record of Administration statements and official statistics for the limited purposes described above does not open the door to routine legal challenges to, much less discovery concerning, visa denials. By definition, reliance on *public* statements and *public* statistics is the opposite of attempting to discover a *secret* reason.

The Government properly does not assert that its constitutional or statutory interpretations in this case should be accorded deference. Hamilton wrote in Federalist Paper No. 78 that the function of interpreting and enforcing the Constitution "belong[s] to" the judicial role. Alexander Hamilton, *The Federalist No. 78*, INDEPENDENT JOURNAL (June 14, 1788) ("Federalist No. 78"), *available at* http://bit.ly/2xlVLnJ. Hamilton also explained that the judicial role includes deciding "the meaning of any particular act proceeding from the legislative body." *Id.* This should be particularly so for the immigration statutes at issue in this case.

To start, the President's interpretations of immigration statutes here would create, at a minimum, serious constitutional issues. This supplies a reason to reject these interpretations, not to defer to them. *See, e.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). *See also Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) ("Congress could not have intended" to give the executive branch authority to rest an immigration decision "on an impermissible basis such as invidious discrimination against a particular race *or group*.") (emphasis added).

Constitutional history further cautions against deference here. The Declaration of Independence lists "obstructing the laws for Naturalization of Foreigners" and "refusing to pass [persons] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." DECLARATION OF INDEPENDENCE (U.S. 1776). Not surprisingly, Article I, section 8, clause 4 of the Constitution gives the power to make rules for immigration "exclusively to Congress," *not* to the executive. *Galvan v. Press*, 347 U.S. 522, 531 (1954). Deference to the President in interpreting immigration statutes that give him only *limited* authority risks improperly transferring the immigration power conferred on Congress to the President.

Indeed, President Trump stated on September 5, 2017, that in the "immigration" context, a President should not be "able to rewrite or nullify federal laws" by adopting in an executive order an approach that "Congress repeatedly rejected . . . ." But the Amended Order's travel and refugee bans do exactly that. Press Release, The White House Office of the Press Secretary, Statement from President Donald J. Trump (Sept. 5, 2017), http://bit.ly/2xMl2Zc.

For example, in 2015, Congress addressed travel by nationals of the six designated countries. Congress enacted the Visa Waiver Program Act ("Visa Waiver Act") codified in 8 U.S.C. § 1187(a)(12). Congress rejected a ban.[2] As implemented by the Department of Homeland Security ("DHS"), the Visa Waiver Act requires visas for nationals of the six designated countries, *see* Pet. Br. at 5-6, but does *not* ban travel. Under the Visa Waiver Act, nationals of the six countries "go through the full vetting of the *regular* visa process, which includes *an in-person interview at a U.S. embassy or consulate.*" Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, Wash. Post (Jan. 21, 2016), http://wapo.st/2sERVn1 (emphasis added); U.S. Customs and Border Protection, *Visa Waiver Program*

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[2] The House had passed the American Security Against Foreign Enemies Act of 2015 ("SAFE Act"). American Security Against Foreign Enemies Act of 2015, H.R. 4038, 114th Cong. (2015). It would have banned any refugees from Syria or Iraq absent *personal*, unanimous certifications by the Secretary of DHS, the FBI Director, and the Director of National Intelligence that the *specific* refugee was not a security threat. *Id.* at § 2(a). The SAFE Act would have operated as a ban. *See* Evan Perez, *First on CNN: FBI Director James Comey balks at refugee legislation*, CNN (Nov. 19, 2015), http://cnn.it/1Ngw5ik ("Comey has told administration and congressional officials that the legislation would make it impossible to allow any refugees into the U.S., and could even affect the ability of travelers from about three dozen countries that are allowed easier travel to the U.S. under the visa waiver program, the officials say."). But the Senate did not pass the SAFE Act, as a cloture vote failed. *See* H.R. 4038 (114th): American Security Against Foreign Enemies Act of 2015, CONGRESS.GOV, http://bit.ly/2w3XhK7. Instead, both houses of Congress enacted the compromise Visa Waiver Act by large margins. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, H.R. 158, 114th Cong. (2015).

Improvement and Terrorist Travel Prevention Act Frequently Asked Questions (June 19, 2017), http://bit.ly/1Tz4wRn. Since such vetting began, the Government cites *no terrorist attack or attempted terrorist attack* in this country by any national of any of the six countries. As the Ninth Circuit held, the Amended Order's bans operate to nullify the Visa Waiver Act. *See* J.A. 1204-05.

Congress also has provided in 8 U.S.C. § 1182(a)(3)(B) "*specific* criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., joined by Alito, J., concurring) (emphasis added). To hold that the Amended Order's blanket travel and refugee bans have statutory authority would impermissibly nullify the "specific criteria" in Section 1182(a)(3)(B).

The Court should fulfill its judicial role. As has been attributed to Edmund Burke: "The only thing necessary for the triumph of evil is for good men to do nothing." *See* Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 Personality and Soc. Psychol. Rev. 193, 206 (1999). This applies to good judges.

II. No National Security Rationale Supported The Extension Of The Travel And Refugee Bans After This Administration Achieved "Extreme" Vetting.

When a rule is extended after its stated reason is over, that purported reason cannot support the rule. That is the story of the national security rationalization for the travel and refugee bans.

A. The Amended Order's Rationale Was That "Short" Bans Would Enable "Adequate" Vetting.

The Government repeatedly has represented to this Court and the courts below that the reason for the "short" and "temporary" travel and refugee bans was to allow this Administration to establish "current screening and vetting procedures [that] are *adequate* to detect terrorists seeking to infiltrate this Nation." Application (16A1190) for a Stay, No. 16-1436, *Trump v. Int'l Refugee Assistance Project*, at 8, 30 (June 1, 2017) (emphasis added); Brief for Appellants at 1-2, 10, 12, 36, 43, No. 17-15589, *Hawaii v. Trump* (9th Cir. Apr. 7, 2017), ECF No. 23; *see also* Pet. Br. at 49-50 (bans are a "temporary pause" to "allow a review precisely to determine whether adequate screening is in place"). But that rationale cannot sustain the bans. This is because those bans were extended on June 14, 2017, *after* President Trump stated on June 5, 2017 that his Administration had achieved "extreme vetting" *while* the travel and refugee bans were completely enjoined. Indeed, nothing in the Government's brief even asserts that, at the time of the extension, *this Administration's* "extreme vetting" was inadequate somehow either for nationals of the six countries designated in the Amended Order because of problems in those countries or for refugees.

B. This Administration Implemented "Extreme Vetting" By June 5, 2017.

Section 5(a) of the Amended Order was *never* enjoined. Pursuant to Section 5(a):

> The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence *shall implement a program*, as part of the process for adjudications, *to identify individuals* who seek to enter the United States on a fraudulent basis, *who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include* the development of *a uniform baseline for screening and vetting standards and procedures, such as in-person interviews*; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; *amended application forms that include questions aimed at identifying* fraudulent answers and *malicious intent*; a mechanism to ensure that applicants are who they claim to be; *a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States;* and *any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.*

J.A. 1432 (emphasis added).

By June 5, 2017, this Administration had "implement[ed]" the additional screening and vetting that Section 5(a) of the Amended Order required for all potential entrants, including nationals of the six countries and refugees. For example, on March 17, 2017, the State Department adopted enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ." Brief of *Amicus Curiae* T.A. at 12, 56, 70, No. 17-15589, *Hawaii v. Trump* (9th Cir. Apr. 7, 2017), ECF No. 114 (State Dep't Cable 25814 ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt).[3] On April 27, 2017, the Administration issued a new rule that adds a question to the Electronic Visa Update System, asking for information associated with an applicant's "online presence," meaning information related to his or her "Provider/Platform"; "social media identifier"; and "contact information." 82 Fed. Reg. 19380 (Apr. 27, 2017). On June 1, 2017, the State Department promulgated a new supplemental questionnaire for visa applicants that asks applicants to list (1) every place they have lived, worked, and traveled internationally—including how such travel was funded—for the past fifteen years; (2) every passport they have ever held, including number and country of issuance; (3) names and birth dates of all siblings, children, spouses, and partners; and (4) every social media handle, phone number, and e-mail address they have used for the past five years. U.S. Dep't of State, Supplemental Questions for Visa Applicants (2017), http://bit.ly/2wzoatR. In addition, during the first six months of the 2017 fiscal year, searches of electronic devices of international travelers arriving at U.S. airports increased 36.5%. U.S. Customs and Border Prot., *CBP Releases Statistics on Electronic Device Searches* (Apr. 11, 2017), http://bit.ly/2oyyLAu.

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[3] Even before this Administration, *every* refugee was vetted by *numerous* federal agencies and the office of the United Nations High Commissioner for Refugees. *See Hawaii v. Trump*, 859 F.3d 741, 775 n.17 (9th Cir. 2017).

President Trump himself has established that his Administration's vetting had surpassed adequate while the travel and refugee bans were fully enjoined and before the President extended the bans. By April 29, 2017, President Trump wrote that his Administration was "substantially improv[ing] vetting and screening." *See* Donald J. Trump, *President Trump: In my first 100 days, I kept my promise to Americans*, Wash. Post (Apr. 29, 2017), http://wapo.st/2s7BmUg ("Visa processes *are being reformed* to substantially improve vetting and screening . . . .") (emphasis added). On June 5, 2017, although the President disparaged the injunctions against the "Travel Ban," President Trump admitted: "*In any event we are* EXTREME VETTING people coming into the U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017 6:37 a.m. and 6:44 a.m.), http://bit.ly/2rtbEIK and http://bit.ly/2etglyy (emphasis added; capitalization in original). Thus, the Administration had implemented "extreme vetting" for all entrants *without* any ban or any change in vetting cooperation from any of the six designated countries. The next day, the White House Press Secretary stated that the President's tweets are "considered official statements by the President of the United States." Aric Jenkins, *Sean Spicer Says President Trump Considers His Tweets 'Official' White House Statements*, Time (June 6, 2017), http://ti.me/2rT57aO.[4]

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[4] Thus, the President's "official statements" prove that a March 10, 2017 letter to him from more than 130 generals and national

The proof of the pudding is in the eating. Comparing April 2017—when the Amended Order's bans were entirely enjoined—to the 2016 monthly averages, nonimmigrant visa issuances were down 15% among all countries, 20% among Muslim-majority countries, almost 30% among Arab countries, and *55% among the six countries designated by the Amended Order.* Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, Politico (May 25, 2017 10:28 EDT), http://politi.co/2r0XBHQ.

C. There Is No Vetting Rationale For The President's Subsequent June 14, 2017 Extension Of The Bans.

Because the Administration had achieved "extreme vetting" by June 5, 2017, the bans should have ended without an extension. Under the Amended Order's plain meaning, *the* "Effective Date" of "[t]his order" was defined as "March 16, 2017," the travel ban was set to end "90 days from *the effective date of this order*," and the refugee ban was set to end "120 days after *the effective date of this order*." J.A. 1426-1427; 1439 (emphasis added). Because the bans had run from "*the* effective date of this order"—March 16, 2017—the travel ban was set to expire

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security experts from across the political spectrum—including two former Secretaries of the Department of Homeland Security—had been correct. That letter explained that the United States would be able to "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of nationals of particular countries or religions." Brief of *Amicus Curiae* T.A., Ex. 5, CV. No. 17-00500-DKW-KJM, *Hawaii v. Trump* (D. Haw. Mar. 14, 2017), ECF No. 201-5 (Nat'l Security Experts' Mar. 10, 2017 Letter to President Trump, *available at* http://politi.co/2klc2FU).

on June 14, 2017, and the refugee ban on July 14, 2017. *Cf.*, *e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 902 (1991) ("[t]he definite article 'the' obviously narrows . . ."); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent . . . .").

Instead, the President, on June 14, 2017, "revise[d]" the Amended Order to *extend* the travel ban until at least September 24, 2017, and the refugee ban until at least October 24, 2017. Pet. Br. at 37; J.A. 1442. Therefore, the ban periods in effect at the time of this Court's oral argument were promulgated *after* this Administration had achieved "extreme vetting" and the resulting reduction in visa issuances.

Consequently, the bans are adrift from any statutory mooring on which they purport to be based. Section 2(c) of the Amended Order rested the travel ban on the statement that "the *unrestricted* entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States." J.A. 1426 (emphasis added). But the "extreme vetting" and 55% reduction in visas achieved *before* the extension are the opposite of "unrestricted entry."[5]

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[5] Indeed, the extension violates President Trump's campaign promise: "I don't want people coming in from the terror countries . . . *unless they're very, very strongly vetted.*" Ali Vitali, *In His Words: Donald Trump on the Muslim Ban, Deportations*, NBC News (June 27, 2016, 4:58 p.m. ET), http://nbcnews.to/2vx0d6C (emphasis added). In a Presidential debate, he similarly promised "extreme vetting from certain areas of the world." J.A. 1015, 1133 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* https://goo.gl/iIzf0A).

Nothing in the prior Amended Order supports continuation of the bans after this Administration implemented "extreme vetting." The Amended Order had cited only one example that involved a native of any of the six designated countries. "[I]n October 2014, a native of Somalia *who had been brought to the United States as a child refugee* and later *became a naturalized United States citizen* was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." J.A. 1424 (emphasis added). The Amended Order, however, could not claim that this United States national was radicalized before he came to this country as a three-year-old "child refugee" who attempted terrorism sixteen years later. *Hawaii v. Trump*, 859 F.3d at 775 n.16. So this lone instance cannot support a suggestion that vetting for nationals of the six countries ever was inadequate, much less that it remains so, despite this Administration's "extreme vetting."

The conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS, cited by Petitioners' Brief at 7, similarly does not support the extension of the travel and refugee bans. That letter did not and could not address whether this Administration's own "extreme vetting" procedures, put in place *after* the March 6, 2017 letter, are currently adequate for nationals of the six countries and refugees. Even when issued, that letter was not joined by the then-senior national security officials with the most anti-terrorism experience—namely, then-FBI Director James Comey and NSA Director Admiral Michael Rogers. Moreover, the letter is belied by the President's subsequent admissions that the Amended Order is merely a "watered-down version of the first order." J.A. 183 (citing Appellees' Br. 7) (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), *available at* http://ti.me/2o09ixe); *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017 3:29 a.m.), http://bit.ly/2rDbHzY ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."). That first executive order was issued "*without* consulting the relevant national security agencies." J.A. 224 (emphasis added).[6]

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[6] Before the Amended Order, a senior White House official was quoted as stating that "DHS and DOJ are working on an intelligence report that will demonstrate that the security threat for these seven countries is substantial and that these seven countries have all been exporters of terrorism into the United States." Jake Tapper & Pamela Brown, *White House Effort to Justify Travel Ban Causes Growing Concern for Some Intelligence Officials*, CNN Feb. 25, 2017), http://cnn.it/2kSAkZB. Instead, the Government's vetting review produced "internal reports" that "contradict th[e] national security rationale" for the travel ban. J.A. 225. A DHS internal report, made public on February 25, 2017, concluded that being a national from one of the six countries is an "unlikely indicator" of terrorism threats against the United States. J.A. 1051-56. A second DHS report, dated March 1, 2017, concluded that "most foreign-born, U.S.-based violent extremists [are] likely radicalized several years *after* their entry to the United States." J.A. 1059. Internal FBI data also "undermine[d] a key premise of the travel ban" because that data revealed that "most" foreign nationals who have posed a risk to the United States came from "countries unaffected" by the Amended Order. *See* Devlin Barrett, *Internal Trump Administration Data Undercuts Travel Ban*, Wash. Post (Mar. 16, 2017), http://wapo.st/2nVszOX. In sum, a "significant amount of internal government data" demonstrated the travel ban was "not likely to be effective in curbing the threat of terrorism in the United States." *Id.*

The June 14, 2017 extension also inexplicably did not remedy even the most obvious disconnect between the travel ban and a purported lack of cooperation in vetting by the six countries. The ban still applies to "nationals of the six countries *without* significant ties to the six designated countries, such as those who left as children or whose nationality is based on parentage alone . . . . Yet nationals of other countries who do have meaningful [current] ties to the six designated countries . . . fall outside the scope of Section 2(a)." J.A. 1202–03 (emphasis added). Thus, the Amended Order would ban travel by a doctor who is a Sudanese national but who lives, works, and would be vetted by a U.S. consular official in Saudi Arabia. J.A. 1024 (citing Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), *available at* https://goo.gl/J8x2iu). But the Amended Order permits travel by a Saudi national with no job at all who lives, and would be vetted, in Sudan.

This disparity already had produced absurd results before the June 14, 2017 extension. Groups of *Canadian girl scouts and school children* would not visit the United States because their groups contain some young people who reside in Canada but are nationals of the six countries. *See* Derek Hawking, *Worried about Trump's travel ban, Canada's largest school district calls off U.S. trips*, Wash. Post (Mar. 24, 2017), http://wapo.st/2nVbHrP.

The Government's brief does not provide even a *post hoc* vetting justification for the June 14, 2017 extension of the bans. This omission is particularly telling as *before* the Government's brief, the Government had received the 20-day report required by Sections 2(a) and (b) of the

Amended Order. Farhana Khera and Johnathan J. Smith, *How Trump Is Stealthily Carrying Out His Muslim Ban*, N.Y. Times (July 18, 2017), http://nyti.ms/2u5Ay0J.

If the Government belatedly argues in its reply that "extreme vetting" is somehow not enough vetting, this transparent litigation tactic would be an improper new reply brief argument. *See, e.g.*, S. Shapiro, *et al.*, Supreme Court Practice § 6.38, p. 511 (10th ed. 2013). Most important, any new argument would be even farther removed from the Amended Order's rationale that "detriment" resulted from "*unrestricted* entry." J.A. 1426 (emphasis added). *See Romer*, 517 U.S. at 635 (government's "particular justifications" are "impossible to credit" when the "breadth" of government action is "so far removed" from those justifications).

The unfortunate but inescapable conclusion is that the actual basis for the June 14, 2017 extension of the travel and refugee bans was fulfilling the President's pledges to ban Muslims. The President *as President* has confirmed this. He stated on June 3, 2017 that a London terror attack by three Muslims *who would not be banned by the Amended Order* show why "[w]e need the Travel Ban." *Supra*, at 4. The President's linking of terror by Muslims with his purportedly narrower bans explains why the President extended the bans *after his Administration* achieved "extreme vetting." *Supra*, at 18-19. The President's bans were and are about fulfilling his pledge to ban Muslims. They are not—and never were—about the adequacy of vetting for nationals of the six designated countries or refugees.

III. In Accord With The Applicable Statutory And Constitutional Texts, This Court Should Enjoin All Prospective Applications Of The Amended Order's Illegal Travel And Refugee Bans.

This is not a case where splitting the baby would be a Solomonic decision. Consider, for example, a ruling by this Court that Respondents have standing and prevail on the merits, but that would restrict injunctive relief so as to enable bans against travelers and refugees who lack a prior bona fide relationship with a person or entity in the United States (hereinafter, "a Prior U.S. Relationship"). This Court should reject any such restriction for at least four reasons.

First, the plain meaning of the pertinent INA provisions precludes restricting their prescriptions to aliens with a Prior U.S. Relationship. 8 U.S.C. § 1182(f) prescribes conditions that apply "[w]henever" the President seeks to suspend "the entry of *any* aliens or *any* class of aliens . . . ." 8 U.S.C. § 1157(a)(2) prescribes conditions that apply whenever the President seeks to limit "the number of refugees." 8 U.S.C. § 1182(a)(3)(B) sets conditions for denying admission to "*[a]ny* alien" based on potential terrorism. (emphasis added). 8 U.S.C. § 1152(a)(1)(A) prescribes that "*no person* shall . . . be discriminated against" based on nationality with four express statutory exceptions. *Id.* (emphasis added). The lack of a Prior U.S. Relationship is not one of the exceptions. The Visa Waiver Act applies to *all* nationals of the six countries. *Supra,* at 12.

Second, the express limits imposed by the Establishment Clause also apply to a government-wide order issued in the United States to deny entry to foreigners, including those without a Prior U.S. Relationship. In 1787, the Constitution gave the power to make *laws* on foreign immigration to Congress. Two years later, the Establishment Clause was proposed for ratification. It provides: "Congress shall make *no law* respecting *an* establishment of religion . . . ." U.S. CONST. Amend. I (emphasis added). That Clause therefore applies to immigration laws and rules, without any exception permitting religious discrimination toward those who lack a Prior U.S. Relationship.

The Government cites *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), for the proposition that "[a]liens abroad have no Establishment Clause rights." Pet. Br. at 35 n.13. That both misreads *Verdugo-Urquidez* and ignores the comprehensive language of the Establishment Clause. *Verdugo-Urquidez* was expressly limited to the Fourth Amendment, "the particular provision[] in question . . . ." 494 U.S. at 273. The Court held that the reach of the Fourth Amendment was circumscribed by its use of the term "the right of the people." *Id.* at 265. The Court emphasized that "in some cases, [other] provisions extend beyond the citizenry." *Id.* at 269.

Justice Kennedy's concurrence, which was necessary for the majority, was even narrower. It held only that, because it would be "impracticable and anomalous," the "Fourth Amendment's warrant requirement should not apply [abroad] as it does in this country." *Id.* at 277-78. Justice Kennedy emphasized that in general "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277.

Unlike the Fourth Amendment, the First Amendment's Establishment Clause is not circumscribed by the term "the right of the people." This omission is particularly telling as, in sharp contrast to the Establishment Clause, the First Amendment's protection of peaceful assembly extends only to "the right of the people." By using the term "no law" without modification, the Establishment Clause prescribes a comprehensive limit on government action whether foreign or domestic.

Nor would it be impracticable or anomalous for the Establishment Clause to apply to a President's government-wide order that is issued in this country and implemented here and in U.S. consular offices. Our country has long admitted foreign travelers, immigrants, and refugees, including those who lack a Prior U.S. Relationship, while complying with various U.S. laws. Indeed, the inscription on the Statue of Liberty does *not* request "your tired, your poor, your huddled masses yearning to breathe free, *if they have a Prior U.S. Relationship.*"

Third, when considering a preliminary injunction, a court envisages what the final judgment likely will provide. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.") (citations omitted). Here, the district court's final judgment is readily envisioned should the Respondents prevail in this Court on their standing and the merits. Such a merits ruling by *this Court*—unlike a lower court ruling or a stay *pending* review—will conclusively establish the law *in every venue* that Sections 2(a), 6(a), and 6(b) of the Amended Order violate both statutory and constitutional limits. The subsequent final judgments of the two district courts ineluctably will therefore provide declaratory relief to the same effect. It makes no sense in this case for the final injunctive relief, or preliminary injunctive relief, to be narrower than this Court's invalidation of Sections 2(c), 6(a), and 6(b).

Such a dichotomy would invite mischief against the rule of law. Indeed, the Administration states that, should *this Court* rule that Sections 2(c), 6(a), and 6(b) "are invalid on their face," the Administration would nonetheless apply those Sections in countless circumstances *unless* the Court also enjoins the Administration from such applications. Pet. Br. at 82–83.

Fourth, were this Court to exclude those without a Prior U.S. Relationship from the scope of the INA and the Establishment Clause, the cure would be worse than the disease. Any President could restrict travel, immigration, and refugees to foreigners who were Christians, unless a non-Christian had a Prior U.S. Relationship. Most Jewish refugees from Hitler could have been banned, and more than one billion foreign Muslims could be banned now.

Eight Justices of this Court have indicated that he or she would never join a decision like *Korematsu v. United States*, 323 U.S. 214 (1944). Chief Justice Roberts is typical. The Chief Justice testified that if a case "like" *Korematsu* came before the Court, "I would be surprised if there were any arguments that could support it." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of John Roberts To Be Chief Justice Of The Supreme Court*, 109th Cong. (2005), 2005 WL 2214702, at *22.[7]

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[7] Justices Ginsburg and Breyer similarly rejected *Korematsu*. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995)

Perhaps most instructive is the "Reading List of Justice Anthony M. Kennedy," entitled "Understanding Freedom's Heritage: How to Keep and Defend Liberty," which is *available at* http://bit.ly/2iZXm08 (hereinafter, "Liberty Reading List"). Justice Kennedy's Liberty Reading List includes the *dissent* of Justice Murphy in

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(Ginsburg, J., dissenting) (*Korematsu* "yielded a pass for an odious, gravely injurious racial classification[.] A *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited."); Stephen Breyer, *Making Our Democracy Work: A Judge's View*, 193 (Knopf, 2010) (*Korematsu* "has been so thoroughly discredited, that it is hard to conceive of any future court referring to it favorably or relying on it."). Justice Alito testified that the "Japanese internment cases . . . were one of the great constitutional tragedies that our country has experienced . . . ." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of Judge Samuel Alito To The U.S. Supreme Court*, 109th Cong. (2006), 2006 WL 45940, at *150–51. Justice Sotomayor testified that *Korematsu* "was wrongly decided." *U.S. Senate Committee On The Judiciary Holds A Hearing On The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice Of The U.S. Supreme Court*, 111th Cong. (2009), 2009 WL 2027303, at *79. Justice Kagan gave *Korematsu* as *the* example of a "poorly reasoned" Supreme Court decision. *Responses to Supplemental Questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn, available at* http://bit.ly/2oI0aAf. When Justice Gorsuch was asked whether *Korematsu* has any precedential value in any case that may come before the Supreme Court, he testified, "no." Senator Mazie K. Hirono, *Questions for the Record following Hearing on March 20-23, 2017 entitled: "On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States,"* Senate Judiciary Committee (Mar. 20-23, 2017), *available at* http://bit.ly/2pmtWHD. *See Generally Steinberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (describing "*Korematsu* and *Dred Scott*" as occupying the worst "place in the history of this Court's jurisprudence").

Korematsu as what the Ninth Circuit website describes as containing some of the "key principles that are integral to our nation's DNA." Justice Murphy stated that even claims by the executive branch regarding military necessity "must [be] subject" to the "judicial process of having . . . reasonableness determined . . . ." *Korematsu*, 323 U.S. at 234. That reasonable "relation" was "lacking" because the internment order simply "assum[ed] that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy." *Id.* at 235. However, no "reason, logic or experience could be marshalled in support of such an assumption." *Id.*; *see also id.* at 240 (rejecting "infer[ence] that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group").

What unavoidably remained, Justice Murphy explained, as the underlying basis for the internment was "an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by *people with racial and economic prejudices—the same people who have been among the most foremost advocates* of the evacuation." *Id.* at 239 (emphasis added). Justice Murphy explained that even a "military judgment" in wartime that was "based upon such racial and sociological considerations is not entitled to the great weight" ordinarily given to military assessments. *Id.* at 239–40. Justice Murphy concluded:

> Racial discrimination *in any form and in any degree* has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free

> people who have embraced the principles set forth in the Constitution of the United States.

Id. at 242 (emphasis added).[8]

The Administration likewise has provided no "reason, logic or experience," *id.* at 235, in support of the Amended Order's ongoing bans. In particular, there is no support that nationals of the six countries and refugees may possess some inherent tendency to commit terrorism in the United States that this Administration's "extreme vetting" would not adequately detect. *See* Part II, *supra.*[9]

Instead of providing any supporting reason, logic, or experience, President Trump has attempted to intimidate the federal judiciary: "*If* something happens, blame [the judge] and court system." Brief of *Amicus Curiae* T.A., Ex. 6, CV. No. 17-00050-DKW-KJM, *Hawaii v. Trump* (D. Haw. Mar. 14, 2017), ECF No. 201-6 (Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 12:39 p.m. ET), *available at* http://bit.ly/2ojCwta) (emphasis added). Such intimidation is antithetical to our constitutional system. To start, constitutional and statutory constraints effectively would be discarded if they could be overridden by a suggestion that following them may increase some potential risk of terrorism or other horrific violence. If that were enough, one could ban the purchase of firearms because the San Bernardino and Orlando terrorists used guns.[10] Or ban the internet because foreign and domestic terrorists use the internet for recruitment, inspiration, and planning. Or ban interstate travel by white nationalists because for decades some of them have crossed state lines in traveling to commit terrorist attacks.[11] And so on.

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[8] In the highest tradition of the bench, Justice Murphy ignored partisan and personal loyalties. President Roosevelt had appointed Justice Murphy three times: as Governor General of the Philippines, Attorney General, and Justice.

[9] Then-Candidate Trump attempted to support his proposed bans by citing the Japanese internment, telling reporters, "[Roosevelt] did the same thing." J.A. 1013 n.15 (citing Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, Wash. Post (Dec. 8, 2015), https://goo.gl/6G0oH7). Taking the wrong page from history again, President Trump has asserted that Muslims do not assimilate in Western societies. See Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Wash. Post (Mar. 16, 2017), http://wapo.st/2o0QXzA. Similar assertions about non-assimilation were made to justify the Japanese internment. *See Hirabayashi v. United States*, 320 U.S. 81, 96 (1943). The Government's brief (Pet. Br. at 23) cites *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), which in turn relies in part on *Korematsu* and *Hirabayashi*. *See* 342 U.S. at 589 n.16, 591 n.17.

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[10] Indeed, President Trump has used the San Bernardino and Orlando shootings as support for his bans even though those terrorists were neither nationals of the six countries nor refugees. One day after the Orlando shooting, then-candidate Trump cited 8 U.S.C. § 1182(f) as a basis to "suspend immigration from areas of the world where there is a proven history of terrorism," explaining that "I called for a ban after San Bernardino, and was met with such great scorn and anger but now . . . many are saying that I was right to do so." Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time.com (June 13, 2016 4:36 p.m. ET), http://ti.me/1XSQ8YS.

[11] For example, in 1985, David Tate, a member of The Order—"a violent anti-Semitic group" that "committed armed robberies . . . and directed counterfeiting operations to finance a 'war' against the Federal Government"—traveled from Idaho to Missouri to murder a Missouri state trooper. *See* Wayne King, *Suspect Wanted in Shooting of Missouri Trooper is Arrested*, N.Y. Times (Apr. 21, 1985), https://goo.gl/xHT1hK; Associated Press, *AROUND THE*

But this Court addressed "terrorism" in *Boumedine* and held: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumedine*, 533 U.S. at 798. The Framers decided that the Establishment Clause is an essential part of that framework.

As important, this Court must never surrender to intimidation. As Hamilton wrote in Federalist No. 78:

> This *independence of the judges* is equally *requisite* to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of *designing men*, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection,

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NATION; White Supremacist Gets Life for Killing Trooper, N.Y. Times (Jan. 8, 1986), http://nyti.ms/2wkuBAr. In 1995, Timothy McVeigh, "a disgruntled Army veteran who went on to declare war on the United States government," traveled from Arizona to Oklahoma to destroy the Alfred P. Murrah Federal Building. Christopher S. Wren, *McVeigh Is Executed for Oklahoma City Bombing*, N.Y. Times (June 11, 2001), http://nyti.ms/2vaTif6; Howard Witt, *In Arizona Town, Oklahoma Bombing Casts Dark Shadow Unwanted Fame Because Suspect Once Lived There*, Chi. Trib. (June 18, 1995), https://goo.gl/1tHdGN. And, recently, James Fields traveled from Ohio to Virginia to plow his car into a group of counter-protestors at a white nationalist rally, killing one and injuring others. *See* Jonah Engel Bromwich, Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing*, N.Y. Times (Aug. 13, 2017), https://goo.gl/xzKdje.

> have a tendency, in the meantime, to occasion dangerous innovations in the government.

Alexander Hamilton, *The Federalist No. 78*, INDEPENDENT JOURNAL (June 14, 1788) (emphasis added), *available at* http://bit.ly/2xlVLnJ.

Likewise, then-Judge Cardozo wrote:

> The great ideals of liberty and equality are preserved against the *assaults of opportunism*, the expediency of the passing hour, the erosion of small encroachments, *the scorn and derision of those who have no patience with general principles*, by enshrining them in constitutions, and *consecrating to the task of their protection a body of defenders*.

Benjamin N. Cardozo, The Nature of the Judicial Process, 92-93 (1921) (emphasis added).

Our Constitution inoculates its "body of defenders" against presidential intimidation. As Justice Scalia said: "What can he do to me? Or to any of us? *We have life tenure* and we have it *precisely so that we will not be influenced* by politics, *by threats from anybody*." Chris Wallace, *Justice Antonin Scalia on issues facing SCOTUS and the country*, Fox News Sunday (July 29, 2012), http://fxn.ws/2fZZBiB (emphasis added).

Experience teaches that half-measures do not assuage autocratic intimidation.[12] This Court's decision should resolve this matter once and for all with a prospective injunction that enforces the full scope of the applicable statutory and constitutional limits.

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[12] "History will teach us that . . . of those men who have overturned the liberties of republics, the greatest number have

CONCLUSION

This Court should affirm the decisions of the Fourth and Ninth Circuits.

DATED: September 6, 2017.

Respectfully submitted,

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begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants." Alexander Hamilton, Federalist No. 1, cited in Liberty Reading List. The Bible in Proverbs 28:15 likens a "tyrant" to "a roaring lion, and a charging bear." *Proverbs 28:15* (International Standard Version). Pastor Martin Niemöller's iconic 1946 Lecture, "First They Came," cited in Liberty Reading List, illustrates the horrific consequences that can follow from attempts to appease nascent autocracy.

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

V.

STATE OF HAWAII, ET AL., *Respondents.*

On Writ of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMICI CURIAE TAHIRIH JUSTICE CENTER, THE ASIAN PACIFIC INSTITUTE OF GENDER-BASED VIOLENCE, CASA DE ESPERANZA, AND THE NATIONAL DOMESTIC VIOLENCE HOTLINE IN SUPPORT OF RESPONDENTS (Additional *Amici* Continued on First Page)

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ADDITIONAL AMICI

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INTEREST OF AMICI CURIAE[1]

Amici are a coalition of organizations united in the goal of serving survivors of gender-based and domestic violence. *Amici* include nonprofit organizations devoted to remedying domestic violence through legislative, legal, and other initiatives, as well as additional organizations dedicated to serving and supporting survivors of domestic violence. Among other things, they provide shelter, counseling, and advocacy services, as well as serving as leaders in developing and implementing the Violence Against Women Act ("VAWA") and other laws that provide safety and independence for survivors of domestic violence. *Amici* have hundreds of years of collective experience working with such survivors, including extensive efforts to improve both the criminal and civil justice systems' responses to and prevention of domestic violence. They are united in their deep concern that the President's Executive Order 13,780 will endanger immigrant and refugee women and children survivors, who are often the persons most vulnerable to gender-based violence.

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[1] *Amici* are described in the Appendix to this brief. Pursuant to this Court's Rule 37.6, *amici* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), *amici* state that counsel of record for both Petitioners and Respondents have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Violence against women and children is a global crisis. Worldwide, one in three women will suffer domestic or sexual abuse in her lifetime.[2] In the United States, a woman is assaulted or beaten every nine seconds.[3] This abuse is often intimate or familial, carried out by the victim's partner or parent.[4] In families where spousal abuse occurs, "child abuse is often present as well."[5] The abuser can dominate the victim's life so fully that any hope for escape is often out of reach—absent a robust system of social and legal support. And any delay in accessing support can mean severe injury or even death.

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[2] *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, World Health Organization Dep't of Reproductive Health & Research, 2 (2013), http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/.

[3] *Domestic Violence National Statistics*, National Coalition Against Domestic Violence, 1 (2015), http://ncadv.org/files/National%20Statistics%20Domestic%20Violence%20NCADV.pdf.

[4] Michele Black et al., *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, Centers for Disease Control and Prevention, 2 (2011) ("More than 1 in 3 women (35.6%) . . . in the United States have experienced rape, physical violence, and/or stalking by an intimate partner"), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

[5] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 891 (1992). *See also United States v. Morrison*, 529 U.S. 598, 614 (2000) (noting the "serious impact that gender-motivated violence has on victims and their families").

For decades the United States has provided such support for its own citizens through an array of social support systems and legal protections, from states criminalizing marital rape, to Congress authorizing, then reauthorizing VAWA, to building a framework of federal protections for domestic violence victims, to creating criminal justice system and community-based responses to gender-based crimes.

While protecting its own, our nation has not closed its eyes, or its doors, to victims of abuse globally. Through VAWA and other legislation, Congress has extended protections to non-citizens, creating new pathways to safety, residency, and citizenship for immigrant, undocumented, and trafficked victims of violence. Congress created the U and T Visa programs, limiting criminals' ability to transform our nation's immigration laws into tools of abuse.[6] Our immigration courts have granted asylum to refugees escaping gender-based violence, demonstrating our nation's commitment to combat such violence by recognizing gender-based persecution as grounds for asylum and refugee status.[7]

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[6] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-1537 (2000).

[7] *E.g.*, *Matter of R-A-*, in which three successive U.S. Attorneys General—one Democrat and two Republicans—took personal jurisdiction from the Board of Immigration Appeals

(continued...)

With a pen stroke, the President's Executive Order 13,780 ("the Order") endangers these protections and upends decades of legal and moral leadership.

1. Displaced women and girls seeking refuge from violence bear the Order's brunt. These refugees are victims of the very instability and violence that the Order decries. Among their ranks are those forced from their homes by the atrocities of the Syrian civil war, those seeking refuge from the failed Libyan and Somalian states, those escaping institutionalized misogyny in Iran and elsewhere, those victimized by terrorist brutality in Sudan and Yemen, and those facing forced marriage, gang violence, or rampant domestic violence in Afghanistan, El Salvador, and Burma. The Order, through Section 2(c), singles out six nations where survivors of gender-based violence are particularly imperiled, targeting for exclusion women and children in desperate need of the protections Congress has historically afforded. The Order's 120-day halt to the refugee program (Section 6(a)) condemns victims from these and other nations to continued victimization, stranding them in refugee camps in which gender-based violence of the most gruesome forms—rape of women and children perpetrated by government officials and aid workers—is the daily norm. The Order forces displaced persons in the refugee pipeline—those

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(continued...)

(proceedings discussed at https://cgrs.uchastings.edu/our-work/matter-r (accessed Sept. 14, 2017)); *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

already engaged in an extreme vetting process consuming 18 to 24 months of painstaking diligence—to remain in camps where violence pervades.

The Order's cap on the total number of refugees the United States will accept (Section 6(b)) would compound the impact on women and girls fleeing gender-based violence, impacting most those countries where women and children are most vulnerable. The Department of State recognizes each of the top fifteen origin nations for refugees to the United States so far in 2017[8] as ones where women and girls are victimized by gender-based violence.[9] By the end of July, the Order's cap on refugees had been reached.[10] Implementation of the Order would abruptly close the door to women and girls seeking refuge from violence.

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[8] *Refugee Arrivals by State and Nationality*, Refugee Processing Ctr., U.S. Dep't of State (Sept. 5, 2017), http://www.wrapsnet.org/s/Arrivals-by-State-and-Nationality-by-Month9517.xls (accessed Sept. 15, 2017).

[9] *Country Reports on Human Rights Practices 2016*, U.S. Dep't of State, § 1(g), https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed Sept. 15, 2017).

[10] *Refugee Admissions Report*, Refugee Processing Ctr., U.S. Dep't of State (July 31, 2017). *See also U.S. hits refugee limit for 2017*, CBS News (July 12, 2017) ("'We reached the 50,000 cap on refugee admissions on July 12,' said a State Department spokesperson."), https://www.cbsnews.com/news/u-s-hits-refugee-limit-for-2017/ (accessed Sept. 14, 2017).

2. The Order's bar on the entry of any nationals from six Muslim-majority nations (Section 2(c)) would bar all women and girls from those nations who may seek to escape gender-based violence through a range of visa programs. In the name of serving America's public good, the Order perversely works a public travesty by also weakening the specific tools Congress has provided law enforcement to prosecute predators of women and children. The U and T Visa programs are designed to incentivize victims of domestic violence, sexual abuse, and trafficking to aid law enforcement in prosecuting abusers. The Order strips these beneficiaries of social support systems designed by Congress to help survivors of gender-based violence recover from their abuse and reintegrate into society. Survivors with U or T nonimmigrant status will no longer be able to seek derivative visas for family members, denying them an important means of combating the profound isolation that abusers impose through gender-based violence and domestic abuse.

3. The Order includes two case-by-case waiver schemes that purport to temper the harshness of its core provisions. In reality, they provide little consolation to victims of gender-based violence. The waiver provisions are underdeveloped. Waiver decisions in any case are entirely discretionary and unreviewable. Worse, the Order does not expressly include victims of gender-based violence among those eligible for waivers. And the Order elsewhere deepens the murkiness about the waiver process and who will obtain them: on the one hand, it invokes, in one of just two examples of terrorism-related crimes used to justify the ban, the case of a Somali man who entered the United States as a young child refugee

nearly two decades before the crime, but on the other suggests (Section 3(c)(v)) a young Somali child refugee would qualify for a waiver of the ban.

Even were such waivers freely available and accepted at face value, the waiver process would impose bruising evidentiary burdens on applicants—at a time when victims of gender-based violence can least sustain additional hurdles to securing safety.

4. Through its hostile, ungenerous spirit, the Order also creates a broader—and very real—danger to noncitizen women and children survivors of gender-based violence. It sends the message that the United States and its officials are no longer friends to be trusted and turned to for protection and support, but threats to be feared. It compounds aversion to law enforcement, providing abusers yet another tool of control and coercion. This in turn undermines an overriding priority of the T and U visa programs—to cultivate trust and cooperation between survivors and law enforcement to bring criminals to justice. The Order condemns survivors to remain in abusive situations rather than come forward—and exposes our communities to criminals who might otherwise have been brought to justice.

This Court's June 26, 2017 decision to grant the government's stay applications in part excluded from that stay individuals who possess a "close-familial relationship" with persons in the United States. The Court thus reaffirmed the understanding—long reflected in this nation's immigration laws, and in the U and T visa programs' derivative visas in particular—of the central importance placed on family for developing a stable, safe, and nurturing domestic environment. But many victims of gender-based violence who have sought and obtained safety in the United States do not have those relationships on first arrival here. Indeed, the very purpose of the refugee program is to provide a safe haven to people fleeing what may well be the only place on earth where they have any family—to those who are now profoundly home-less—whether or not they possess any pre-existing connection to the United States.[11] To impose a newfound family nexus requirement would be at odds with the refugee program's nature.

Ours has long been a nation personified by a "mighty woman with a torch, . . . her name Mother of Exiles" who would challenge despots and tyrants to "[s]end these, the homeless, tempest-tost," with her

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[11] Humanitarian relief, rather than family reunification, has long been—and remains today—the primary purpose of the U.S. Refugee Assistance Program. *See United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. Citizenship & Immig. Servs. (May 5, 2016) (noting "family reunification cases" are "Priority 3" cases, while cases referred by the UNHCR and NGOs and cases involving "groups of special humanitarian concern" constitute "Priority 1" and "Priority 2" cases for the refugee program, respectively), https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities (accessed Sept. 14, 2017). *See also* S. Rep. 96-256 at 1 (1979) (modern U.S. refugee program created with "a new definition of a refugee that recognizes the plight of homeless people all over the world") *and* Miriam Jordan, *With 3 words, Supreme Court opens a world of uncertainty for refugees*, The New York Times (June 27, 2017) ("About four out of 10 refugees who come to the United States have no family ties in the country, according to independent estimates.").

"lamp [lifted]" to welcome them in.[12] Congress has honored this vision by crafting a framework of protections developed over decades across administrations and party lines, one that enables survivors to escape extreme violence and rebuild a life of safety and basic humanity. The Order departs from this salutary vision, to no good end. The harm it will cause—and has already caused—victims of gender-based violence is all too real, as *amici* see in their work every day. It slams the nation's door on displaced women and girls vulnerable and regularly subjected to gender-based violence. It impedes effective police work. It makes Americans and would-be Americans less safe.

Amici respectfully request that this Court affirm the judgments of the courts of appeals.

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[12] Emma Lazarus, *The New Colossus* (1883). *See also Ex parte Kumezo Kawato*, 317 U.S. 69, 73 (1942) ("Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth."); *Foley v. Connelie*, 435 U.S. 291, 294 (1978) ("As a Nation we exhibit extraordinary hospitality to those who come to our country, which is not surprising for we have often been described as 'a nation of immigrants.'").

ARGUMENT

I. BY HALTING THE REFUGEE PROGRAM, THE ORDER VICTIMIZES ALREADY VICTIMIZED WOMEN AND CHILDREN.

A. Section 6 disables the United States Refugee Admissions Program in contravention of congressional intent.

Since 1980, victims of persecution have resorted to the United States refugee program to escape extreme discrimination and violence. That year, after fifteen years of congressional debate on refugee challenges posed by conflicts in Southeast Asia, President Carter signed into law the Refugee Act of 1980.[13] In recognition of the United States' "historic policy" of "respond[ing] to the urgent needs of persons subject to persecution in their homelands," Congress established "a permanent and systematic procedure" to admit refugees on a humanitarian basis.[14] "The admission of refugees is a national policy," noted the Act's Senate sponsor, "decided in partnership between the Executive Branch and Congress."[15]

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[13] Pub. L. No. 96-212, 94 Stat. 102, 102-118 (1980); Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143 (Spring 1981) ("The origins of [the Act] date from hearings conducted during 1965-68 by the Senate Judiciary Subcommittee on Refugees. . . .").

[14] Pub. L. No. 96-212, § 101(a-b), 94 Stat. at 102.

[15] Kennedy, *supra* note 13, at 155-56.

In the decades since, displaced persons facing persecution in their home country, or who had a well-founded fear of persecution if they returned home, have been eligible to apply for refugee status.[16] Six successive presidents have employed this standard to admit over three million refugees.[17] Over this period, the United States has confronted grave threats at home and abroad, including terrorist attacks on our embassies, bombings targeting our soldiers, and the unprecedented massacre of civilians on September 11, 2001. Even after that atrocity, the quota was dropped only by 10,000, or 12.5% of the previous year's cap, and thereafter remained steady for five years, only to be increased again in 2008.[18] Despite those threats, no president has before asserted the need (or the authority) to upend Congress' framework and halt the refugee program in its tracks, and to so suddenly slash the number of refugees permitted—all at a time when the need is so great.[19]

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[16] 8 U.S.C. § 1001(a)(42) (2013).

[17] *Refugee Admissions by Region, Historical Arrivals Broken Down by Region*, Refugee Processing Ctr., U.S. Dep't of State (Sept. 5, 2017), http://www.wrapsnet.org/s/Graph-Refugee-Admissions-since-19759517.xls (accessed Sept. 14, 2017).

[18] *Annual ORR Reports to Congress–2002: I. Refugee Resettlement Program*, Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs. (Aug. 2014). *See also Presidential Determination on FY 2002 Refugee Admissions Numbers*, 66 Fed. Reg. 63,487 (Dec. 7, 2001).

[19] The Order cuts the ceiling by more than half, from 110,000 annually to just 50,000. *Compare Presidential Determination on Refugee Admissions for Fiscal Year 2017*, 81 Fed. Reg.

(continued...)

B. Survivors of gender-based violence rely on the United States refugee program to escape their abusers.

Survivors of extreme violence, especially gender-based and domestic violence, rely on the refugee program for their very survival. The United Nations High Commissioner for Refugees counts over 21 million refugees and 65 million displaced persons worldwide.[20] Women and children make up the vast majority.[21] Many flee their home countries to escape legal and social infrastructures that actively enable violence against women. For decades, these refugees have sought and found sanctuary in the United States.

Amicus Tahirih Justice Center assisted a young Tajik woman, "F", for example, who lived in an Afghani village raided by the Taliban because of the residents' ethnicity. The Taliban broke into F's home, killed her husband, and broke her teeth and jaw. They beat and raped her repeatedly. They then abducted her son and daughter, five- and three-years-old. Severely traumatized and with no family

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70,315 (Oct. 11, 2016) *with* Order, § 6(b). *Cf.* Br. for Resp. State of Hawaii, Trump v. State of Hawaii, No. 16-1540, at 13 (Sept. 2017) (the Order "lowers the refugee cap mid-year, in plain violation of Section 1157(a)" of the INA).

[20] *Figures at a Glance*, U.N. High Comm'r for Refugees (Jun. 20, 2016) (33,972 people are forced to flee their homes each day due to persecution and violence), http://www.unhcr.org/en-us/figures-at-a-glance.html (accessed Sept. 14, 2017).

[21] *UNHCR Statistical Yearbook 2014*, U.N. High Comm'r for Refugees, 14th ed., at 64-66 (Dec. 8, 2015).

left, F fled to Pakistan. With Tahirih's help, F ultimately requested admission to the United States as a refugee.

"S" was abducted from her family in Afghanistan, forcibly married, raped, and tortured by the Taliban. She later escaped, after which the Taliban threatened to kill her and her entire family if she did not return to her "marriage." Her sisters lost their jobs, and her father and brothers were beaten near to death as a result. One brother eventually died from his injuries, at age sixteen. The Taliban tried to force S's sisters into marriage as well. But the family fled to Pakistan and sought help from Tahirih in obtaining refuge in the United States.

These examples are not anomalies. They are the daily travesties that characterize the work of *amici*, and the sanctuary and relief *amici* are able to provide courtesy of this country's humane principles and practices.

The Order would end sanctuary and relief. For at least 120 days, the Order shuts the door to refugees worldwide.[22] And likely longer: the refugee program's protections will remain unavailable to refugees from any but those scarce foreign countries that, in the unanimous discretion of the Secretaries of State and Homeland Security and the Director of National Intelligence, have implemented "additional procedures" that are "adequate to ensure the security and welfare of the United States."[23] War-torn nations without stable governments—like five of the six the Order's Section 2(c) calls out—may never meet that nebulous standard, despite being the nations whose nationals most need refugee protection. The Order thus threatens these nations' victims with *indefinite* exclusion.

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[22] Order, § 6(a).

Take Syria. Its enduring civil war has incited an epidemic of gender-based violence. In 2016, more refugees—4.9 million—fled Syria than fled any other nation on earth.[24] The United States State Department recently reported that, since the onset of the conflict, Syrian government forces have committed over 7,600 incidents of sexual abuse against Syrian women.[25] These forces exploit civil war as a license to target women for sexual abuse and employ violent rape as a tool of warfare. The State Department's report notes "an increased use of sexual violence against women before granting permission to depart besieged areas or to return with medical supplies and food."[26] Yet under the Order, the very government whose forces are engineering sexual violence would be required to implement "additional procedures" before protections might (emphasis on "might") be reinstated.

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[23] *Id.*

[24] *Figures at a Glance*, *supra* note 20.

[25] *Country Report*, *supra* note 9, at § 1(g) (Syria).

[26] *Id.*

Somalia is no different. Somali women and girls endure extreme violence from which this Order extinguishes relief. Decades of armed conflict have eroded Somalia's central government. Violent militias have capitalized on the resulting law enforcement vacuum to commit gender-based violence with impunity.[27] These violent acts, among them rape and female genital mutilation and cutting, are often carried out by clan militias, al-Shabaab, members of the national military and police forces, and even soldiers enlisted in the African Union's mission in Somalia.[28] This dire crisis has led more than a million Somalis to flee the country as refugees.[29] Historically, they could seek protection through our nation's refugee assistance program. No longer. The Order strands Somali rape victims in a country where their supposed protectors are often themselves victimizers. Yet it is they, those who speak for the Somali government, who must implement "additional procedures" before its own victims can seek safety in the United States.

Even in more stable nations, legal systems fail to protect—and sometimes actively punish—victims of gender-based violence. In Iran, women and girls endure misogynistic laws and practices that perpetuate widespread sexual violence.[30] Forced marriages are common, especially for young women.[31] Iranian law does not recognize rape inside marriage.[32] Once married, women are statutorily required to "submit" to their husbands; refusal to have sex is punishable by law.[33] Unmarried victims of sexual violence face implausible evidentiary burdens—a rape victim must proffer as witnesses four Muslim men or a combination of three men and two women or two men and four women[34]—often disabling Iranian courts from providing recourse for victims of even the most brutal rapes. Cruelly, victims who cannot meet this burden after reporting sexual violence are themselves subject to prosecution and barbaric punishment.[35] The Order bars these innocent victims from United States refuge.

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[27] *Country Report*, *supra* note 9, at § 1(g) (Somalia). ("Government forces, allied militias, men wearing uniforms, and AMISOM troops used excessive force, including torture, and raped women and girls, including IDPs. . . . [I]mpunity was the norm.").

[28] *Id.*; *Somalia*, Special Rep. of the Sec'y-Gen. for Sexual Violence in Conflict, United Nations (Mar. 25, 2015), http://www.un.org/sexualviolenceinconflict/countries/somalia/ (accessed Sept. 14, 2017).

[29] *Figures at a Glance*, *supra* note 20.

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[30] Ahmed Shaheed, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, U.N. Human Rights Council, at ¶ 18 (Aug. 27, 2014) (66% of Iranian women have experienced domestic violence), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/A_HRC_34_65_AEV.docx (accessed Sept. 14, 2017).

[31] *Country Report*, *supra* note 9, at § 6 (Iran) (2015).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* (a woman found to have made a false accusation of rape faces 80 lashes).

Refugees flee many countries other than the six targeted by Order § 2(c) where gender-based and domestic violence are committed with impunity. One is Afghanistan, where violence against women has been criminalized only since 2009.[36] Afghan authorities seldom prosecute reported cases of gender-based violence, instead relying on male-dominated "mediations" to mete out appropriate resolution.[37] Another is Burma, where our own State Department reports that domestic violence is "prevalent and considered socially acceptable."[38] Yet another is El Salvador, where gang violence runs rampant, and gangs "corral[]" women and "dispose[] of [them] at the whims of male gang members."[39] The Order would halt the pathway to refuge for the victims of all of this violence, wherever perpetrated.

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[36] *Country Report*, *supra* note 9, at § 6 (Afghanistan).

[37] *Id.*; *see also A Way to Go: An Update on Implementation of the Law on Elimination of Violence Against Women in Afghanistan*, Office of the U.N. High Comm'r for Human Rights, 4 (Dec. 2013) (reporting that although 1,669 incidents were reported during one yearlong period, only 109 cases went through the judicial process), https://unama.unmissions.org/sites/default/files/unama_evaw_law_report_2013_revised_on_16_dec_2013.pdf (accessed Sept. 14, 2017).

[38] *Country Report*, *supra* note 9, at § 6 (Burma).

[39] *Country Report*, *supra* note 9, at § 6 (El Salvador).

C. By delaying refugee admissions decisions for at least 120 days and lowering the ceiling on refugee admissions, the Order perpetuates violence.

Even were the Administration to restart the refugee program promptly after 120 days, profound, incurable damage will have been done. Delay will expose women and children, many of whom have already endured and satisfied extensive vetting by international and U.S. organizations, to more violence. Women and children face great risk of becoming victims of gender-based, sexual, and domestic violence while in refugee camps awaiting U.S. refugee admission status. U.N. officials have registered alarm about this "deplorable and persistent trend":

> [F]emale refugees across the world are highly vulnerable to all forms of sexual and physical violence. In addition to the dangers women face from contesting armed groups, once on the move from the conflict zone, they are also at risk of being brutalized by human traffickers or even border security forces. Even after exiting the conflict zone, safety can be elusive: staying in a refugee camp within the country of origin or seeking protection

> elsewhere brings serious threats to women's security, freedom and health.[40]

Rape, sexual assault, and subjugation plague refugee camps, perpetrated by male refugees and, alarmingly, by camp administrators.[41] Executive Branch agencies themselves acknowledge that many prospective refugees have already endured these deplorable conditions for months, if not years.[42]

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[40] Marija Obradovic, *Protecting Female Refugees against Sexual and Gender-Based Violence in Camps*, U.N. University's Inst. on Globalization, Culture, and Mobility (Oct. 23, 2015), https://ourworld.unu.edu/en/protecting-female-refugees-against-sexual-and-gender-based-violence-in-camps (accessed Sept. 14, 2017).

[41] Audrey Sheehy, *Sexual Assault in the Refugee Camp*, HARVARD POLITICAL REVIEW (Oct. 17, 2016) ("No woman or girl is safe in a refugee camp, because rape is a weapon for war and power. . . . Many rapes in refugee camps occur while women are receiving rations, running daily errands, or sleeping in mixed gendered settlements. . . . [P]ublic officials working in the camps and humanitarian staff also sometimes assault women refugees."); Mark Hanrahan, *Refugee Crisis: Women, Children Report Sexual Violence, Abuse on Migration Trail, Says UN*, NBC News (Feb. 28, 2017) ("[T]hree quarters of refugee and migrant children who took part in a survey said that they had experienced violence or harassment at the hands of adults during their journey, while nearly half of both women and children interviewed reported suffering sexual abuse, often on multiple occasions."), http://www.nbcnews.com/news/world/refugee-crisis-women-children-report-sexual-violence-abuse-migration-trail-n726731 (accessed Sept. 14, 2017).

[42] *U.S. Refugee Program FAQs*, U.S. Dep't of State (Jan. 20, 2017) ("[T]he average processing time is about 18 to 24 months from UNHCR referring a refugee to the U.S. for consideration,

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The top fifteen countries of origin from which refugees have been admitted to the United States thus far in 2017[43] are all countries cited by the State Department for gender-based violence and abuse.[44] The majority of those refugees originated from Iraq, Syria, Somalia, and the Democratic Republic of the Congo, nations where women and children face gender-based killings, forced marriage, and weaponized rape and other forms of sexual violence.[45] Requiring these women and girls to show a "bona fide relationship" to someone already in the

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(continued...)

through the U.S. Government's screening and processing of the applicant, to [its] granting admission to the refugee."), https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm (accessed Sept. 14, 2017).

[43] *See Refugee Arrivals by State and Nationality*, *supra* note 8.

[44] *Country Reports*, *supra* note 9, § 6.

[45] *Id.* The Order professes concern for the occurrence of "acts of gender-based violence against women, including so-called 'honor killings,' in the United States by foreign nationals," directing the Secretary of Homeland Security and Attorney General to collect and publish data about the "number and type[]" of any such acts. Order § 11(a)(iii). A 2014 report commissioned by the U.S. Department of Justice, however, indicated that "cases of any type of honor violence appear to be rare in comparison to other types of crime in the United States." Cynthia Helba et al., *Report on Exploratory Study into Honor Violence Measurement Methods*, at 1-1 (Nov. 26, 2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/248879.pdf (accessed Sept. 15, 2017). And the Order points to nothing to suggest otherwise. But in a sad irony, the Order would condemn refugee victims to remain in nations where these crimes are known to be far too common and where victims encounter significant obstacles to seeking safety and protection. *Country Reports*, *supra* note 9, § 6.

United States would exclude many from relief. Lowering the cap on the number of refugees to be admitted to the United States will likewise ensure that many remain in harm's way. And doing so now, in the midst of a surge in refugees from Muslim-majority nations like Syria, will inflict disproportionate harm on Muslim women and children.

The Order excepts from its ban those refugees for whom the State Department has already arranged travel.[46] Yet many thoroughly vetted candidates who have completed most (and even all) of the State Department's pre-admission requirements will still be excluded. Before scheduling transit to the United States, a prospective refugee must: (1) undergo screenings and interviews by the U.N. High Commissioner for Refugees; (2) secure a UNHCR referral to the U.S. refugee screening agencies (which only one percent of applicants receives); (3) pass rigorous biographic security checks; (4) clear interviews with the FBI, DHS, State Department, and National Counterterrorism Center (all which subject refugees, especially those from Syria, to heightened screening criteria); (5) pass a biometric identifier screen with the FBI, DHS, and Defense Department; (6) undergo and pass a comprehensive medical evaluation; (7) complete a course of cultural orientation classes to prepare for life in the United States; and (8) collaborate with refugee program authorities to determine a resettlement location.[47] The Order blocks even applicants who have successfully completed all of these steps, stranding them in refugee camps and condemning them to further abuse.

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[46] Order, § 6(a).

II. SECTION 2(C) IMPERILS VICTIMS OF GENDER-BASED VIOLENCE AND UNDERMINES LAW ENFORCEMENT.

Amici regularly serve women and children from the six nations targeted by Section 2(c) who could not have been served had the Order been in place. Tahirih, for example, has assisted numerous women who obtained asylum or special immigrant juvenile status here upon fleeing one of those countries after having been subjected to forced child marriage, female genital mutilation, or other forms of gender-based violence. These women and girls arrived in the United States before the Order was signed, through a variety of immigration programs. One mother, for example, saved her then thirteen-year-old daughter, Muna, from forced marriage in Yemen under the cover of night, taking her daughter to accompany her for cancer treatment she had arranged in the United States.[48] Women like Muna and her mother would never have made it here had the Order been in place.

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[47] *U.S. Refugee Admissions Program: Applications and Case Processing*, U.S. Dep't of State, https://www.state.gov/j/prm/ra/admissions/ (accessed Sept. 17, 2017).

[48] *Success Stories, Muna*, Tahirih Justice Center, http://www.tahirih.org/success_stories/muna/ (accessed Sept. 17, 2017).

The Order's blanket ban on entry for nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen will endanger survivors of gender-based and domestic violence from those nations regardless of the type of visa by which they would have entered the United States—whether for medical treatment, as tourists, students, guest workers, or otherwise. Among the avenues to safety Section 2(c) jeopardizes are programs Congress designed specifically to empower such survivors and make our communities safer—the T and U Visa programs.

A. Congress designed the T and U Visa programs to empower immigrant survivors of gender-based and domestic violence and to make our communities safer.

Congress created T and U nonimmigrant status when it passed the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA").[49] The bill recognized that unauthorized immigrants—particularly women and children—were vulnerable to gender-based violence because their fear of deportation could outweigh their determination to seek justice. To that end, the legislation created a sensible *quid pro quo*, whereby survivors were permitted legally to remain in the United States provided they assisted law enforcement in prosecuting their abusers and traffickers. Criminals could no longer wield immigration law against their victims with impunity.

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[49] Pub. L. No. 106-386, *supra* note 6.

Survivors of "severe forms of trafficking in persons," such as sex and forced labor trafficking, are granted nonimmigrant status under the T program. In addition to being a trafficking survivor, those granted T program status must be present in the United States because of trafficking, agree to assist law enforcement in the prosecution or investigation of trafficking, and show that they will experience extreme hardship if removed.[50] Meanwhile, survivors of domestic abuse and sexual assault, as well as other enumerated crimes, can access nonimmigrant status through the U program. Eligible survivors must have suffered "substantial physical or mental abuse" as a result of the crime, possess information about it, be willing to assist law enforcement in the investigation and prosecution of the offender, and demonstrate that the crime occurred in the United States or violated a law over which it has extra-territorial jurisdiction.[51]

The T and U status programs empower survivors by encouraging them to seek assistance from law enforcement rather than avoid it for fear of deportation. These survivors can then freely and without fear serve as witnesses in prosecutions that are otherwise too rare,[52] making communities safer.

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[50] 8 U.S.C. § 1101(a)(15)(T)(i)(I)–(IV) (2013).

[51] 8 U.S.C. § 1101(a)(15)(U)(i)(I)–(IV) (2013).

[52] *See United States v. Hayes*, 555 U.S. 415, 426 (2009) ("[M]any people who engage in serious spousal or child abuse ultimately

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This is an important animating purpose of the programs.[53] It is not the sole purpose, however. Congress also meant to provide survivors with the means to rebuild their lives and reintegrate into their communities. The programs enable survivors to seek employment.[54] They create pathways to lawful permanent resident status after continued residence in the United States.[55] And because recovery for survivors is often best accomplished through the nurturing domestic environment that family can provide, Congress authorized survivors to seek derivative status for family members overseas.

The Order wreaks havoc on this carefully constructed program.

B. Section 2(c) impairs a critical form of humanitarian relief offered by the T and U visa programs—family reunification through derivative visas.

The Order, on taking effect, imposes an immediate travel and entry ban on nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen.

(continued...)

are not charged with or convicted of felonies."), *quoting* 142 Cong. Rec. 22985 (1996).

[53] *E.g.* H.R. Rep. No. 106-487, at 4 (1999) ("[T]o deter international trafficking and to bring its perpetrators to justice, nations . . . must . . . giv[e] the highest priority to investigation and prosecution of trafficking offenses, and . . . protect[] rather than punish[] the victims of such offenses.").

[54] 8 C.F.R. § 214.11(d)(11); 8 C.F.R. § 214.14(c)(7).

[55] 8 U.S.C. § 1255(l-m) (2013).

Nationals of these countries who are outside the United States and did not have a valid visa on January 27, 2017, or on the Order's effective date, cannot enter the United States.[56] There are limited exceptions. The entry ban does not apply to lawful permanent residents, foreign nationals admitted or paroled into the United States after the Order's effective date, or foreign nationals with advance parole or an equivalent document granting entry.[57] The Order also purports to grant consular officers and Customs and Border Patrol ("CBP") officials discretionary case-by-case waiver authority if a foreign national can make certain demonstrations.[58] Even were discretion exercised—and there is credible reason to doubt it will be—the Order's scheme is woefully inadequate.

The travel ban would cripple the T and U status programs and harm the very victims of violence Congress intended them to help. A strong network of support helps survivors of gender-based violence recover and reintegrate into society.[59] For immigrant women and children who find themselves strangers in a strange land upon escaping their abusers, this social construct may be available only through reunification with family. Congress recognized this, and provided in the VTVPA that individuals with T or U status could obtain derivative visas for family members residing overseas.[60] Congress' endorsement of the centrality of family for survivors echoes the value placed on the family institution by our Constitution and in our laws.[61]

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[56] Order, § 3(a).

[57] Order, § 3(b).

[58] Order, § 3(c)(iv) (waiver permissible if (1) denial of entry during the suspension would cause undue hardship, (2) the foreign national's entry would not pose a national security threat, and (3) such entry would be in the national interest). The Order describes scenarios in which a waiver could be appropriate, including when a foreign national seeks entry to be reunited with "a close family member . . . admitted on a valid nonimmigrant visa. . . .]").

Generally, an individual granted T or U nonimmigrant status can petition United States Citizenship and Immigration Services ("USCIS") for certain family members to receive derivative status.[62] In the U Visa program, derivative visas are available for the survivor's spouse, children, and unmarried siblings under age eighteen.[63] If the survivor is younger than age twenty-one, she can petition for derivative status for her parents.[64] In the T Visa program, a survivor over twenty-one can petition for derivative visas for her spouse and children, while a survivor under twenty-one can also petition for derivative visas for her parents.[65] The survivor must demonstrate that the individual for whom she seeks derivative status is an eligible family member and is admissible to the United States. If USCIS denies an application, it must do so in writing, providing the survivor with an opportunity to file an administrative appeal.

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[59] Alytia A. Levendosky, et al., *The Social Networks of Women Experiencing Domestic Violence*, 34 AM. J. OF CMTY. PSYCHOLOGY 95, 106 (2004); Lisa Goodman, et al., *Obstacles to Victims' Cooperation with the Criminal Prosecution of Their Abusers: The Role of Social Support*, 14 VIOLENCE AND VICTIMS 427, 429 (1999) (survivors may hesitate to cooperate with law enforcement because they fear losing their abusers' social and economic support).

[60] 22 U.S.C. § 7101(b)(5) (2013) ("Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends . . . and other sources of protection and support, leaving the victims defenseless and vulnerable.").

[61] *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

The Executive Order upends this carefully calibrated statutory framework. By its terms, if a survivor's family members are nationals of one of the six enumerated countries, they will be banned from entering the United States. Nor can the Order's vague waiver mechanism be considered a meaningful stand-in for the statutory derivative visa program, as it imposes a heightened evidentiary burden on the individual seeking entry. Rather than observe the existing statutory requirement that the survivor demonstrate familial eligibility and admissibility, the family member must now satisfy the ill-defined requirement of proving that her or his entry would not pose a national security threat to the United States *and* would be in the nation's interest. Worse, the consular or CBP official's decision not to issue a waiver is unappealable. There is thus appreciable risk that family members who wish to enter the United States under U or T visa derivative status will be turned away, without recourse.

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[62] 8 C.F.R. § 214.11(k)(2); 8 C.F.R. § 214.14(f)(2).

[63] 8 C.F.R. § 214.14(f)(1).

[64] *Id.*

[65] 8 C.F.R. § 214.11(k)(1).

The resulting risk to survivors is grave. The support provided by family members can help a survivor overcome trauma and reconstruct her identity after leaving her abuser. Through family, she can begin to shed the label "victim" and re-identify as "mother," "parent," or "sister." This ability both to nurture family members, and be nurtured by them, begins to free survivors from the isolation that accompanies their abuse.[66] The presence of a family member also provides physical protection against retaliation by the abuser. And, in instances where a survivor can obtain a derivative visa for a parent, the parent's presence can prevent her from sliding into poverty.[67] A parent can assist

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[66] Kathy Bosch & M. Betsy Bergen, *The Influence of Supportive and Nonsupportive Persons in Helping Rural Women in Abusive Partner Relationships Become Free From Abuse*, 21 J. OF FAMILY VIOLENCE 311, 311 (2006) ("Social support reduces the isolation that many abusers enforce, and is a major factor in helping women become safe and free from abuse.").

[67] Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. PA. L. REV. 1581, 1583 (2010) (T visa recipients are usually locked into "low-paying and insecure jobs" even after receiving

(continued...)

with chores and child care, providing the survivor a base of domestic support necessary for her to become economically self-reliant and preventing an economically-driven return to abusive relationships.

The presence of family can also allay a survivor's often justified concern that her family members are not safe overseas. An abuser or trafficker often will have connections in the survivor's native country. Threats to the family's well-being can be every bit as coercive as threatening a survivor with deportation. Likewise, an underage survivor's ability to obtain derivative status for her parents can rebuild the family structure, preventing a survivor from becoming a ward of the state and staving off continued abuse.

For survivors of violence, who so often are left in precarious circumstances after escaping their abusers, even the Order's three months of "temporary" delay will cause extreme hardship. Three months for a victim can be a lifetime—or the end of one.[68] The immediate presence of family can mean the difference between recovery and more suffering.

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nonimmigrant status due, in part, to a lack of social networks and support).

[68] *Casey*, 505 U.S. at 892 ("Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income.").

III. THE ORDER'S CASE-BY-CASE WAIVER PROVISIONS ARE UNDERDEVELOPED AND OF LITTLE CONSOLATION TO VICTIMS OF ABUSE.

The Order identifies certain categories of foreign nationals and refugees who may qualify for "case-by-case" admission at the discretion of the Secretaries of State and Homeland Security.[69] This discretionary and unreviewable waiver regime poses at least three problems for the populations *amici* serve.

First, victims of gender-based violence are excluded altogether from those the Order suggests may qualify for waivers.

Second, public evidence unfortunately reveals this waiver provision to be just dressing—an attorney sleight-of-hand to inoculate the Order from legal challenge.[70] The Order's internal inconsistency alone betrays the waiver provisions' emptiness. As one of only two specific examples of terrorism-related crimes used to justify the refugee ban, the Order cites the 2014 conviction of "a native of Somalia who had been brought to the United States as a child refugee."[71] This refers to Mohamed Osman Mohamud, born in 1991, who fled Somalia with his family in early 1992 to a Kenyan refugee camp.[72] In October 1993, the United States allowed his father, a university professor who speaks five languages, to resettle in this country.[73] When Mohamud was five, the United States permitted him and his mother to join his father in Portland.[74] Presented with the identical situation today, two of the Order's "case-by-case waiver" provisions would suggest that the State Department should admit Mohamud to the United States.[75] Yet by offering Mohamud as an example of the problem the Order is supposedly addressing, it suggests that he would have been excluded as a young child had the Order then been law. This confusion should give this Court no comfort that the waiver provisions can cure what ails the Order. Nor can survivors of gender-based violence rest secure that waiver provisions so vague and indeterminate will preserve the protections Congress specifically created for providers through the T and U programs.

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[69] Order, §§ 3(c) and 6(c).

[70] Donald J. Trump, White House Press Conference (Feb. 16, 2017) ("[T]he new order is going to be very much tailored to what I consider to be a very bad decision. . . ."); Donald J. Trump, Nashville, Tenn. (March 15, 2017) ("The order he blocked was a watered down version of the first order that was also blocked by another judge and should've never been blocked to start with.").

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[71] Order, § 1(h).

[72] Lynne Terry, *Family of Portland's bomb suspect, Mohamed Mohamud, fled chaos in Somalia for new life in America*, The Oregonian (Dec. 4, 2010), http://www.oregonlive.com/portland/index.ssf/2010/12/suspect_in_portland_bomb_plot.html.

[73] *Id.*

[74] *Id.*

[75] Order, § 3(c)(iv) (waiver appropriate when "the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent)" with long-term permission to remain in the United States) *and* Order, § 3(c)(v) (waiver appropriate when "foreign national is an infant, a young child or adoptee").

Even if the waiver provisions are accepted at face value, the waiver process imposes heavy evidentiary burdens on applicants. As the Hawaii Respondents noted below, "[a]ll aliens covered by the Order—including refugees who are themselves seeking to escape violence—are presumptively excluded as potential terrorists . . . [and] must seek admission based on an intricate scheme of categorical exemptions and case-by-case waivers."[76] These burdens are now compounded by the imperative, under the Court's stay decision, to prove they possess a "bona-fide relationship" with someone already in the United States. And for T or U status holders seeking derivative visas for family members, the Order's waiver scheme presents additional hurdles that would delay family reunification. This is no small matter when reunification, by Congress' design, could provide a gender-based violence survivor the social support and protection she needs.

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[76] Mem. Supp. Pl.'s Mot. TRO at 39, *State of Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KJM (D. Haw. Mar. 8, 2017), ECF No. 65. *See also* Br. for Resp. State of Hawaii, *Trump v. State of Hawaii*, No. 16-1540, at 8 (Sept. 11, 2017) (second Order "was largely unchanged from the first ... Most nationals of these [six] countries may escape the ban only by obtaining a wholly discretionary, '[c]ase-by-case waiver'").

IV. THE ORDER UNDERMINES THE CRIMINAL JUSTICE SYSTEM.

The Order also imperils the safety of immigrant survivors of gender-based and domestic violence currently in the United States by stoking a fear of law enforcement. While not affecting their legal status in name, the Order reinforces a growing anxiety among undocumented survivors that any interaction with government institutions may subject them to deportation. When viewed in conjunction with other fear-inducing government actions—the Administration's promise to deport eleven million undocumented immigrants,[77] its executive order on removal priorities,[78] its recently announced rescission of the Deferred Action for Childhood Arrivals program,[79] and ICE's invasions of the sanctity of the courtroom[80]—the effects on undocumented survivors of domestic violence may be profound.[81] Victims may well choose to remain in the shadows rather than seek justice or cooperate with local law enforcement.[82] The Order discourages

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[77] Andy J. Semotiuk, *What Trump's presidency means for illegal immigrants and immigration to the U.S.*, Forbes (Nov. 10, 2016) (noting President Trump's intent to deport 11 million illegal immigrants), www.forbes.com/sites/andyjsemotiuk/2016/11/10/what-trumps-presidency-means-for-illegal-immigrants-and-immigration-to-the-u-s/#47ebb17347eb; Jeremy Diamond, *Trump orders construction of border wall, boosts deportation force*, CNN (Jan. 25, 2017), http://www.cnn.com/2017/01/25/politics/donald-trump-build-wall-immigration-executive-orders/.

[78] Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[79] U.S. Department of Justice, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

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[80] Marty Schladen, *ICE detains alleged domestic violence victim*, El Paso Times (Feb. 15, 2017) (ICE arrested undocumented victim of domestic abuse as she left the courtroom where she had just obtained a protective order from her abuser, apparently based on that abuser's tip), http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/; Beth Fertig, *Outcry after immigration agents seen at Queens human trafficking court*, WNYC News (Jun. 16, 2017), http://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse/ (accessed Sept. 14, 2017).

[81] P.R. Lockhart, *Immigrants fear a choice between domestic violence and deportation*, Mother Jones (Mar. 20, 2017), http://www.motherjones.com/politics/2017/03/ice-dhs-immigration-domestic-violence-protections.

[82] Heidi Glenn, *Fear of deportation spurs 4 women to drop domestic abuse cases in Denver*, NPR (Mar. 21, 2017), http://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver; National Latin@ Network for Healthy Families and National Domestic Violence Hotline, *Realidades Latinas: A National Survey on the Impact of Immigration and Language Access on Latina Survivors* (April 2013), http://www.nationallatinonetwork.org/images/files/NLNRealidades_Latinas_The_Impact_of_Immigration_and_Language_Access_FINAL.pdf; James Queally, *ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court*, Los Angeles Times (Mar. 16, 2016), http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html (describing apprehension of

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the very cooperation the T and U visa programs are intended to foster.

These effects are not hypothetical; *amici* serve women and girls who have encountered precisely these fears since the Order was issued.

For example, earlier this year, after the Order was announced, a 16-year-old survivor in Pennsylvania attempted suicide rather than report a crime against her because she feared the offender would report her and her family to ICE. Similarly, a survivor in Nevada informed advocates that she would not report her boss for sexual harassment due to her immigration status. And in Minnesota, an immigrant victim of assault and robbery refused to report the crime to police for fear of deportation.[83]

Indeed, as documented in a May 2017 survey conducted by seven national organizations providing services to victims of gender based violence (including *amici*), 78 percent of advocates reported that immigrant survivors expressed concerns about

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undocumented immigrant by ICE on the Pasadena courthouse steps).

[83] These examples were reported confidentially in response to a survey conducted in May 2017. *See Survey Reveals Impact of New Immigration Policies on Survivors of Violence*, Tahirih Justice Center, http://www.tahirih.org/news/survey-reveals-impact-of-new-immigration-enforcement-policies-on-survivors-of-violence/ (accessed Sept. 1, 2017). A total of 715 victim advocates and attorneys in 46 states and the District of Columbia completed the survey.

contacting police.[84] Three in four service providers responding to the survey reported that immigrant survivors have concerns about going to court for a matter related to the abuser or offender. Forty-three percent of advocates worked with immigrant survivors who dropped civil or criminal cases because they were too afraid to press them.

This widespread fear of deportation as a consequence of reporting crime is not unreasonable—in Washington, a victim of abuse was deported shortly after she reported the abuse against her. And law enforcement officials, including the police chiefs in Houston and Los Angeles, themselves have noted the significant drop in reports of abuse and violence from neighborhoods of immigrant concentration.[85]

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[84] *Id.*

[85] James Queally, *Latinos are reporting fewer sexual assaults amid a climate of fear in immigrant communities, LAPD says*, Los Angeles Times (Mar. 21, 2017), http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html (accessed Sept. 14, 2017) (citing Los Angeles Police Chief Charlie Beck's statements "that reports of sexual assault and domestic violence made by the city's Latino residents have plummeted this year amid concerns that immigrants in the country illegally could risk deportation by interacting with police or testifying in court."); Lindsey Bever, *Hispanics 'are going further into the shadows' amid chilling immigration debate, police say*, Washington Post (May 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.0a8565583f25 (accessed Sept. 14, 2017) (quoting Houston Police Chief Art Acevedo: "It looks like

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This growing fear and distrust imperils the lives of immigrant survivors. Often, the fear of being deported and separated from family is all that prevents an undocumented survivor from leaving her abuser.[86] That fear can be wielded as yet another tool of coercion and control in an abuser's hands.[87] And domestic abuse is a crime that tends to escalate over time.[88] The longer a survivor remains with her abuser, the more likely it is she will be seriously injured or killed. By intensifying a distrustful atmosphere, the Order deters undocumented survivors from seeking help from law enforcement, placing them in increased danger.

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they're going further into the shadows, and there appears to be a chilling effect in the reporting of violent crime by members of the Hispanic community"); John Burnett, New immigration crackdowns creating "chilling effect" on crime reporting, NPR (May 25, 2017), http://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting (accessed Sept. 14, 2017).

[86] Beth Lubetkin, *Violence Against Women and the U.S. Immigration Laws*, 90 AM. SOC'Y INT'L L. PROC. 616, 620 (1996) ("Fear of deportation deters abused immigrant woman from coming forward to report abuse. Just as with abuse victims who are not immigrants, batterers threaten that they will take custody of minor children. For immigrant women, that threat is all the more frightening when they are unfamiliar with the U.S. justice system, may not speak English and fear they will never see their children again if separated from them through deportation.").

[87] *Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) ("Threats of violence and intimidation are among the most favored weapons of domestic abusers . . . .").

[88] *United States v. Castleman*, 134 S.Ct. 1405, 1408 (2014) ("Domestic violence often escalates in severity over time . . . .").

This dynamic does not only endanger the immigrant survivors themselves. When victims of gender-based and domestic violence avoid cooperating with law enforcement to bring their abusers to justice, communities are less safe. As former New York City Mayor Rudy Guiliani remarked, "If you are an illegal immigrant . . . and a crime is committed against you, I want you to report that, because lo and behold, the next time a crime is committed, it could be against a citizen or a legal immigrant."[89] The public has a strong interest—reflected in the T and U visa framework established by Congress—in ensuring that undocumented immigrant survivors trust and not fear law enforcement.

CONCLUSION

Some of the darkest blots on our nation's history have occurred when, in times of national fear, the Executive Branch has targeted the innocent to promote what it declares to be the public's safety. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 218 (1944). By contrast, what has made our constitutional order the world's envy are those other moments when, even in times of fear—*especially* then—we stand on our founding principles and protect the innocent. This Order is an unfortunate example of the former. It would subvert Congress' intent to extend protection and support to foreign national victims of gender-based and domestic violence where it is needed most. It would subvert the public interest in helping those survivors and enlisting their help in turn to bring criminals to justice. It would turn a blind eye to the world's innocent women and girl victims. It would depart profoundly from our nation's historical humanitarian bent. It would not, and should not, make us proud.

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[89] Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 599–600 (2011).

Amici support Respondents' positions and respectfully request that this Court affirm the judgments of the courts of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as Amici Curiae in support of Respondent, and urge this to Court affirm the judgments of the courts of appeals.

Tahirih Justice Center ("Tahirih") is a national non-profit legal and social services provider that has served courageous individuals fleeing gender-based human rights abuses since 1997. Through direct services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can enjoy equality and live in safety and dignity. Tahirih serves immigrant women and girls who have rejected violence, but face incredible obstacles to justice, including language barriers, lack of resources, and a complex immigration system.

The **Asian Pacific Institute on Gender-Based Violence** is a national resource center on domestic violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities, including domestic violence dynamics in refugee zones. The institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander survivors, and is a leader on providing analysis on critical issues facing victims in the Asian and Pacific Islander community. The institute aims to strengthen advocacy, change systems, and prevent gender violence through community transformation.

Casa de Esperanza seeks to mobilize Latinas and Latino communities to end domestic violence. Founded in 1982 to provide emergency shelter for women and children experiencing domestic violence in Minnesota, in 2009 Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities. The National Latin@ Network is a national institute focused on preventing and addressing domestic violence in Latino communities. It organizes national and regional events and provides training and consultations to practitioners and advocates throughout the United States, as well as in Latin America. The organization also engages in federal and state public policy advocacy and conducts research on issues that affect Latino communities.

The **National Domestic Violence Hotline** ("NDVH") was established in 1996 as part of the Violence Against Women Act ("VAWA"). It operates a free, anonymous and confidential, around-the-clock hotline available via phone, internet chat, and text services to offer victims of domestic violence compassionate support, crisis intervention, safety planning and referral services to enable them to find safety and live lives free of abuse. A substantial number of the victims NDVH serves are immigrants or request help related to immigration-related issues. From May 2015 through March 2017, for example, over 10,000 victims contacted NDVH identifying as immigrants and over 6,500 of them sought help related to immigration concerns.

ASISTA Immigration Assistance ("ASISTA") worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 VAWA and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security ("DHS") personnel charged with implementing these laws, most notably Citizenship and Immigration Services ("CIS"), Immigration and Customs Enforcement ("ICE"), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to the Second, Seventh, Eighth, and Ninth Circuits.

Break the Cycle is the leading national non-profit organization providing comprehensive dating abuse programming exclusively focused on young people ages 12-24. Founded in 1996 to fill a gap in services for young people experiencing abuse in dating relationships in Los Angeles, California, Break the Cycle expanded nationally in 2004. Today the organization trains law enforcement officers, judges, advocates, attorneys, educators, counselors, and parents across the United States on how to promote healthy youth relationships and serve young survivors of all backgrounds. Break the Cycle also trains peer educators to work with young people in their communities to end dating abuse. Finally, Break the Cycle helps young survivors of dating abuse, domestic violence, sexual assault, and stalking in Washington, DC navigate the justice system and find safety through direct legal representation in civil protection order and related legal matters. The organization is guided by Let's Be Real youth leaders across the United States.

Futures Without Violence ("FUTURES"), formerly the Family Violence Prevention Fund, is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals; children's, women's, and civil rights groups; allied professionals; and other social justice organizations to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence. FUTURES joins with the other *amici* because it has a long-standing commitment to supporting the rights and interests of women and children who are victims of crime regardless of their immigration, citizenship, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women working to help service providers, survivors, law enforcement, and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence. Using this knowledge, FUTURES helped draft legislative recommendations that were ultimately included in VAWA and the Trafficking Victims Protection Act to assist immigrant victims of violence. FUTURES participates in the Alliance to End Slavery and Trafficking and co-chairs the Coalition to End Violence Against Women and Girls Globally, partnering with other national organizations to reduce sexual and domestic violence against women and children.

Legal Momentum, the Women's Legal Defense and Education Fund, is the oldest women's legal advocacy group in the United States. Legal Momentum served at the helm of the National Task Force to End Sexual and Domestic Violence Against Women, which led efforts to pass VAWA in 1994, and its subsequent reauthorizations in 2000, 2005 and 2013. Since VAWA's inception, Legal Momentum has assisted the U.S. Department of Justice, federal agencies, state and local governments, and private entities with developing and implementing policies to protect victims of domestic and intimate partner violence. Additionally, since 1980, Legal Momentum's National Judicial Education Program has educated and trained thousands of judges and court officials nationwide on gender bias issues related to domestic and partner violence.

The **National Alliance to End Sexual Violence** ("NAESV") is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors, especially those in immigrant communities. We oppose any impediments to survivors feeling safe to come forward, receive services, and seek justice.

The **National Coalition Against Domestic Violence** is the voice of victims and survivors. We are the catalyst for changing society to have zero tolerance for domestic violence. We do this by effecting public policy, increasing understanding of the impact of domestic violence, and providing programs and education that drive that change.

The **National Coalition of Anti-Violence Programs** ("NCAVP") works to prevent, respond to, and end all forms of violence against and within lesbian, gay, bisexual, transgender, and queer ("LGBTQ") communities. We strive to increase power, safety, and resources through data analysis, policy advocacy, education, and technical assistance. Many of our member programs provide LGBTQ immigration specific services, including legal services, counseling and support, and advocacy. NCAVP is a national coalition of over 50 local member programs and affiliate organizations who provide services to and advocacy for LGBTQ survivors of violence, including many LGBTQ immigrant survivors. Our member programs continue to see an increase in the number of LGBTQ immigrants reporting violence and accessing their services. For example, the percentage of undocumented LGBTQ survivors of intimate partner violence reporting to NCAVP programs increased from 4% in 2014 to 9% in 2015. The issues involved in this case will have significant implications for the clients that NCAVP member programs serve.

The **National Immigrant Justice Center** ("NIJC") is a Chicago-based national non-profit organization that provides free legal representation to low-income refugees and asylum seekers. In collaboration with pro bono attorneys, NIJC represents hundreds of applicants for U visas, T visas, asylees, and refugees at any given time, before the Asylum Office, the immigration courts, the Board of Immigration Appeals, and the federal courts. In addition to the cases that NIJC accepts for representation, it also screens and provides legal orientation to hundreds of potential asylum applicants every year.

The **National Indigenous Women's Resource Center** ("NIWRC") is a national non-profit organization dedicated to increasing safety and access to justice for American Indian, Alaska Native, and Native Hawaiian women and girls who have been victimized by domestic violence, sexual assault, sex trafficking, and other crimes. NIWRC coordinates closely with other organizations to ensure adequate protections for survivors of domestic violence, sexual assault, and other crimes are included in federal legislation, particularly VAWA.

The **National Network to End Domestic Violence** ("NNEDV"), a social change organization, is dedicated to creating a social, political and economic environment in which violence against women no longer exists. NNEDV is the leading voice for domestic violence victims and their advocates. As a membership and advocacy organization representing the 56 state and territorial domestic violence coalitions, allied organizations and supportive individuals, NNEDV works closely with its members to understand the ongoing and emerging needs of domestic violence victims and advocacy programs. Then NNEDV makes sure those needs are heard and understood by policymakers at the national level.

The **National Organization for Women Foundation** (a 501 (c) (3) organization) is the education and litigation arm of the National Organization for Women ("NOW"), the largest feminist grassroots organization in the United States, with hundreds of chapters in every state and the District of Columbia. The Foundation's mission is to advocate for the equal rights and well-being of women, addressing a range of issues including violence against women, equal educational opportunity, reproductive rights and women's health, constitutional equality, LGBTQIA rights, combating racism, and especially focusing on the intersectionality of race- and sex-discrimination that harms women of color, including many immigrant women. With NOW and other organizational partners NOW Foundation co-founded the National Coalition for Immigrant Women's Rights ("NCIWR") to advocate for comprehensive immigration reform and effective policy and legislative solutions to problems confronting immigrant women and their families, especially concerning immigrant women who have experienced domestic violence or sexual assault and are at risk for continuing violence from their abuser.

Since 1993, the **National Resource Center on Domestic Violence** ("NRCDV") has provided comprehensive and individualized technical assistance, training, and resource development related to domestic violence intervention and prevention, community education and organizing, and public policy and systems advocacy. The NRCDV strives to be a trusted national leader and sustainable organization, renowned for innovation, multi-disciplinary approaches, and a commitment to ensuring that policy, practice and research is grounded in and guided by the voices and experiences of domestic violence survivors and advocates.

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v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DONALD J. TRUMP, ET AL., PETITIONERS
v.
HAWAII, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MISSOURI, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal Executive Branch to restrict or set the terms of aliens' entry into the States for public-safety and national-security reasons, pursuant to the laws of Congress. *See Arizona v. United States*, 567 U.S. 387, 409-10 (2012). And the Immigration and Nationality Act (INA) gives the Executive significant authority to suspend aliens' entry into the country. Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Clerk.

SUMMARY OF ARGUMENT

The courts below issued remarkable injunctions of the President's Executive Order temporarily suspending the entry of specified classes of nonresident aliens and limiting the admission of refugees. The injunctions extend even to "foreign nationals abroad who have no connection to the United States at all." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam) (*IRAP*). That said, the injunctions are improper in their entirety because they issued despite multiple longstanding doctrines limiting the availability of judicial remedies for disagreement with policy decisions like the Executive Order here.

I. The Fourth Circuit grievously erred in sustaining a discriminatory-purpose challenge to the Executive Order based on purported religious animus.

A. The Court has long accorded facially neutral government actions a presumption of validity and good faith, so those actions can be invalidated under a discriminatory-purpose analysis only if there is the clearest proof of pretext. This longstanding, exacting standard for judicial scrutiny of government motives has been recognized by this Court in multiple types of constitutional challenges. *See infra* Part I.A. This limit respects institutional roles by precluding courts from engaging in a tenuous "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005). *See* Pet. Br. 70-78.

B. Plaintiffs cannot satisfy this Court's exacting standards for showing that the Executive Order is pretext masking a religious classification. The Order classifies aliens according to nationality based on concerns about the government's ability to adequately vet nationals of six covered countries who seek entry. Not only that, but these six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." The Order is therefore valid, as it provides a "facially legitimate and bona fide reason" for exercising the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). *See* Pet. Br. 62-69.

II. The Ninth Circuit also erred by finding that the President lacked statutory authority to issue the Executive Order. *See* Pet. Br. 38-62. The Executive Order comports with Congress's scheme that grants the President sweeping power, under 8 U.S.C. § 1182(f), to restrict alien entry into the United States. Thus, in addition to the presumptions of constitutionality and good faith that apply to this government action, the Executive Order must also be further accorded "the strongest of presumptions and the widest latitude of judicial interpretation," because it is in *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

III. Nor could the injunctions be justified under a procedural-due-process theory turning on whether a nonresident alien abroad has a sufficient connection to the United States. *See* Pet. Br. 6-7, 67-69.

The Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry. So neither the Fifth Amendment nor the Establishment Clause extend to the aliens covered by the Executive Order. Indeed, this Court has specifically recognized that there is no "judicial remedy" to override the Executive's use of its delegated 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry into this country. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Even assuming the Constitution applies to nonresident aliens abroad seeking entry, the Executive Order fully complies with any possible due-process requirements. The Order publicly sets forth facially valid, bona fide national-security grounds for restricting entry to a class of nonresident aliens abroad. *See* Pet. Br. 65-69.

At an absolute minimum, constitutional rights do not extend extraterritorially to "foreign nationals abroad who have no connection to the United States at all." *IRAP*, 137 S. Ct. at 2088. The Order therefore cannot be enjoined as applied to foreign nationals who lack a "credible claim of a bona fide relationship with a person or entity in the United States"—such as "a close familial relationship," or a relationship with an entity that is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Id.*

Ultimately, the lower courts' injunctions of the Executive Order are contrary to law. These injunctions deny the federal government—under a statutory regime crafted by the people's representatives in Congress—the latitude necessary to make national-security, foreign-affairs, and immigration-policy judgments inherent in this country's nature as a sovereign. The Court should reverse.

ARGUMENT

I. Plaintiffs Cannot Overcome the Exacting Standard that Applies to Discriminatory-Purpose Challenges to Facially Neutral Government Actions.

As this Court has recognized for years and in many different contexts, a discriminatory-purpose challenge to facially neutral government action faces an exacting standard. The Court has articulated this exacting standard in different ways, but the central principle in this well-established body of case law is that a facially neutral government action can be invalidated as pretext only upon the clearest proof. *See infra* pp. 6-9. This high standard for overriding government action by discerning a discriminatory purpose respects the "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted); *see also* Pet. Br. 77-78.

That heavy presumption cannot be overcome by plaintiffs' arguments here, especially given the Executive Order's detailed national-security findings, the resonance of those findings in determinations of numerous federal officials, and the judicial deference owed to executive decisions in this context. *See* Executive Order 13,780 (EO) § 1(d)-(i), 82 Fed. Reg. 13,209, 13,210-12 (Mar. 9, 2017). The Fourth Circuit's analysis deeming the Executive Order pretext for a religious test discounts those weighty considerations, and it undermines the sound reasons for the exacting standard required to invalidate facially neutral government action based on an alleged discriminatory purpose.

A. An exacting standard insulates government action from being deemed a discriminatory pretext absent the clearest proof to the contrary.

A discriminatory-purpose challenge to facially neutral government action faces an exacting standard under this Court's precedents: it requires the clearest proof of pretext.

1. This exacting standard for discriminatory-purpose challenges is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *Triplett*, 494 U.S. at 721.

And this presumption of constitutionality applies with particular force to the foreign-affairs and national-security determinations at issue here. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491-92 (1999) (*AADC*). After all, "[u]nlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Indeed, "the Government's interest in enforcing" the Executive Order's travel restrictions "and the Executive's authority to do so" extend from the government's "interest in preserving national security[, which] is 'an urgent objective of the highest order.'" *IRAP*, 137 S. Ct. at 2088 (quoting *Holder v. Humanitarian Law Project*, 561 U. S. 1, 28 (2010)). The presumption of constitutionality is especially strong as to executive action regarding nonresident aliens abroad who seek entry to the country without existing ties to U.S. residents or entities, since the President's national-security powers are "undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.*

2. Consequently, this Court "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977); *see also Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc). The Court has therefore permitted a discriminatory-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted a discriminatory-purpose analysis of government action, this Court has concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained for the Court over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing. 6 Cranch at 128.

The Court has thus repeatedly explained, in various contexts, that courts can override facially neutral government actions as pretext only upon clear proof. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).
- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).
- "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make

little "practical sense." *McCreary Cty.*, 545 U.S. at 862.

This exacting standard for a discriminatory-purpose challenge to facially neutral government action exists for good reason. It ensures that a purpose inquiry will remain judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

B. The Order here, which classifies aliens by nationality and reflects national-security concerns, cannot be deemed a pretext for a religious test.

The Executive Order's travel restrictions classify aliens by nationality—not religion.[2] The Order's temporary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.*; *see also* Pet. Br. 70-73.

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[2] Because the Executive Order classifies aliens by nationality, and not religion, any equal-protection analysis possibly applicable under the Constitution, *but see infra* Part III.A, subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain

The Executive Order therefore is emphatically not a "Muslim ban." Numerous majority-Muslim countries in the world are not covered by the Executive Order, and data from the Pew-Templeton Global Religious Futures Project indicates that the six countries covered by the Executive Order contain only about 10% of the world's Muslims.[3]

The Order finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." EO § 2(c). All six of these countries were already included in the list of seven "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)." EO § 1(b)(i), (f). That set

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benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

[3] *See Muslim Population by Country: 2010*, Pew-Templeton Global Religious Futures Project (last visited Aug. 17, 2017), http://www.globalreligiousfutures.org/religions/muslims (providing statistics on Muslim population as a percentage of total population on a per-country basis).

of seven countries under 8 U.S.C. § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The Order then explains at length the rationale for ordering a pause in entry for nationals of the six covered countries. *See* EO §§ 1-2. Those restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order thus further directs that, while entry from those countries is paused, the Secretary of Homeland Security in consultation with the Secretary of State and Director of National Intelligence undertake a worldwide review to identify what information is needed from foreign countries to allow adequate screening of entrants. Then, the Secretary must submit reports to the President naming any country that these officials believe should be added to or removed from the list of countries subject to a suspension of entry. EO § 2(a)-(b), (d)-(g).

Moreover, before the current Administration took office, numerous federal officials—including the FBI Director,[4] the Director of National Intelligence,[5] and the Assistant Director of the FBI's Counterterrorism Division[6]—expressed concerns about the country's current ability to vet alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[7] and "groups like ISIS may seek to exploit the current refugee flows."[8] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists have been recognized since the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).[9]

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[4] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

[5] *Id.*

Given this national-security grounding, a challenge to the Executive Order as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the delicate policy judgments inherent in the Executive Order, as these decisions must account for factors indicating a heightened national-security risk that warrants a particular course of action regarding the Nation's borders. Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797; *AADC*, 525 U.S. at 491. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

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[6] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[7] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[8] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terror Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

[9] *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

Comments the President made during his campaign for office cannot overcome the combination of (1) the Order's detailed explanation of its national-security basis, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 10-12, and (3) the exacting standard for deeming facially neutral government action pretext for a discriminatory purpose, *see supra* Part I.A; *see also* Pet. Br. 73-76. Furthermore, this Court has recognized the limited significance of campaign statements made before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Washington*, 858 F.3d at 1172-74 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernment officials are irrelevant for determining whether the Executive Branch took action as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

II. The Executive Order Complies with the INA, so It Also Receives "the Strongest of Presumptions" of Validity Because It Is Within *Youngstown*'s First Category as Executive Action Pursuant to Power Delegated Expressly by Congress.

The Order also complies with Congress's statutory delegation of Executive power, so the Ninth Circuit should not have enjoined the Order as violating the INA. *See* Pet. App. 38-62. In fact, plaintiffs' discriminatory-purpose challenge to the Order faces yet another strong presumption of validity: the President's action here is accorded "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). That is because the Order is within *Youngstown*'s first zone of executive action: Congress expressly delegated to the President the authority he exercised here. The burden of persuasion for plaintiffs' constitutional challenges will therefore "rest heavily upon" plaintiffs, as the parties challenging the President's *Youngstown*-zone-one action. *Id.*

A. Pursuant to Congress's statutory immigration scheme, the Executive Order temporarily suspends the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents (LPRs) of the United States, were outside this country ten days after the Executive Order issued, and do not qualify

- for other exceptions (such as holding a valid visa ten days after the Executive Order issued); and
- aliens seeking entry under the U.S. Refugee Admissions Program.

EO §§ 2, 3, 6(a). The Executive Order also caps the entry of refugees at 50,000 for Fiscal Year 2017. *Id.* § 6(b). This Executive Order exercises authority that Congress expressly delegated.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress too has recognized this sovereign power to exclude aliens, giving the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary*, *suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's broad § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding (as opposed to an entry denial), if the "revocation provides the sole ground for removal." *Id.*

And, as to refugees, the President's power to limit alien admission is authorized, not only by § 1182(f), but also by the INA's separate delegation to the President of power to control refugee admissions. *Id.* § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)).

2. Any challenge to congressional authorization for the Order's nationality-based suspension of entry under § 1182(f) founders on this Court's decision in *Sale*, 509 U.S. at 187-88. *Sale* held—in terms equally applicable here—that no "judicial remedy" exists to override the Executive's use of its § 1182(f) power to deny entry to specified classes of nonresident aliens. *Id.* at 188 (quoting *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

Sale is fatal to any claim that the Order here is unauthorized by the INA. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

Likewise here. The Ninth Circuit panel erred in deciding that "[t]here is no sufficient finding in [the Order] that the entry of the excluded classes would be detrimental to the interests of the United States." *Hawaii v. Trump*, 859 F.3d 741, 770 (9th Cir. 2017) (per curiam). The President need not even disclose his "reasons for deeming nationals of a particular country a special threat," *AADC*, 525 U.S. at 491, let alone to a court's satisfaction. Even when the President does disclose his reasons for deeming certain nationals to present a risk to national security, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*

In all events, the Executive Order provides extensive findings supporting the need for a temporary pause in entry to assess whether several failed states, or governments that are state sponsors of terrorism, provide adequate information about their nationals to permit national-security vetting. EO § 1(d)-(f). Specifically:

> Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations,

> their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

EO § 1(d). "[W]hen it comes to collecting evidence and drawing factual inferences" regarding determinations such as these, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Humanitarian Law Project*, 561 U.S. at 34.[10]

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[10] The Ninth Circuit's additional holding that the Executive Order's refugee-admission restrictions lacked sufficient findings, *Hawaii*, 859 F.3d at 774-76, was wrong for similar reasons. Section 6(a) of the Order (pausing refugee admissions) is based on findings that "[t]errorist groups have sought to infiltrate several nations through refugee programs" and that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation," some of whom have been "convicted of terrorism-related crimes." EO § 1(b)(iii), (h). Section 6(b) of the Order (capping refugee admissions) is justified based on the President's finding "that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." Even if the President had offered additional detail, courts would be ill-equipped to review it. *See AADC*, 525 U.S. at 491. And where such preventative measures are involved, the President "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *Humanitarian Law Project*, 561 U.S. at 35.

3. Nor is Congress's broad delegation of authority to suspend the entry of classes of aliens undermined by 8 U.S.C. § 1152(a)(1)(A), which makes no mention of § 1182(f). Section 1152(a)(1)(A) does not address the entry of aliens into the country at all. Instead, it is part of a set of restrictions on the issuance of *immigrant visas*—that is, permission for aliens to seek admission for permanent residence. *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier nationality-based quota system for allocating immigrant visas, § 1152(a)(1)(A) provides:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict requirement for repeal by implication). An alien's *entry* into this country is a different and much more consequential event than the preliminary step of receiving a *visa*, which merely entitles the alien to apply for admission into the country. *See* 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. Visa possession does not control or guarantee entry; the INA provides several ways in which visa-holding aliens can be denied entry. *E.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the President suspended the entry of Cuban nationals as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 648 & n.2 (4th Cir. 2017) (en banc) (Niemeyer, J., dissenting) (citing additional examples). Plaintiffs point to no instance in which the government has read § 1152(a)(1)(A)'s visa-allocation provisions as prohibiting nationality-based suspensions of entry under § 1182(f).

Finally, § 1152(a)(1)(A) applies only to *immigrant* visas, and does not cover other prospective entrants, such as those seeking *nonimmigrant* visas. So, even on plaintiffs' view, this section cannot possibly establish that § 2 of the Order is statutorily unauthorized as applied to aliens seeking entry as nonimmigrants.[11]

4. The President's § 1182(f) authority to suspend aliens' entry is not at all limited by 8 U.S.C. § 1182(a), which also makes no mention of § 1182(f). *Cf. Int'l Refugee Assistance Project*, 857 F.3d at 614 (Wynn, J., concurring) (addressing plaintiffs' § 1182(a) arguments because "[t]he majority opinion does not reach the merits of Plaintiffs' claim that Section 2(c)'s suspension on en-

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[11] Similarly, refugee admission does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So § 1152(a)(1)(A)'s provisions regarding immigrant-visa issuance, even on plaintiffs' view, cannot show that Congress somehow withheld authority for the refugee-program directives in § 6 of the Order.

try violates the Immigration Act . . . ."); *Hawaii*, 859 F.3d at 781-82 (noting but not ruling on this argument based terrorism-related inadmissibility on 8 U.S.C. § 1182(a)(3)).

In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to this country, unless an exception applies. Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary."

As the District of Columbia Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not within one of the enumerated § 1182(a) categories that automatically make aliens inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

5. Nor are the Executive Order's refugee-admission provisions contrary in any way to 8 U.S.C. § 1157. *See Hawaii*, 859 F.3d at 775-76. Refugee admis-

sions are *capped* at a number determined by the President. *See supra* p. 16. Section 1157 contemplates that, after certain congressional consultation, the President will set a *ceiling* for refugee admissions at the beginning of each year, but the provision contains no requirement the President actually allow that number of refugees to be admitted. Section 1157 provides a mechanism for the President to seek an increase in the number of refugees that may be admitted in a given year based on certain unforeseen circumstances. 8 U.S.C. § 1157(b). But determining the maximum number of aliens that "may be" admitted in a fiscal year in no way sets a minimum floor for refugee admissions, let alone one that conflicts with the President's separate authority to restrict the entry of aliens when doing so is "detrimental to the interests of the United States." *Id.* § 1182(f).

B. Because the Executive Order is an exercise of power delegated by Congress in the INA, it is executive action in the first *Youngstown* zone. The Order is therefore also "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674. Overcoming this strongest presumption for any claim challenging the Executive Order is a burden that rests "heavily" on plaintiffs. *Id.*[12]

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[12] The Ninth Circuit panel professed that it was "cognizant" of this framework, *Hawaii*, 859 F.3d at 782, but found the President's power at its "lowest ebb," under *Youngstown*'s third zone of executive action that runs contrary to Congressional authorization, *id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J.,

Plaintiffs' significant burden is well-founded here, not only because of the explicit congressional grant of authority to *deny* entry, 8 U.S.C. § 1182(f), but also because of the INA's complementary approach to *allowing* entry. Specifically, Congress enacted "extensive and complex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 567 U.S. at 395; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress imposed these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously provided the Executive broad authority to *exclude* aliens from the country, under § 1182(f).

The President's authority in this context therefore "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). The injunctions here are thus remarkable for interfering with a decision authorized by two branches of government. And they do so in a particularly sensitive area. The admission of aliens into this country is a federal prerogative "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign en-

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concurring)). That conclusion is incorrect for the reasons explained above.

croachments and dangers—a power to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Plaintiffs' claim that the Order is pretext for a religious classification thus fails for this additional reason that the Order is within *Youngstown*'s first zone. And the Order is already accorded the heavy presumption that facially neutral government action is valid and taken in good faith. *See supra* Part I.A.

Especially with those presumptions in mind, the Executive provided a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770; *see also Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment) (federal government official informing alien of visa denial based expressly on statutory provision is a "facially legitimate and bona fide" reason under *Mandel*). Courts therefore must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.

III. The Constitutional Provisions Invoked by Plaintiffs Do Not Extend Extraterritorially, Nonresident Aliens Abroad Possess No Constitutional Rights Regarding Entry into this Country, and the Executive Order Provides All Process that Could Possibly Be Due.

Neither court below enjoined the Order on a procedural-due-process theory. Any such theory, turning on whether a nonresident alien abroad has a sufficient connection to the United States, does not justify any injunction of the Executive Order. That is because the constitutional provisions on which plaintiffs rely do not apply extraterritorially. And even if they do, the Executive Order provides all process that is possibly due by giving facially neutral, bona fide national-security grounds for its restrictions. *See* Pet. Br. 65-66. At a minimum, the injunctions must be narrowed to allow entry only to foreign nationals with a "credible claim of a bona fide relationship with a person or entity in the United States." *IRAP*, 137 S. Ct. at 2088.

A. The constitutional claims here are fundamentally untenable because the constitutional provisions that plaintiffs invoke are inapplicable to the nonresident aliens abroad covered by the Executive Order.

1. Nonresident aliens outside territory under clear United States control possess no constitutional rights regarding the terms on which they may enter the country: It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to

the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Consequently, the Fifth Amendment's Due Process Clause provides no "judicial remedy" to override the President's 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry. *Sale*, 509 U.S. at 188; *see id.* ("agree[ing] with the conclusion expressed in Judge Edwards' concurring opinion" regarding statutory and constitutional challenges in *Gracey*, 809 F.2d at 841: "'there is *no solution to be found in a judicial remedy*'" overriding the Executive's exercise of § 1182(f) authority (emphasis added)).

This Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Rather, the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Constitution does not regulate immigration policy regarding foreign nationals who are neither resident nor present in United States territory. The Court has therefore recognized a key distinction between aliens inside versus outside the United States, according the former certain constitutional rights while not extending those rights to the latter. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Boumediene, 553 U.S. at 732-33, is not to the contrary. That case involved the lengthy detention of alien enemy-combatants at the U.S. Naval Station at Guantanamo Bay and, therefore, implicated habeas corpus and the Suspension Clause, the history of which the Court detailed. *See id.* at 739-52. The federal government here is merely denying entry into the country, not engaging in lengthy detention. *Cf. id.* at 797 ("[F]ew exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person"). And unlike Guantanamo Bay, the United States lacks "plenary control, or practical sovereignty" over the seven countries in the Executive Order's travel restriction—or from the various countries where the refugee directive would apply. *Id.* at 754; *cf. id.* at 764 ("The United States has maintained complete and uninterrupted control of the bay for over 100 years.").

2. Plaintiffs' challenges fare no better when framed as claims that the Executive Order violates rights against religious discrimination under the equal-protection component of the Fifth Amendment's Due Process Clause and under the Establishment Clause. *See* First Am. Compl. ¶¶ 220-25, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361, Docket entry No. 93 (D. Md. Mar. 10, 2017); Second Am. Compl. ¶¶ 111-17, *Hawaii v. Trump*, No. 1:17-cv-50, Docket entry No. 64 (D. Haw. Mar. 8, 2017). Plaintiffs' theory is the same as to both Clauses—that the Executive Order is a pretext for discrimination on account of religion. But that theory fails because nonresident aliens seeking to enter the country lack constitutional rights regarding entry in the first place. *See supra* pp. 25-26.

What is more, Congress has repeatedly designated members of certain religious groups—such as Soviet Jews, Evangelical Christians, and members of the

Ukrainian Orthodox Church—as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation). That accepted practice underscores the inapplicability in this context of the religious-nondiscrimination rights invoked by plaintiffs.

Plaintiffs cannot make an end-run around the territorial limits on constitutional rights by relying on the alleged stigmatizing effect on individuals within the United States of a challenged decision about whether *nonresident aliens outside* this country are admitted. To hold otherwise would allow bootstrapping a constitutional claim based on government action regulating only aliens beyond constitutional protection. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated *other* persons who possessed no constitutional rights regarding entry. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing doctrine in a challenge to the expenditure of government funds in foreign countries).

B. Even if the constitutional provisions at issue could somehow apply extraterritorially, there is still no constitutional violation from the Executive Order's limits on the entry of nonresident aliens abroad. *Cf.* Second Am. Compl. ¶¶ 118-26 (Hawaii plaintiffs' substantive-

and procedural-due-process claims). Plaintiffs' Fifth Amendment claim would thus fail for this reason as well.

1. There can be no Fifth Amendment violation if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). And nonresident aliens abroad have no constitutionally protected interest in entering the United States.[13] *See Mandel*, 408 U.S. at 762. Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1354 (D.C. Cir. 1997); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981). Thus, plaintiffs lack support for the notion that aliens have due-process claims to advance.

2. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a separate panel of the Ninth Circuit posited that several categories of aliens, other than lawful permanent residents, may have "potential"

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[13] The analysis could be different for certain lawful permanent residents who are returning to the country from abroad, *see Landon*, 459 U.S. at 33-34, but the Executive Order does not apply to LPRs, *see supra* p. 14.

claims to constitutional protections regarding travel and entry. *Id.* at 1166. That suggestion was incorrect because the four categories of aliens cited by the Ninth Circuit lack valid constitutional claims.[14]

First, there are no constitutional rights regarding prospective *entry* for aliens who are in the United States "unlawfully." *Id.* The INA provides that visas issued to aliens seeking admission to the country confer no entitlement to be admitted, and that visas can be revoked at any time in the Executive's discretion. 8 U.S.C. § 1201(h)-(i). Even as to an alien who was admitted into the country under a visa, "revocation of an entry visa issued to an alien already within our country has no effect upon the alien's liberty or property interests," and thus cannot support a due-process challenge. *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 212 (5th Cir. 1981).

If *removal proceedings*—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, that alien would enjoy certain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (noting that it is "well established" that aliens have due-process rights in deportation hearings); *see also Zadvydas*, 533 U.S. at 693 (alien entitled to Fifth Amendment protections once alien is within the country). Accordingly, the INA provides for judicial review of visa revocations only in the limited context of deportation proceedings. 8 U.S.C. § 1201(i). But this case is not about deportation—it is about preventing nonresident aliens abroad from entering the country in the first place.[15] The Court has never held that the Fifth Amendment is violated when restrictions are placed on nonresident aliens abroad seeking to enter the country. *Cf. Landon*, 459 U.S. at 32. And because visas can be revoked unilaterally and often without judicial review, *see* 8 U.S.C. § 1201(i), it does not follow that the Constitution requires protections for aliens seeking to leave and then re-enter the country.

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[14] The *Washington* panel erroneously concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. 847 F.3d at 1164-65. That conclusion is wrong because no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property, and nonresident aliens abroad have no constitutionally protected interest in entering the United States. *See supra* pp. 25-26. Regardless, whatever process could possibly be due was satisfied here by the Executive Order's "facially legitimate" public proclamation prospectively announcing an exercise of the Executive's § 1182(f) authority. *See infra* pp. 34-35.

Second, this Executive Order does not cover any nonresident alien visa holders who travelled internationally and are attempting to reenter the country. The Executive Order applies only to aliens who were outside the United States on the effective date of the Order, who did not have a valid visa as of January 27, 2017, and who did not have a valid visa on the effective date of the Order. EO § 3(a). Regardless, *Landon* does not establish that "non-immigrant visaholders" have due-process rights when seeking to return from abroad. *See Washington*, 847 F.3d at 1166 (citing *Landon*, 459 U.S. at 33-34). *Landon* involved a *resident* alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional [due-process] status changes accordingly.... The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."). Those ties are significantly less in the case of a *nonresident* alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review... of a revocation" of a visa, "except in the context of a removal proceeding if such revocation provides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

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[15] This claim is particularly weak for unlawfully present aliens. Even if unlawfully-present aliens have due-process rights in *removal proceedings*, *see Zadvydas*, 533 U.S. at 693, that does not mean that an unlawfully-present alien who leaves the country has a right to process to be admitted to the country upon return. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B) (inadmissibility based on prior unlawful presence), (f).

Third, there are no viable due-process claims for aliens abroad seeking refugee status. *See Washington*, 847 F.3d at 1166. That argument morphs statutory protections for those seeking asylum into constitutional protections for refugees. The INA's conferral of statutory rights to seek asylum, *see* 8 U.S.C. § 1158, cannot create constitutionally protected rights for refugee admission. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." 8 U.S.C. § 1158(a)(1). Only an alien *outside* the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). Hence, § 1182(f) independently permits the Executive to deny refugee applicants entry into the United States. Similarly, statutory provisions under the United Nations Convention Against Torture (CAT) provide that certain aliens may not be returned to a country in which they fear torture, "regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note. The CAT provisions, however, merely limit the possible countries to which an alien can be *returned* and say nothing about overriding the President's statutory authority to restrict alien *entry* into the United States, even if aliens cannot be returned to a certain other country. *See id.* § 1182(f).[16]

Fourth, plaintiffs lack viable due-process arguments based on visa applicants who have a relationship with a U.S. resident or institution. *See Washington*, 847 F.3d at 1166 (citing *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762–65. *Din* did not hold that such due-process rights exist. To the contrary, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment); *see also* Pet. Br. 67-68. In fact, the concurrence reasoned that, even if due process applied in this context, the only process possibly required was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad. *Id.* at 2141; *see also id.* at 2131 (plurality op.) ("[A]n unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission.").

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[16] These arguments are particularly weak here since the Executive Order's revised entry restrictions do not even apply to "any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture." EO § 3(b)(vi).

And the *Din* concurrence's standard is plainly met here by the Order's lengthy recitation of national-security reasons. *See* EO § 1(d)-(h). The Order therefore already provides whatever process may be due, as it publicly announces the "facially legitimate and bona fide" invocation of the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770.

C. Regardless, the existence of occasional scenarios like that in *Din*—of nonresident aliens abroad with sufficiently strong connections to the United States—could not possibly support the lower courts' facial injunctions, even if some additional process were due in these limited situations.

At the very minimum, the Constitution cannot extend rights to nonresident aliens abroad who have no other connection to the country. Such a holding would extend constitutional rights to every person on the planet. That point alone is fatal to plaintiffs' facial challenge.

Even if there were some entitlement to more process than the Executive Order's public recitation of reasons supporting its entry restrictions, the only possible remedy would be what this Court ordered in its stay opinion. The Order cannot be enjoined as applied to "foreign nationals abroad who have no connection to the United States at all." *IRAP*, 137 S. Ct. at 2088. Thus, at a minimum, the Court should narrow the injunction to apply only to foreign nationals with a "credible claim of a bona fide relationship with a person or entity in the United States"—such as "a close familial relationship," or a relationship with an entity that is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Id.*

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

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DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.

◆

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.

◆

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Fourth And Ninth Circuits**

◆

BRIEF OF AMICI CURIAE 37 APPELLATE LAWYERS SUPPORTING RESPONDENTS

◆

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BRIEF OF AMICI CURIAE 37 APPELLATE LAWYERS SUPPORTING RESPONDENTS

The 37 citizens listed *post*, pages 32-38, submit this brief as amici curiae supporting respondents.[1]

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INTEREST OF THE AMICI CURIAE

Amici are 37 appellate lawyers admitted to the bar of this Court. We write as citizens on our own behalf and not for employers, legal-practice organizations in which we have an interest, or clients. Please attribute the words and positions stated in this brief solely to the named amici.

The interest of amici is to preserve the rule of law. As officers of the Court, many of whom have briefed and argued cases in the Court for clients, we owe our highest duty to the rule of law. We perceive the rule of law to be threatened by actions that gave rise to this case. Our duty to the rule of law calls us to write this brief to expose and resist the threat.

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[1] Pursuant to Supreme Court Rule 37.3(a), amici certify that Petitioners have filed a blanket consent with the Clerk, and counsel of record for all Respondents have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, amici state that this brief was written by members of the amici group, who exclusively produced and funded the brief. No party or counsel for a party was involved in preparing this brief or contributing financially to fund the preparation or submission.

SUMMARY OF ARGUMENT

Appellate review of executive orders that legislate should embrace all verifiable evidence of a President's motive or intent when motive or intent is relevant. In the Nation's intentionally divided government, Congress legislates and the President faithfully executes.[2] When Congress broadly delegates legislative power, the President becomes an authorized autocrat. Then the judicial branch must assure the President does not "trench upon fundamental rights."[3] When a President as a sole state actor would abridge civil rights or the rights of a minority in the name of enhancing security or prosperity, the Court uniquely owes the people a duty to scrutinize the abridgment with full attention to whether its true motive is repression. As a matter of judicial process that means considering all verifiable evidence of the President's motives.

This brief explains how lessons of recent history favor considering everything verifiable that a President says about the purposes for issuing an executive order. Amici show what perils attend a judiciary's failing to take a leader at his or her word. Disregarding expressions of repressive motive or will to act outside the rule of law contributes to social breakdowns greater than those embodied in a particular case.

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[2] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 588 (1952).

[3] *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see Greene v. McElroy*, 360 U.S. 474, 507 (1959).

Part I documents how the judiciary in another rule-of-law nation – Germany in 1933 – failed to see clearly and question deeply when facing a would-be totalitarian. Seduced by popular nationalism and cowed by factions angry over unemployment and underemployment, the German judiciary – like many other thoughtful German leaders and later world leaders – appeased when it should have stood its ground under its nation's constitution and rule-of-law tradition. The courts facilitated the plurality government's descent into totalitarianism. The result was not security or prosperity. It was tens of millions of deaths and Germany's destruction.

Part II shows that Germany's catastrophic experience is pertinent to the United States today. American courts – even this Court 70 years ago – have sometimes blinded themselves to real and knowable reasons for oppressive measures. They have accepted palpably meritless excuses invoking national security or tranquility. But the words of this Court and individual justices have often advocated the constitutional duty to prevent presidential trenching on fundamental rights, and the Court has invalidated executive acts – including in times of crisis.

Part III applies the lessons of parts I and II to show why the Court should take a President at his or her word – wherever or however uttered verifiably –

for the meaning and purpose of an executive order being challenged or interpreted under the Constitution or laws of the United States. The conditions in which this case arrives at the Court have salient analogies to the histories in parts I and II. As the Nation's chief guardian of the Constitution and the rule of law, this Court must examine thoroughly and deeply, and then thoughtfully stand on the ground of the rule of law.

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ARGUMENT

I. How a Society Based on the Rule of Law Descended Into the Abyss.

In 1871, Germany became a republic under the Constitution of the German Reich, which provided the organic law of Germany until 1919.[4]

A. The Weimar Constitution provided for civil rights and for the rule of law administered by an independent judiciary.

After the First World War, Germany adopted a new constitution, the Reich Constitution of August 11, 1919, often called the Weimar Constitution.[5] The Weimar Constitution began similarly to the opening phrases of the United States Constitution: "The German people, united in its tribes and inspirited with the will to renew and strengthen its Reich in liberty and justice, to serve peace inward and outward and to promote social progress, has adopted this constitution." Article 1 declared: "The German Reich is a republic. State authority derives from the people."

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[4] Carlton J. H. Hayes, A Political and Social History of Modern Europe 397 (1916).

[5] Amici rely on the translation available at Weimar Constitution (Alexander Ganse, trans. 2001), http://www.zum.de/psm/weimar/weimar_vve.php, last visited September 4, 2017, a copy of which is maintained in the records of counsel of record.

Germans enjoyed freedoms declared in terms similar to those of the Bill of Rights. Article 109 of the Weimar Constitution expressed the substance of the Equal Protection Clause. Articles 114, 115, and 117 declared key principles of the Fourth, Fifth, and Sixth amendments, adding an explicit right of privacy. Article 116 could not be distinguished from the Ex Post Facto Clause. In articles 118, 123, 124, and 135, the Weimar Constitution laid out the principles of First Amendment freedoms of expression, assembly, and religion. Articles 136 and 137 further implemented freedom of religion by prohibiting religious tests for public office, prohibiting any state church, and guaranteeing the right to form religious communities. Article 153 required just compensation for taking of property.

German civil rights were protected by the rule of law under an independent judiciary with life tenure. Judges swore an oath of "loyalty to the Constitution, obedience to the law, and conscientious fulfillment of the duties of my office. . . ."[6] Express constitutional provisions included:

Article 102 – "Judges are independent and subject only to the law."

Article 104 – "Judges serving ordinary jurisdiction are appointed for lifetime. Against their will they can only be suspended temporarily or forced into early retirement or transferred to another location if a judge decided so, based on reasons and according to procedures determined by law. Legislation may establish an age limit, at which judges retire." Also, under Article 105, the government could not create extraordinary courts or subject civilians to military jurisdiction.

Sadly for the German people and the world, the Weimar Constitution embedded its own potential nullification by providing in Article 48(2) that the Reich President could suspend many individual rights "[i]n case public safety is seriously threatened or disturbed . . . to reestablish law and order. . . ."

B. The German judiciary betrayed the rule of law.

Before 1933, virtually no judges were members of the National Socialist German Workers' Party ("Nazi

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[6] William F. Meinecke, Jr. & Alexandra Zapruder, Law, Justice and the Holocaust 24 (2d ed. U.S. Holocaust Memorial Museum, 2014). *Compare* Judiciary Act of 1789 (1 Stat. 73, ch. 20, § 8); 28 U.S.C. § 453.

Party").[7] But some had eroded the rule of law by allowing criminal convictions for truthful journalism and acquittals for crimes including murder when the defendant's conduct supported Germany's illegal rearming.[8]

On January 30, 1933, Reich President Hindenberg appointed the leader of the Nazi Party, Adolf Hitler, to be chancellor.[9] The Nazi Party held barely more than one-third of the seats in Germany's parliament, the Reichstag. But that was the largest party bloc.[10]

On February 27, 1933, someone – according to the Nazi Party a terrorist – set fire to the Reichstag building.[11] The next day, Hindenburg issued a decree suspending most of the civil rights and liberties of the German people until further notice under Article 48(2) of the Weimar Constitution.[12] A German who "provokes, or appeals for, or incites the disobedience of the orders" implementing the decree was guilty of a crime and subject to unlimited imprisonment.[13]

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[7] H. W. Koch, In the Name of the Volk: Political Justice in Hitler's Germany 7 (1989).

[8] Ingo Müller, Hitler's Justice 22-24 (Deborah Lucas Schneider, trans., Harvard Univ. Press 1991) (Kindler Verlag GmbH 1987).

[9] Michael Bazyler, Holocaust, Genocide, and the Law 5 (Paperback ed. Oxford Univ. Press 2017).

[10] *Id.*

[11] Meinecke, *supra*, at 10.

[12] *Id.* at 11-12 (Decree of the Reich President for the Protection of the People and the State).

[13] *Id.* at 11.

Less than three weeks later, the German Federation of Judges capitulated to Hindenburg by issuing a declaration approving "'the will of the new government to put an end to the immense suffering of the German people'" and expressing full confidence in the government. The Federation declared "'German judges have always been loyal to the nation and aware of their responsibility.'"[14]

On March 24, Hindenburg declared that the Reichstag had, the day before, validly amended the constitution with a Law to Remedy the Distress of the People and the Reich.[15] Commonly called the Enabling Act, this law permitted the Reich Government to enact laws without engaging the Reichstag: "Laws enacted by the Reich Government may deviate from the Constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat."[16]

A week later, on April 1, the government suspended all Jewish judges and prosecutors. A week after that, the government enacted a law removing all Jewish officials from civil service. This put 643 judges out of office in Prussia alone. The chairman of the German Federation of Judges expressed complete confidence in the chancellor, claiming the independence of judges would be maintained.[17] In parallel, the government, with help from the remaining judges, began to purge Jewish lawyers from the bar.[18]

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[14] Müller, *supra*, 37.

[15] Meinecke, *supra*, at 18.

[16] *Id.* The Reichsrat was the upper house of the German legislature with limited power to object to legislation adopted by the Reichstag. Weimar Constitution, arts. 63, 68, 74.

The Law to Secure the Unity of the Party and the State declared on December 10, 1933: "After the victory of the National Socialist revolution, the National Socialist German Workers' Party has become the upholder of German state thinking and is indissolubly linked to the state."[19]

As 1934 arrived, state and Reich courts enhanced government decrees by finding implicit subversion, Communism, and disobedience in acts not literally prohibited, if police or government officials denounced them as adverse to state interests. Civil courts participated by disbanding organizations, refusing to enforce laws and regulations in favor of citizens, permitting expropriation of private property without process or compensation, and refusing to enforce contracts between Aryans and Jews. The courts eagerly joined the government's quest to crush all political dissent and opposition.[20] Even before decrees required them to do so, German judges adopted Nazi Party race theory as the basis of civil decisions, including denying and annulling marriages.[21]

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[17] Müller, *supra*, 37 (Law for Restoration of the Professional Civil Service).

[18] *Id.* at 61-64.

[19] Diemut Majer, "Non-Germans" under the Third Reich 24 (Peter Thomas Hill, et al., trans., Johns Hopkins Univ. Press 2003) (2d ed. Oldenbourg Verlag, München, 1993).

[20] Müller at 47-49, 116-117.

Traditional legal standards became barren sacks to be filled with Nazi Party ideology. "[T]his *required no changes* in the established legal system but only the setting forth of new definitions of meaning and revised guidelines. . . ."[22] "There were essentially three principles that were held to be axiomatic for the entire field of administration as well as the judiciary: the principle of absolute rule by a leader (the Führer principle), the principle of the authority of the Party over the state, and the influence of race as the fundamental principle guiding affairs of state ('racial inequality')."[23]

When Hindenburg died on August 2, 1934, the chancellor joined the presidency with the chancellorship and proclaimed himself Führer. The armed forces swore allegiance to the Führer by office and name.[24] On August 24, 1934, the judicial oath's loyalty to the constitution was replaced with a promise "to be true and obedient to the Führer of the German Reich and people, Adolf Hitler. . . ."[25]

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[21] *Id.* at 91-95.

[22] Majer, *supra*, at 6 (original italics); Richard J. Evans, The Third Reich in Power 73 (2005).

[23] Majer, *supra*, at 10.

[24] Evans, *supra*, at 42-43.

[25] Meinecke, *supra*, at 23-24. Evans, *supra*, at 43 (the Reich Commissioner for Justice in 1936 declares the role of a judge is to apply Nazi Party ideology).

All the acts of the German state leading to and culminating in the crimes prosecuted at Nuremberg were authorized by decrees under the Enabling Act or adopted by the Reichstag. The government adopted and carried out, from 1934 through the end of the war, racial discrimination laws that inflicted humiliations, theft, ghettoization, imprisonment, and death. On the process and precedent built in the first year of Nazi Party rule, the courts enforced those laws. Almost without exception, the laws had benign titles; without reading the content, one could not have determined they were not neutral but instead oppressed Jews and other minorities.[26] Emblematic of filling traditional process with Nazi Party ideology, a 1935 decree created ex post facto crime-by-analogy: conviction for acts contrary to the "sound sentiment of the people" even though the elements of a crime were absent.[27] A survivor of both a Soviet gulag and a German concentration camp said the Soviets possessed a "'blundering, often stupid brutality,'" but the Germans proceeded with a "'refined, law-abiding sadism.'"[28]

The German judiciary assimilated itself into the Third Reich, presided over the destruction of its own independence, and subordinated itself to authoritarian leadership. While a few judges resisted the Nazi Party regime extrajudicially, only one can be documented to have refused to accept a Nazi Party decree as German law; he was given early retirement.[29] German judges acquiesced in a view of life that all things are political and all politics is dichotomous: us/them, win/lose, good/evil. Their loyalty ran more to the material state than to the rule of law.[30]

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[26] Bazyler, *supra*, 7-32; Evans, *supra*, at 547-554.

[27] III Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10: "The Justice Case" 176-178 (U.S. Gov't Printing Off. 1951) (quoting Law of June 28, 1935, arts. 2, 170a).

[28] Bazyler, *supra*, at 4.

C. Conquest and contrast.

To the collapse of the rule of law in the Third Reich, no greater contrast could be found than the Allies' trials at Nuremberg of German officials accused of war crimes. Against withering pressure for vengeance and summary executions from the Soviet Union and the United Kingdom, the United States prevailed on the principle that the Germans would be tried under the rule of law, both substantive and procedural.[31] The chief prosecutor for the United States, who stood against others' pressure, was Justice Robert Jackson of this Court.[32]

No author has eclipsed the first 95 words of Justice Jackson's opening statement to declare the magnitude of the Nuremberg trials: "The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[33]

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[29] Müller, *supra*, at 194-196.

[30] *Id.* at 296-298.

[31] Norbert Ehrenfreund, The Nuremburg Legacy 8-13 (2007).

[32] *Id.*; *see* Eugene C. Gerhart, America's Advocate: Robert H. Jackson 310 (1958) (Jackson's appointment on May 2, 1945).

II. American Analogies and Contrasts.

At times, this Court has succumbed to pulls from the executive branch and emotional factions to compromise the rule of law, and history has judged it harshly for doing so. But dissenters and recent majority decisions have spoken with a wiser voice that should guide the Court here.

A. This Court's nadirs came when it yielded to executive or popular racial sentiment and compromised the rule of law.

In *Korematsu v. United States*, 323 U.S. 214 (1944) ("*Korematsu*"), the Court upheld the part of Executive Order 9066 that excluded American citizens of Japanese descent from so-called military areas, as declared by military authority.[34] The executive order stated as its justification: "'the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . .'"[35] The order justified exclusion primarily by citing the "Final Report, Japanese Evacuation from the West Coast, 1942" ("Final Report").[36]

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[33] II Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945-1 October 1946, 98-99 (Nuremberg, Germany 1947).

The Final Report "deliberately omitted relevant information and provided misleading information in" forming the *Korematsu* record.[37] The civilian government knew the Final Report's mendacity at the time, and the Justice Department's brief in *Korematsu* disavowed the report.[38]

Under Executive Order 9066 and the Army's implementing orders, military areas consisted of the Western United States, and American citizens of Japanese ancestry could leave military areas only by submitting to transportation to concentration camps.[39]

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[34] *Korematsu*, *supra*, at 216-217.

[35] *Id.* at 217.

[36] *Id.* at 219 n.2.

[37] *Korematsu v. United States*, 584 F.Supp. 1406, 1420 (N.D. Cal. 1984) ("*Korematsu-II*").

[38] Brief of the United States at 12 n.2, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22) (disavowing reliance on the "Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. DeWitt").

[39] *Korematsu*, *supra*, at 221-224, *see id.* at 227 (dis. opn. of Roberts, J.) (documenting extent of military areas).

Thus, although facially less oppressive, the orders imprisoned all Americans of Japanese ancestry without proof of a crime or even a propensity to commit one. Despite notice of the Final Report's flaws, the Court refused to adjudicate the constitutional consequences of the imprisonment worked by Executive Order 9066's combined impositions. The Court affirmed Korematsu's conviction despite recognizing that race-based restrictions on civil rights must be subjected "to the most rigid scrutiny."[40]

The Court has never disapproved *Korematsu*, although the United States has apologized to the victims of the internment.[41] Congress declared the internment was "carried out without adequate security reasons and without any acts of espionage or sabotage documented by [appropriate authorities], and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[42]

Korematsu must be recognized as one of America's great judicial failures, but it is not the only decision in which the Court lent a willing hand to undermining the rule of law. In *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (*Dred Scott*), Chief Justice Taney led a majority of the Court to declare that descendants of African slaves could not become citizens of the United

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[40] *Id.* at 216.

[41] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988). This was four years after a district court granted Mr. Korematsu's petition for writ of error coram nobis. *Korematsu-II*, *supra*, at 1420.

[42] *Id.* at § 2(a).

States, and a slave taken by a master into a free state remained the master's property, notwithstanding statutes to the contrary.[43] Forsaking the rule of law, including the Missouri Compromise, the Court aimed to preserve the Union by appeasing the pro-slavery faction and bolstering Southern dignity.[44] President James Buchanan by ex parte communications convinced Justice Robert Grier to side with Chief Justice Taney.[45] Far from preserving the Union, corrupting the rule of law did the opposite: it immediately inflamed the North and contributed to the evolving political revolution's becoming violent.[46]

In a third case, *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court compromised the rule of law to accommodate popular racism, codified in a local Jim Crow law rather than an executive order. *Plessy* was no naïve or ignorant mistake; Justice Harlan confronted the majority with what it was doing and why.[47]

Could the Court again undermine the rule of law by complicity with executive lawlessness, trading the Constitution for a claim of better security? This is what the President asks the Court to do at pages 23, 64, 66, and 72 of the Brief for Petitioners. And three Fourth

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[43] *Dred Scott*, *supra*, at 427, 452.

[44] Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 557-558 (1978).

[45] John Mack Faragher, et al., Out of Many: A History of the American People 388, Revised Printing (4th ed. 2005).

[46] Fehrenbacher, *supra*, at 417-418, 425-426, 432-433 (state legislative responses), 566-567.

[47] *Plessy*, *supra*, 163 U.S. at 557, 562 (dis. opn. of Harlan, J.)

Circuit judges would do exactly that. For himself and two colleagues, Circuit Judge Shedd explicitly endorsed subordinating the rule of law to extra-legal public interests: "Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest."[48] Justice Thomas warned against such wagers: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow."[49]

B. The Court and its members have also affirmed the wisdom of an independent judiciary as a check on executive power.

The United States was founded on the rule of law by citizens of a rule-of-law nation.[50] The nation to which the Founders formerly owed their loyalty treated them as mere colonists.[51] Chief among their grievances was that the English government denied them an independent judiciary to enforce their civil rights and commercial law.[52]

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[48] *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 659 (4th Cir. 2017) (dis. opn. of Shedd, J.).

[49] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 781-782 (2007) (Thomas, J., concurring).

[50] The Declaration of Independence; U.S. Const. preamble.

[51] The Declaration of Independence.

[52] The Declaration of Independence, paras. 9, 10, 13, 19, 20.

In better voices than the majority opinions in *Korematsu*, *Dred Scott*, and *Plessy*, the Court and individual justices have declared the wisdom of enforcing the rule of law cherished by the Founders. Opinions have called for opposing an executive branch that would trample it, and the Court has invalidated executive acts. Justice Roberts dissented in *Korematsu* on the ground that the government could not convict a citizen of being in a prohibited place when the citizen could leave only by subjecting himself to unconstitutional imprisonment in a concentration camp.[53] Justice Murphy dissented on the ground that the "exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[54] The Court must declare, he said, that "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."[55] He used the record to show that the Final Report was a racist sham[56] and concluded: "A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations."[57] And Justice Jackson dissented, arguing that even if the courts should not interfere with unconstitutional military orders, they must not enforce them.[58] "I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy."[59]

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[53] *Korematsu*, *supra*, 323 U.S. at 225-233 (dis. opn. of Roberts, J.).

[54] *Id.* at 233 (dis. opn. of Murphy, J.).

[55] *Id.* at 234.

[56] *Id.* at 234-239, 241-242.

[57] *Id.* at 239-240.

In 1974, the Court faced a President whose philosophy was that "[w]hen the president does it, that means it is not illegal."[60] Rejecting a claim of executive privilege embodying that attitude, the Court held that the rule of law applied to the President and ordered him to comply with a special prosecutor's subpoena for recordings of his Oval Office conversations about the Watergate crimes.[61] The Court held that the privilege for presidential communications "must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'"[62]

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court held that although Congress authorized the detention of enemy combatants, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[63] The plurality rejected the jurisprudential foundation of *Korematsu*: "[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts. . . . Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government."[64] Thus: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[65] Other justices rebuked the government's war powers position more forcefully.[66]

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[58] *Id.* at 242-248 (dis. opn. of Jackson, J.).

[59] *Id.* at 247.

[60] David Frost interview with Richard M. Nixon, May 19, 1977.

[61] *United States v. Nixon*, 418 U.S. 683, 713-714 (1974).

[62] *Id.* at 708-709.

These voices of the Court provide foundation to uphold the rule of law against executive violations. They are the kinds of voices absent from the German jurisprudence prevalent in 1933.

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[63] *Hamdi*, 542 U.S. at 509 (plur. opn. of O'Connor, J.), 553-554 (conc. & dis. opn. of Souter, J.).

[64] *Id.* at 535-536 (plur. opn.).

[65] *Id.* at 536 (plur. opn.).

[66] *Id.* at 554 *ff*. (dis. opn. of Scalia, J.).

III. A Sole Lawmaker's Acts Should Be Tested With All Available Evidence.

A. The President has limited power to legislate under Congressional delegation.

Congress has delegated to the President power to legislate on certain immigration subjects.[67] The President may act as a lawmaker only within lawful delegation.[68]

President Truman's effort to seize the steel mills exemplifies the President's limited power to legislate. By executive order, he granted himself power to seize steel mills as essential to prosecuting the Korean War, and the same order directed the Secretary of Commerce to execute the seizure.[69] The Court insisted that any such presidential power must be found in the Constitution.[70] None existed in either the war powers of the Commander in Chief of the Armed Forces or the power to execute the laws faithfully.[71] In rejecting the President's claim for the latter, the Court emphasized that the order was essentially legislative. The order created a presidential policy; it did not execute a congressional policy "in a manner prescribed by Congress."[72] Explaining the constitutional principle that Congress holds the general power to legislate and the President has no such power, the Court stated:

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[67] 8 U.S.C. § 1182(f). Whether this President's actions conflict with other provisions of the INA, including 8 U.S.C. §§ 1152(a)(1)(A) and 1157, is outside the scope of this brief.

[68] A "broad generalized" delegation does not allow the President to "trench upon fundamental rights." *Kent v. Dulles*, *supra*, 357 U.S. at 129; *see Greene v. McElroy*, *supra*, 360 U.S. at 507.

[69] *Youngstown*, *supra*, 343 U.S. at 583, 588.

[70] *Id.* at 587.

[71] *Id.* at 587, 588.

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States * * *." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[73]

Amici assume that provisions of the Constitution generally limiting federal power – the Free Exercise Clause, the Establishment Clause, the equal protection component of the Fifth Amendment's Due Process Clause – apply to executive action.[74] This appeal requires the Court to decide whether specific orders violate one or more of those provisions.

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[72] *Id.* at 588.

[73] *Id.* at 587-588.

[74] *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

Judicial loyalty to the Constitution requires upholding the rule of law not only by the substance of the Court's opinions but also in the rules of scrutiny and review of presidential acts. The remainder of this brief explains that when a sole actor – here, the President – promulgates a challenged law, everything the actor has ever said or written about that law should be considered in testing its meaning and validity.

B. Objections to Congressional legislative history do not apply to extrinsic evidence of an executive order's purpose.

If the Court reaches the issue whether the plaintiffs showed sufficient probability of success on the merits, precedent will call for examining the President's purposes in issuing the executive orders.[75] For example, the plaintiffs' Establishment Clause argument is that they made "an affirmative showing of bad faith," which allows judicial scrutiny to go beyond the text of a facially neutral statute or decree.[76] Going beyond the text means consulting extrinsic evidence, raising the question what extrinsic evidence can be considered.

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[75] *United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675, 2693 (2013) (congressional intent to interfere with state sovereignty); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860-862 (2005) (motive relevant to Establishment Clause analysis); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) (same); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (same).

[76] *Kerry v. Din*, ___ U.S. ___, 135 S.Ct. 2128, 2140-2141 (2015) (Kennedy, J., concurring in the judgment) (determining what "bona fide" means in *Kleindienst v. Mandel*, 408 U.S. 753, 770

From the Court's earliest days, it has considered extrinsic evidence in seeking to understand lawmakers' intent or motive. "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived. . . ."[77] Some justices have objected to this practice,[78] but even had their objections commanded a majority, none applies to analyzing executive orders like those under scrutiny here. That is because neither logically nor in the real world do the objections carry over to analyzing decrees of a sole lawmaker, which is how the President acts in promulgating many executive orders.

- Uncertainty whether a committee report or a floor speech was in the minds of all senators and representatives[79] is immaterial in the case of an executive order because only the President's reasons matter. There is no doubt whether any expression of a single mind bears on its purposes and intents.

- One cannot object that the history of an executive order is "inherently open

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(1972)); *see Marks v. United States*, 430 U.S. 188, 193 (1977) (determining what is holding when the Court's opinions are fragmented).

[77] *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

[78] *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 520 n.2 (1993) (conc. opn. of Scalia, J.).

[79] *See id.*

ended"[80]; at most, the material time embraces one President's campaign and term in office.

- There is no inherent difficulty determining the accuracy of sole-source extrinsic evidence. To illustrate by the plaintiffs' Establishment Clause challenge, the lawmaker's public statements are "readily discoverable fact[s]" of the kind courts use to determine the primary purpose of a governmental action.[81]

- Supporters of the orders object to drawing inferences from the President's statements because those statements express only one person's viewpoint. Universally, these arguments cite cases that reject relying on a single legislator's floor debate statements. Those cases validly rest on the fact that one cannot infer the intent of a legislative body from individual legislators' personal perspectives.[82] The grounds for excluding individual Congressional comments do not logically carry over to executive orders.

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[80] *Id.* at 520.

[81] *McCreary*, *supra*, 545 U.S. at 862.

[82] "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921); *see McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-494 (1931). Authors and floor managers are different, of course. *See, e.g.*, *Edelman v. Lynchburg College*, 535 U.S. 106, 117 n.15 (2002).

C. The record here demonstrates the appropriateness and ease of gathering evidence of presidential intent.

Some have expressed fear that if a presidential candidate is on the record for later constitutional adjudications, he or she will self-censor campaign speech. Amici respectfully disagree. Briefs have identified no principled or probative difference between statements made in a presidential campaign, statements made after an election but before inauguration, and statements made after inauguration. *This* president modified *his* campaign speech attacking all people of Muslim faith because that attack did not play well with voters.[83] His behavior shows that presidential candidates mold themselves and mend their language to attract voters, not to make or conceal evidence of the reasons for future official actions. There is no evidence that the Court would change political behavior by regarding as evidence what a presidential candidate tells the American people. That lawyer-invented fear contradicts experience with politicians' behavior. And failing to take a President at his or her word – known to all interested Americans except federal judges – would impair the integrity of the judicial process in the eyes of the people. Nor is there a slippery-slope threat to legislative branch elections: statements by individual legislators are already excluded from judicial review of Congressional legislation for reasons not affected by the scope of evidence appropriate in judicial review of executive orders.[84]

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[83] J.A. 798.

The Court confronts no inability to find evidence of purpose and intent declared by the President. The Fourth Circuit related some of that evidence in *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 594. The statements remain consistent whether made before the election, before inauguration, or by the inaugurated President:

- December 7, 2015, "Statement on Preventing Muslim Immigration," calling "for a total and complete shutdown of Muslims entering the United States. . . ."[85]
- March 9, 2016, interview: "Islam hates us," and "[w]e can't allow people coming into this country who have this hatred. . . ."[86]
- March 22, 2016, interview, calling to exclude Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[87]

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[84] *Duplex*, *supra*, at 474; *McCaughn*, *supra*, at 493-494.

[85] J.A. 346.

[86] J.A. 516-517.

[87] J.A. 522.

- July 17, 2016, response to criticism of his religion-based comments: "So you call it territories. OK? We're gonna do territories."[88]

- December 21, 2016, comment on terrorism in Europe: "You know my plans. All along, I've proven [sic] to be right. 100% correct."[89]

- January 27, 2017: "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."[90]

Our point is not that this evidence necessarily carries the day; that is for respondents to show. Our point is that the evidence must be *considered*; otherwise a sole lawmaker can evade judicial scrutiny by sanitizing text that the Court considers probative while trampling the rule of law for all to see – and for a dangerous minority like the *Dred Scott*-era slave owners to celebrate.

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[88] J.A. 798. *See* J.A. 480-481 ("talking territory instead of Muslim" and referring to the territorial concept as an expansion of the ban).

[89] J.A. 506.

[90] J.A. 403. *See* J.A. 508 (a presidential advisor takes credit for finding a way to ban Muslims legally); *Int'l Refugee Assistance Project*, *supra*, at 594-595 (comments on the lack of substantive or purposive difference between the first and second executive orders).

D. Upholding the rule of law requires considering all the President's statements that relate to the executive orders.

"Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake."[91] In 2010, the Court unanimously declared that government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals."[92] But one can renounce abdication and nevertheless abdicate by deferring excessively to the government's – and especially a sole government actor's – invocation of authority and expertise. It should be "significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns"[93] – a factor absent here.

To limit inquiry to the text of a sole lawmaker's enactment, or to the text and official statements of intent, is to abdicate judicial duty as did the Weimar judges beginning in 1933 and the majorities in *Dred Scott*, *Plessy*, and *Korematsu*. If the Court's methodology for reviewing executive orders abdicates scrutiny by refusing to consider a President's words, the Court would have no principle with which to brake itself on the slippery slope of accommodating executive lawlessness. True, the Court has said in another context that it can stop where it wants: "[t]he power to tax is not the power to destroy while this Court sits."[94] But the Weimar experience shows how quickly a judiciary can be absorbed into an authoritarian regime if it lacks the jurisprudential muscle and constitutional courage to rebuke an executive's first step in destroying a republican form of government.

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[91] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

[92] *Id.*

[93] *Id.* at 35.

Amici advocate a rule of appellate review applicable to all decrees by sole lawmakers, at all times, and regardless of the subject. But following that rule is especially important here and now. The President who issued the executive orders openly disrespects the rule of law and the judiciary.[95] He boasted he could get away with murder.[96] He advocated police brutality.[97] His address to the Boy Scouts of America at their 2017 Jamboree[98] is chillingly reminiscent of Leni Riefenstahl's *Triumph of the Will*. And he advocated, then through staff withdrew, a proposal for a Muslim registry.[99]

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[94] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

[95] https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442; http://joshblackman.com/blog/2016/05/27/donald-trumps-dangerous-attack-on-u-s-district-judge-gonzalo-curiel-and-the-rigged-federal-judiciary/ [transcript of comments]; https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/ (the President denigrating the "so-called judge" who first enjoined enforcement of the travel ban: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!").

Events in Charlottesville on August 11 and 12 of this year, and the President's responses, cannot go unnoticed. White supremacy is not new: it derives from slavery. The Ku Klux Klan has been with the Nation since Nathan Bedford Forrest's 1867 election as Grand Wizard, and American Nazism traces to the German American Bund of 1936. But never before have those forces of violence and authoritarianism coexisted with a President who took two days after race-based violence to repudiate the perpetrators by name, only later to reverse himself and attack the victims.

The Court's decision must show that the judiciary listens to the real reasons for presidential acts, refuses to defer to cynical inventions of facially neutral text, and refuses to tolerate unconstitutional official acts of racial and religious hatred. History teaches that the Court cannot afford to wait. The risk of not standing against the first trenching on fundamental rights is that there may not be another timely opportunity to make that stand.

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[96] "'I could stand in the middle of Fifth Avenue and shoot somebody and I wouldn't lose anyone,' the Republican presidential candidate said, complete with a gun shooting gesture. 'That's how loyal they are,' he said about his supporters." http://siouxcityjournal.com/news/state-and-regional/iowa/trump-crows-about-support-calls-out-opponents-at-dordt-rally/article_bb5afdb4-e18e-5fff-bbc8-09a0eb5a6ff7.html.

[97] https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/u-s-police-chiefs-blast-trump-for-endorsing-police-brutality/.

[98] http://time.com/4872118/trump-boy-scout-jamboree-speech-transcript/.

[99] *See* https://www.theguardian.com/us-news/2016/nov/17/trump-camp-denies-muslim-ban-registry.

◆

CONCLUSION

Everything the President writes, says, or tweets that logically bears on the motives and purposes of an executive order is relevant and material, and should be admissible, to interpret and determine the validity of that order.

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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF HAWAII, ET AL.,
Respondents.

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Fourth And Ninth Circuits**

BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CATHOLIC CHARITIES USA, AND CATHOLIC LEGAL IMMIGRATION NETWORK, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[*]

The United States Conference of Catholic Bishops. The United States Conference of Catholic Bishops (the "Conference" or "USCCB") is an assembly of the leadership of the Catholic Church of the United States to which all the active Cardinals, Archbishops, and Bishops belong. The Conference seeks to coordinate and encourage Catholic activities in the United States; to protect religious liberty; to conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for migrants and refugees; and generally to further these goals through education, publication, and advocacy. When lawsuits touch upon central Catholic tenets, as this case does, the Conference files *amicus curiae* briefs to make its views known.

Our beliefs emphasize the importance of assisting the most vulnerable members of society. To that end, the Conference engages in extensive faith-based work on behalf of migrants and refugees. The Conference's Committee on Migration sets broad policies for the Church's work in the area of migration. Protecting refugees and finding long-lasting solutions to their plight is one of the Committee's highest priorities. The Committee has arranged site visits to refugee areas around the world and has called for action from the international community.

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

The Committee also oversees the Conference's Office of Migration and Refugee Services, which is charged with "fulfill[ing] the commitment of the U.S. Catholic bishops to protect the life and dignity of the human person" by "serv[ing] and advocat[ing] for refugees, asylees, migrants, unaccompanied children, and victims of human trafficking." USCCB, *Migration and Refugee Services*, "Mission Statement," https://goo.gl/X6Hba9. Migration and Refugee Services carries out this mission by engaging in advocacy, education, refugee resettlement, and other specialized services to vulnerable populations. In fact, Migration and Refugee Services, working in collaboration with local Catholic Charities offices across the United States, is the largest refugee resettlement agency in the country, resettling about one-fourth of the refugees coming to the United States.

The moral and religious obligation to protect migrants and refugees is owed to people of all faiths, including Muslims. As the Second Vatican Council explained in *Nostra Aetate*, the Church holds Islam and its adherents in "esteem" in light of the common principles and practices of the two religions. *See Nostra Aetate*, no. 3 (1965), https://goo.gl/iSYPTo. In the same document, the Church urges Catholics to "work sincerely for mutual understanding" with their Muslim brethren, and to "promote together for the benefit of all mankind social justice and moral welfare, [and] peace and freedom." *Ibid.* Similarly, the Catholic commitment to religious freedom is rooted in respect for the dignity of *every* human person—including not only Catholics and other Christians, but Muslims and other non-Christians as well. *See Dignitatis Humanae* (1965).

Much like the Muslim migrants and refugees that the Executive Order singles out for disfavor, Catholic immigrants seeking a better life in the United States were once the targets of widespread animus. Having experienced such harsh treatment themselves, and having been the victims of discriminatory legislation motivated by religious animus, Catholics cannot be silent when other religious groups are targeted for mistreatment.

Catholic Charities USA. Catholic Charities USA is the national office for Catholic Charities agencies nationwide. For more than 100 years it has guided and supported the vast network of Catholic Charities agencies in a common mission to provide service to people in need, to advocate for justice in social structures, reduce poverty, support families, and empower communities. In 2016, Catholic Charities agencies employed more than 57,000 individuals at 2,951 service sites in 49 states, the District of Columbia, and the 5 U.S. territories. Collectively, in 2016, these agencies provided services to more than eight million poor and vulnerable persons, including assistance in the settlement of more than 23,400 refugees and in the ongoing resettlement of more than 28,000 refugees.

Since Catholic Charities' founding in 1910, its ministries have responded to the particular needs of newcomers to our country. From the influx of migrants in the late 19th and early 20th centuries to today, Catholic Charities agencies have worked to serve migrants and refugees, regardless of those individuals' religious belief. This work is motivated by the biblical experience of migration, which teaches all Catholics to care for migrants. "Jesus himself was a migrant—born in a manger on a journey, he and his family fled to Egypt, and in his ministry he had 'nowhere to lay his head.' [Catholics] have been taught by Him to look for Him in the faces of migrants and to welcome the stranger." Catholic Charities USA, *Justice for Newcomers: A Catholic Call for Solidarity and Reform* at v (2005) (quoting Matthew 8:20), https://goo.gl/6BX6GH.

This gospel requirement to serve refugees and migrants regardless of religious belief has long guided the work of Catholic Charities USA. Reflective of this history, Monsignor John O'Grady, Ph.D., the executive secretary of the National Conference of Catholic Charities (now Catholic Charities USA), worked extensively to promote refugee resettlement following World War II.

Informed by its experiences and reflecting its faith and history, Catholic Charities USA continues its efforts to serve refugees and to advocate for just refugee resettlement policies. So far this year, Catholic Charities agencies, working with the U.S. Conference of Catholic Bishops, have settled 16,537 refugees and have launched a national campaign to support the ongoing needs of refugees settled in the United States.

The Catholic Legal Immigration Network, Inc. The Catholic Legal Immigration Network, Inc. ("CLINIC"), a national religious organization created in 1988 by the Conference, embraces the Gospel value of welcoming the stranger and promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC's network includes more than 300 diocesan and other affiliated immigration programs with 400 offices around the country, and employs roughly 1,200 attorneys and Department of Justice-accredited representatives who serve hundreds of thousands of citizens and immigrants each year.

As a religious organization dedicated to the fair and just administration of United States immigration laws, CLINIC is alarmed by Executive Order 13,780, titled "Protecting the Nation from Foreign Terrorist Entry into the United States," which proscribes nationals from certain majority-Muslim countries from entering the United States, temporarily suspends refugee admissions, and lowers the refugee admissions ceiling. CLINIC has a substantial interest in the Court's resolution of this case because the issues this Court will decide have a direct impact on the work of CLINIC's network and the immigrants and resettled refugees it serves. Within CLINIC's network, over 94% of legal immigration programs provide family-based immigration services, and, moreover, a majority of CLINIC's network provides legal assistance for resettled refugees. Consequently, CLINIC has a substantial interest in ensuring that intending immigrants can be united with their families, as well as refugees safely resettled, and that each group is not denied entry to the United States on constitutionally impermissible grounds like religious belief.

SUMMARY OF THE ARGUMENT

The Executive Order has both the purpose and the effect of discriminating against Muslims. Prior to issuing the Executive Order, the President announced repeatedly his desire to target Muslims for denial of entry to the United States. And the Executive Order does just that, singling out the populations of six overwhelmingly Muslim nations for sweeping immigration restrictions that apply nowhere else in the world.

Such blatant religious discrimination is repugnant to the Catholic faith, core American values, and the United States Constitution. In particular, it poses a substantial threat to religious liberty that this Court has never tolerated before and should not tolerate now. Having once borne the brunt of severe discriminatory treatment, particularly in the immigration context, the Catholic Church will not sit silent while others suffer on account of their religion as well. In the words of Elie Wiesel, "[t]he opposite of faith is not heresy, it's indifference." Elie Wiesel, *One Must Not Forget*, U.S. News & World Report, Oct. 27, 1986.

This Court should strike down the Executive Order as a violation of the Free Exercise Clause of the First Amendment.

ARGUMENT

I. THE EXECUTIVE ORDER DISCRIMINATES ON THE BASIS OF RELIGION IN VIOLATION OF THE FREE EXERCISE CLAUSE.

The Executive Order is an implementation of the Administration's repeatedly expressed antipathy to Muslims and to Islam. Indeed, prior to issuing the Executive Order, the President called for "a total and complete shutdown of Muslims entering the United States." J.A. 124. Religious discrimination often can be difficult to identify, shrouded in neutral-sounding principles or benign-seeming justifications. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (recognizing that courts must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders" (internal quotation marks omitted)). "But this wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Such blatant discrimination on the basis of religion is abhorrent to Catholic teaching, is inconsistent with American values, and, most importantly for present purposes, violates the Free Exercise Clause of the First Amendment. This Court should relegate the discriminatory Executive Order to the dustbin of history, so it will do no further harm. *See Korematsu* v. *United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("[O]nce a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of . . . discrimination," which "then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."); *see also* Pope Francis, Address to the Joint Session of the United States Congress, 161 Cong. Rec. H6193 (daily ed. Sept. 24, 2015) ("The yardstick we use for others will be the yardstick which time will use for us.").

A. The Text and Context of the Executive Order Leave No Doubt That It Targets Muslims for Special Disfavor, Failing the Basic Requirement of Religious Neutrality.

Our Nation was founded as a refuge for religious adherents fleeing persecution. The First Amendment enshrines this dedication to religious liberty, providing that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 542).

The Free Exercise Clause was a response to "historical instances of religious persecution and intolerance" in the colonial era. *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.). The "English legacy was not a happy one" for religious liberty. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990). "[B]oth Roman Catholicism and extreme Protestantism . . . were suppressed," and many of the colonies were also hostile to other minority religions. *See id.* at 1421–30. "In assuring the free exercise of religion," the Framers of the First Amendment were thus acutely "sensitive to [the] recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience." *McGowan* v. *Maryland*, 366 U.S. 420, 464 (1961) (opinion of Frankfurter, J.). Forged from this experience over the course of the last two centuries, the freedom to exercise one's own religion without government sanction has persisted as a core American value. It is a beacon of hope around the world.

Under this Court's precedent, any law that singles out the members of a particular religious faith for special disabilities must be struck down unless it survives strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32; *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment).

Here, the Executive Order fails this basic test of religious neutrality. The President issued the Executive Order "against a backdrop of public statements" expressing antipathy to Muslims and Islam. J.A. 179. These statements, in varying forms, called for an immigration ban on individuals from certain Muslim-majority countries. *See, e.g.*, J.A. 180 (the President asserting that "Islam hates us" and that "we can't allow people coming into the country who have this hatred"); J.A. 181 ("[W]e're having problems with Muslims coming into the country."); J.A. 1202 n.14 ("That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!").

Viewed in the context of these and the many other inflammatory public statements catalogued by the lower courts in these cases, the discriminatory intent of the Executive Order—which suspended entry of nationals from six predominantly Muslim countries for

90 days, suspended the United States Refugee Admissions Program for 120 days, and reduced the number of refugees authorized to be admitted in 2017 by over 50%—is clear.

Moreover, the Executive Order's disproportionate effect on Muslims is further evidence of its discriminatory intent. *Church of the Lukumi Babalu Aye*, 508 U.S. at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). As the Fourth Circuit recognized, "Iran's [Muslim population] is 99.5%, Libya's is 96.6%, Sudan's is 90.7%, Somalia's is 99.8%, Syria's is 92.8%, and Yemen's is 99.1%." J.A. 173 n.2 (citing Pew Res. Ctr., *The Global Religious Landscape* 45–50 (2012)). The Executive Order effectuates sweeping immigration restrictions and disabilities on the entirety of these predominantly Muslim populations—and *only* these populations.

Thus, the Executive Order, which not only arises out of express hostility to Islam, but actually operates to target Muslims for special disfavor, is presumptively unconstitutional and can be justified only if it is narrowly tailored to serving a compelling government interest. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32; *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment).

B. Excluding Migrants and Refugees on the Basis of Religion Fails Strict Scrutiny and Is Unconstitutional.

In the face of such a stark display of religious discrimination, this Court should apply "the most rigorous of scrutiny" to the Executive Order, *Church of the Lukumi Babalu Aye*, 508 U.S. at 546, and strike it down as unconstitutional. Leaving the Executive Order in place would deal a severe blow to religious freedom and set a dangerous precedent for adherents of all religious faiths.

To be sure, national security is an "interest[] of the highest order." *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)). But the government bears a heavy burden to show that the interest is actually implicated in this case, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006), and that the religious discrimination at issue is narrowly tailored to serve that interest, *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). The government has not come close to meeting this exacting burden.

On the contrary, the government has made no serious effort to demonstrate why such a sweeping anti-Muslim measure is needed for national security. Instead, following the repeated expressions of hostility to Islam noted above, the Executive Order paints the *entire* population of *entire* predominantly Muslim countries with the same broad strokes, even though none of those countries has been home to any of the terrorists that have struck the homeland before. *See* J.A. 127 ("[N]o terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001," and "no intelligence as of January 19, 2017 suggested any such potential threat.") (citing Joint Declaration of national security, foreign policy, and intelligence officials who previously served in the White House, State Department, DHS, and CIA, reproduced at J.A. 894); *see also* J.A. 178 (Fourth Circuit reliance on the same Joint Declaration);

J.A. 897 ("In our professional opinion, this Order cannot be justified on national security or foreign policy grounds."). At the same time, the Executive Order's list of countries supposedly posing "heightened risks to the security of the United States," § 1(e), conspicuously omits the countries (such as Saudi Arabia) from which the September 11th hijackers hailed. *See O Centro*, 546 U.S. at 433 ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (quoting *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment))) (alterations original).

What is more, U.S. intelligence services have made clear that restricting immigration from predominantly Muslim nations will not deter terrorism. Just before the President signed the Executive Order, DHS's Office of Intelligence and Analysis found that "most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States," and concluded that "increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States." J.A. 178 (citing report at J.A. 1059–60); *see also ibid.* ("[A] separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat.") (citing document at J.A. 1051). Such under- and over-inclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011).

For these and other reasons, the Executive Order fails strict scrutiny and cannot stand. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (invalidating ordinances because they were "underinclusive to a substantial extent with respect to each of the interests that respondent has asserted").

II. THE CATHOLIC CHURCH TAKES A STRONG STAND AGAINST RELIGIOUS DISCRIMINATION IN ALL ITS FORMS.

Amici are deeply concerned about the Executive Order and the threat it poses to religious liberty in general and Muslims in particular. American Catholics will recall a time not too long ago when they were the targets of discriminatory immigration restrictions and nativist sentiment, often in the name of national security. Our Constitution must serve to protect migrants and refugees of all religious faiths—particularly those faiths that find themselves the subject of disfavor—and so must forbid denial of admission to the United States on the basis of religion.

A. Catholic Immigrants to the United States Have Experienced Discrimination Firsthand.

1. This Nation was founded on the belief that freedom of religion is an essential condition of a free and democratic society. As George Washington wrote in his letter to the Annual Meeting of Quakers in 1789, "the Conscientious scruples of all men should be treated with great delicacy & tenderness and it is my wish and desire that the laws may always be . . . extensively accommodated to them." George Washington, Letter to the Annual Meeting of Quakers (Oct. 13, 1789), https://goo.gl/hHo9Em.

George Washington made clear that the need for religious liberty and diversity extended to welcoming refugees and migrants of all faiths: "The bosom of America is open to receive not only the opulent & respectable Stranger, but the oppressed & persecuted of all . . . Religions; whom we shall wellcome to a participation of all our rights & previleges, if by decency & propriety of conduct they appear to merit the enjoyment." Letter from George Washington to Joshua Holmes (Dec. 2, 1783), https://goo.gl/Du9TPW.

2. Unfortunately, despite the noble ideals espoused by the founders and embodied in our Constitution, the American experience has not always been a happy one for Catholics, particularly in the context of immigration. *See* Rory Carroll, *America's Dark and Not-Very-Distant History of Hating Catholics*, The Guardian, Sept. 12, 2015. Early settlers brought "anti-Catholic bias . . . to Jamestown in 1607 and vigilantly cultivated [it] in all the thirteen colonies from Massachusetts to Georgia." John Tracy Ellis, *American Catholicism* 19 (2d ed. 1969). Colonial charters specifically singled out Roman Catholics, prohibiting them from, for example, holding political office. *See* McConnell, *supra*, 103 Harv. L. Rev. at 1423–24 (discussing anti-Catholic laws in colonies "throughout the South," where "Catholics . . . were detested and excluded").

Anti-Catholic sentiment persisted through the nation's founding. John Jay authored an address "to the People of Great Britain" on behalf of the Continental Congress accusing Parliament of plotting to "reduce the ancient, free Protestant colonies to" a "state of slavery" by encouraging Catholic emigration to North America, and thus, he wrote, promoting a religion that "dispersed impiety, persecution, murder and rebellion through every part of the world." Address to the People of Great Britain (1774), 1 *The Correspondence and Public Papers of John Jay (1763–1781)*, https://goo.gl/KfmKFY.

In the 19th and early 20th centuries, Catholic immigrants suffered pernicious discrimination as they sought a better life for themselves and their families. The number of Catholics living in the United States had already increased from 30,000 at the time of the Founding to 600,000 by 1830. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001). And beginning in the 1830s, increased immigration from Ireland and Germany (and later Italy) "began to swell" the Catholic ranks. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 42 (1992). "By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting).

"'Dreading Catholic domination,' native Protestants 'terrorized Catholics.'" *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting) (quoting Philip Hamburger, *Separation of Church and State* 219 (2002)); *see also Mojica* v. *Reno*, 970 F. Supp. 130, 145 (E.D.N.Y. 1997) (observing that prejudice against Irish and Italian immigrants, primarily Catholic, "emerged as these groups emigrated in substantial numbers"). As early as 1841, Samuel Morse, the New York newspaper editor and inventor of Morse code, declared to a sympathetic audience that "the evil of immigration brings to these shores illiterate Roman Catholics . . . the obedient instruments of their more knowing priestly leaders." Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* 56–57 (2002) (alteration original). And Josiah Strong, a prominent Protestant leader and best-selling author, included "immigration" and "Catholicism" as the first two threats on his "list of seven perils facing the nation." Jeffries & Ryan, *supra*, 100 Mich. L. Rev. at 303; *see also* Richard E. Morgan, *The Supreme Court and Religion* 47 (1972) ("The nineteenth century was pockmarked by this virulent fusion of hostility to the newcomer and inherited No-Popery.").

3. Some of the most severe hostility towards Catholics appeared in the realm of education. In the 19th century, the majority of schools were "propagators of a generic Protestantism that . . . was intolerant of those who were non-believers." Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559 (2003) (internal quotation marks omitted). Students were frequently made to listen to or read from "the Protestant King James Bible." *Ibid.* Those who refused "suffered beatings or expulsions." *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting) (quoting Jeffries & Ryan, *supra*, 100 Mich. L. Rev. at 300). Other general "[a]ttacks on the Catholic faith were commonplace, as were slurs against the Irish ethnicity of many of the new immigrants." DeForrest, *supra*, 26 Harv. J.L. & Pub. Pol'y at 559.

Recognizing that they would be unable to ensure their children learned the Church's teachings and preserve Catholic heritage in the public schools, Catholics "set up parochial schools and sought shares of the common school fund or exemptions from taxation." Green, *supra*, 36 Am. J. Leg. Hist. at 41; *see also Zelman*, 536 U.S. at 720 (Breyer, J., dissenting).

But this approach drew significant ire from Protestant majorities, reaching a fever pitch in the 1870s "with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *see also* H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875). The measure followed on the heels of President Ulysses S. Grant's thinly veiled (and politically popular) attacks on Catholic schools in which he "resolv[ed] that not one dollar . . . shall be appropriated to the support of any sectarian schools" and called for a constitutional amendment "prohibiting the granting of any school funds or taxes . . . for the benefit or in aid, directly or indirectly, of any religious sect or denomination." Green, *supra*, 36 Am. J. Leg. Hist. at 47, 52 (internal quotation marks and citations omitted).

Although the text of the Blaine Amendment did not expressly use the word "Catholic," its discriminatory intent and effect—much like the Executive Order here—were unmistakable given the "pervasive hostility to the Catholic Church and to Catholics in general," as well as the "open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (plurality op.); *see also* DeForrest, *supra*, 26 Harv. J.L. & Pub. Pol'y at 564 (describing a similar proposed amendment that "had the benefit of appearing neutral while at the same time effectively targeting only the Catholic schools").

B. The Catholic Church Is Committed to Helping Migrants and Refugees of All Religious Faiths.

1. Catholics' own experience with discrimination in the United States informs the Church's commitment to advocating on behalf of migrants and refugees of all religious faiths. "Having once felt the sting of religious persecution in the United States, American Catholics understand that the majority can do great violence to the constitutional rights of an insular religious minority." Loredana Vuoto, *Could Trump's Muslim Ban Threaten Everyone's Religious Freedom?*, Catholic News Agency, Jan. 14, 2016, https://goo.gl/4qzhyV (quoting First Liberty Institute Deputy General Counsel Matthew Kacsmaryk).

Thus, as Cardinal Theodore McCarrick and others have emphasized, the Church advocates on behalf of migrants and refugees of all faiths; the mandate to speak out on their behalf arises "not because they are Catholic, but because we are Catholic." The Universal Church as Defender of the Rights of Migrants (Mar. 21, 2011) (internal quotation marks omitted), https://goo.gl/A4RLN2. Pope Francis recently explained that "American Catholics are committed to building a society which is truly tolerant and inclusive, to safeguarding the rights of individuals and communities, and to rejecting every form of unjust discrimination." Address at South Lawn of the White House (Sept. 23, 2015), https://goo.gl/nPNrtf. American Catholics "are likewise concerned that efforts to build a just and wisely ordered society respect their deepest concerns and their right to religious liberty"—"one of America's most precious possessions." *Ibid.*

2. The affirmative mandate to welcome migrants and refugees is deeply rooted in Catholicism, beginning in Scripture and continuing in modern teachings.

Abundant Biblical passages establish this core principle. For example, Exodus 23:9 teaches, "You shall not oppress a resident alien; you well know how it feels to be an alien, since you were once aliens yourselves in the land of Egypt." And Jesus later pronounced, "For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me." Matthew 25:35. Put simply, the Bible repeatedly exhorts us to "exercise hospitality." Romans 12:13.

In recent decades, the Catholic Church has reemphasized these principles. *See generally* Catholic Legal Immigration Network, Inc., *Modern Catholic Social Teaching on Immigration: Notable Quotes* (2015), https://goo.gl/3pCoeK; Todd Scribner & J. Kevin Appleby, *On Strangers No Longer: Perspectives on the Historic U.S.-Mexican Catholic Bishops' Pastoral Letter on Migration* (2013). In 1952, against the backdrop of a refugee-filled post-war Europe, Pope Pius XII promulgated the apostolic constitution *Exsul Familia*, calling upon the Church to "offer refugees and migrants a comfort in their trials," and to "look after them with special care and unremitting aid." https://goo.gl/9whnYr. In 1965, The Second Vatican Council called upon the national conferences of bishops to pay particular attention to the "migrants, exiles and refugees," often "not adequately cared for by the ordinary pastoral ministry." *Christus Dominus*, no. 18, https://goo.gl/aSN9Tm. Three decades later, Pope John Paul II recognized that an "atmosphere of welcoming is increasingly necessary," as "profoundly evidenced in the problem of millions of refugees and exiles," and "intolerance toward the person whose only 'fault' is a search for work and better living conditions outside his own country." Message of John Paul II for Lent 1998 (Sept. 9, 1997), https://goo.gl/Tydy7r.

Most recently, Pope Francis has highlighted the "moral imperative" of furthering these directives. Address to Participants in the 6th International Forum on Migration and Peace (Feb. 21, 2017), https://goo.gl/HXiPgA. Drawing on prior teaching of the Church, Pope Francis has called upon Catholics to "respond to the many challenges of contemporary migration with generosity, promptness, wisdom and foresight," by promoting "social and professional inclusion" and "integrating migrants and refugees." Message of His Holiness Pope Francis on the 104th World Day of Migrants and Refugees 2018 (Aug. 15, 2017), https://goo.gl/jfeBuJ.

As Archbishop Joseph Kurtz (then-President of the Conference) explained at the height of the Syrian refugee crisis: "Regardless of their religious affiliation or national origin, these [individuals] are all human persons—made in the image of God, bearing inherent dignity, and deserving our respect and care and protection by law from persecution." Statement of Archbishop Joseph Kurtz of Louisville, KY and President of USCCB on the Syrian Refugee Crisis (Sept. 10, 2015), https://goo.gl/NErwZR.

3. In light of these traditions and teachings, the Catholic Church in the United States has long provided critical social services to migrants and refugees.

It has participated in the federal government's resettlement program since it was formally established in the years following World War II, and has assisted in the resettlement of well over one million refugees since its inception. The early years of the program focused primarily on Central and Eastern Europe and the resettlement of predominantly Christian and Jewish refugees. The geographic expansion of the program in subsequent decades to areas including Africa, Asia, and the Middle East brought with it an increase in the number of non-Christian and non-Jewish refugees. Most recently, in 2016, the number of Muslim refugees resettled into the United States outpaced the number of Christian refugees. *See* Jie Zong & Jeanne Batalova, Migration Policy Inst., *Refugees and Asylees in the United States* (June 7, 2017).

The Catholic Church has remained committed to the well-being and successful resettlement and integration of migrants and refugees without regard to their religious identity. The U.S. Conference of Catholic Bishops, in collaboration with Catholic dioceses across the United States, has made services to migrants and refugees a key part of its principles and its programming. Hundreds of parishes and Catholic Charities agencies assist refugees and other migrants every year in various ways.

C. The Church, Through Its Pastoral Ministry to Refugees, Has Witnessed Directly the Suffering Caused By the Discriminatory Executive Order.

1. In light of these teachings and the Catholic Church's long-standing commitment to migrants and

refugees of all faiths, *amici* are compelled to speak out clearly against the injustice of this Executive Order.

After enactment of the original Executive Order, Bishop Joe S. Vásquez, the chairman of the Committee on Migration, reaffirmed the Conference's commitment to "assisting all those who are vulnerable and fleeing persecution, regardless of their religion." USCCB Committee on Migration Chair Strongly Opposes Executive Order Because It Harms Vulnerable Refugee and Immigrant Families (Jan. 27, 2017), https://goo.gl/Fbh5Aq. He reminded Catholics that "by helping to resettle the most vulnerable, we are living out our Christian faith as Jesus has challenged us to do." *Ibid.* In particular, the Conference "believe[s] it is possible to simultaneously provide for the security of our country and have a humane refugee policy that upholds our national heritage and moral responsibility." USCCB Chairman Welcomes Ninth Circuit Decision Upholding Preliminary Injunction on Refugee Resettlement Pause and Travel Ban (June 13, 2017), https://goo.gl/UgtZiz.

In July 2017, after United States refugee admissions reached the Executive Order's cap of 50,000, Bishop Vásquez professed his "deep[] concern about the human consequences of this limitation and its impact on vulnerable refugees such as unaccompanied refugee children, elderly and infirm refugees, and religious minorities." U.S. Bishops Chairman Urges Administration to Raise Cap on Refugee Admissions (July 14, 2017), https://goo.gl/VSgzL6. "Now, these vulnerable populations will not be able to access needed protection and will continue to face danger and exploitation." *Ibid.*

2. *Amici* also have direct, firsthand experience with the Executive Order's human toll. *See* USCCB, *Those We Serve*, "Refugees," https://goo.gl/jNUsr8. The story of Bassam Osman, a thirty-six-year-old married father of five who fled the Syrian civil war for a better life in the United States, exemplifies the tragic consequences of the Executive Order. Osman fled Aleppo with his seriously ill daughter in December 2011, eventually uniting with his family in a United Nations camp in Turkey. *See* Associated Press, *Syrian Refugee Finds His Place at Ohio Shoe Repair Shop*, Crux, July 5, 2017, goo.gl/G18a1N. After several years of "intense vetting involving five interviews and document searches," the Conference and its affiliates helped Osman and his family resettle in Cincinnati, Ohio. *Ibid.* Osman and his family arrived just "six months before the Trump administration announced a ban to prevent most travel from Syria and six other predominantly Muslim countries." *Ibid.* Osman and his family have thrived in Cincinnati, where he has become a valued employee at a shoe repair factory and his children are learning English and adapting to American life. *Ibid.*

But because of the Executive Order, other Syrian refugee families will not be so lucky—even if they have already been approved to resettle in the United States. As Ashley Feasley, Policy Director for the Office of Migration and Refugee Services, explained, "[t]hese people have travel documents, they are ready to go . . . . They have relationships with the resettlement offices in the cities they were to be resettled in. It would be heartbreaking and administratively inefficient if they are not able to complete their journey of seeking refuge." Rhina Guidos, *As the Partial Travel*

Ban Nears, Agencies Worry About Refugees in Limbo, Crux, July 5, 2017, goo.gl/2KPU6F.

The Executive Order also prevents the Conference from helping unaccompanied minors fleeing persecution. The Conference is one of two refugee resettlement agencies—along with Lutheran Immigration Refugee Services—authorized by the U.S. Department of State to help the Unaccompanied Refugee Minors Program identify children in need of resettlement and facilitate their placement with foster families across the country. *See* USCCB, *Children and Migration*, https://goo.gl/ZRXaQA. These foster families are critical to helping the most vulnerable refugees start a new life in America.

Tianna and Todd Rooney are one such example. *See* Tianna Rooney & Todd Rooney, *President Trump's Refugee Ban Is Splitting Our Family Apart*, Wash. Post, Aug. 28, 2017, http://wapo.st/2xqldJy. In February 2017, working with Lutheran Immigration Refugee Services, they decided to foster a young boy named "K.," who had fled Eritrea when he was fourteen years old to escape military conscription. But because foster parents "are not considered part of a 'bona fide' relationship, and neither are the agencies that facilitated [the Rooneys'] connection to K.," K. is stranded in a refugee camp in Egypt. *Ibid.* The Rooneys have devoted months to preparing for K.'s arrival, furnishing his room with books and clothes and reserving him a place at their local high school. But "K's room remains empty." *Ibid.*

Similarly, Irene Stevenson became a certified foster parent for an unaccompanied minor refugee after "thinking about literally the millions of children who have no family, have no home, who are completely alone." Justin Wm. Moyer, *Trump's Travel Ban Is Leaving Orphans Stuck in Refugee Camps*, Denver Post, July 28, 2017, goo.gl/4GjoVY. After six months of training, she cleared out a spare bedroom in her Washington home for A.A., a Somali girl who fled to Kenya in 2004 after war broke out. *Ibid.* But even though A.A. was approved to live with Stevenson, she remains in Kenya—where aid workers fear she will be targeted as an ethnic minority—as a result of the Executive Order. *Ibid.*

These stories are not outliers. The Executive Order has now "stranded more than 100 refugee children who were already matched to waiting American foster families." Ellen Knickmeyer, *Trump's Travel Bans Keep Orphans from US Foster Families*, Boston Globe, July 31, 2017, https://goo.gl/WFX684. Of these, the Executive Order means that thirty children the Conference itself was working with are stranded.

If allowed to stand, the Executive Order will prevent countless other vulnerable refugees—including children—from escaping persecution and starting a new life with the help of resettlement services from organizations like the Conference. Such cruel and inhumane treatment, denying refugee children life-saving entry to the United States based on an Executive Order clearly motivated by anti-religious bias, is both un-Catholic and un-American. It is also unconstitutional, and it is incumbent upon this Court to say so.

CONCLUSION

This Court should strike down the Executive Order as a violation of the Free Exercise Clause of the First Amendment.

Respectfully submitted.

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DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *ET AL.*,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *ET AL.*,

Respondents.

◆

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *ET AL.*,

Petitioners,

v.

STATE OF HAWAII, *ET AL.*,

Respondents.

◆

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Fourth And Ninth Circuits**

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AMICUS CURIAE BRIEF OF PROFESSOR VICTOR WILLIAMS IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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INTEREST OF THE *AMICUS CURIAE*

Victor Williams is a Washington, D.C. attorney and law professor with over twenty years' experience.[1] He has been formerly affiliated as fulltime faculty with both the Catholic University of America's Columbus School of Law and the City University of New York's John Jay College of Criminal Justice. He is founder and senior counsel of the America First Lawyers Association. (www.americafirstlawyers).

Professor Williams has particular knowledge and expertise regarding the text, history, and interpretation of Article II and Article III of the U.S. Constitution with many scholarly and popular publications. He earned his J.D. from the University of California, Hastings College of the Law. After completing an externship with both Ninth Circuit Judge Joseph Sneed and Eleventh Circuit Judge Gerald Bard Tjoflat, Williams took a two-year clerkship with Judge William Brevard Hand of the Southern District of Alabama. Williams did advanced training in federal jurisdiction and international law (LL.M.) from Columbia University's School of Law and in economic analysis of the law (LL.M.) from George Mason University's Antonin Scalia School of Law.

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[1] All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made monetary contributions to the preparation or submission of this brief. Institutional affiliation is for information purposes only. Professor Victor Williams lodged *amicus curiae* briefs in support of President Trump in the actions below.

Professor Williams has published scholarship and commentary that offered strong support for the constitutional discretion and appointment prerogatives of the past four presidents without regard to their party affiliation. Although these past presidents often pursued policy ends at odds with Professor Williams' personal policy preferences, he continued to defend their constitutional authority.

It was with great enthusiasm that Professor Williams was drawn to candidate Donald Trump's pragmatic "America first" and "forgotten American" agenda.[2] Williams was an early primary supporter of candidate Donald Trump. In spring 2016, Williams launched a widely-reported disruptive legal action to support Trump during the primaries.[3] After obtaining "competitor candidate standing" as a write-in candidate for president in several late primary states, Williams challenged the ballot eligibility of (naturally-born Canadian) Ted Cruz.[4] After Senator Cruz withdrew from the GOP primary, Williams also withdrew from the race and formally endorsed Donald Trump. Williams then founded a Super PAC (GOP Lawyers), rallying lawyers and law professors to support Donald Trump in the general election. The campaign group has now transformed into the "America First Lawyers Association" (www.americafirstlawyers.com) to advance the Trump administration's nominations, policies, and programs.[5]

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[2] Victor Williams, *Law Professor Now in Basket of Deplorables*, The Hill, Sept. 20, 2016, http://thehill.com/blogs/pundits-blog/presidential-campaign/296783-law-prof-once-an-obama-supporter-now-in-basket-of and Victor Williams, *Trump Will Bring Return to Rule of Law and Economic Growth*, The Hill, Nov. 6, 2016, http://thehill.com/blogs/pundits-blog/presidential-campaign/304291-trump-will-bring-return-to-rule-of-law-and-economic.

[3] *See, e.g.*, Pema Levy, *Meet the Law Professor Who is Running for President to Get Ted Cruz Disqualified*, Mother Jones, Apr. 12, 2016, http://www.motherjones.com/politics/2016/04/lawsuits-ted-cruz-eligibility-president-canada-natural-born/; Debra Weiss, *Law Prof. Enters GOP Presidential Race to Challenge Ted Cruz's Eligibility*, ABA Journal, Apr. 11, 2016, http://www.abajournal.com/news/article/law_prof_enters_gop_presidential_race_to_challenge_ted_cruzs_eligibility/; and Pete Williams, *Law Professor Challenges Cruz on Citizenship, Candidacy*, NBC News, Apr. 11, 2016, http://www.nbcnews.com/news/us-news/law-professor-candidate-challenges-cruz-citizenship-n554046.

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SUMMARY OF THE ARGUMENT

This litigation presents a nonjusticiable political question: "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

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[4] *See* Jonathan Adler, *Law Professor Runs for President In Order to Challenge Ted Cruz's Eligibility*, WASH. POST, Apr. 9, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/09/law-professor-runs-for-president-in-order-to-challenge-ted-cruzs-eligibility/?utm_term=.1bab552d2507 and Stephen Dinan, *Hearing to Decide Ted Cruz Eligibility in New Jersey*, WASH. TIMES, Apr. 11, 2016, http://www.washingtontimes.com/news/2016/apr/10/hearing-to-prove-ted-cruzs-eligibility-for-new-jer/.

[5] *See, e.g.*, Victor Williams, *Madison, Hamilton, and Scalia: Original – Not Nuclear – End to Gorsuch Filibuster*, THE HILL, Apr. 6, 2017, http://thehill.com/blogs/congress-blog/politics/327504-madison-hamilton-and-scalia-original-not-nuclear-option-to-end and Victor Williams, *Scrap the Senate's 30-hour per Nominee Debate Rule to Clear Backlog of Trump Nominees*, THE HILL, Aug. 2, 2017, http://thehill.com/blogs/congress-blog/politics/344971-scrap-the-senates-30-hours-per-nominee-debate-rule-to-clear.

In response to the Question Presented regarding justiciability, this *amicus curiae* argues separately that the judiciary does not have subject-matter jurisdiction to review the travel freeze challenges. A political-question determination should preclude a standing analysis, a mootness evaluation, or a merits review.

This Court has acknowledged the relationship between "decisions made by the Congress or the President in the area of immigration," and the "reasons that preclude judicial review of political questions." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977). An examination of the "amalgam of circumstances" of this litigation compels this Court's political-question determination. *See Zivotofsky v. Clinton I*, 566 U.S. 189, 1431 (2012) (Sotomayor, J., concurring).

The travel freeze policy is first and foremost about foreign relations. As a diplomatic entreat, the Executive Order is meant to lever our government's negotiations with foreign nations to secure those nations' cooperation with our vetting of their citizens who seek to visit America. The travel freeze policy is also a terror-war strategy aimed at preventing dangerous belligerents from alighting our shores. The travel freeze is thus an integral constant in the new president's interrelated calculus of a foreign policy and war strategy shift.

These complicated diplomacies with foreign nations, most immediately with the six listed nations, "uniquely demand a single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962). By interfering with the foreign policy negotiations and war strategy, the courts below have violated the separation of powers and have caused substantial "embarrassment of our government abroad." *Id.* at 217.

All six *Baker v. Carr* formulations are found inextricably intertwined in an analysis of the instant challenges. 369 U.S. 186 (1962). The first two criteria of textual commitment and manageable standards are predominant. This Court has repeatedly acknowledged the textual commitment of foreign relations and war strategy to the elected political branches, and the lack of manageable standards for such judicial inquiry in these areas. Each of the later four *Baker* factors are also tangled in the analysis of the Executive's rationale and strategic tactical decision making that led to the travel freeze.

The D.C. Circuit offers a particularly helpful line of political-question analysis in cases challenging President Bill Clinton and President Barack Obama for making allegedly defamatory statements and taking allegedly unjustified actions against Muslim aliens abroad: "Courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (*en banc*). In its June 2017 *Jaber v. United States* ruling, the D.C. Circuit again explicitly refused to review presidential statements justifying actions taken against Muslim aliens abroad: "'These Executive statements, however, do not constitute an invitation to the Judiciary to intrude upon the traditional executive role." *Jaber v. United States*, No. 16-5093 (D.C. Cir. June 30, 2017).

And the court acknowledged how such judicial restraint is constitutionally required "[h]owever sympathetic the allegations." *Id. See also Schneider v. Kissinger*, 412 F.3d 395 (D.C. Cir. 2005); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); and *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008).

When cogitating the myriad harms that could result from precedent allowing judicial interference in the president's foreign policy decisions and tactical war strategy, the prudential abstention caution of Alexander Bickel arises. *See* Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale, 1986).

◆

ARGUMENT

Fulfilling his inaugural pledge, our new president invokes his Article II authorities to reorient America's foreign policy and take charge of this nation's unusual, prolonged war with radical Islamic terrorists. In his first foreign trip, President Donald Trump previewed these policy changes in the epicenter of the terror war, and the Executive then went directly to Europe to inform allies.[6] The challenged Executive Order is implemented as an integral constant in this interrelated calculus of his foreign policy and war strategy shift.[7]

Although the broader policy objectives of the travel freeze are layered, one is patent and dynamic: To give all nations of the world – "friends and foes alike" – notice that America's interests now come first. By its explicit terms, the travel freeze may expand to include "the names of any additional countries recommended for similar treatment, as well as [to contract to remove] the names of any countries." Exec. Order No. 13780 (March 6, 2017). The travel freeze as policy thus applies – not just to majority Muslim nations where military action is presently ongoing but – to all nations of the world. The travel freeze as policy also applies to our European allies whose governments have so naively neglected their own border security. The travel freeze is a transparent diplomatic entreat to all nations to cooperate with our government so as to allow adequate vetting of their citizens who seek to visit America. (Iraq is an example of a nation who recently came into compliance through a close cooperative relationship and was thus dropped from the initial travel freeze list).

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[6] *See generally*, Reuben Fischer-Baum and Julie Vitkovskaya, *How Trump is Changing America's Foreign Policy*, WASH. POST, July 25, 2017, https://www.washingtonpost.com/graphics/2017/world/trump-shifting-alliances/?utm_term=.9c391edb0536.

[7] Victor Williams, *Travel Ban Challenges Present a Non-Reviewable Political Question*, JURIST – FORUM, Feb. 15, 2017, http://jurist.org/forum/2017/02/Victor-Williams-travel-ban.php.

The foreign theater of the terror war is presently focused on nations in the Middle East and North Africa. Substantial military engagements are being escalated or planned by the Executive in each of the six nations presently listed in the travel freeze.[8] There is an unbroken chain of historic practice of presidents excluding entry of aliens abroad coming from war-zone nations. The travel freeze is a modest, even timorous, strategy in the terror war. It is not difficult to imagine more direct alternatives to implement the travel freeze policy in war-zone nations; the Executive has legal authority and at-the-ready modern weaponry abundant to eliminate every airport and transportation depot in each of the listed nations.

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[8] *See* Thomas Gibbons-Neff, *U.S. Troops Deployed to American Embassy in South Sudan*, WASH. POST, July 11, 2016, https://www.washingtonpost.com/news/checkpoint/wp/2016/07/13/u-s-troops-deployed-to-bolster-security-at-american-embassy-in-south-sudan/?utm_term=.074cf9b02c9a; Rebecca Khee, *Trump Gives Military More Authority to Launch Somalia Strikes*, THE HILL, Mar. 30, 2017, http://thehill.com/policy/defense/326565-trump-gives-military-more-authority-on-somalia-strikes; Rebecca Khee, *Trump Signals Deeper U.S. Involvement in Yemen*, THE HILL, Apr. 1, 2017, http://thehill.com/policy/defense/326767-trump-signals-deeper-us-involvement-in-yemen; Barbara Starr, *U.S. Military Considers Ramping up Libya Presence*, CNN, July 10, 2017, http://www.cnn.com/2017/07/10/politics/trump-us-military-libya-strategy/index.html; David M. Tafuri, *Why Trump's Attack on Syria is Legal*, POLITICO, Apr. 13, 2017, http://www.politico.com/magazine/story/2017/04/donald-trump-syria-attack-legal-215022; Sarah Westwood, *Trump Suggests Military Action Against Iran is Possible*, WASH. EXAMINER, Feb. 2, 2017, http://www.washingtonexaminer.com/trump-suggests-military-action-against-iran-is-possible/article/2613742.

I. Nonjusticiable Political Question: Travel Freeze Is Integral to New Executive's Foreign Policy Reorientation and Terror War Strategy; Policy Choices Permeate Respondents' Challenges

President Donald Trump acts within his *inherent* Article II authorities in reorienting American foreign policy and developing unique war-strategy. This nation continues its seeming unending war with terrorists. At the same time, an ever-increasing, near-unlimited number of foreign-soil aliens, from the listed nations who are living in horrific conditions, understandably seek refuge on American shores. But it is "wholly outside the power of this Court to control," as Justice Felix Frankfurter wrote in his *Harisiades v. Shaughnessy* concurrence, the political branches "conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based." 342 U.S. 590, 596-97 (1952) (Frankfurter, J., concurring).

Again, the new Commander in Chief has planned or escalated military action for each of the six nations presently-listed in the travel freeze policy. And the president, together with Congress, is reorienting foreign and economic policies regarding and impacting the most troubled of areas of the world including the six listed nations.[9]

The Acting Solicitor General convincingly argues that Respondents' challenges regarding entry of aliens abroad are without procedural foundation or substantive merit. As this Court ruled in *United States ex rel. Knauff v. Shaughnessy*, "[t]he exclusion of aliens is a fundamental act of sovereignty" that resides in the "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. 537, 542 (1950). And this Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. at 792. *See also Landon v. Plasencia*, 459 U.S. 32 (1982). Indeed, President Donald Trump acts with power "inherent in [the nation's] sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted).[10] Excluding aliens abroad is a plenary power of the president.

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[9] *See* Karen DeYoung, *U.S. Slaps New Sanctions on Iran*, WASH. POST, July 17, 2017, https://www.washingtonpost.com/world/national-security/us-certifies-that-iran-is-meeting-terms-of-nuclear-deal/2017/07/17/58d0a362-6b4a-11e7-b9e2-2056e768a7e5_story.html?utm_term=.196238eef969; Ben Fishman, *Could Italy Get Trump to Care about Fixing Libya*, FOREIGN POLICY, Apr. 20, 2017, http://foreignpolicy.com/2017/04/20/could-italy-get-trump-to-care-about-fixing-libya/; Al Mariam, *Trump's Suspicion of Foreign Aid to Africa is Right on the Money*, THE HILL, Mar. 9, 2017, http://thehill.com/blogs/pundits-blog/foreign-policy/323198-trumps-suspicion-of-foreign-aid-to-africa-is-right-on-the; John Prendergast, *Why Donald Trump Needs to Take Action on Sudan*, TIME, May 31, 2017, http://time.com/4798594/trump-sudan-sanctions-aid-corruption-terrorism/.

In response to the Question Presented regarding justiciability, this *amicus curiae* argues separately that the judiciary does not have subject-matter jurisdiction to review the travel freeze challenges. A political-question determination should preclude a standing analysis, a mootness evaluation, or a merits review.[11]

These matters "implicate our relations with foreign powers" and any competent judicial inquiry must extend to analysis of a "wide variety of classifications" understood only by the Executive "in the light of changing political and economic circumstances." *Fiallo v.*

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[10] Respondents' challenges do not involve aliens having been involuntarily taken to, and/or subject to detention on, American soil or on foreign soil over which America has "plenary or exclusive jurisdiction." *Rasul v. Bush*, 542 U.S. 446 (2004); *see Boumediene v. Bush*, 53 U.S. 723 (2008).

[11] In *Schlesinger v. Reservists To Stop the War*, this Court affirmatively noted: "The lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability was recently exhibited by the Court of Appeals for the Second Circuit, which bypassed a determination on standing to rule that a claim was not justiciable because it presented a political question." 418 U.S. 208, 215, n.5 (1974) (citing *DaCosta v. Laird*, 471 F.2d 1146, 1152 (2d Cir. 1973).

Bell, 430 U.S. at 796. The federal courts below were drawn into the most dense and ugly of contemporary political thickets. Resistance to Donald Trump's election and governance, of which this litigation is a component, is reaching historic intensity – save obviously the "resistance" after the 1860 election. It behooves this Court to make a political-question determination to insure finality in the instant cases, to retard other such resistance litigation, to honor the December 2016 choice of a majority of the States' electors in "maintenance of a republican form of government," and to acknowledge that it is the new president who has responsibilities to calculate war strategy and related foreign policy – not the unelected judiciary. *Harisiades v. Shaughnessy* 342 U.S. at 588-89.

In *Zivotofsky v. Clinton I*, this Court acknowledged that abstention is required when federal courts are "being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination." 566 U.S. 189, 196 (2012). Justice Stephen Breyer separately warned about exercising judicial review in foreign-policy matters involving the Middle East:

> Political reactions in that region can prove uncertain. And in that context it may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only

> whether but also the extent to which enforcement will interfere with the president's ability to make significant recognition-related foreign policy decisions.

Id. at 1440 (Breyer, J., dissenting).

Rather than merely touch on foreign relations, the instant litigation deeply impacts and directly challenges the new president's foreign-policy reorientations and war-strategy determinations. Policy choices, ideological preferences, and national-security judgments permeate judicial analysis of Respondents' challenges. *See Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

The Executive – not the judiciary – is constitutionally empowered to conduct negotiations with foreign nations to insure their cooperation with our alien vetting processes. Judicial interference with implementation of President Trump's travel freeze policy creates doubts among the international community as to the resolve of the United States in other foreign policy areas – such as those developing on the Korean peninsula. Beyond the unintended consequences of such interference lays the uncomfortable issue of judicial competence in foreign relations and war strategy:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. . . . They are decisions of a

> kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); *accord Haig v. Agee*, 453 U.S. 280, 292 (1981).

Goldwater v. Carter perhaps best exemplifies in the president's foreign relations discretion (treaty-abrogation) can have unknown consequences. 444 U.S. 996 (1979). It was without oral argument, or even waiting for merits briefing, that this Court ordered: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.*

II. *Baker* Formulations Inextricably Intertwined with Travel Freeze Analysis

The traditional beginning point for a discussion of abstention understandings begins with U.S. Chief Justice John Marshall's early guidance as to the "rule of law to guide the court in the exercise of its jurisdiction." Marshall offered this political-question description: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803). Three years before, Representative John Marshall had warned his U.S. House colleagues that the political branches would be "swallowed-up by the judiciary" without such judicial self-restraint. *See* Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain, eds.) 25 n.10) 2007). On the very same day, Representative Marshall rearticulated his "sole organ" thesis of presidential power in foreign relations. *Id.*

Fast forward to *Baker v. Carr*'s reasoning that political-question abstention is "essentially a function of the separation of powers," 369 U.S. 186, 217 (1962), as Justice Sonja Sotomayor reaffirmed in her *Zivotofsky v. Clinton I* concurrence addressing a "demanding" inquiry needed for political question analysis. 566 U.S. 189, 1431 (2012) (Sotomayor, J concurring).

The travel freeze policy is first and foremost about foreign relations. As a diplomatic entreat, the Executive Order is meant to lever our government's negotiations with foreign nations to secure those nations' cooperation with our vetting of their citizens who seek to visit America. These complicated diplomacies "uniquely demand a single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211. By interfering with these foreign policy negotiations and related war strategy, the courts below have violated the separation of powers and have caused substantial "embarrassment of our government abroad." *Id.* at 217.

Abstention touchstones are laid by the six independent, disjunctive *Baker* formulations:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

All six *Baker* formulations are found inextricably intertwined in an analysis of the instant challenges. The first two criteria of textual commitment and manageable standards are predominant.[12] This Court has repeatedly acknowledged the textual commitment of foreign relations and war strategy to the elected political branches, and the lack of manageable standards for such judicial activity in these areas. And it must be stated directly that the federal courts do not have better institutional ability, nor superior military instincts, nor more accurate classified information than does the Executive Branch in formulating such foreign policy or war strategy. Nor are judges able to *ex ante* predict the costs or consequences of interference in such Executive Branch policy determinations. A nonjusticiability finding is required where, as here, the judiciary "is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

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[12] "[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon v. United States*, 506 U.S. 224, 228-29 (2003).

Moreover, each of the later four *Baker* factors are also tangled in analysis of the Executive's policy rationale and strategic tactical decisions that led to the travel freeze. The courts below have boldly announced their own ideological and policy determinations. It has been with little respect shown to the coordinate political branch that the judiciary below second-guesses the president's judgment as to the wisdom, purpose, or need for the freeze. It has been with little respect shown that judges below devolve their inquiry into the president's alleged biased motivations for the travel freeze. After conflating the Office of President with the person of a presidential candidate, the unmoored judicial inquiry sank to the depths of campaign rhetoric in attempts to mine proof of religious bigotry. Such strange non-juridical behavior examples a historic disrespect of the Executive branch.

With assertive invocation of universal, nationwide injunctions against the travel freeze, the trial courts below made "multifarious pronouncements" that disrupted "adherence" to the president's political decision already made. Even after this Court issued its stay pending a merits review, the Hawaii District Court again reasserted its power to second-guess the Executive's evaluation of certain classifications of foreign-soil aliens' alleged "bona fide" connection to America.

As did D.C. Circuit Judge Stephen Williams, when *Nixon v. United States* was below, it is important to emphasize the substantial finality value of a abstention determination: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991).

III. D.C. Circuit's *El-Shifa Pharmaceutical* Political-Question Analysis: President Bill Clinton's Allegedly Anti-Muslim Defamatory Statements and Actions Against Muslim Aliens Abroad (Sudan), Ruled Not Justiciable

The D.C. Circuit offers a helpful line of contemporary political-question authority: "Courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (*en banc*). The *en banc* D.C. Circuit invoked the political-question doctrine to bring finality to a decade of litigation resulting from President Bill Clinton having described a Sudanese industrial enterprise, owned by wealthy Muslims, as being connected to radical Islam. Clinton repeatedly made these statements before – and after – destroying the Muslim-owned factory with military air strikes.

The factory owners claimed that President Clinton and senior administration officials defamed them based on the factory owners' Muslim faith and Muslim identity. The factory owners alleged the biased statements were made and the bombing was done for the rawest of political purposes. Plaintiffs framed the biased statements and the bombing as coming just days after Bill Clinton's grand jury testimony and public confession during the Monica Lewinski scandal. And the plaintiffs pointed to widespread speculation that President Clinton made the defamatory statements for personal political advantage to shift focus away from the escalating sex scandal.

The *en banc* D.C. Circuit resisted temptation to review the Executive's "justification" for the statements, refused to address whether the underlying strike decision was "mistaken," and refused to "determine[ ] the factual validity of the government's stated reasons" for the statements and actions. *Id.* at 844. The court stated:

> The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion. . . . The conclusion that the strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters. We must decline to reconsider what are essentially policy choices.

Id. at 842-43. The court recognized the unelected judiciary's limited role in our democratic Republic and thus refused to "expand judicial power at the expense of the democratically elected branches." *Id.* at 850.

IV. D.C. Circuit's 2017 *Ali Jaber* Political-Question Extension: No Judicial Second-Guessing Whether President Barack Obama's Statements and Actions Against Muslim Aliens Abroad (Yemen) Was Mistaken or Justifiable

In its June 2017's *Jaber v. United States* ruling, the D.C. Circuit reaffirmed and extended the *El-Shifa* political-question analysis. *Jaber v. United States*, No. 16-5093 (D.C. Cir. June 30, 2017). Yemeni nationals asserted claims, under international law, the Alien Tort Statute, and the Torture Victims Protection Act, resulting from deadly American signature drone strikes in Khashamir, Yemen. Salem Ali Jaber, a leading imam in the port town of Mukalla, Yemen, and his son Walled, were killed in a 2012 American signature drone strike.[13] The imam and his family were visiting in Khashamir for a week-long wedding, and the imam gave a guest sermon at a local Khashamir mosque. Three local radical Islamic militants began stalking the imam to express their theological disagreement with his sermon.

Family-member plaintiffs alleged the American drone strike had targeted the behavioral and locational signature of three militants, and that Salem and Walled were innocent collateral victims of the strike. The family members sought a declaratory judgment determining that the killing of the imam Salem Ali Jaber and his son Walled Jaber violated international law and federal tort statutes. Their complaint emphasized Executive statements that were made to justify and promote the deadly drone strikes.

The D.C. Circuit ruled that it was not the judiciary's role to second-guess the determination of President Barack Obama that the national interest required a particular action against foreign-soil persons in the ongoing terror war. The court explained that the suit improperly called for the judiciary to pass judgment on the wisdom of a presidential decision – mistaken or not – regarding statements justifying and actions taken against foreign-soil aliens during the terror war. *Id.* And the court quoted from the complaint to explain the nature of the second-guessing that review would require. The court would have been required to second-guess whether:

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[13] With a signature strike, our government targets unidentified individuals solely based on patterns of where they live, with whom they associate, and behaviors associated with militants.

- "[n]o urgent military purpose or other emergency justified" the drone strike, JA 10;
- killing the alleged targets was not "strictly unavoidable" to defend against an "imminent threat of death" to the "United States or its allies," JA 36-37; and
- the risk to nearby civilians was excessive in comparison to the military objective since "there [was] no evidence" the three men were "legitimate military targets," and "there were no U.S. or Yemeni forces or military objectives in the vicinity that were in need of protection against three young Yemeni men," JA 38.

Id. (quoting plaintiffs' complaint).

The D.C. Circuit again resisted temptation to review presidential statements made regarding the policy decision: "These Executive statements, however, do not constitute an invitation to the Judiciary to intrude upon the traditional executive role." *Id.* And the court acknowledged how such judicial restraint was constitutionally required "[h]owever sympathetic the allegations." *Id.* For earlier D.C. Circuit rulings analyzing the political-question doctrine in the foreign relations/ national security context, *see Schneider v. Kissinger*, 412 F.3d 395 (D.C. Cir. 2005); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); and *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008).

Relying on the abstention wisdom of *El-Shifa Pharmaceutical Industries*, the District Court for the District of Columbia in 2016 rejected review of claims from American citizens that arose in Yemen. When closing the U.S. Embassy in Yemen, President Barack Obama had refused to facilitate the exit and safe travels of American citizens from the horrific conditions in Yemen back to American soil. Notwithstanding the compelling emotional arguments made by, and the exacting statutory claims of, the Muslim-American citizens, the District Court refused to review such claims.[14] The trial court artfully explained why such inquiry and analysis would have required the court to answer a political question:

> But the question that Plaintiffs' APA claim poses is not just what these provisions mean; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is that aspect of the court's inquiry that would necessarily require the court to answer a non-justiciable political question.

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[14] In both *Jaber* and *Mobarez*, the courts relied on this Court's *Zivotofsky I* analysis, to explain why political-question abstention was required notwithstanding the plaintiffs' styling of their cases as based on federal statutes, executive orders, or random presidential statements.

Mobarez v. Kerry, Civil Action No. 2015-0516 (D.D.C. 2016). For additional political-question analysis of the District Court of the District of Columbia, *see Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

V. Alexander Bickel's Prudential Abstention Counsel

In view of the judge-centric consciousness so predominant at bar and in the legal academy, perhaps less "domesticated" abstention advocacy is needed to counsel the judiciary's self-restraint; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability still incubates in Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Professor Bickel described political questions as those issues which ask the courts to evaluate policy and choose between outcomes – functions which the judiciary as an institution is functionally incompetent to carry out.

In unmatched written aesthetic, Alexander Bickel offered an abstention foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive . . . Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which

> tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986).

The late Yale University law professor's prudential poetry begs for this Court's deep consideration of its foundational truth. When cogitating the myriad harms that could result from precedent allowing judicial interference in the president's foreign policy decisions and tactical strategy in the terror war, it is disturbingly prescient that Professor Bickel addressed *"the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be." Id.* (emphasis added).

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CONCLUSION

As the nation's unusual war with radical Islamic terrorists continues, our new president reorients the Republic's foreign policy and military strategy. The challenged Executive Order is needed to lever the administration's diplomatic negotiations with foreign nations, most immediately the six listed nations, so as to secure those nations' cooperation with our government's vetting of their citizens who seek to alight our shores. The travel freeze is thus an integral constant in the administration's interrelated calculus of a foreign policy and war strategy shift.

Our federal judiciary has its own high duty to perform in the terror war – political-question abstention.

Respectfully submitted,

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In The
Supreme Court of the United States

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DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

HAWAII, ET AL.,

Respondents.

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**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Fourth and Ninth Circuits**

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BRIEF AMICUS CURIAE BY THE ZIONIST ORGANIZATION OF AMERICA (ZOA) IN SUPPORT OF PETITIONERS DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

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INTEREST OF AMICUS CURIAE[1]

The Zionist Organization of America ("ZOA") respectfully submits this amicus brief in support of President Donald J. Trump's petition to enforce the March 6, 2017 executive order entitled "*Protecting the Nation from Foreign Terrorist Entry into the United States*," Exec. Order No. 13780, 82 Fed. Reg. 13209 ("EO-2").

The Zionist Organization of America is the oldest pro-Israel organization in the United States, founded in 1897 as the Federation of American Zionists. One of the ZOA's earliest presidents was Supreme Court Associate Justice Louis Brandeis. ZOA is dedicated to protecting the safety, rights and survival of the Jewish people, pro-Israel community and fellow American citizens, by educating the public, and via court and administrative proceedings, involvement in and monitoring Congressional hearings, media publications and other mechanisms.

ZOA is a leader in combatting anti-Semitism today. ZOA assists Jewish, pro-Israel and neutral students on U.S. college campuses who are subjected to attacks and threats from members of radical groups. ZOA is also in contact with Jewish leaders throughout Europe regarding the frightening increase in radical groups' physical and other attacks against Jews, Christians, women, homosexuals, and others, in the wake of extensive unvetted immigration into Europe from terrorist haven countries. ZOA President Morton A. Klein was a keynote speaker at the 2014 International Center for Combatting Anti-Semitism conference in Belgium.

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[1] Counsel for Petitioner filed a blanket consent to amicus briefs. Counsel for Respondents consented to ZOA's filing of an amicus brief. No entity other than ZOA assisted with or paid expenses for filing this brief.

ZOA's knowledge and experience can provide important insights and background for the Court.

In addition, ZOA officers, staff and members include direct descendants of Holocaust victims and refugees. For instance, ZOA President Morton Klein is the son of Holocaust survivors, and was born in a displaced persons camp in Germany. ZOA Director of Special Projects (counsel herein) Elizabeth Berney is the daughter of a refugee from Nazi Germany (who went back with the United States Army to fight the Nazis). Several of her relatives including her great-grandmother were passengers on the infamous May-June 1939 voyage of the SS St. Louis.

Given the background of many at the ZOA, ZOA is concerned that EO-2's opponents are exploiting and making false analogies to Jews' World War II experiences; ignoring the real dangers that EO-2 seeks to address, and distorting Jewish/Judeo-Christian and American values to try to justify admitting persons into the United States today who cannot be properly vetted and who thus endanger U.S. citizens.

◆

SUMMARY OF ARGUMENT

It is evident that our government lacks the information and procedures to thoroughly vet persons admitted to the United States, particularly persons from the six countries specified in EO-2. These six named countries are marked by combat zones and infested with terrorist groups (*e.g.*, ISIS, Hezbollah, al Qaeda, Hamas, and al-Shabaab) and their sympathizers. Three of the countries named in EO-2 (Iran, Syria and Sudan) are designated state sponsors of terrorism. Numerous sources, including former Obama administration top officials, have confirmed the serious vetting problems that EO-2 seeks to address.

The terrorist attacks in Paris, London, Brussels, Cologne and elsewhere in the wake of ISIS and other terrorists accompanying unvetted refugees pouring into Europe, and increased radical terrorist activity in the United States – the Boston Marathon, San Bernardino, Orlando – highlight the danger posed by terrorists infiltrating into the United States along with refugee and immigrant streams.

EO-2's vital purpose is to protect the American public by improving our country's vetting and immigration system. The executive order's aims thus exemplify our most fundamental, overriding value of protecting American lives.

Some of EO-2's opponents have proffered distorted interpretations of Jewish/Judeo-Christian and American values to try to justify admitting persons into the United States who cannot be properly vetted and who thus endanger U.S. citizens. Jewish refugees' life-threatening situations and U.S. policies during World War II are *not* analogous to today's circumstances. Past dissimilar situations do not warrant admitting into the United States persons who cannot be properly vetted.

◆

ARGUMENT

I. NUMEROUS SOURCES CONFIRM THE WEAKNESSES IN U.S. VETTING PROCESSES THAT EO-2 SEEKS TO ADDRESS

During the eighteen months leading up to EO-2's issuance, bipartisan Congress members and numerous experts – including top Obama administration officials testifying before Congress – brought to the public's attention terrorist infiltration dangers and America's inability to adequately vet immigrants from terrorist havens/conflict zones, especially Syria. EO-2 addresses, in a clear religion-neutral constitutional manner, the precise concerns that Congress and a veritable parade of experts highlighted. As the Government set forth, the Fourth Circuit and *Hawaii* District Court improperly speculated about President Trump's supposedly illicit purpose in issuing EO-2. *Brief for Petitioners Trump, President of U.S., et al.*, pp. 70-78, *Trump v. Hawaii*, Nos. 16-1436 and 16-1540 (S. Ct. Aug. 10, 2017).

The Congressional and expert backdrop set forth below further buttresses that EO-2 was issued for proper constitutional purposes, in the national interest:

- **Former FBI Director James Comey** testified before the Homeland Security Committee on October 21, 2015:

> If someone has never made a ripple in the pond in Syria in a way that would get their identity or their interests in our database, **we can query our database until the cows come home, but there will be nothing showing up because we have no record of them** . . . we can only query against that which we have collected . . . **Syrian refugees will be harder to check because, unlike in Iraq, US soldiers have not been on the ground collecting information on the local population**. . . . [W]ith Iraqi databases, we had far more data because of our country's work there for a decade. This is a different situation . . . yet a number of people who were of serious concern [slipped through the screening of Iraqi war refugees, including two arrested on terrorism charges].[2]

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[2] *Nation's Top Security Officials' Concerns On Refugee Vetting*, H. Rep. Homeland Security Committee website, Nov. 19, 2015, https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/ (quoting Comey Oct. 21, 2015 testimony). *See also Homeland Security Committee Hearing on Worldwide Threats and Homeland Security Challenges*, video, Oct. 21, 2015, https://homeland.house.gov/hearing/worldwide-threats-and-homeland-security-challenges/

Emphasis is added unless otherwise specified.

Comey also testified before the House Judiciary Committee on October 22, 2015 that we have a "dramatically" less robust data set for Syrian refugees than for Iraqi refugees.[3]

A year later, on September 28, 2016, Comey again testified before the House Judiciary Committee that the same problem still exists – lack of data on Syrian migrants, saying:

> The challenge remains, **especially with respect to folks coming from Syria, we are unlikely to have anything in our holdings**. That is, with people coming from Iraq, the United States Government was there for a very long period of time, we had biometrics, we had source information. We are unlikely to have that kind of picture about someone coming from Syria, . . .[4]

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[3] *Oversight of the Federal Bureau of Investigation, Hearing Before the Committee on the Judiciary*, H. Rep., 114th Cong., 1st Sess., Oct. 22, 2015, No. 114-55, https://judiciary.house.gov/wp-content/uploads/2015/10/114-55_97262.pdf, p. 54. *See also id.*, at 28, 53-55, 64 and 70.

[4] *Oversight of the Federal Bureau of Investigation, Hearing Before the Committee on the Judiciary,*" H. Rep., 114th Cong., 2nd Sess., Sept. 28, 2016, No. 114-91, https://judiciary.house.gov/wp-content/uploads/2016/09/114-91_22125.pdf, p. 94. *See also id.*, pp. 64-65, 85-86, 93-95, and 115-116.

- **Former Director of National Intelligence Gen. (ret.) James Clapper** testified: "We obviously don't put it past the likes of ISIS to infiltrate operatives among these refugees, that's a huge concern of ours."[5]

- **FBI Assistant Director Michael Steinbach** stated: "Yes, I'm concerned [about bringing Syrian refugees into the United States]. . . . [T]he concern in Syria is that we don't have the systems in places on the ground to collect the information."[6]

- **Former Director of the National Terrorism Center Nicholas Rasmussen** testified in response to Congressman Lamar Smith (R-TX)'s query regarding whether terrorist organizations were likely to infiltrate the U.S. to commit terrorist acts: "We have certainly seen terrorist groups talk about, think about, exactly what you are describing."[7]

- **Former Department of Homeland Security Director León Rodríguez**, admitted when questioned by Senator Ted Cruz (R-TX) that refugee applications can be approved based solely on the applicant's testimony, without any documentation, evidencing further weaknesses in the U.S. vetting system.[8]

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[5] *Nation's Top Security Officials' Concerns on Refugee Vetting*, *supra* n.2 (quoting Clapper Sept. 9, 2015 statement).

[6] *Id.* (quoting Steinbach Feb. 12, 2015 statement).

[7] *Homeland Security Committee Hearing on Worldwide Threats*, *supra* n.2, minute 55:00-57:00; Lana Shadwick, *Homeland Security Hearing Reveals Why Accepting Syrian Refugees Risks American Lives* – video, Nov. 17, 2015, http://www.breitbart.com/big-government/2015/11/17/homeland-security-hearing-reveals-accepting-syrian-refugees-risks-american-lives/

- **Lebanon's Education Minister Elias Bousaab** warned former British Prime Minister David Cameron that two in every 100 Syrian migrants smuggled into Europe are ISIS-trained jihadists, sent under cover to attack western targets. That equals 200 jihadists per ten thousand migrants. Minister Bousaab also stated that the terrorists select operatives, including children, in refugee camps and schools before trafficking them into Europe via Turkey and Greece.[9]

- **ISIS Operative:** A Syrian ISIS smuggler revealed in 2015 that ISIS had already smuggled 4,000 ISIS jihadists into Europe.[10]

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[8] *Video: Obama Administration Official Admits to Allowing Refugees in to U.S. Based on Their Testimony Alone*, Senator Ted Cruz press release, Sept. 28, 2016, https://www.cruz.senate.gov/?id=2841&p=press_release

[9] Jack Doyle, *Two in Every 100 Syrian Migrants are ISIS fighters, PM is Warned: Lebanese Minister Tells Cameron Jihadists are Coming 'Under Cover' to Attack the West*, Daily Mail, Sept. 15, 2015, http://www.dailymail.co.uk/news/article-3234458/Two-100-Syrian-migrants-ISIS-fighters-PM-warned-Lebanese-minister-tells-Cameron-extremist-group-sending-jihadists-cover-attack-West.html

[10] Aaron Brown, *'Just wait . . . ' Islamic State Reveals it has Smuggled THOUSANDS of Extremists into Europe*, UK Express, Nov. 18, 2015, http://www.express.co.uk/news/world/555434/Islamic-State-ISIS-Smuggler-THOUSANDS-Extremists-into-Europe-Refugees

- **House Homeland Security Committee, Counterterrorism and Intelligence Subcommittee Chairman, Congressman Peter King** (R-NY) stated on national television:

> [W]e know [ISIS is] going to try [to seed ISIS terrorists among refugees], and [with] allowing 10,000 people in from Syria, [] we have to assume that somebody is going to make it through . . . in the post-9/11 era, we always have to assume the worst, and there's a very good chance here that the worst will happen. **There is absolutely no way – no real way of vetting, to any extent, these refugees coming in . . . there is no intelligence on the ground.** We don't have people on the ground who can vouch for everyone. There's obviously no government records we can go to. Syria is a totally chaotic country, and it's a hotbed of al Qaeda and ISIS. And **we have no idea who's coming out of Syria. . . . it definitely puts the United States at risk**. . . . We have to seal the borders now, and have the strictest possible vetting.[11]

Congressman King also wrote:

> [W]e know that ISIL will attempt to infiltrate its members into the United States with these refugees. . . . Since the beginning of the year, **the FBI has arrested more than 50 individuals connected with ISIL and plotting**

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[11] Ian Hanchett, *Peter King: 'No Real Way of Vetting' Syrian Refugees*, Breitbart, Sept. 15, 2015, http://www.breitbart.com/video/2015/09/15/peter-king-no-real-way-of-vetting-syrian-refugees/

> **attacks in the homeland; we cannot afford to compound this threat.** With the lack of stable foreign governments and on-the-ground intelligence in Syria, our ability to vet refugees is significantly degraded. The [Obama] White House announcement that 10,000 additional Syrian refugees will be admitted next year is contrary to the advice of law enforcement and intelligence professionals.[12]

Congressman King noted that his statements were based on classified briefings to Congress about the U.S. vetting process.[13]

- **House Homeland Security Committee Chairman, Congressman Michael McCaul** (R-TX) issued a press release stating:

> Many Americans are understandably concerned about the threat posed by inadequate security screening procedures for refugee [sic] seeking entry into the United States. **ISIS themselves have stated their intention to take advantage of the crisis to infiltrate**

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[12] Peter King, *Rep. Peter King: Refugees Bring Security Risks*, USA Today, Sept. 13, 2015, https://www.usatoday.com/story/opinion/2015/09/13/syrian-refugees-rep-peter-king-editorials-debates/72212362/

[13] Gregg Birnbaum, *Pete King: No Vetting, No Syrian Refugees*, CNN, Nov. 17, 2015, http://www.cnn.com/2015/11/17/politics/pete-king-vetting-syrian-refugees/index.html

> the west. We have to take this threat seriously.[14]

Chairman McCaul also released a compendium of ten high-level Obama administration officials' warnings about vetting inadequacies and infiltration dangers, along with his own statement that:

> It is the [Obama] Administration's own officials that were warning us about this [vetting] program. It's not me making this up. This came from testimony that came from both F.B.I. and homeland security officials in briefings and in public testimony. . . . [T]he fact of the matter is: the threat is real. ISIS has said in their own words that they want to exploit it to infiltrate the West. Again, it is not a threat I am making up, it's a threat their [Obama's] own officials have warned us about.[15]

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[14] *McCaul Introduces Bill to Give Congress Oversight of Syrian Refugee Resettlement Program*, Congressman Michael McCaul press release, Sept. 18, 2015, https://mccaul.house.gov/media-center/press-releases/mccaul-introduces-bill-to-give-congress-oversight-of-syrian-refugee

[15] *Nation's Top Security Officials' Concerns On Refugee Vetting*, *supra*, n.2 (quoting warnings regarding vetting from former Obama administration officials: FBI Director James Comey; CIA Director John Brennan; National Terrorism Center Director Nicholas Rasmussen; Homeland Security Secretary Jeh C. Johnson; Special Presidential Envoy for the Global Coalition to Counter ISIL Gen. (ret.) John Allen; Director of National Intelligence James Clapper; FBI Assistant Director Michael Steinbach; and Homeland Security Under Secretary for Intelligence and Analysis Francis X. Taylor; and Institute for the Study of War Chairman General (ret.) Jack Keane).

- **House Committee on the Judiciary Chairman Congressman Bob Goodlatte** wrote to then-President Obama:

> [Y]our plan to admit 10,000 Syrian refugees to the United States during Fiscal Year 2016 . . . seems ill-conceived considering numerous statements by security officials within your Administration about the current lack of ability to properly vet potential refugees for admission to the United States. . . .

Congressman Goodlatte's letter then quoted admissions by FBI Director Comey (described above); Homeland Security Secretary Jeh Johnson (who conceded: "It is true that we're not going to know a whole lot about a lot of these Syrians"); officials of the U.S. Citizenship and Immigration Services (USCIS), the agency responsible for processing refugee applications and ensuring requisite background checks are performed (who admitted that Syria does not have any databases that the U.S. can access to run security checks); and FBI Counterterrorism Division Assistant Director Michael Steinbach (who testified that "all the data sets" that intelligence services would normally go to "don't exist.").[16]

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[16] House of Representatives Judiciary Committee press release, *Goodlatte: Why Does the President Ignore Concerns About Syrian Refugees?*, Oct. 27, 2015, https://judiciary.house.gov/press-release/goodlatte-why-does-the-president-ignore-concerns-about-syrian-refugees/; Congressman Bob Goodlatte letter to President Barack Obama, Oct. 27, 2015, https://judiciary.house.gov/wp-content/uploads/2016/02/102715_Letter-to-President-Obama.pdf

- **Senator Chuck Schumer** (D-NY, current House Minority Leader) said "a pause may be necessary" on the entry of Syrians to the U.S.[17]

- **Senator Dianne Feinstein** (D-CA, ranking Democrat on the Senate Intelligence Committee) stated that the U.S. needs to examine the role the visa process plays in security risks, and that ISIS has "got people all throughout Europe."[18]

- **Senators Joe Manchin** (D-WV) and **Shelley Moore Capito** (R-WV) and additional Senators sent a bi-partisan letter to then-President Obama, following the massive ISIS terror attacks in Paris in November 2015, stating:

> The U.S. government must redouble its efforts to keep the American people safe. We believe that an essential component of that effort is ensuring that no refugee related to the Syrian crisis is admitted to the United States unless the U.S. government can guarantee, with 100 percent assurance, that they are not members, supporters, or sympathizers of [ISIS] . . .
>
> Reports indicate that ISIS apparently utilized the flow of refugees to infiltrate at least one of the Paris attackers into Europe. These facts require a serious and objective reexamination of the Administration's policy toward Syrian refugees to avoid unnecessary risks. . . . [O]ur

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[17] *Schumer Joins Republicans Questioning Obama's Refugee Plan*, Newsmax, Nov. 17, 2015, http://www.newsmax.com/Headline/schumer-immigration-plan-syrian/2015/11/17/id/702593/

[18] *Id.*

> first and most important priority must be to ensure that any refugee who comes to the United States does not present a threat to the American people. . . . The fact that ISIS may have utilized the flow of refugees to infiltrate Europe and potentially the United States is not a surprise. . . . [Discusses DNI Clapper and FBI Director Comey's testimony].[19]

- **Congressman Bennie Thompson** (D-MS) told then-FBI Director Comey at the October 21, 2015 Homeland Security Committee hearing: "a lot of us are concerned about whether you have enough information available to you to do an accurate vetting."[20]

- **House Speaker Paul Ryan** (R-WI) called for a pause in Syrian refugee resettlement in the U.S., explaining:

> [I]t is better to be safe than to be sorry, so we think the prudent, the responsible thing is to take a pause in this particular aspect of this refugee program in order to verify that terrorists are not trying to infiltrate the refugee

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[19] *In Wake of Paris Attacks, Manchin Calls for Increased Efforts to Keep the U.S. Safe: Senators Say That the U.S. Should Not Accept Any Syrian Refugees Until They Are Thoroughly Vetted To Guarantee 100 Percent That They Are Not Involved With ISIS*, Sen. Manchin website, Nov. 16, 2015, https://www.manchin.senate.gov/public/index.cfm/press-releases?ID=2a6fde7b-055b-4699-a296-575197786f49

[20] Taylor Rushing, *FBI Admits There's No Way To Screen All The Syrian Refugees The Obama Administration Plans To Accept Into The US*, Daily Mail, Oct. 21, 2015, http://www.dailymail.co.uk/news/article-3283587/FBI-admits-s-no-way-screen-Syrian-refugees-Obama-administration-plans-accept-US.html

> population. . . . This is not about politics. This is about national security.[21]

- **Senate Majority Leader Mitch McConnell** (R-KY) likewise called for, "at the very least," a "pause or moratorium" in refugee programs.[22]

- **Thirty-one U.S. governors** announced after the Paris ISIS attacks that they opposed allowing Syrian migrants to settle in their states.[23]

- **Former federal terrorism prosecutor Andrew McCarthy** wrote:

> A background check is only as good as the available information about a person's background. In refugee pipelines like **Syria, Iraq, Afghanistan, Somalia, and Sudan, such information is virtually nonexistent**. . . .

McCarthy also described widespread immigrant violence in Europe – including enclaves where the law is ignored; thousands of torched cars; attacks on French and Belgian police; immigrant gangs controlling Malmo, Sweden; and the British soldier beheaded in broad daylight by jihadists known to British intelligence services.

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[21] CNN Wire Service, *Speaker Paul Ryan Calls for Pause in Refugee Program: 'Better to be Safe than to be Sorry'*, Nov. 17, 2015, http://fox6now.com/2015/11/17/house-speaker-paul-ryan-calls-for-pause-in-refugee-program/

[22] *Id.*

[23] Byron Tau and Kristina Peterson, *Republican Governors Object to White House Syrian Migrant Policy*, Wall Street Journal, Nov. 16, 2015, https://www.wsj.com/articles/u-s-governors-object-to-white-house-syrian-migrant-policy-1447699052

McCarthy further noted that "vetting only works if you vet for the right thing." McCarthy explained that Washington only vets for "ties to terrorism" (defined as violent extremism) – and fails to vet for supremacist ideologies that breed tomorrow's terrorists.[24]

- **Polling:** An Arab Center for Research and Policy Studies' poll of 900 Syrian refugees in late 2015 found that one third of Syrian refugees are ISIS sympathizers, and 13% support ISIS.[25] One out of every eight supported ISIS!

- **Paris attacks: ISIS infiltration from Syria:** The coordinated ISIS attacks on the Bataclan theater, a soccer stadium and cafes throughout Paris in November 2015 were planned in Syria. Six of the eight Paris attackers spent time in Syria.[26] At least one of the Paris assailants posed as a Syrian refugee to enter Europe, via Greece and the Balkans, using a fake Syrian passport.[27]

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[24] Andrew McCarthy, *The Controversy Over Syrian Refugees Misses the Question We Should Be Asking*, Nat'l Review, Nov. 28, 2015, http://www.nationalreview.com/article/427698/syrian-refugees-tk-andrew-c-mccarthy

[25] Kristinn Taylor, *SHOCK POLL: Third of Syrian Refugees ISIS Sympathizers, 13% Support*, Gateway Pundit, Nov. 17, 2015, http://www.thegatewaypundit.com/2015/11/shock-poll-third-of-syrian-refugees-isis-sympathizers-13-percent-support/ (linked to Arab Center for Research and Policy Studies poll, *The Military Campaign against the Islamic State in Iraq and the Levant: Arab Public Opinion*, http://english.dohainstitute.org/file/Get/40ebdf12-8960-4d18-8088-7c8a077e522e)

[26] Eliott C. McLaughlin and Catherine E. Shoichet, *Paris attacks: What We Know So Far*, CNN, Nov. 17, 2015, http://www.cnn.com/2015/11/16/europe/paris-attacks-at-a-glance/

The Paris attacks also revealed another difficulty: ISIS terrorists appear to be skilled at hiding their plans and affiliations – even from persons close to them. Mohammed Abdesalam said that he and the rest of his family did not know that his brothers were planning the Paris massacres.[28] U.S. vetting systems would seem to require a massive overhaul to be able to ferret out more than terrorists' own close family members know.

- **U.S. Vetting Failures:** Immigrants who have obtained U.S. citizenship and were subsequently arrested on terrorism-related charges, including assisting ISIS, evidence serious U.S. vetting failures. These immigrants have included one of the Boston massacre bombers; a Somali who trained with a terrorist group in Syria and plotted to execute American soldiers at a Texas military base; the Kuwaiti-born shooter of four

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[27] Marcus Walker and Noemie Bisserbe, *Paris Stadium Attacker Got to Europe Using Fake Syrian Passport: Man Apparently Posed As Refugee, Entered Through Greek Island Of Leros*, Wall Street J'nal, Nov. 16, 2015, https://www.wsj.com/articles/paris-stadium-attacker-entered-europe-via-greece-1447698583

[28] Gordon Rayner and Camilla Turner, *Suicide Bomber 'Blew Himself Up Because of Stress', Says Ibrahim Abdeslam's Family*, Telegraph, Nov. 16, 2015, http://www.telegraph.co.uk/news/world-news/islamic-state/11998297/Suicide-bomber-blew-himself-up-because-of-stress-says-Ibrahim-Abdeslams-family.html

U.S. Marines in Chattanooga, Tennessee; a Saudi female pre-school teacher who pledged allegiance to ISIS and planned to bomb a police funeral, and others.[29]

EO-2 provides further examples, including a Somali-born refugee who obtained U.S. citizenship and plotted to bomb a crowded Christmas tree-lighting ceremony in Portland, Oregon. EO-2 further notes that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States," and that more than 300 persons who entered the U.S. as refugees are currently the subjects of FBI counterterrorism investigations.

Even when the United States is warned about terrorist ties, U.S. vetting has spectacularly failed. Russia's intelligence agency cabled the FBI twice warning that immigrant Tamerlan Tsarnaev associated with militants.[30] Yet the FBI found that Tsarnaev had no links to terrorism, and no alert was triggered when Tsarnaev subsequently flew in and out of JFK airport. On September 11, 2011, Tsarnaev and his brother brutally slit the throats of three young Jewish men whom the Tsarnaevs had befriended,[31] and in April 2013, they bombed the Boston marathon, murdering three more people and wounding over 264 innocent runners and bystanders.

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[29] Rachel Stolzfoos, *At Least 15 US 'Citizen Terrorists' Are Also Legal Immigrants*, Daily Caller, Nov. 18, 2015, http://dailycaller.com/2015/11/18/at-least-15-us-citizen-terrorists-are-also-legal-immigrants/

[30] *Russia Warned U.S. About Boston Marathon Bomb Suspect Tsarnaev*, Reuters, Mar. 25, 2014, http://www.reuters.com/article/us-usa-explosions-boston-congress-idUSBREA2P02Q20140326

[31] *2011 Waltham Triple Murder*, Wikipedia, https://en.wikipedia.org/wiki/2011_Waltham_triple_murder

The supposedly vigorous vetting of San Bernardino killer Tashfeen Malik that permitted her to enter the U.S. failed to uncover that the address listed on her visa application did not exist.[32] Dr. Ben Carson observed: "if [] vetting resulted in missing someone who carried out such a horrendous crime, that should be the end of the argument right there" for admitting Syrian refugees into the U.S.[33]

II. VULNERABLE U.S. GROUPS ARE AT PARTICULAR RISK FROM MIGRANTS

While all Americans are at risk from ISIS-infiltrated Syrian, etc. migrants, such immigration especially threatens vulnerable American groups, including American Jews, Homosexuals, women, various Christian denominations, etc. This further complicates the vetting process needed to assure all Americans' safety, again demonstrating the need for EO-2.

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[32] AP, *Jihadi Bride Entered The US On A 'Fiance Visa' On Which She Entered a FALSE Home Address*, Daily Mail, Dec. 4, 2015, http://www.dailymail.co.uk/news/article-3346831/California-killing-spurs-concerns-fiance-visa-program.html#ixzz3thCBWb6R

[33] Jose DelReal, *Ben Carson Says San Bernardino Shooting Should End Debate on Syrian Refugees*, Washington Post, Dec. 4, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/12/04/ben-carson-says-san-bernardino-shooting-should-end-debate-on-syrian-refugees/?utm_term=.4d928d0a2f7d

The ISIS shooters who perpetrated the San Bernardino Christmas party massacre specifically targeted a pro-Israel gentile Messianic Jew to murder first, after threatening him that Jews and Christians deserve to die.[34] The ISIS shooter in Orlando specifically targeted a gay nightclub.[35]

In France, radical migrants, ISIS, etc. have been terrorizing French Jews with hundreds of physical attacks and threats each year[36]; murdered a Rabbi and three innocent little Jewish schoolchildren[37]; murdered four Jewish shoppers at a kosher grocery[38]; and murdered an elderly Catholic priest.[39] Terrorists repeatedly targeted the Bataclan theater because Jews owned it.[40]

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[34] Uriel Heilman, *Messianic San Bernardino Victim was Gentile Supporter of Israel, Argued with Killer on Islam*, Times of Israel, Dec. 5, 2015, http://www.timesofisrael.com/messianic-san-bernardino-victim-was-gentile-supporter-of-israel/

[35] Monica Hesse, *The Target was a Gay Nightclub*, Washington Post, June 12, 2016, https://www.washingtonpost.com/lifestyle/style/the-target-was-a-gay-nightclub-the-target-was-also-all-of-us/2016/06/12/74de576c-30cb-11e6-8f7-7b6c1998b7a0_story.html?utm_term=.6d3977569459

[36] Michael Kaplan, *Attacks On France's Jews Surge Amid Concerns Of Rising Anti-Semitism in Europe*, Int'l Business Times, July 13, 2015, http://www.ibtimes.com/attacks-frances-jews-surge-amid-concerns-rising-anti-semitism-europe-2006003

[37] AP, *French Gunman Who Killed Jewish Children 'Was Raised an Anti-Semite'*, The Guardian, Nov. 11, 2012, https://www.theguardian.com/world/2012/nov/11/french-gunman-mohamed-merah-racist

Syrians are indoctrinated from an early age to celebrate martyrdom and violence towards "enemies," and to hate Jews. Textbooks used in Syrian schools from 2001 through 2015 teach Syrian children that martyrdom and violence towards "enemies" are the path to glory; that Jews are evil people whose treachery brought the Holocaust upon themselves; and that Zionism is "world Imperialism" headed by the United States.[41]

The leader of Germany's Jewish community, Dr. Josef Schuster, implored German Chancellor Angela

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[38] Noah Rayman, *Kosher Grocery Assault Confirms Worst Fears of French Jews*, Time, Jan. 9, 2015, http://time.com/3661697/paris-terror-attack-kosher-grocery-jewish/

[39] *Islamic State Murder of Priest is Pure Savagery*, USA Today, July 30, 2016, https://www.usatoday.com/story/opinion/editorials/2016/07/30/islamic-state-murder-of-priest-is-pure-savagery/92609244/

[40] AP, *Jewish Owners Recently Sold Paris's Bataclan Theater, Where IS Killed Dozens*, Times of Israel, Nov. 14, 2015, http://www.timesofisrael.com/jewish-owners-recently-sold-pariss-bataclan-theater-where-is-killed-dozens/

[41] David Bedein, with Michael Kuttner, Ruthy Amkraut, Maayan Avery, Alena Cisneros, *What do Syrians Learn in Their Schools?*, Israel Resource Review, Dec. 8, 2015, http://israelbehindthenews.com/what-do-syrians-learn-in-their-schools/14197/?utm_source=wysija&utm_medium=email&utm_campaign=ibn-today

Merkel to set quotas limiting refugees. Schuster explained:

> "Many refugees are fleeing the terror of the Islamic State and want to live in peace and freedom, but at the same time they come from cultures in which hate towards Jews and intolerance are fixed components. Don't only think about the Jews, think about equal rights for women and the treatment of homosexuals."[42]

A leaked German intelligence chiefs document warned that fully integrating migrants will be "impossible," and that Germany was importing anti-Semitism, extremism and conflict.[43] On New Years' eve 2016, Middle Eastern migrants raped and assaulted 1,200 women in Cologne and other German cities.[44]

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[42] Sue Reid, *Migrant Blunder Splitting Germany In Two: Weeks Ago, Merkel Threw Open Germany's Doors. Today, Amid Fears It's Importing Anti-Semitism, Many Worry Their Way Of Life Is Under Threat*, Daily Mail, Nov. 27, 2015, http://www.dailymail.co.uk/news/article-3337002/Migrant-blunder-splitting-Germany-two-Weeks-ago-Merkel-threw-open-Germany-s-doors-Today-amid-fears-s-importing-anti-Semitism-worry-way-life-threat.html

[43] *Id.*

[44] Rick Noack, *Leaked Document Says 2,000 Men Allegedly Assaulted 1,200 German Women on New Year's Eve*, Washington Post, July 11, 2016, https://www.washingtonpost.com/news/worldviews/wp/2016/07/10/leaked-document-says-2000-men-allegedly-assaulted-1200-german-women-on-new-years-eve/?utm_term=.c69354ce1910

Radical Middle Eastern migrants in Europe have terrorized Jews: A Syrian migrant threw grenades at Jewish children waiting for a bus, killing a 15-year-old Jewish boy and wounding dozens of others. Elderly Holocaust survivors were violently attacked in their Amsterdam apartment. Terrorists attacked a Bar Mitzvah in Austria, trying to murder the children inside. Cries of "death to the Jews" fill certain Paris streets. Mobs screamed at Jews in Marseille: "Vive Mohamed Merah [murderer of Jewish children]; F___ the Jews." There are frightening attacks on European synagogues.[45]

Moreover, a 2007 poll found that 77% of Syrians support Hamas, whose headquarters was based in Damascus until 2012.[46] We will need to vet for this, too.

In the United States, Jews (especially college students) are being subjected to increasing anti-Semitic attacks. At colleges ranging from CUNY (City University of New York) to Vassar to University of California-Berkeley, the hate group "Students for Justice in Palestine" ("SJP") holds anti-Semitic rallies, chanting "Jews out of CUNY!," "Zionists out of CUNY!," "We support the Intifada!," and "Death to the Zionists!," and make it unsafe for Jewish students at some universities.[47] ("Intifada" is the violent "uprising" in which Palestinian Arabs bombed, murdered and maimed thousands of innocent Jews.) At Temple University, an SJP member or sympathizer punched an innocent Jewish student in the face, and a gang of SJP members screamed at the Jewish student that he was a "Zionist pig" and "kike" and deserved it.[48]

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[45] Daniel Greenfield, *Opposing Syrian Muslim Refugees Is A Jewish Value*, Frontpage Mag., Dec. 2, 2015, http://www.frontpagemag.com/fpm/260961/opposing-syrian-muslim-refugees-jewish-value-daniel-greenfield. *See also* Jeffrey Goldberg, *Is it Time for Jews to Leave Europe?*, Atlantic, April 2015, https://www.theatlantic.com/magazine/archive/2015/04/is-it-time-for-the-jews-to-leave-europe/386279/

[46] *Id.* (Greenfield).

American synagogues in New York, Los Angeles, Chicago and Washington D.C. have been repeated targets[49] of terrorist plots.

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[47] *E.g.*, *ZOA Letter to CUNY Leaders about Anti-Semitic, Violence-Inducing Rallies There*, Feb. 22, 2016, http://zoa.org/2016/02/10315402-letter-to-cuny-chancellor-and-board-of-trustees-jew-haters-spread-fear-at-cuny-colleges/; Ziva Dahl, *It's Dangerous to Be Jewish and Pro-Israel at Vassar College*, Algemeiner, Nov. 16, 2015, http://www.algemeiner.com/2015/11/16/its-dangerous-to-be-jewish-and-pro-israel-at-vassar-college/; Ryan Torok, *Berkeley Students Chant for Intifada* [video], Jewish Journal, Oct. 14, 2015, http://jewishjournal.com/news/nation/california/178556/

[48] *ZOA Demands Expulsion of Temple U. Student Who Made Anti-Semitic Violent Attack on Jewish Student*, Aug. 21, 2014, http://zoa.org/2014/08/10256050-zoa-demands-expulsion-of-student-at-temple-u-who-made-anti-semitic-violent-attack-on-jewish-student/

[49] *E.g.*, Benjamin Weiseraug, *Convictions in Synagogue Bombing Plot Upheld*, NY Times, Aug. 23, 2013, http://www.nytimes.com/2013/08/24/nyregion/appeals-court-upholds-convictions-of-men-in-bronx-synagogue-plot.html; AP, *FBI Thwarts Muslim's Plot to Bomb Florida Synagogue*, NY Post, May 3, 2016, http://nypost.com/2016/05/03/fbi-thwarts-muslims-plot-to-bomb-florida-synagogue/

The improved vetting contemplated by EO-2 is essential for keeping these dangerous situations from becoming even more rampant.

III. PAST REFUGEE SITUATIONS AND POLICIES ARE NOT ANALOGOUS TO EO-2

ISIS-infiltrated Syrian etc. refugees are *not* analogous to past waves of refugees to America, such as the Jews fleeing from the Nazis whom EO-2's opponents often invoke. As Congressman Peter King noted, previous refugees "were not a threat to the United States,"[60] and were fleeing for their lives. By contrast, refugees from EO-2 nations pose a threat, and are already living in refugee camps in countries where their lives are not in danger. Congressman King explained:

> Jews were kept out during the 1930s when they were escaping Nazi Germany, and that was terrible. . . . The fact is, those Jews were not a threat to the United States, there was no rationale to keep them out. . . . It was a terrible, terrible decision, and they should have been let in, because they were no threat to the United States, plus they needed, of course, the relief from the horror they were going through.
>
> In this [Syrian refugee] case, we have no idea who we're getting. And a lot of these refugees – even for instance, my understanding is, that three-year-old boy that was – that washed up

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[60] *Peter King: 'No Real Way of Vetting' Syrian Refugees*, *supra* n.11.

> onto the shore, . . . and it was a terrible disaster, but he was not a political refugee. He and his family were living in Turkey, and they were from Syria, went to Turkey, and they were going to Europe for economic gain. And, you can understand that, but do you open up all your borders, not knowing who's a real refugee, who's coming for economic reasons, and who is affiliated with ISIS?[51]

Jews fleeing from the Nazis also lacked viable alternatives. Britain's infamous 1939 White Paper slammed shut Israel's doors to Jewish immigration, in violation of Britain's League of Nations Mandate.[52] Other nations were being overrun by the Nazis, or refused Jews entry. By contrast, refugees from EO-2 countries are already located in "countries of first asylum" – where the U.S. can continue to compassionately give them aid, without risking U.S. citizens' lives.[53]

IV. EO-2's PURPOSE – PROTECTING AMERICAN CITIZENS – IS A FUNDAMENTAL DUTY AND VALUE

EO-2's policy and purpose is "to protect [U.S.] citizens from terrorist attacks, including those committed by foreign nationals" and "to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP [United States Refugee Admissions Program]."[54]

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[51] *Id.*

[52] *British White Papers: 1939*, Jewish Virtual Library, http://www.jewishvirtuallibrary.org/british-white-paper-of-1939

[53] Barbara Hollingsworth, *Former Ambassador to UN: US Has 'No Obligation' to Accept Syrian Refugees*, CNS News, Nov. 16, 2015, http://www.cnsnews.com/news/article/barbara-hollingsworth/former-un-ambassador-us-has-no-obligation-accept-syrian-refugees

Protecting the lives of our nation's citizens is a fundamental, overriding value.

The U.S. Declaration of Independence lists the right to "life" as the first inalienable right, and recognizes that our government must control admissions into the country, to protect American lives. The Declaration of Independence condemned King George both for interfering with the immigration of persons whom the American colonists wished to admit, and for transporting violent foreigners into the U.S. to kill and tyrannize American colonists, stating:

> He [King George] is at this time transporting large Armies of foreign Mercenaries to compleat [sic] the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.[55]

Emma Lazarus's poem "*The New Colossus*," part of which is inscribed on the Statue of Liberty, likewise recognizes that America's welcome mat is not an invitation to those who seek to destroy or dominate us. "*The New Colossus*" welcomes to America those who "yearn to breathe free," while denouncing foreigners seeking to conquer and tyrannize, telling them to stay away, with the lines: "Not like the brazen giant of Greek fame, With conquering limbs, astride from land to land. . . . Keep, ancient lands, your storied pomp!"[56] Emma Lazarus was also horrified by Russia's deadly anti-Jewish pogroms, and would be equally aghast if her poetry was misused to admit ISIS infiltrators who could wreak death and destruction on U.S. citizens.

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[54] EO-2, § 1(a).

[55] Declaration of Independence (July 4, 1776).

The U.S. Immigration and Nationality Act (INA), likewise does not countenance admission of foreigners who persecute or harm others. Under the INA, "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[57] We cannot determine whether a potential immigrant incited or assisted persecution if he is not properly vetted.

The Torah (the Five Books of Moses) and Jewish/Judeo-Christian values also cherish preserving citizens' lives above unfettered immigration. We are discussing these principles both because "the American Constitution was rooted in ethical and political principles whose source is . . . the Torah, the Five Books of

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[56] Emma Lazarus, *The New Colossus* (1883), https://www.poetryfoundation.org/poems/46550/the-new-colossus

[57] Immigration and Nationality Act (INA), 8 U.S.C. § 1101(42).

Moses,"[58] and because EO-2's opponents are misleadingly and wrongly invoking the Torah and supposed Jewish/Judeo-Christian values to attack EO-2.

Preserving human life ("pikuach nefesh") takes precedence over Judaism's other commandments.[59] The Torah and Talmud repeatedly command us to prevent situations and avoid people who endanger our lives, and to erect barriers to prevent death and injury. Specific commands include: "Take heed and carefully guard your lives"[60]; "Distance yourself from a bad neighbor; do not connect yourself with a rasha [evildoer]"[61]; and "Make a fence for your roof, so you will not place blood in your house if a fallen one falls off of it."[62] These commandments are interpreted expansively, and require a wide range of precautionary steps to protect lives, including, for instance, fencing in a swimming pool to prevent neighborhood children from wandering into the area and drowning. Properly vetting persons wishing to enter the country, and keeping out those who cannot be properly vetted, comports with these values.

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[58] Prof. Paul Eidelberg, *Jewish Roots of the American Constitution*, http://britam.org/eidelberg.html

[59] Rabbi Simon Glustrom, "*Saving a Life (Pikuach Nefesh)*," http://www.myjewishlearning.com/article/saving-a-life-pikuach-nefesh/

[60] Deuteronomy 4:9 and 4:15.

[61] Pirkei Avot 1:7.

[62] Deuteronomy 22:8.

Opponents of EO-2 also erroneously cite Exodus 22:20: "You shall not wrong [taunt] a stranger or oppress him, for you were strangers in the land of Egypt." In fact, the Hebrew word for "stranger" in Exodus 22:20 (and similar passages) is "ger." A "ger" is a convert to Judaism or a resident alien who accepts seven basic laws prohibiting murder, theft, idolatry, incest, etc. Commentators explained that Exodus 22:20 (and similar passages) forbid taunting a convert, including by reminding him of his non-Jewish past. These passages do not support immigration of an ISIS-infiltrated hostile population.

A potential terrorist who could murder innocent citizens in his new host country is neither a convert nor a resident alien who accepted the basic moral laws, and is thus not a "ger." Instead, he is an enemy, prohibited from dwelling in the land.

Strong borders are a Jewish/Judeo-Christian value. Moses blessed the Jewish people before his death with a prayer for strong borders "sealed like iron and copper" to enable the people to live "securely" into healthy "old age."[63] Bringing enemies into one's country is not only unwise; it is prohibited. The Torah also commands: "They [enemies] shall not dwell in your Land,"[64] and explains that God established borders of the world's nations.[65] Thus poorly vetted or unfettered immigration – an essentially borderless world – is not a Jewish/Judeo-Christian value.

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[63] Deuteronomy 33:25, 28.

[64] Exodus 23:33.

[65] Deuteronomy 23:8.

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CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted,

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